

Complaint

IN THE MATTER OF

NORTH AMERICAN QUILTING CORP. ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS

Docket C-140. Complaint, May 18, 1962—Decision, May 18, 1962

Consent order requiring Brooklyn, N.Y., manufacturers to cease violating the Wool Products Labeling and Federal Trade Commission Acts by labeling and invoicing as "80% reused wool, 20% reused unknown fibers", quilted interlining materials which contained substantially less reused wool than so represented; failing to label certain interlining materials with the generic name of the constituent fibers and the percentage thereof, and to comply in other respects with labeling requirements; and furnishing false guaranties that products were not misbranded.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that North American Quilting Corp., a corporation, and Harry Belsky, Leon Diamond, and Mayer Ofman, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent North American Quilting Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Individual respondents Harry Belsky, Leon Diamond, and Mayer Ofman are president, secretary, and treasurer, respectively, of the corporate respondent. Said individual respondents cooperate in formulating, directing and controlling the acts, policies and practices of the corporate respondent, including the acts and practices hereinafter referred to. All respondents have their office and principal place of business at 561 Grand Avenue, in Brooklyn, N.Y.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more especially since July, 1956, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, and

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offered for sale in commerce, wool products, as the terms "commerce" and "wool product" are defined in said Act.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a) (1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively labeled or tagged with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were quilted interlining materials labeled or tagged by respondents as "80% reused wool, 20% reused unknown fibers", whereas, in truth and in fact, said products contained substantially less than the represented quantity of reused wool.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged or labeled as required under the provisions of Section 4(a) (2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto were certain interlining materials with labels which failed: (1) to show the true generic names of the fibers; (2) to show the percentages of such fibers.

PAR. 5. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939 in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The required information descriptive of the fiber content contained on the labels attached to the wool products was minimized, and rendered obscure and inconspicuous, so as likely to be unnoticed by purchasers and purchaser-consumers, by the use of other written and printed matter intermingled with the required information, in violation of Rule 11 of the aforesaid Rules and Regulations.

(b) The stamps, tags, labels, and other marks of identification attached to certain wool products contained the names or designations of fibers not present in said products, in violation of Rule 25 of the aforesaid Rules and Regulations.

PAR. 6. Respondents have furnished false guaranties that certain of their wool products were not misbranded, when they knew, or had reason to believe, that the said wool products so falsely guaranteed might be introduced, sold, transported, or distributed in commerce, in violation of Section 9 of the Wool Products Labeling Act of 1939.

PAR. 7. The acts and practices of the respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

PAR. 8. Respondents are now, and for some time past have been, engaged in the offering for sale, selling and distributing of quilted interlining materials.

PAR. 9. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein, have maintained, a substantial course of trade in said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 10. Respondents in the course and conduct of their business, as aforesaid, have made statements on invoices and shipping memoranda to their customers misrepresenting the fiber content of certain of their said products. Among such misrepresentations were statements representing quilted interlining materials to be "80% reused wool, 20% unknown fibers", whereas in truth and in fact, the said products contained substantially less than the represented quantity of reused wool.

PAR. 11. The acts and practices set out in paragraphs 9, and 10 have had and now have the tendency and capacity to mislead and deceive purchasers of said products as to the true content thereof and to cause them to misbrand products manufactured by them in which said materials are used.

PAR. 12. The acts and practices of the respondent set out in paragraphs 8, 9 and 10 were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and the respondents having been served with

notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, North American Quilting Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 561 Grand Avenue, in the city of Brooklyn, State of New York.

Respondents Harry Belsky, Leon Diamond, and Mayer Ofman are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondent North American Quilting Corp., a corporation, and its officers, and respondents Harry Belsky, Leon Diamond and Mayer Ofman, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the manufacture for introduction into commerce, the introduction into commerce, or the offering for sale, sale, transportation, distribution or delivery for shipment, in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding wool products by:

1. Falsely and deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers included therein.

2. Failing to securely affix to or place on each product, a stamp,

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tag, label, or other means of identification showing in a clear and conspicuous manner, each element of information required to be disclosed by Section 4(a) (2) of the Wool Products Labeling Act of 1939.

3. Minimizing or rendering obscure or inconspicuous the required information descriptive of the fiber content contained on the labels attached to such wool products.

4. Setting forth the name or designation of fibers not present in wool products on the stamp, tag, label or other mark of identification affixed to such wool products.

5. Furnishing false guaranties that wool products are not misbranded under the provisions of the Wool Products Labeling Act, when there is reason to believe that the wool products so guaranteed may be introduced, sold, transported or distributed in commerce.

It is further ordered, That respondent North American Quilting Corp., a corporation, and its officers, and respondents Harry Belsky, Leon Diamond, and Mayer Ofman, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of interlining materials or other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the character or amount of constituent fibers contained in such products on invoices or shipping memoranda applicable thereto or in any other manner.

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

Complaints

IN THE MATTERS OF

CARNATION COMPANY ET AL., DOCKET 6172

THE BORDEN COMPANY ET AL., DOCKET 6173

BEATRICE FOODS COMPANY (DELAWARE) ET AL.,
DOCKET 6174NATIONAL DAIRY PRODUCTS CORPORATION ET AL.,
DOCKET 6175

PET MILK COMPANY ET AL., DOCKET 6176

FAIRMONT FOODS COMPANY ET AL., DOCKET 6177

ARDEN FARMS CO. ET AL., DOCKET 6178

FOREMOST DAIRIES, INC., ETC., DOCKET 6179

H. P. HOOD & SONS, INC., DOCKET 6425

ORDERS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT*Amended Complaints, Sept. 12, 1955 *—Decisions, May 23, 1962*

Orders dismissing, for failure of proof, complaints charging major ice cream manufacturers with unlawfully lessening competition by granting such inducements to retail customers as providing refrigeration cabinets and other equipment, and servicing the equipment, and giving discounts, rebates, and allowances; but including warning that the Commission would continue close scrutiny of the granting of loans to retailers on the condition that the recipient deal exclusively with the giver.

AMENDED AND SUPPLEMENTAL COMPLAINTS

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the corporations listed above in the caption hereof and more particularly described and referred to hereinafter as respondents have violated the provisions of Section 5 of the said Act (U.S.C. Title 15, Sec. 45), and it appearing to the Commission that proceedings by it in respect thereof would be

*Similar amended and supplemental complaints are combined along with the original complaint in docket 6425, issued October 3, 1955, which was substantially identical with the amended complaints.

in the public interest, hereby issues its amended and supplemental complaints, stating its charges in that respect as follows:

PARAGRAPH 1. Each of the following named respondents is a corporation organized, existing, and doing business under the laws of the State and with its principal office and place of business located as hereinafter set forth:

CARNATION CO. ET AL., DOCKET NO. 6172

Name	State of incorporation	Principal office and place of business
Carnation Company.....	Delaware.....	5045 Wilshire Boulevard, Los Angeles, California.
Carnation Co. of Washington.....	Washington.....	W. 411 Cataldo Avenue, Spokane, Washington.
Carnation Co. of Texas.....	Texas.....	326 Ohio Street, Wichita Falls, Texas.
Carnation Co. of Oklahoma.....	Oklahoma.....	115 No. Cheyenne Street, Tulsa, Oklahoma.
Damascus Milk Co.....	Oregon.....	3342 S. E. Morrison St., Portland, Oregon.
Carnaco Equipment Co.....	Delaware.....	5045 Wilshire Boulevard, Los Angeles, California.

Respondent, Carnaco Equipment Co., is hereinafter referred to as the "Equipment Company." Respondent Carnation Company is hereinafter referred to as "Carnation." The other above named respondents, when referred to collectively hereinafter, will be referred to as the "Carnation Companies."

Carnation was founded by the late Elbridge A. Stuart at Kent, Washington, on September 6, 1899. Its growth was rapid and after various organizational changes it was incorporated under the laws of the State of Maine as Carnation Milk Products Co., and, on July 1, 1920, respondent Carnation was chartered under the laws of the State of Delaware to take over the business of the aforesaid Maine Corporation. During the history of its growth Carnation has acquired a number of independent frozen products manufacturers. On November 1, 1929, the corporate name was changed to Carnation Company, the style now used.

Carnation owns the preferred stock and the stockholders of Carnation own the common stock of the Equipment Company, which was organized by Carnation in 1948 as a corporate device for use in connection with the purchase, sale, lease and loan of ice cream cabinets and other refrigeration equipment. The Equipment Company is operated, controlled and managed as a unit of Carnation's business, and has been and is used by Carnation for the purchase, sale, lease and loan in interstate commerce of such equipment.

Carnation operates its frozen products business directly and through the Carnation Companies, which it wholly owns and controls.

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THE BORDEN CO. ET AL., DOCKET NO. 6173

Name	State of incorporation	Principal office and place of business
The Borden Company.....	New Jersey.....	350 Madison Avenue, New York 17, New York.
Fussell Ice Cream Company, Inc.....	New York.....	350 Madison Avenue, New York 17, New York.
The Ricciardi Co., Inc.....	New York.....	551 Waverly Avenue, Brooklyn 38, New York.

Respondent, The Borden Company, is hereinafter referred to as "Borden." The other above named respondents, when referred to collectively hereinafter, will be referred to as "Borden Companies."

Borden was founded by Mr. Gail Borden, now deceased, in 1857 in Burrville, Connecticut. This business founded by Mr. Borden in 1857 later became known as New York Condensed Milk Co., which was in turn succeeded on April 24, 1899, by Borden's Condensed Milk Company, organized and incorporated on that date under the laws of the State of New Jersey. The present corporate title was adopted in October, 1919.

Respondent, Fussell Ice Cream Company, Inc., was recently merged with its parent corporation, respondent Borden.

Borden operates its frozen products business directly and through the Borden Companies, and other wholly owned and controlled subsidiaries. During the history of its growth, Borden has acquired a number of independent frozen products manufacturers.

BEATRICE FOODS CO. ET AL., DOCKET NO. 6174

Name	State of incorporation	Principal office and place of business
Beatrice Foods Company.....	Delaware.....	120 S. LaSalle St., Chicago 6, Illinois.
Beatrice Foods Company.....	Ohio.....	943 Carr Street, Cincinnati, Ohio.
Meadow Gold Products Company.....	Delaware.....	120 So. LaSalle St., Chicago, Illinois.
Meadow Gold Dairies of California, Inc.....	Delaware.....	442 So. Fair Oaks Ave., Pasadena, California.
Meadow Gold Products Corporation.....	New York.....	777 Kent Avenue, Brooklyn, New York.
Wright & Wagner Dairy Company.....	Wisconsin.....	525 Cross Street, Beloit, Wisconsin.
Meadow Gold Ice Cream Company.....	Maryland.....	1726 E. Pratt, Baltimore, Maryland.

Respondent, Beatrice Foods Company (Delaware), is sometimes hereinafter referred to as "Beatrice." The other named respondents when referred to collectively hereinafter, will be referred to as "Beatrice Companies." The Beatrice Companies are each wholly owned subsidiaries of Beatrice. This business originated in 1890 in Beatrice, Nebraska, as a partnership styled Haskell & Bosworth. In 1897 Beatrice was incorporated to succeed the partnership. In 1905 this corporation was succeeded by an Iowa corporation under the same name. Later, on November 20, 1924, Beatrice was incorporated under the laws of the State of Delaware, retaining the same name, Beatrice

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Creamery Company. The present name, Beatrice Foods Company, was adopted on June 1, 1946.

The business of respondent Creameries of America, Inc., a Delaware Corporation, 727 W. 7th Street, Los Angeles, 17, California, was recently merged into the business of Beatrice. Likewise Beatrice has recently succeeded through merger and otherwise to a number of important frozen products businesses, among which are Louis Sherry, Inc., 30-30 Northern Blvd., Long Island City, New York, Russell Creamery, 1627 Broadway, Superior, Wisconsin, and Greenbrier Dairy Products Co., 704 Donnally St., Charleston, West Virginia. In addition, Beatrice, since its incorporation, has acquired a number of independent frozen products manufacturers.

Beatrice conducts and operates its business directly and through the said wholly owned subsidiaries, the Beatrice Companies, which are operated as divisions. There are extensive inter-company merchandise transactions between the parent, respondent Beatrice, and the Beatrice Companies, and among the Beatrice Companies themselves. Beatrice also makes loans and advances to the Beatrice Companies.

NATIONAL DAIRY PRODUCTS CORP. ET AL., DOCKET NO. 6175

Name	State of incorporation	Principal office and place of business
National Dairy Products Corporation.....	Delaware.....	260 Madison Avenue, New York, N.Y.
Ballard Ice Cream Co., Inc.....	Delaware.....	217 W. State Street, Huntington, Ind.
Breyer Ice Cream Co.....	Delaware.....	43d St. and Woodland Ave., Philadelphia, Pa.
Castles Ice Cream Co.....	New Jersey.....	444 Raymond Blvd., Newark, New Jersey
Clover Farm Dairy Co.....	Tennessee.....	175 Walnut Street, Memphis, Tennessee.
Cloverland Dairy Products Corp.....	Delaware.....	3400 S. Carrollton Ave., New Orleans, La.
Cloverleaf Creameries, Inc.....	Delaware.....	Huntington, Indiana.
Consolidated Dairy Products Co., Inc.....	Delaware.....	11-50 44th Road, Long Island City, N.Y.
Detroit Creamery Co.....	Michigan.....	3333 Grand River Ave., Detroit, Mich.
Ewing-Von Allmen Dairy Co.....	Delaware.....	431 W. Oak Street, Louisville, Kentucky.
The Franklin Ice Cream Co.....	Delaware.....	1217 Harrison St., Kansas City, Mo.
Frechtling Dairy Co.....	Delaware.....	950 Kenyon Avenue, Cincinnati, Ohio.
General Ice Cream Corp.....	New York.....	101 Nott Terrace, Schenectady, N.Y.
The Harding Co.....	Missouri.....	715 So. 72nd St., Omaha, Nebraska.
Hydrox Corporation.....	Delaware.....	415 E. 24th St., Chicago, Ill.
Hydrox Ice Cream Company, Inc.....	New York.....	Van Dam St. and 47th Ave., Long Island City, N.Y.
Luick Ice Cream Co.....	Delaware.....	505 E. Capitol Drive, Milwaukee, Wisconsin.
Ohio Clover Leaf Dairy Co.....	Delaware.....	1820 Vermont Ave., Toledo, Ohio.
Rieck Ice Cream Co.....	Pennsylvania.....	4634 Browns Hill Road, Pittsburgh, Pa.
J. D. Roszell Co.....	Delaware.....	736 So. Washington, Peoria, Illinois.
St. Louis Dairy Co.....	Delaware.....	2001 Chestnut St., St. Louis, Mo.
The Sanitary Milk Co.....	Ohio.....	801 Cherry Ave., N.E., Canton, Ohio.
Southern Dairies, Inc.....	Delaware.....	500 Dalton Avenue, Charlotte, N.C.
Supplee-Wills-Jones Milk Co.....	Pennsylvania.....	15 So. 34th St., Philadelphia, Pa.
Telling Ice Cream Co.....	Delaware.....	3740 Carnegie Avenue, Cleveland, Ohio.
Union Ice Cream Co.....	Tennessee.....	1156-62 Broad St., Nashville, Tenn.
Youngstown Sanitary Milk Co.....	Delaware.....	715 Erie Street, Youngstown, Ohio.

Respondent National Dairy Products Corporation is sometimes hereinafter referred to as "National." The other named respondents, when referred to collectively hereinafter, will be referred to as "Na-

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tional Companies." The National Companies are each wholly owned subsidiaries of National except in the case of Southern Dairies, Inc., of which National owns 98.05 per cent of the stock.

The business of respondent, Ballard Ice Cream Co., Inc., has recently been transferred to respondent Cloverleaf Creameries, Inc.

National was incorporated under the laws of the State of Delaware on December 8, 1923. Since then, it has acquired ownership of many dairy companies, including respondent National Companies, most of which had their inception prior to the date of incorporation of respondent National. Several of the National Companies have been in operation for fifty years or more. One has been operating for more than a century.

National conducts and operates its business through the said National Companies which are operated as divisions.

National maintains general control over each of the National Companies through approval or disapproval of budgets, the supplying of large capital expenditures, the approval or disapproval of the acquisition of property sites, the approval or disapproval of loans of money to dealers and in various other ways and means. For this purpose regular meetings of the board of directors and of an operating committee and executive committee are held.

PET MILK CO. ET AL., DOCKET NO. 6176

Name	State of incorporation	Principal office and place of business
Pet Milk Company.....	Delaware.....	1401 Arcade Building, St. Louis, Missouri.
Pet Dairy Products Company.....	Delaware.....	303 W. Walnut Street, Johnson City, Tenn.
Colville Ice Cream Company.....	Utah.....	159 W. First S., Salt Lake City, Utah.

Respondent, Pet Milk Company, is hereinafter referred to as "Pet." The other above-named respondents, when referred to collectively hereinafter, will be referred to as "Pet Companies."

Pet was incorporated under the laws of the State of Delaware on March 31, 1925, and acquired at that time all of the property, business and assets of an Illinois corporation of the same name which had succeeded by change of name on September 6, 1923, another Illinois corporation named Helvetia Milk Condensing Company, which was incorporated February 16, 1885, with a 20 year life.

Pet conducts and operates its business directly and through wholly-owned and controlled subsidiaries, including the Pet Companies. Pet controls and directs the activities of the Pet Companies through the use of common officers and through control of large capital ex-

penditures, acquisition of new facilities, loans of money for expenses and working capital, approval or disapproval of budgets submitted, and other general supervision.

Respondent, Pet Dairy Products Company, a wholly owned subsidiary of respondent Pet, was incorporated under the laws of the State of Delaware on April 16, 1952, succeeding to the business of various subsidiary corporations of respondent Pet as follows:

Meier Ice Cream Company which was incorporated under the laws of the State of Wisconsin in March 1927; Kellogg Ice Cream Company was incorporated under the laws of the State of Wisconsin in 1930 and was merged into Meier Ice Cream Company on June 15, 1948, and the name of Meier Ice Cream Company, the surviving corporation, was changed to Pet Ice Cream Company, still a Wisconsin corporation; the name of the Pet Ice Cream Company was changed to Pet Dairy Products Company on December 28, 1951; another corporation named Pet Dairy Products Company was incorporated under the laws of the State of Tennessee on July 11, 1929; on May 1, 1952, the business of the Tennessee corporation and the Wisconsin corporation was transferred to the Delaware corporation and the Delaware corporation was the only surviving corporation under the name Pet Dairy Products Company.

Respondent Colville Ice Cream Company, a wholly owned subsidiary of respondent Pet, is a corporation organized and existing under and by virtue of the laws of the State of Utah, having its principal office and place of business at 159 W. First S., Salt Lake City, Utah.

During the history of its growth Pet has acquired a number of independent frozen products manufacturers.

FAIRMONT FOODS CO. ET AL., DOCKET NO. 6177

Name	State of incorporation	Principal office and place of business
Fairmont Foods Company.....	Delaware.....	3201 Farnam Street, Omaha, Nebraska.
Fairmont Foods Co., Inc.....	New York.....	197 Scott Street, Buffalo, New York.
Fairmont Foods Company of Wisconsin.....	Wisconsin.....	165 N. Broadway, Green Bay, Wisconsin.

Respondent Fairmont Foods Company is sometimes hereinafter referred to as "Fairmont." The other named respondents when referred to collectively hereinafter will sometimes be referred to as "Fairmont Companies."

The corporate history of Fairmont Foods Company is as follows: This business was originally established in 1834 when a Nebraska corporation was chartered at Fairmont, Nebraska, under the style of

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Fairmont Creamery Company. On March 5, 1929, the business was incorporated under the laws of the State of Delaware as the Fairmont Creamery Co., with various wholly owned subsidiaries. In August 1945, Fairmont Creamery Co. acquired the assets of Imperial Ice Cream Co. of Parkersburg, West Virginia. On May 3, 1947, the articles of incorporation were amended to adopt the present name, Fairmont Foods Company.

Fairmont conducts and operates its business directly and through wholly owned and controlled subsidiaries, which are operated as divisions. The portion of Fairmont's business which is hereinafter described, is conducted and operated directly and through the Fairmont Companies. Fairmont controls and operates the activities of the Fairmont Companies through the use of common officers and through control of large capital expenditures, acquisition of new facilities, loans of money for expenses and working capital, approval or disapproval of budgets submitted and other general supervision.

Respondent, Fairmont Foods Co., Inc., was originally incorporated as Fairmont Creamery of New York in June 1912, under the laws of the State of New York. On May 6, 1947 its present name was adopted.

Respondent, Fairmont Foods Company of Wisconsin, was incorporated on March 4, 1915 under the name of Green Bay Cheese Company, Ltd., and was changed to Fairmont Creamery Company of Wisconsin on August 24, 1917, when the assets were acquired by the respondent. Later, on May 6, 1947, its present name was adopted. During the history of its growth respondent Fairmont has acquired a number of independent frozen products manufacturing firms.

ARDEN FARMS CO. ET AL., DOCKET NO. 6178

Name	State of incorporation	Principal office and place of business
Arden Farms Co.....	Delaware.....	1900 W. Slauson Ave., Los Angeles 17, Calif.
Stokes Creamery Co.....	Washington.....	1501— 4th Street, Seattle, Washington.
Equipment Enterprises, Inc.....	California.....	1900 W. Slauson Ave., Los Angeles, Calif.
Melvorn-Fussell Ice Cream Co. (formerly known as Fussell-Young Ice Cream Co.).	California.....	400 Calvert Avenue, Alexandria Virginia.
Kansas City Diced Cream Co.....	California.....	325 E. 31st Street, Kansas City, Missouri
Camellia Diced Cream Co. (formerly known as Houston Diced Cream Co.).	California.....	2006 Westheimer St., Houston, Texas.

Respondent Arden Farms Company is sometimes hereinafter referred to as "Arden." The other named respondents, except Equipment Enterprises, Inc., when referred to collectively hereinafter, will be referred to as "Arden Companies." Equipment Enterprises, Inc., is hereinafter referred to as the "Equipment Company."

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Arden was founded by the late Samuel H. Berch. Mr. Berch founded a company known as Velvet Ice Cream Company in Seattle, Washington, in 1919. This became the nucleus of respondent Arden, of which Mr. Berch was president since its inception in 1925.

Respondent Arden's business was incorporated under the laws of the State of Delaware on December 11, 1933, as Western Dairies, Inc. The present name, Arden Farms Company, was adopted through a merger of Western Dairies, Inc., and three companies known as Arden Farms Co. (formerly Western Products Company), Arden Farms, Inc. (formerly Western Dairy Products, Inc. and California Dairies, Inc.), and Arden Protected Milk Company (formerly California Co-operative Creamery Company).

Arden conducts and operates its business directly and through wholly owned and controlled subsidiaries and other subsidiaries in which it has majority ownership of the capital stock, all of which are operated as divisions. Respondents Stokes Creamery Company, Equipment Enterprises, Inc., Melvern-Fussell Ice Cream Co. (formerly known as Fussell-Young Ice Cream Co.) and Kansas City Diced Cream Co. are wholly owned. Respondent Camellia Diced Cream Co. (formerly known as Houston Diced Cream Co.) is 55 per cent owned by Arden. Respondent Arden has recently acquired the stock and assets of its subsidiary respondents, Stokes Creamery Company and Kansas City Diced Cream Co. During the past few years Arden has bought up and taken over the stock and assets of a number of important dairy products concerns.

FOREMOST DAIRIES, INC., ETC., DOCKET NO. 6179

Name	State of incorporation	Principal office and place of business
Foremost Dairies, Inc.	New York	2093 College Street, Jacksonville, Fla.
Phenix Dairy, Inc.	Texas	1220 South Street, Houston, Texas.
Tennessee Dairy, Inc.	Texas	216 N. Crowds St., Dallas, Texas.
Tennessee Milk Company, Inc.	Texas	Odessa, Texas.
Southern Maid, Inc.	Virginia	Bristol, Virginia.
Welch Milk Company, Inc.	West Virginia	Welch, West Virginia.
Bridgeman-Russell Co., Inc.	Minnesota	110 W. Michigan, Duluth, Minnesota.

Respondent, Foremost Dairies, Inc., is sometimes hereinafter referred to as "Foremost." The other named respondents, when referred to collectively hereinafter, will be referred to as "Foremost Companies." Foremost conducts and operates its business directly and through wholly owned and controlled subsidiaries. Other wholly owned or controlled subsidiaries of Foremost engaged in the frozen products business, in commerce, as frozen products are hereinafter defined, are made respondents in this complaint.

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Foremost is the result of mergers and acquisitions, including the following: A merger between Foremost Dairies, Inc., a Delaware corporation, and Maxson Food Systems, Inc., a New York corporation. Foremost Dairies, Inc., a Delaware corporation, was organized in 1931 and is the principal component of the present organization. Maxson Food Systems, Inc., was organized in 1945 to succeed the former Maxson Food Systems, which was a division of W. L. Maxson Corporation. The aforesaid merger was effective February 8, 1949. The name of the surviving corporation, Maxson Food Systems, Inc., was changed to Foremost Dairies, Inc., as of the date of the merger. A more recent merger was one in which respondent Golden State Company, Ltd., a Delaware corporation, 425 Battery Street, San Francisco, California, was merged into respondent Foremost, the agreement having been approved initially by the respective Boards of Directors on December 3, 1953 and ratified on February 25, 1954 by the respective stockholders, with the corporate name remaining as Foremost Dairies, Inc. The former business of Golden State Company, Ltd., has been continued by respondent Foremost under a division known as Golden State Division.

During the history of its growth, Foremost has acquired a number of independent frozen products manufacturers.

H. P. HOOD & SONS, INC., DOCKET 6425

Respondent H. P. Hood & Sons, Inc., sometimes hereinafter referred to as Hood, is a corporation, organized, existing and doing business under the laws of the State of Massachusetts, with its principal office and place of business located at 500 Rutherford Avenue, Charlestown, Mass.

The present Hood corporation was organized on February 2, 1920, at which time it acquired all of the assets and assumed all of the liabilities of H. P. Hood & Sons, a Maine corporation. Prior to the incorporation under Massachusetts law, the firm had functioned as an individual proprietorship and as a corporation in Massachusetts since 1846.

In addition to its plant at Charlestown, Massachusetts, respondent Hood manufactures its frozen products at plants located at Bangor, Maine; Portland, Maine; Saint Johnsbury, Vermont; Manchester, New Hampshire; Boston, Mass.; Springfield, Mass.; Providence, Rhode Island; New Haven, Connecticut, and Ravena, New York.

Apart from the above named manufacturing plants respondent has a number of branch sales offices where no manufacturing activity takes place. These sales offices operate as satellites of the branch manufacturing facilities. Respondent has branch sales offices located

in the following municipalities: Troy, New York; Houlton, Maine; Lewiston, Maine; Rutland, Vermont; Dover, New Hampshire; Concord, New Hampshire; Fall River, Mass.; Fitchburg, Mass.; Hyannis, Mass.; Northampton, Mass.; Quincy, Mass.; New Bedford, Mass.; Salem, Mass.; Springfield, Mass.; Taunton, Mass.; Lawrence, Mass.; Worcester, Mass.; Hartford, Conn., and Norwich, Conn. In addition to these sales offices respondent maintains two branch sales offices at the firm's headquarters in Charlestown, Mass. Apart from the absence of manufacturing activity in these branch sales offices, respondent operates them in the same manner as those offices where manufacturing is conducted except that rather than manufacturing some of their own needs, all frozen products sold by them are received from one or another of the manufacturing facilities.

Respondent sells its frozen products principally at wholesale to retailers and other handlers of same, such as drug, grocery and confectionery stores, restaurants, hotels and institutions. There are approximately 12,000 of these establishments purchasing ice cream from the various Hood facilities throughout New England. The number of customers served by the various sales offices varies from 123 served by Northampton to 1101 served by Boston West, the great concentration of customers being located within the large municipal centers through New England. Delivery to these retail customers by the Hood facilities is, in virtually all cases, by route trucks operating from a manufacturing plant or sales office, although in some instances customers in outlying areas are served by rail or independent contract carriers.

PAR. 2. Respondents are engaged in the business of producing, purchasing, processing, manufacturing, selling, and distributing dairy and related food products among which are ice cream, sherbets and other similar frozen dairy foods, hereinafter referred to as "frozen products". In carrying on their frozen products business respondents buy, sell, lease, and loan ice cream cabinets and other refrigeration equipment hereinafter referred to as "facilities".

Respondents sell their frozen products principally at wholesale to retailers and other handlers of same, such as drug, grocery and confectionery stores, restaurants, hotels, and institutions.

Because of the nature of frozen products it is necessary for such retailers and handlers to have a facility or facilities of some sort designed and manufactured for use in connection with the storage, display, and sale of them to the purchasing public.¹

¹ Respondent Arden organized the Equipment Company as a corporate device for use in connection with the purchase, sale, lease, and loan of facilities. The Equipment Company is operated, controlled, and managed as a unit in Arden's business and has been and is used by Arden in the purchase, sale, lease, and loan in interstate commerce of facilities.

Generally, retailers and other handlers of frozen products handle, store, and sell only one manufacturer's line of such products in their stores and places of business. Most retailers have limited floor space for such facilities in their places of business. The placement by an ice cream manufacturer of facilities on the premises of a retailer or handler and the performance of any of the other acts and practices alleged in paragraph 6 hereof with or without an agreement, condition or understanding that only the frozen products of said manufacturer shall be stored in or sold from such facilities, or that such dealer will purchase his full requirements of frozen products from such manufacturer, are in effect the same as exclusive requirements dealing arrangements or contracts.

Ice cream cabinet and refrigeration facility units which a retailer must have in his place of business for selling and distributing frozen products vary in price according to size. The size of the facility unit that a retailer needs varies with his volume of business. The cost of these units to retailers ranges from \$500.00 or less, to \$5,000.00 or more.

PAR. 3. Respondents are engaged in interstate commerce in that they purchase and produce ingredients which are used in the manufacture of frozen products and cause some of these to be shipped across state lines to the states of manufacture of such frozen products; in that they sell and distribute frozen products across state lines; in that in carrying on the acts, practices and methods herein alleged respondents buy, sell, lease, loan, and supply facilities, buy, sell, and supply equipment other than facilities, make arrangements for loans of money, furnish services and facilities, and arrange for terms and conditions of sale, across state lines; in that in connection with the carrying on of their said business as aforesaid in frozen products over the area of the states of the United States in which they operate, respondents send and receive orders, information, signs, advertising material, advertising copy, and material and equipment relating to the said business and products thereof; and, in general, promote said business through the media of interstate transactions.

PAR. 4. In the course and conduct of their said business said respondents are, and have been for a substantial time in the past in competition with firms, partnerships, corporations, and individuals engaged in the aforesaid business of frozen products and facilities in commerce between and among various of the States of the United States.

PAR. 5. Ice cream was first manufactured for wholesale in this country in 1851 and was first officially reported as manufactured in the United States in 1859. By 1869, ice cream was being produced

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in this country at the rate of 24,000 gallons a year. Since then, ice cream and other frozen products have steadily increased in importance as foods in the economic life of the United States and many foreign countries. In 1951, 642,639,000 gallons of frozen products were produced and sold in the United States.

Carnation Company et al., Docket 6172

In the year [1951] respondents produced and sold approximately 1.73% of the total of frozen products in the United States, representing a total of 11,150,487 gallons of frozen products. In 1951 the total net sales of all dairy products produced and sold by respondents amounted to \$297,729,394. Of these approximately 5.6% were of their frozen products, amounting to \$16,828,175.27. Respondents' sales of frozen products and their sales, loans, leases and subleases of facilities were in areas of the United States west of the Mississippi. Respondents are a major factor in this business in these trading areas.

The Borden Company et al., Docket 6173

In the year [1951] respondents produced and sold approximately 10% of the total of frozen products produced and sold in the United States.

The net sales of dairy products by respondents in 1951 amounted to \$792,056,671, of which 16% were of their frozen products amounting to approximately \$117,000,000.

Borden has divided the United States into geographical trading areas. For example, Borden's Pioneer Ice Cream Division includes parts of the States of New York and New Jersey. Respondents operate 84 manufacturing plants and 228 distributing branches in 31 States of the United States in the conduct of their business in frozen products and facilities.

Beatrice Foods Company et al., Docket 6174

In the year [1951] respondents, collectively, but excluding Creameries of America, Inc., which was acquired at a later date, produced and sold approximately 4 per cent of the total of frozen products in the United States, representing a total of 25,024,337 gallons. In the same year, 1951, the net sales of respondents, excluding Creameries of America, Inc., of all dairy products sold amounted to \$228,661,163.24. Of this, approximately 16 per cent, or \$36,585,700 were of their frozen

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products. The sale of frozen products by respondents and the aforesaid sales, loans and leases of facilities by them were made in a substantial number of the States of the United States and in the District of Columbia.

National Dairy Products Corporation et al., Docket 6175

In the year [1951] respondents produced and sold approximately 14 percent of the total of frozen products in the United States, representing a total of 86,129,249 gallons. In the same year, 1951, the net sales of respondents of all dairy products sold amounted to \$1,038,422,362. Of this, approximately 15 per cent, or \$155,456,543 were of their frozen products. In 1952, respondents increased their total to 89,444,810 gallons out of a total 588,750,000 gallons in the United States, representing a sales dollar volume of \$163,406,514 and approximately 15.19 per cent of the total of the national figure. In 1952 respondents' total net sales of all dairy products sold was \$1,141,295,700. The sale of frozen products by respondents and the aforesaid sales, loans and leases of facilities by them were made in a substantial number of the States of the United States and in the District of Columbia.

Pet Milk Company et al., Docket 6176

In the year [1951] respondents produced and sold approximately 2 percent of the aforesaid total of frozen products in the United States, representing a total of approximately 13,333,333 gallons. In the same year, 1951, the net sales of respondents of all dairy products sold amounted to \$127,809,984, and increased in 1952 to \$165,286,857. Of the 1951 net sales, approximately 12%, or \$20,000,000, were of their frozen products.

The sale of frozen products by respondents and the aforesaid sales, loans and leases of facilities were in the States of Tennessee, Kentucky, North Carolina, South Carolina, Georgia, Virginia, West Virginia, Wisconsin, Illinois, Utah and Idaho. Respondent Pet, through the Pet Companies, is an important factor in this business in these trade areas.

Fairmont Foods Company et al., Docket 6177

In the year [1951] respondents produced and sold approximately 1.6 per cent of the total of frozen products in the United States, representing a total of 10,650,000 gallons. In the same year 1951, the net sales of respondents of all dairy products sold amounted to \$111,531,415. Approximately 15 per cent of these were of their frozen products, amounting to \$17,600,000. In 1952, net sales of all dairy products increased to \$121,000,839.

The sale of frozen products by respondents and the aforesaid sales, loans and leases of facilities were in the States of Massachusetts, Connecticut, Pennsylvania, Ohio, Michigan, Kansas, Texas, Oklahoma, Arkansas, Nebraska, North Dakota, Minnesota, Iowa, Kentucky, West Virginia, Maryland, New York and Wisconsin. Respondents are an important factor in this business in these trade areas.

Arden Farms Company et al., Docket 6178

In the year [1951] respondents produced and sold approximately 2 per cent of the total of frozen products in the United States, representing a total of 12,959,100 gallons. In the same year, 1951, the net sales of respondents, except those of respondent Melvern-Fussell Ice Cream Co. (at that time known as Fussell-Young Ice Cream Co.) of all dairy products sold amounted to \$130,328,509.01. Of this, approximately 14 per cent, or \$18,372,884.54 were of its frozen products. The sale of frozen products by respondents and the aforesaid sales, loans and leases of facilities by them were made principally in the Pacific coastal States, the States adjacent thereto, Kansas, Missouri, Texas, Virginia, Maryland, and the District of Columbia.

Foremost Dairies, Inc., Etc., Docket 6179

In 1951 net sales of all dairy products produced and sold by Foremost were \$53,627,028. This increased in 1952 to \$77,912,842. In the same year respondents, Foremost and its then wholly owned subsidiaries, produced and sold a total of 8,268,113 gallons of frozen products, representing approximately 1.3 per cent of the national figure. This represented approximately 25 per cent of the total sales of all products sold by those respondents, amounting to approximately \$12,945,790. The other respondents, Foremost Companies, whose sales and production of frozen products in 1951 are not included in this total, were acquired by Foremost at a later date. The sale of frozen products by respondents and the aforesaid sales, loans and leases of facilities by them were in the States of Alabama, Florida, Virginia, Louisiana, Massachusetts, North Carolina, South Carolina, New York, Pennsylvania, Tennessee, Texas, North Dakota, South Dakota, Minnesota, Kentucky, West Virginia, Wisconsin and California.

H. P. Hood & Sons, Inc., Docket 6425

For the fiscal year ending February 28, 1953, the total net sales of all dairy products produced and sold by respondent amounted to \$110,898,128.00. Of this approximately 15% was of their frozen products amounting to \$17,361,648.00. Respondent's sales of frozen prod-

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ucts together with its sales and loans of facilities were and are made in the six New England States and in that part of New York State surrounding the city of Troy. Respondent is a major factor in this business in this trading area.

In 1920, 148,298,000 gallons of frozen products were produced and sold in the United States. This volume was increased to 618,532,000 in 1950. During the same period the number of establishments manufacturing frozen products gradually decreased from 2,427 in 1920 to 1,521 in 1941. The number of employees engaged in the frozen products industry increased from 15,443 in 1939 when there were 2,734 manufacturing establishments to 35,974 in 1947 when the number of such establishments had decreased to 1,521. This decrease in the number of manufacturing establishments occurring as it has during the period of the aforesaid increase in the production of frozen products and increase in the population of the United States from 105,710,760 in 1920 to 145,000,000 in 1947 and 150,000,000 in 1950 has been accompanied by a gradual increase in the degree of the concentration of ownership of the production facilities of such manufacturing establishments in terms of volume produced in the hands of a comparatively few corporations, including respondents. This increase in concentration has resulted in part from the impact of the methods of competition and acts and practices described hereinafter in paragraph 6. Small business entities in this industry have been and are forced to attempt to meet and to meet such competitive method, acts and practices, but, because of lack of capital means to do so, many have had to sell out to the larger corporations, including respondents, while others have been forced into bankruptcy.

PAR. 6. For more than two years last past and continuing up to the present time, respondents, in carrying on their business of manufacturing, selling, and attempting to sell, frozen products, have attempted to induce, and have induced, retail dealers and prospective retail dealers and other handlers of frozen products to handle, store, and sell respondents' products exclusively, by doing, engaging in, and carrying out various acts, methods and practices including the following:

1. Respondents have made facilities available to retail dealers and prospective retail dealers and other handlers of frozen products by sale, loan and lease, and through arrangements with others to supply such dealers and handlers facilities, on the condition, agreement, or understanding, express or implied, that the lessee, purchaser, or borrower thereof shall not handle, store, or sell the frozen products of respondents' competitors.

2. Respondents have made facilities available to retail dealers and prospective retail dealers and other handlers of frozen products by sale, loan, and lease on the condition, express or implied, that only the frozen products of respondents shall be stored therein or sold therefrom.

3. Because of their purchasing power and the resources at their command, respondents are able to, and have, and do now purchase and lease "facilities" at prices no higher and in some cases less than the prices paid by regular licensed facility dealers and small ice cream manufacturers and have and do now sell, lease, loan and install such facilities at prices less, and on terms more favorable than retail dealers or prospective retail dealers or other handlers of frozen products have been able to or can obtain them elsewhere.

4. Respondents have sold, leased, loaned and rented facilities to frozen products dealers and prospective dealers or other handlers of frozen products without receiving or contemplating receiving any direct profit or compensation from such transactions.

5. Respondents have made facilities available to retail dealers and prospective retail dealers and other handlers of frozen products.

6. Respondents have made loans of money to retail dealers and prospective retailer dealers and other handlers of frozen products on the condition, agreement, or understanding, express or implied, that such dealers and handlers shall not handle, store or sell the frozen products of respondents' competitors.

7. Respondents have made loans of money to retail dealers and prospective retail dealers and other handlers of frozen products for building, repairing, and remodeling stores and for the purchase of facilities and for the purpose of supplying the needs of such dealers and handlers for general operating expenses, without receiving or contemplating receiving any direct interest or compensation from said loans.

8. Respondents have made loans of money and have arranged with others by various means and methods to make loans of money to retail dealers and prospective retail dealers and other handlers of frozen products.

9. Respondents have supplied retail dealers and prospective retail dealers and other handlers of frozen products with other equipment than facilities, and arranged with others to supply such dealers and handlers with equipment, for use in the conduct of their business, e.g., soda fountains, and other store fixtures by sale, lease and loan and otherwise, on the condition, agreement, or understanding, express or implied, that the lessee, purchaser, or borrower thereof shall not handle, store, or sell the frozen products of respondents' competitors.

10. Respondents have supplied retail dealers and prospective retail dealers and other handlers of frozen products with other equipment than facilities, and arranged with others to supply such dealers and handlers with equipment, for use in the conduct of their business, e.g., soda fountains, and other store fixtures, by sale, lease, and loan without receiving or contemplating receiving any direct profit or compensation from such transactions.

11. Said respondents have supplied retail dealers and prospective dealers and other handlers of frozen products with other equipment than facilities for use in the conduct of such dealers' and handlers' business, e.g., soda fountain equipment and store fixtures.

12. Respondents have performed and furnished services of value for and to retail dealers and prospective retail dealers and other handlers of frozen products, e.g., repainting of the interior of a dealer's or prospective dealer's or handler's establishment, servicing facilities or soda fountain equipment, and supplying signs and advertisements, on the condition, agreement or understanding, express or implied, that the dealer or handler shall handle, store or sell the frozen products of respondents only.

13. Respondents have performed and furnished services of value for and to retail dealers and prospective retail dealers and other handlers of frozen products, e.g., repainting of the interior of such dealers' stores, servicing facilities or soda fountain equipment without receiving or contemplating receiving any direct profit on or compensation for such services.

14. Said respondents have performed and furnished services of value for and to retail dealers and prospective retail dealers, and other handlers of frozen products, e.g., repainting of the interior of a dealer's or prospective dealer's or other handler's establishment or servicing facilities or soda fountain equipment.

15. Respondents have granted discounts and rebates on sales of frozen products to retail dealers and other handlers on the condition, agreement, or understanding, express or implied, that the dealer or handler shall handle, store or sell the frozen products of respondents exclusively.

16. Respondents have granted volume discounts and rebates on the prices of frozen products sold to retail dealers and other handlers sufficiently large enough to constitute an inducement to such dealers and handlers to handle, store, or sell respondents' frozen products exclusively.

17. Respondents have made allowances or payments in connection with sales of frozen products in the form of discounts or rebates to retail dealers and other handlers who own their own facilities on the

condition, agreement, or understanding, express or implied, that said dealers and handlers shall handle, store, or sell the frozen products of respondents exclusively.

18. Said respondents have made allowances or payments in connection with sales of frozen products in the form of discounts or rebates to retail dealers and other handlers who own their own facilities while not making or offering to make such allowances or payments on sales of frozen products to competing retail dealers and handlers who do not own their own facilities.

PAR. 7. The aforesaid acts, practices and methods of respondents have induced, and do now induce a substantial number of frozen products dealers and users of facilities to refrain from buying or leasing facilities from regular licensed facility dealers and handling the frozen products of respondents' competitors and to deal in respondents' frozen products exclusively; and such acts, practices and methods of a comparatively few of the larger corporations, including respondents, have caused a substantial number of manufacturers with resources insufficient to carry on said practices to sell out to or merge with respondents or others, or to go out of business entirely. The effect upon competition of the use of the aforesaid acts, practices, and methods by respondents is adverse to the public interest and the capacity, tendency and effect of said acts, practices and methods are and have been, unreasonably to hinder, hamper and restrain competing manufacturers of competitive products in disposing of their products to frozen products dealers. Said acts and practices and methods have and do now unreasonably hamper, restrain, lessen and eliminate competition in the sale and distribution of frozen products and have the capacity to create in the hands of a few, including respondents, a tendency toward monopoly in the sale and distribution of frozen products. The use by respondents and others of such unfair methods of competition is advantageous to competitors with the most resources at their command and prejudicial to small business concerns with limited resources; and they tend to destroy the freedom of retailers to select frozen products pursuant to customer demands or their own free will. Said acts, practices, and methods are all to the prejudice and injury of the public, and in the circumstances constitute unfair methods of competition and unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

Mr. Lynn C. Paulson, Mr. Ashby H. Cantor and Mrs. Estelle L. Ague supporting the complaint.

Mr. Gordon T. Jeffers and Mr. James R. Baird, Jr., of Los Angeles, Calif., for Carnation respondents.

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Mr. Cecil I. Crouse and Dewey, Ballantine, Bushby, Palmer & Wood, by Mr. John E. F. Wood, Mr. Charles E. Stewart, Jr., and Mr. E. Deane Turner, of New York, N.Y., for Borden respondents.

Mr. Walter L. Dilger and Mr. John P. Fox, and Winston, Strawn, Smith & Patterson, by Mr. Thomas A. Reynolds and Mr. Edward J. Wendrow, of Chicago, Ill., for Beatrice Foods respondents.

Mr. Robert S. Gordon and Snyder, Chadwell, Fagerburg & Keck, by Mr. John T. Chadwell, Mr. Richard W. McLaren, Mr. John W. Thomas and Mr. Jean Engstrom, of Chicago, Ill., and Whiteford, Hart, Carmody & Wilson, by Mr. John J. Carmody, of Washington, D.C., for National Dairy respondents.

Mr. Gene Mayfield, of St. Louis, Mo., and Cann, Taylor, Lamb & Long, by Mr. George P. Lamb, Mr. C. Brewster Chapman, Jr., and Mr. Carrington Shields, of Washington, D.C., for Pet respondents.

Mr. Charles H. Flansburg, of Lincoln, Nebr., for Fairmont Foods respondents.

Mr. Milton H. Barker and Gibson, Dunn & Crutcher, by Mr. Julian O. von Kalinowski and Mr. John J. Hanson, of Los Angeles, Calif., for Arden respondents.

White & Case, by Mr. Edgar Barton and Mr. Thomas M. Johnson, of New York, N.Y., and Milam, LeMaistre, Ramsay & Martin, by Mr. George W. Milam, of Jacksonville, Fla., for Foremost respondents.

Ropes, Gray, Best, Coolidge & Rugg, by Mr. Charles B. Rugg and Mr. Frank W. Crocker, of Boston, Mass., for H. P. Hood & Sons, Inc.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

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STATEMENT OF PROCEEDINGS

These are nine separate proceedings instituted by the issuance of separate, but substantially identical, complaints against the above-named respondents charging them with having engaged in various unfair methods of competition and unfair acts and practices, in com-

merce, in violation of Section 5 of the Federal Trade Commission Act. Complaints were originally issued against the respondents in the first eight of the above-captioned proceedings on February 15, 1954. Said proceedings were initially assigned for hearing to another examiner of the Commission. After the filing of their respective answers by said respondents, a joint pre-hearing conference was held before said examiner on April 22, 1954. Thereafter, five of the proceedings were reassigned to the undersigned hearing examiner, by order of the Commission issued September 2, 1954. A further joint pre-hearing conference was held on September 2, 1954. Two of the remaining three of the original eight proceedings were thereafter reassigned to the undersigned by order of the Commission issued October 11, 1954, and the third was reassigned on November 22, 1954.

Separate hearings on the original complaints were held before the undersigned in Washington, D.C., seriatim, on various dates between September 14, 1954 and May 13, 1955. Thereafter, motions were filed by counsel supporting the complaint to amend and supplement the complaint in all eight proceedings. Following a hearing in Washington, D.C., on August 22, 1955, and subject to certain conditions agreed to by all counsel, the undersigned filed his orders, dated September 12, 1955, in each of said proceedings, granting the motions and directing that the complaints be amended and supplemented in accordance therewith. Following service of said amended and supplemental complaints, the respondents filed their respective answers thereto. On October 3, 1955, the Commission issued and thereafter served on respondent Hood a complaint identical with the amended and supplemental complaints theretofore issued against the respondents in the original eight proceedings. Answer to said complaint was duly filed by respondent Hood.

Further hearings for the purpose of receiving evidence in support of the complaints in these proceedings were held before the undersigned on various dates between October 24, 1955 and December 18, 1956 in Portland, Oregon; Seattle, Washington; San Francisco and Los Angeles, California; Washington, D.C.; Richmond, Virginia; Easton, Maryland; Charlotte, North Carolina; Atlanta, Georgia; Jacksonville and Miami, Florida; Houston, Texas; Phoenix, Arizona; New York, New York; Pittsburgh and Philadelphia, Pennsylvania; Knoxville, Tennessee; Chicago, Illinois; Des Moines, Iowa; Omaha, Nebraska; Rapid City, South Dakota; Cincinnati, Ohio; Kansas City, Missouri; Portland, Maine; and Hartford, Connecticut. The evidence offered at the above hearings consisted mainly of testimony as to competitive conditions in the above areas. In order to avoid the necessity for having to recall witnesses where their testimony related to more

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than one respondent, joint hearings were held with respect to all respondents doing business in any hearing area, and the testimony of all witnesses called was transcribed in the record of each respondent doing business in such area, subject to the right of any respondent to move to strike such portions of the testimony of any witness as did not pertain to it.¹

At the close of the case-in-chief counsel for respondents were granted approximately one month to determine whether to file motions to dismiss or strike, or to proceed with their defense. Counsel for all respondents, except Pet, thereafter notified the examiner that they would reserve all motions until the close of the case and would proceed with the presentation of defense evidence. A motion to dismiss was filed by respondent Pet which was denied by order of the undersigned dated March 5, 1957.

Separate defense hearings were thereafter held in each of these proceedings on various dates between April 29, 1957 and November 22, 1957, except for consolidated hearings on September 16-20, 1957 at which certain economic and statistical evidence was offered on behalf of all respondents, except Fairmont, Hood and Pet. Portions of the testimony and evidence received at the consolidated hearings were later stipulated into the Pet record. At the close of all the evidence respondents other than Hood, Fairmont and Pet moved to consolidate various portions of the testimony and other evidence taken in their proceedings subsequent to the amendment of the complaints. Said motions were made and granted on the condition that the consolidation of such testimony would not prejudice the separate identity of each proceeding and the right of each respondent to make a separate appeal from any adverse ruling in these proceedings.

Counsel were granted leave to file proposed findings, conclusions, and briefs in support of their respective positions, and appropriate motions to dismiss or strike. Thereafter six of the respondents filed joint findings and briefs, together with an appendix thereto, and separate motions to dismiss or strike. Respondents in the Hood, Fairmont and Pet proceedings filed separate proposed findings, briefs and motions to dismiss or strike. Counsel supporting the complaint filed a single set of proposed findings and brief, together with an appendix thereto, in all nine cases. In lieu of oral argument counsel were granted leave to

¹ This procedure was agreed to by all counsel, except counsel for Pet and counsel supporting the complaint. Counsel for Pet requested that separate hearings be held with respect to their client. Counsel supporting the complaint sought a complete consolidation of all records, with the testimony of all witnesses to be received in the record of each respondent, irrespective of whether said respondent did business in the particular portion of the country from which a witness was being called or not. Both objections were overruled.

file replies to the proposed findings and briefs of opposing counsel. Respondents Hood, Fairmont and Pet filed separate replies to the proposed findings and brief of counsel supporting the complaint.² The remaining respondents filed a joint reply to the proposals and brief of counsel supporting the complaint and several of such respondents also filed separate supplemental replies. Counsel supporting the complaint elected not to file any reply to the proposals or briefs of respondents, but filed a document entitled "Supplemental Brief" which is, in substance, a response to the ancillary motions of certain respondents to dismiss on grounds of lack of commerce and to strike certain evidence.

At the hearings held herein all parties were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to offer evidence, and to examine and cross-examine witnesses. The records in these proceedings consist of approximately 14,000 pages of testimony (not counting testimony which is duplicated in more than one record) and 3,800 exhibits, some of which exhibits consist of several hundred pages. The proposed findings, briefs and motions filed at the close of the evidence aggregate approximately one thousand pages.

The undersigned has concluded that in view of the substantial identity of many of the basic issues of fact and law in these proceedings and the fact that the records in six of them have been largely consolidated, and in the interest of a more expeditious disposition of these protracted proceedings, that it would be appropriate to issue a single decision in all nine cases. The examiner has concluded that this may be done, without prejudicing respondents' right of due process, by issuing a basic decision setting forth the facts and legal principles common to all cases and pointing up, wherever necessary, significant factual differences in the individual cases, and by supplementing such decision with an appendix containing more detailed facts concerning the separate market areas where each group of respondents does business, as reflected by the evidence.

Having carefully reviewed the entire records in these proceedings, and the proposals and briefs of the parties,³ and based on the entire record and his observation of the witnesses, the hearing examiner makes the following:

² Counsel for said respondents, in the replies filed by them, have objected to the procedure of counsel supporting the complaint in joining their clients in a single set of proposals and in treating the separate proceedings as if they were a single case. Said respondents request that the hearing examiner issue a separate decision in each of their proceedings.

³ Proposed findings not herein adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

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FINDINGS OF FACT

I. The Business of Respondents

1. Respondent National Dairy Products Corporation, sometimes referred to hereinafter as "National," was incorporated under the laws of the State of Delaware on December 8, 1923. Its principal office and place of business is at 260 Madison Avenue, New York, New York. It is engaged, either directly or through various subsidiaries or divisions, in the manufacture, sale and distribution of a variety of dairy and related products, including ice cream and other frozen desserts. At the time of the issuance of the amended complaint it had 26 subsidiaries engaged in the manufacture, sale or distribution of ice cream and other frozen desserts. Said subsidiaries have been named as respondents along with respondent National. Until May 1956 all of said subsidiaries were wholly owned by respondent National, except for respondent Southern Dairies, Inc., in which respondent National owned more than 98 percent of the stock. Beginning May 31, 1956 respondent National began a program of merging its subsidiaries into the parent company. When completed, all of the subsidiaries will become divisions of respondent National.

As of 1952, respondent National and its subsidiaries had manufacturing plants and/or distribution branches in 28 states of the United States and the District of Columbia. The area of operation of the National companies includes most of the eastern and midwestern portion of the United States. They do not operate on the west coast, in the Rocky Mountain States, or in Texas. Most of the divisions of respondent National use the "Sealtest" label on the ice cream products distributed by them, except for the Breyer Division which uses the "Breyer" label.

2. Respondent The Borden Company, hereinafter sometimes referred to as "Borden," was incorporated under the laws of the State of New Jersey on April 24, 1899 under the name Borden's Condensed Milk Company. The present corporate title was adopted in October 1919. Its principal place of business is 350 Madison Avenue, New York, New York. It is engaged in the manufacture, sale and distribution of a variety of dairy and related products, including ice cream and other frozen desserts. Respondent Fussell Ice Cream Company was a wholly-owned subsidiary of respondent Borden but was dissolved on September 24, 1953, after having disposed of its assets to respondent Borden. Respondent Ricciardi is a wholly-owned subsidiary of respondent Borden and operates a frozen dairy products business in the New York metropolitan area. Borden has manufac-

turing plants and/or distribution branches in 41 states of the United States. It operates generally throughout the eastern and midwestern portions of the country and in the western states of California, Arizona and New Mexico. Its standard ice cream products are distributed generally under the "Borden" label, except that in the New York metropolitan area it also uses the "Ricciardi," "Horton" and "Reid" labels, and in the Baltimore area it also uses the "Hendler" label.

3. Respondent Foremost Dairies, Inc., hereinafter sometimes referred to as "Foremost," is a corporation organized, existing and doing business under the laws of the State of New York, with its principal office located as 2093 College Street, Jacksonville, Florida. It is the result of a merger, effective February 8, 1949, between Foremost Dairies, Inc., a Delaware corporation organized in 1931, and Maxson Food System, Inc., a New York corporation. It is engaged, either directly or through various subsidiaries, in the manufacture, sale and distribution of a variety of dairy and related products, including ice cream and other frozen dairy products. Its sales of ice cream and other frozen desserts are made in 22 states of the United States. Prior to 1951 its operations were confined mainly to eight southern states. Thereafter, and largely by the acquisition of other companies, it extended its operations to the central states of Minnesota, Wisconsin, North and South Dakota, Kansas, Missouri and Arkansas, to the eastern states of New York, Pennsylvania, Massachusetts and Connecticut, and to the western states of New Mexico and California. Its ice cream products are sold mainly under the "Foremost" label.

4. Beatrice Foods Company (Delaware), sometimes hereinafter referred to as "Beatrice," is a corporation organized, existing and doing business under the laws of the State of Delaware, with its principal office and place of business at 120 South LaSalle Street, Chicago, Illinois. It originated in 1890 in Beatrice, Nebraska, as a partnership and was incorporated in 1897. The company became a Delaware corporation in 1924. It is engaged, directly or through various subsidiaries, in the manufacture, sale and distribution of a variety of dairy and related products, including ice cream and other frozen dairy products. Beatrice and its subsidiaries are engaged in the manufacture, sale and distribution of ice cream and other frozen products in 36 states of the United States and the Territory of Hawaii, and operate manufacturing plants and distribution branches in 20 states and Hawaii. Originating in the Midwest, the company and its subsidiaries have extended their operations to the east and west coasts, aided substantially by the acquisition of a number of other companies.

Their ice cream products are sold mainly under the "Meadow Gold" label.

5. Respondent Arden Farms Co., sometimes hereinafter referred to as "Arden," is a corporation organized, existing and doing business under the laws of the State of Delaware, with its principal office and place of business located at 1900 West Slauson Avenue, Los Angeles, California. Its predecessor company was founded in 1919 in Seattle, Washington, under the name Velvet Ice Cream Company by Samuel H. Berch. Arden's business was originally incorporated under the laws of the State of Delaware on December 11, 1933, as Western Dairies, Inc. The present name was adopted through a merger of Western and three companies using the name Arden. It is engaged, directly or through several subsidiaries, in the manufacture, sale and distribution of a variety of dairy and related products, including ice cream and other frozen dairy products. Its frozen products subsidiaries are: Melvern-Fussell Ice Cream Co., a California corporation whose principal office and place of business is 400 Calvert Avenue, Alexandria, Virginia, and Camellia Diced Ice Cream Company, a California corporation, whose principal office and place of business is 2006 Westheimer Street, Houston, Texas. A former subsidiary, Kansas City Diced Cream Company, ceased operating January 1, 1955 and was merged with respondent Arden. Another Arden subsidiary is respondent Equipment Enterprises, Inc., which is a California corporation having its principal office at 1290 Wilshire Boulevard, Los Angeles. It is engaged in a general financing business, including the leasing and sale of equipment, and is not in the frozen products business.

Respondent Arden for many years operated mainly on the west coast. However, in recent years it has expanded through its subsidiaries into Missouri, Texas, Maryland and Virginia. Its expansion into Texas occurred in 1950, when it acquired a controlling interest in the company which became Camellia Diced. It entered the eastern area around 1951 by acquisition of the company which became Melvern-Fussell. Arden and its subsidiaries presently have manufacturing plants and/or distribution branches in California, Oregon, Washington, Arizona, Texas, Missouri and Virginia. In addition to the above States, the Arden companies sell in Idaho, Montana, Kansas, Maryland, West Virginia and the District of Columbia.

6. Respondent Carnation Company, sometimes hereinafter referred to as "Carnation", is a Delaware corporation with its principal place of business at 5045 Wilshire Boulevard, Los Angeles, California. It was founded on September 6, 1899 at Kent, Washington, was incor-

porated in Maine as Carnation Milk Products Company, and was subsequently chartered under the laws of the State of Delaware on May 21, 1920. It is engaged, directly or through various subsidiaries, in the manufacture, sale and distribution of a variety of dairy and related products, including ice cream and other frozen products. It has three frozen dairy products subsidiaries operating, respectively, in the States of Washington, Texas and Oklahoma, each of which bears the Carnation name followed by the name of the state of incorporation. Another frozen products subsidiary is Damascus Milk Company, incorporated in Oregon and operating in that State and Washington. Respondent Carnaco Equipment Company is not in the frozen products business, but leases equipment to the other Carnation companies. The controlling stock interest in that company is held by respondent Carnation. In addition to the States of California, Oregon, Washington, Arizona, Texas and Oklahoma, in which the Carnation companies operate manufacturing plants and distribution branches, they have distribution branches and sell in Nevada and Idaho.

7. Pet Milk Company, hereinafter sometimes referred to as "Pet Milk", is a Delaware corporation having its principal office at 1401 Arcade Building, St. Louis, Missouri. It is engaged in the manufacture, sale and distribution of dairy and related products, but does not directly manufacture and sell ice cream or other frozen dairy products. Respondent Pet Dairy Products Company, sometimes hereinafter referred to as "Pet Dairy", is a Delaware corporation having its principal office and place of business at 303 West Walnut Street, Johnson City, Tennessee. It is a wholly-owned subsidiary of Pet Milk and is engaged in the manufacture, sale and distribution of ice cream and other frozen dairy products in seven southern states. It formerly also operated in Wisconsin and Illinois but sold out its interests in that area in November 1954. Respondent Colville Ice Cream Company, sometimes hereinafter referred to as "Colville", is a Utah corporation having its principal office and place of business at 159 West First Street, Salt Lake City, Utah. It is also a wholly-owned subsidiary of Pet Milk and operates in Utah, Nevada and Wyoming. In view of the disposition to be made of this proceeding the examiner finds it unnecessary to resolve the issue raised by respondent Pet Milk as to whether its control over its two subsidiaries is such as to subject it to liability for their activities.

8. Respondent Fairmont Foods Company, hereinafter sometimes referred to as "Fairmont", is a Delaware corporation having its principal office at 3201 Farnam Street, Omaha, Nebraska. It was originally incorporated in Nebraska in 1884 under the name the Fair-

mont Creamery Co. and became a Delaware corporation on March 5, 1929. It is engaged, either directly or through its subsidiaries, in the manufacture and sale of a variety of dairy and related products, including ice cream and other frozen dairy products. It also prepares and distributes frozen foods other than frozen dairy products. Respondents Fairmont Foods Company, Inc., and Fairmont Foods Company of Wisconsin are New York and Wisconsin corporations, respectively, with their respective principal offices at 197 Scott Street, Buffalo, New York, and 165 North Broadway, Green Bay, Wisconsin. Both are wholly-owned subsidiaries of respondent Fairmont. The Fairmont companies sell and distribute ice cream and other frozen dairy products in 19 states, all but seven of which are located in the central part of the United States. It has extended its operations in recent years into portions of Virginia, West Virginia, Kentucky, Maryland, Pennsylvania, New York, Connecticut and Massachusetts.

9. Respondent H. P. Hood & Sons, Inc., sometimes hereinafter referred to as "Hood", is a Massachusetts corporation having its principal place of business at 500 Rutherford Avenue, Boston, Massachusetts. The company and its predecessor have engaged in the manufacture and sale of dairy products, including ice cream and other frozen dairy products, since 1918. It has eight manufacturing plants located in five New England States and New York State. It distributes ice cream and frozen dairy products in all six New England States and a portion of eastern New York State. Its operations were confined to the New England States until it acquired two companies in eastern New York in 1953 and 1954.

II. Interstate Commerce

1. Each of the respondents operates a number of manufacturing plants located in various states of the United States. To a considerable extent the frozen products business is local in nature, and sales and shipments of frozen dairy products are made within a more limited radius of the producing plant than sales and shipments of less perishable products. For this reason sales and shipments from a number of plants of respondents are made entirely or almost entirely within the state of production. However, other plants of the same respondents do make sales and shipments across state lines. In some instances such sales or shipments are quite substantial, while in others they represent a relatively small percentage of total production of the plant.

2. Each of the respondents purchases or receives a significant portion of the ingredients or other materials used in the manufacture

of its frozen products from states other than the state of production. Signs, advertising materials, refrigeration equipment and other equipment relating to the sale, storage or distribution of frozen dairy products are also received by the various respondents from without the state of production and, in some instances, are transported to the establishments of retail customers located outside the state where such materials and equipment have been received. In some instances the supplying of equipment or furnishing of assistance to retail customers, of the general type referred to in the complaints, is subject to the approval of a head office or headquarters of a particular respondent located in a state other than that in which the supplying plant or division is located.

3. Some of the respondents have questioned the jurisdiction of the Commission with respect to their subsidiaries, divisions or plants which sell entirely within a given state. For example, the Oklahoma subsidiary of respondent Carnation makes no sales outside the State of Oklahoma, and various other plants of the company make no sales or shipments across state lines. Similarly, respondent Arden's subsidiary in Texas, Camellia Diced, makes no sales or shipments in commerce, nor does its plant in Arizona.

In view of the disposition hereinafter made of the complaints in these proceedings, the examiner finds it unnecessary to make detailed commerce findings with respect to each respondent and the various subsidiaries, divisions or operations of each respondent. Aside from other interstate aspects of their frozen products business, since each group of respondents regularly makes some sales or shipments of frozen products across state lines, in excess of de minimis quantities, with respect to some portion of their operations, there is a sufficient showing of commerce to warrant denial of motions to dismiss based on lack of jurisdiction, and to justify consideration of the substantive issues raised by the complaints.

III. The Alleged Unlawful Practices

A. *Background and Issues*

1. The complaints in these proceedings challenge various practices which are alleged to be used by respondents for the purpose of inducing retail dealers to handle or to continue handling the ice cream and other frozen products manufactured and sold by respondents. Before turning to a consideration of the charges it is desirable to note briefly certain basic facts concerning the ice cream industry and its methods of distribution.

2. Generally speaking, ice cream manufacturers distribute their products to the public through retail outlets which are not owned or affiliated with the ice cream manufacturer. However, a small, but increasing, percentage of ice cream is sold through retail outlets which have their own ice cream manufacturing facilities or are affiliated with an ice cream manufacturer. An example of this is the Safeway grocery chain which at one time purchased its ice cream from non-affiliated ice cream manufacturers, but more recently has set up its own manufacturing facilities in various sections of the country. A manufacturer who distributes ice cream through retail outlets is referred to as a wholesaler of ice cream. Where the manufacturer is owned by or affiliated with the retail outlets distributing his ice cream he is referred to as a "captive" or "affiliated" wholesaler. The latter terms refer to distribution through multiple outlets. Where there is a single retail outlet involved which manufactures entirely for retail sale on the premises, it is regarded in the industry as a retail, rather than a wholesale operation.

3. Most of the wholesaling of ice cream involves the direct sale or distribution by the manufacturer to the retail outlets. However, some manufacturers sell a portion of their products to middlemen, usually referred to as a "distributor," who in turn sell to retail stores. So far as appears from the record, the distribution of ice cream through distributors involves a relatively small percentage of the ice cream distributed in the United States, the usual channel of distribution being directly from the manufacturer to the retail outlet. Another exception to the direct manufacturer-dealer relationship is the sale by one manufacturer to another manufacturer. This usually involves specialty items which the purchasing manufacturer does not himself produce. It includes such items as popsicles, creamsicles and similar items, which are referred to in the industry as "novelties." Still another exception to the usual manufacturer-retailer channel of distribution is the relatively minor amount of distribution directly from the manufacturer to the consumer. This usually involves small dairy companies in rural areas, which deliver ice cream to the home along with milk.

4. Within the category of ice cream manufacturers are some who manufacture and distribute only ice cream and related frozen products, while others produce or distribute a broad line of dairy products, including milk, cream, butter and eggs. The record does not contain any numerical breakdown between ice cream manufacturers who are exclusively in the ice cream manufacturing business and those which produce and distribute a broad line of dairy products. It does

appear, however, that in recent years a number of companies which were formerly only in the milk business have expanded into the ice cream business in order to have an outlet for their surplus milk production and in order to take advantage of the preference existing on the part of some retail dealers for purchasing their entire line of dairy products from the same supplier.

5. The basic product manufactured by an ice cream manufacturer is, of course, ice cream, which is made out of a combination of cream, milk, flavor extracts, fruits, nuts, stabilizers and other ingredients, which are frozen in a freezer and maintained in hardening rooms prior to retail distribution. However, in recent years many of such manufacturers have supplemented their manufacture of ice cream with various other frozen desserts. Among these are ice milk which, as the name implies, contains milk but no cream and has a much lower butterfat content than regular ice cream. It is a product which appeals to calorie-conscious people. Another such product is known as "Mellorine", which has made rapid strides in the Southwest, particularly in Texas. It is made from fats and vegetable oils other than milk fats, and bears the same relationship to ice cream as oleomargarine does to butter. Other products produced by ice cream manufacturers include sherbets (with or without milk) and water ices.

Most of the above products are considered hard-frozen products. However, there are also a number of plants and establishments which produce soft-frozen dairy products. These are frozen products which are sold directly from the freezer, without going through a hardening process, or are kept in a hardening cabinet for less than twelve hours. In recent years there have arisen a number of retail establishments along the highways and byways of the United States which have their own counter-freezers and which sell soft-frozen dairy products from purchased ingredients. Many of such establishments are affiliated with a chain or operate under a franchise arrangement, such as the Dairy Queen, Tastee-Freeze and Carvel stores. Such soft ice cream establishments, while still a relatively small factor in the industry as a whole, have been making rapid strides since the end of World War II and, in some areas, have managed to become a troublesome factor to traditional ice cream manufacturers by virtue of their competition for the consumer's dollar.

6. Traditional ice cream and related hard-frozen dairy products are sold to the public in various forms and through various types of retail establishments. The two major forms are bulk and package ice cream. Bulk ice cream is sold to the dealer in large bulk containers, from which it is resold to the public in smaller quantities, either for con-

sumption on the premises or in small packages for use at home. Ice cream is also sold by the manufacturer to the retailer in package form suitable for resale in the same form to the consumer. This is known in the industry as package ice cream. The usual quantities in which such packages are prepared are pints, quarts, half gallons and gallons.

7. The types of retail establishments through which ice cream is sold to the public include restaurants and other eating establishments, where it is usually purchased for consumption on the premises; drug and confectionery stores, where it may be purchased either for consumption on the premises or away from the premises; and grocery and similar food establishments, where it is purchased primarily for consumption away from the premises. Restaurants and similar eating establishments usually purchase only bulk ice cream; confectionary establishments and drug stores usually carry both bulk and package ice cream; and grocery and food establishments usually only carry package ice cream.

8. Prior to World War II the great preponderance of ice cream sold in the United States reached the public through confectionery, drug and other establishments which handled ice cream in bulk form. Food stores handling package ice cream constituted a relatively small outlet for ice cream. It is estimated that during this period approximately two-thirds of the ice cream sold in the country was distributed in bulk form. However, during the postwar period there was a marked shift in the channels of distribution and, at the present time, approximately two-thirds of the ice cream consumed is sold through food stores which handle it in package form. There has also been a substantial increase in sales of ice cream novelties and of ice cream substitutes, such as Mellorine and soft ice cream.

9. In the parlance of the ice cream industry a retail establishment through which ice cream is sold to the public is known as a "stop". One which handles bulk ice cream is known as a bulk or "wet" stop, while one handling package ice cream is known as a package or "dry" stop. Most establishments have traditionally handled the ice cream of only a single manufacturer, due mainly to limitations of floor space. However, there is a growing trend in some sections of the country for retail establishments to carry more than one brand of ice cream. This is particularly true in the larger food stores and supermarkets. An establishment which handles more than one manufacturer's brand is known as a "split" stop.

Ice cream dealers are also differentiated in industry parlance on the basis of whether the account was formerly served by another manufacturer, at the same location, or was initially acquired by

the manufacturer serving it when the account entered business. An account which is acquired from another manufacturer is known as a "switch" account. One which is acquired by a particular manufacturer at the time the account entered business is referred to as a "pioneer" account.

10. The complaints in these proceedings attack as illegal certain forms of assistance given by respondents to their retail dealer accounts. It is charged that these forms of assistance are used as an inducement for the dealers to handle or continue handling the frozen dairy products of the respondent offering them. The forms of dealer assistance which the complaints challenge fall into four broad categories; (a) furnishing of refrigeration facilities and other types of equipment to dealers, (b) making loans to dealers, (c) performing various services of value for dealers, and (d) granting discounts to dealers.

11. The original and the amended complaints are basically the same insofar as the practices challenged are concerned. However, there are two noteworthy differences, one of which involves a broadening of the charges and the other a narrowing thereof. The original complaints challenged the practices in question only when they were used in connection with "switch" accounts, i.e., when a particular respondent used them to induce a dealer handling a competing ice cream manufacturer's products to switch to that respondent. The use of the practices in connection with new or "pioneer" accounts was thus not challenged, nor was their use challenged in connection with accounts which were already being served by the respondent in question. The amended and supplemental complaints have broadened the charges so that the practices in question are now attacked not merely when used in connection with inducing accounts to "switch", but also when they are used in obtaining "pioneer" accounts and in seeking to retain accounts which the respondent in question is already serving.

12. While broadening the charges in the respect that the challenge to the practices is no longer limited to "switch" accounts, the amended and supplemental complaints have made a significant retreat in their attack on the practices in question, in that the practices are now challenged only when they are used to induce the handling of a respondent's products "exclusively." The original complaints contained no such limitation. Their attack on the practices was, in most instances, in the form of a trilogy, only one allegation of which involved the element of exclusivity. For example, the furnishing of refrigeration equipment was alleged to be illegal (a) when done with

an agreement or understanding, express or implied, that the dealer would handle respondent's products exclusively, (b) when the equipment was made available at less than cost, and (c) when the equipment was simply made available to the dealer. Under the first subparagraph, the furnishing of equipment was challenged only when it involved an exclusive dealing arrangement, while under the second subparagraph it was challenged only when supplied at less than cost. The third subparagraph attacked the practice as such, irrespective of whether it occurred in an exclusive dealing context or one which involved the element of below cost. The rationale of the original complaints appears to have been to advance alternative challenges to the practices in question, the strongest (albeit the last stated) being an attack on the practice as such, and the second two being alternative positions to which counsel could retreat in the event the strongest attack proved to be untenable.

While the amended and supplemental complaints still contain the essential triad form of attacking the practices in question, the basic allegation in Paragraph Six of the complaint which introduces the subparagraphs describing the specific practices has been amended so as to make exclusivity an essential element of the offense, by alleging that all of the practices in question were used to induce dealers "to handle, store and sell respondents' products *exclusively*." The word "exclusively", which was added to Paragraph Six of the amended complaints, also appears in Paragraph Seven of the complaints in which it is alleged that by use of the practices in question respondents have induced retail dealers "to deal in respondents' frozen products *exclusively*." It cannot be assumed that the introduction of the word "exclusively" in the amended and supplemental complaints was intended as a nullity. While, as in the original complaints, certain of the subparagraphs contain no reference to an understanding as to exclusivity, the reference to "exclusively" in the basic allegation of Paragraph Six is a clear indication of an intention to challenge the practices only when they are used in a context of exclusive dealing, whether or not there is any specific agreement with respect to this subject.

The introduction of the limiting factor of exclusivity, not found in the original complaints, would appear to have been motivated by a decision to recede from the broad and possibly untenable attack on the practices as such, but which was restricted to switch accounts, in order to attack the practices without regard to the type of account involved.

During the course of the hearings and in his brief and proposed findings, counsel in support of the complaint has chosen to ignore the

allegation of exclusivity and to treat the complaints as an attack on the practices as such, without regard to whether they are used with the purpose or effect of inducing exclusive dealing.⁴ In fact, the proposed order submitted by counsel seeks to have the practices outlawed without regard to whether they are used in a context of exclusive dealing or not. This approach, however, is not justified under the language of the complaint and, as will be hereafter discussed, is of dubious legal merit.

13. As indicated above, the practices which the complaints attack revolve about four main items: (a) equipment, (b) loans, (c) services and (d) discounts. Respondents are alleged to have used these to induce retailers to handle their products exclusively as follows:

(a) *Equipment*. The subparagraphs dealing with equipment refer to two separate classes of equipment. The first involves ice cream cabinets and similar refrigeration equipment used for storing ice cream and related frozen products, which the complaints designate as "facilities." The second class of equipment is a broad category covering all types of equipment other than facilities, and includes such items as soda fountains and store fixtures. There are five subparagraphs dealing with facilities and three dealing with other equipment. In general, it is alleged that respondents have made facilities available to dealers (apparently without charge) or have sold or leased facilities or other equipment to dealers, either with an understanding as to exclusive dealing or at less than cost or without profit. In the case of facilities there is an alternative allegation that they have been supplied with an understanding as to exclusive storage, i.e., that only the respondents' products will be stored therein. In both instances there is an alternative allegation, similar to the third alternative in the original complaints, which simply alleges that respondents have supplied facilities or other equipment.

(b) *Loans*. There are tripartite allegations with respect to the making of money loans to dealers as follows: (1) That such loans are made with an understanding as to exclusive dealing, (2) that they are made without interest, and (3) that they simply are made.

(c) *Services*. The same formula is repeated with respect to services, viz., (1) that they are performed with an understanding as to exclusive dealing, (2) that they are performed without cost, and (3) that they simply are performed. The services alleged to be rendered

⁴ Reference to counsel supporting the complaint is generally herein made in the singular since much of the presentation of evidence and argument appears to reflect the views of the senior attorney in support of the complaint, who was substituted for earlier counsel following the amendment of the complaints.

by respondents include such services as repainting the interior of a dealer's store, servicing facilities or soda fountain equipment and supplying signs and advertisements.

(d) *Discounts and Rebates.* The subparagraph dealing with discounts and rebates falls into two main categories: (1) Volume discounts and (2) discounts based on dealers owning their own facilities. Under the first category it is alleged, in the alternative, that discounts and rebates are granted with the understanding that the dealer will handle respondents' products exclusively, or that the discounts are so large as to constitute an inducement, in fact, for a dealer to handle respondents' products exclusively. Under the second category it is alleged, in the alternative, that respondents grant discounts and rebates to dealers who own their own refrigeration facilities with the understanding that they will handle respondents' products exclusively, and that respondents grant discounts and rebates to such dealers without making them available to dealers who do not own their own facilities.

14. Under Paragraph Seven of the complaint it is alleged that the practices in question have affected three different economic groups. The primary group involved are competing manufacturers of frozen products who, it is alleged, have been unduly hindered in disposing of their products because respondents have used the practices in question to induce retailers to deal in respondents' products exclusively. It is alleged, in this connection, that a substantial number of competing ice cream manufacturers have not had resources sufficient to use the practices in question and have been forced to sell out or to merge with respondents or others or to go out of business entirely. The second group involved are "regular licensed facility dealers" who, it is alleged, have been affected because respondents have induced users of such facilities to refrain from buying or leasing facilities from the regular licensed facility dealers. The third group allegedly affected are the retail ice cream dealers who, it is alleged, have been precluded from selecting frozen products "pursuant to customer demands or their own free will."

15. The basic factual issues arising under the complaints are: (a) To what extent do respondents assist dealers by supplying equipment or services, or by granting financial assistance or discounts in the manner indicated in the complaints; (b) are such forms of dealer assistance offered as, or do they act as, an inducement to dealers in their choice of an ice cream supplier or in their continuing to handle the products of a particular supplier; (c) are such forms of assistance offered with the understanding that the recipient dealer will handle

exclusively the products of the manufacturer furnishing them, or do they in fact result in, or tend to result in, the exclusive handling of the products of the manufacturer supplying them; and (d) has the furnishing of assistance to dealers in the manner charged resulted in, or is there a reasonable probability that it will result in, injury to competition.

16. In the brief and proposed findings filed by counsel supporting the complaint it is asserted that respondents concede the use of the practices in question, that they have "introduced no evidence to counter the Commission's proof of injury" to competition and that they have raised no issue of fact but merely one of law as to whether the practices constitute unfair methods of competition within the meaning of the Federal Trade Commission Act. This does not fairly or accurately reflect the position of respondents or the real issues in these proceedings. Respondents do concede that they have assisted dealers and performed various services for them, some of which assistance or services fall within certain of the broad categories referred to in the complaints. However, respondents deny that such assistance or services are utilized to the extent or with the purpose and effect claimed by counsel supporting the complaint. Respondents contend that the furnishing of such services and assistance constitutes a normal incident of doing business and is engaged in generally by ice cream manufacturers. They also contend that such assistance or services are not offered as an inducement to dealers to handle or continue handling their products, and that because they are generally available to dealers from most ice cream suppliers, they do not materially affect the dealers' choice of a supplier. While it is conceded that some of the respondents have used agreements in connection with some of the practices, which contain exclusive dealing provisions, it is contended that such clauses are not enforced in practice and that the use of the practices in question has neither resulted in exclusive dealing nor had any tendency in that direction. Finally, respondents deny that the practices have had or are likely to have any adverse competitive effect.

17. The evidence presented by counsel supporting the complaint was offered in two phases. The first phase occurred prior to the amendment of the complaints and consisted of stipulations of facts and documentary evidence as to each respondent's size and scope of operations, statistical information as to dollar amounts invested in the complaint practices, forms of leases and agreements used in connection therewith, copies of price lists and discount schedules, and detailed information as to assistance given specific dealer accounts or to dealers

in specific geographic areas. The information as to the use of the complaint practices was confined mainly to "switch" accounts since it was offered prior to the amendment of the complaints. However, following the amendments further information was submitted which was not so limited.

The second and major phase of the presentation of the case-in-chief took place following the amendment of the complaints and consisted mainly of testimony by competing ice cream manufacturers and retail dealers in various market areas. Such evidence was apparently offered to show the competitive impact of respondents' use of the complaint practices and the extent to which the practices influence the dealer's choice of a supplier.

The evidence offered by respondents in defense consisted largely of testimony and other evidence offered by each respondent, separately, with respect to its methods of selling and distributing frozen products, and the extent to which the complaint practices play a part therein. Certain of the respondents also called dealer and competitor witnesses. A number of the respondents also joined in presenting certain statistical and economic evidence. This evidence consisted of two parts. One involved the results of a statistical survey of ice cream dealers conducted by National Analysts, Inc. of Philadelphia on behalf of a number of respondents, purporting to show the extent to which the complaint practices play a part in the choice of a supplier by dealers. The second part of the joint evidence consisted of testimony and other evidence offered through Professor M. A. Adelman of Massachusetts Institute of Technology, based on official data of the Department of Agriculture, purporting to show the market and production shares of certain of the respondents in various market areas and states.

Counsel supporting the complaint called in rebuttal an official of the Department of Agriculture for the purpose of explaining certain industry data compiled and published by the Department of Agriculture.

Before turning to a consideration of the evidence with respect to the complaint practices, it is desirable to consider at this time motions filed by a number of respondents to strike substantial portions of the testimony adduced by counsel supporting the complaint on the ground that such testimony is hearsay or consists of unsupported conclusions and opinions. Since a large portion of the argument of counsel supporting the complaint is based on such testimony, it is important to dispose of the motions before discussing the evidence.

B. The Motions to Strike

During the presentation of the case-in-chief counsel supporting the complaint called a number of ice cream manufacturers who testified concerning competitive conditions in their respective market areas. Certain of such manufacturers claimed that their ice cream sales had declined in recent years or had failed to keep pace with population increases. In an effort to attribute these conditions to respondents, counsel supporting the complaint sought to show through these competitor witnesses that they had lost or been unable to acquire a number of specifically named retail accounts because the accounts had been assisted by respondents in one of the ways challenged by the complaints.

The testimony of these witnesses as to why they had lost the accounts in question was based, in many instances, on conversations allegedly had with the retail dealers in which the latter purported to state the reason they had switched to a particular respondent or were doing business with that respondent. In some instances the competitor witness had not himself spoken to the dealer but based his testimony on information received from a salesman or driver who had allegedly spoken with the dealer. In other instances the witness' testimony as to why the account had been lost or could not be acquired was based merely on his own opinion or surmise, it not appearing that either he or an employee had been informed as to the reason by the dealer.

Respondents objected to such testimony as being hearsay or based on unsupported conclusions. The examiner ruled that the testimony of a conversation between a competitor witness and a dealer would be received as evidence of the dealer's state of mind, provided that independent evidence was later offered to show that the dealer had in fact been assisted in the manner related by him, but that a motion to strike would be entertained if such independent evidence was not offered. Objections were sustained as to testimony regarding the reasons for loss of accounts where such testimony was based on reports received from third persons or merely on the witness' own conclusions. However, in a number of instances, such testimony came into the record before it was apparent that it was not based on personal conversation between the witness and the dealer involved.

Despite numerous admonitions by the examiner that he would make no findings as to why competitor witnesses had lost specifically named accounts unless independent evidence was offered to establish the assistance of such accounts by respondents, counsel supporting the complaint failed to offer such evidence with respect to the bulk of the

accounts in question.⁵ Counsel for six of the respondents have, accordingly, filed motions to strike the testimony of competitor witnesses dealing with the loss of or inability to acquire such accounts.

The testimony of competitor witnesses concerning the loss of, or inability to acquire, particular retail accounts has relevance in this proceeding only insofar as this condition is attributable to the complaint practices and to respondents' use thereof. The mere fact that respondents engage in some of the complaint practices and that competitors have lost accounts to respondents does not necessarily establish a causal connection between the two, since such losses may have been due to competitive factors having no connection with the complaints. Counsel supporting the complaint apparently recognized this by seeking to elicit from competitors the fact that it was respondents' use of the complaint practices which was the specific reason for the loss of, or inability to acquire, the accounts referred to.

In order to demonstrate that an account was lost to a respondent because it had received assistance in one of the ways indicated in the complaints, two facts must be established: (1) That the account was in fact assisted in the manner alleged in the complaints, and (2) that this assistance was, in fact, the reason for the account's choice of respondent as his supplier. For example, if it is sought to establish that Doe Ice Cream Company lost Jones' Grocery Store to respondent National Dairy because of a loan, it must appear (1) that Jones did in fact receive a loan from respondent National Dairy and (2) that this was his reason for switching from Doe Ice Cream Company to respondent National. The testimony by Doe's president that Jones informed him that a loan from National was his reason for changing suppliers is acceptable evidence that he was induced to switch because of the loan, provided there is independent evidence in the record that Jones did, in fact, receive a loan from respondent National. However, the testimony of the conversation between Doe and Jones cannot be used to establish both the fact of the giving of the loan by National

⁵ During the course of the proceedings a number of the respondents offered to supply counsel supporting the complaint with information from their records as to whether dealers specifically named by competitors had been assisted by them, if counsel would furnish them with a list of dealers as to which such information was desired. So far as appears from the record, no such request was made by counsel supporting the complaint. Subpoenas duces tecum requesting detailed information with respect to assistance to dealer accounts, beyond that which the examiner deemed necessary for purposes of these proceedings, were quashed or limited on motion of a number of the respondents. The examiner's order of May 1, 1956, quashing certain of such subpoenas provided that an application for new subpoenas could be made in the event respondents failed to supply information with respect to specifically named accounts, in response to a request from counsel supporting the complaint. No application for a renewal of such subpoenas was ever made.

and Jones' motive or state of mind in switching. As evidence of Jones' state of mind, the testimony is admissible as exception to the hearsay rule. As evidence of the fact of granting the loan the testimony is pure hearsay.

Respondents suggest that the best evidence of why a dealer ceased dealing with his former supplier and switched to a respondent would be the testimony of the dealer himself, rather than the testimony of his former supplier. Respondents cite, in this connection, the decision of a Commission hearing examiner in *Yale and Towne Manufacturing Company*, Docket No. 6232, holding such evidence to be unreliable hearsay. This holding was, however, later modified by the Commission in its opinion in the case, which held that such evidence "came within one of the recognized exceptions to the hearsay rule." The Commission's holding in this respect is in accord with the line of authority beginning with *Lawlor v. Loewe*, 235 U.S. 52, which is cited in this examiner's decision (as affirmed by the Commission) in *Purex Corporation, Ltd.*, 51 FTC, 100, 121 (fn. 12).

However, while testimony of conversations between a competitor of respondent and a dealer is admissible to show the state of mind or motive of the dealer, it is pure hearsay insofar as establishing the fact of assistance to the dealer by respondent. Absent independent evidence of the latter, there is nothing for the appendage of the competitor's testimony as to motive to attach to, and such testimony standing alone can be given no probative weight. See, in this connection, *Harley-Davidson Motor Co.*, 50 FTC, 1047, a proceeding under Section 3 of the Clayton Act, where letters of dealers indicating their refusal to deal with a competitor of respondent because of an exclusive dealing arrangement with respondent were held admissible as an exception to the hearsay rule, as showing reason or motive, but where the Commission stated that (p. 1068) :

Standing alone, these letters could not establish the existence of an exclusive dealing agreement. But where the exclusive dealing arrangement has been established, and where certain of respondent's dealers have stopped buying certain competitive products, letters of these dealers to the sellers cut off are competent to show the reason for this action given by the dealer at the time. Taken together with other evidence showing the existence of respondent's activities to enforce its exclusive dealing policy, and the actual stopping of purchases from the competitor, these letters are very persuasive, competent, and clearly material as part of the evidence showing the effect of respondent's practices on competition. [Emphasis supplied.]

See also, *Purex Corporation, Ltd.*, *supra*, at 125, 143, 154-155, 158, 160, where the testimony by competitors of respondent concerning conversations with distributor customers was held to have no pro-

bative value in establishing that a discriminatory price received from respondent was the reason for the change in suppliers, where there was no independent evidence of the discriminatory price in the market areas involved.

The second main category of evidence objected to involves testimony of competitors relating conversations purported to have been had with a dealer by one of the witness' employees, rather than by the witness himself. Such testimony is a classic example of hearsay evidence. It is not admissible evidence of motive or reason for changing suppliers since the witness himself did not talk to the dealer, but is a mere recitation of a conversation reported to the witness by a third person. Counsel supporting the complaint has urged that such testimony is admissible as being a report made in the regular course of business. The exception to the hearsay rule involving reports made in the regular course of business, relates to written reports made substantially contemporaneously with the event recorded. Furthermore, such exception does not make admissible matters of hearsay and opinion contained in the report. See *Purex Corporation, supra*, at 130, holding to be unreliable hearsay, oral reports of conversations with a dealer reported to the witness by a third person. See also *Woody Fashions, Inc.*, 51 FTC 62, 63, 66, holding that even a written report is inadmissible as hearsay when the person who prepared it was not available to testify. In any event, since the testimony of conversations between competing manufacturers and dealers is admissible only to show motive, and since there is no independent evidence of dealer assistance by respondents to most of the accounts involved, the evidence of such conversations can have no probative value absent such independent evidence.

The final category of testimony objected to consists largely of testimony by competitors seeking to attribute the loss of certain accounts to respondents, where it does not appear from their testimony that their conclusions regarding the loss of the accounts is based on anything more than their own opinion, conclusion or surmise. It does not appear in most of such instances that the witness' opinion is based either on a personal conversation with the dealer or that it is even based on a report received from one of his employees who talked to the dealer. In most of such instances the witness appeared to be simply giving his own opinion or that of an employee as to why the account had been lost or could not be acquired. Such conclusory testimony is clearly not reliable evidence upon which to base a finding. Moreover, as in the case of testimony involving conversations with dealers, there is no independent evidence in most of such

instances that the dealer had actually received assistance from one of the respondents in the manner claimed.

Counsel supporting the complaint makes a general argument in favor of receiving hearsay evidence in an administrative proceeding, citing the opinion of Judge Wyzanski in *U.S. v. United Shoe Machinery Corp.*, 89 F. Supp. 349, which holds that it is not error to receive such evidence in civil antitrust cases tried without a jury. However, the opinion cited does not stand for the proposition that hearsay is generally admissible, but only where it involves testimony "of the kind that usually affects fair-minded men in the conduct of their more important affairs." The testimony which counsel supporting the complaint is here urging as admissible does not fall within the exception cited in the *United Shoe Machinery* case since it is of a generally unreliable nature. A number of the competitor witnesses themselves recognized that credence could not be given to such reports from dealers, concerning what another manufacturer had done for them or had offered to do for them, since dealers traditionally play off one manufacturer against another in an effort to make the best deal. As one of them testified: "I would say you hardly ever get the whole truth by talking to one party in an affair." In a number of instances the reports allegedly received by competitor witnesses from dealers, as to what assistance certain respondents had given them, were demonstrated to be false by other evidence offered by counsel supporting the complaint, which disclosed that the dealers in question had not received the reported assistance. While hearsay may be admissible under the more lenient rules applicable in administrative proceedings, it is not generally considered to be reliable and substantial evidence and hence, unless corroborated, cannot be made the basis of a finding. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229-230; *Willapoint Oysters, Inc. v. Ewing*, 174 F. 2d 676, 690-691 (C.A. 9); *Yiannopoulos v. Robinson*, 247 F. 2d 655, 657-658 (C.A. 7); *Compagnie de Navigation Cyprien Fabre* (Federal Maritime Board), August 18, 1955, 5 Pike & Fischer, Admin. Law (2d) 441.

Accordingly, in each instance where the testimony concerning the loss of, or inability to acquire, specific accounts by competitor witnesses is not buttressed by independent evidence establishing that the dealer referred to did in fact receive assistance or an offer of assistance in the manner indicated, the examiner will make no finding that the competitor lost or was unable to obtain the account in question for the reason indicated. Ordinarily the examiner would consider it appropriate to strike such hearsay evidence in view of counsel's failure to offer evidence necessary to give it probative value. However, the ex-

aminer does not consider it practical to do so in this instance. Respondents' specifications of the testimony they seek to have stricken cover 36 pages and involve hundreds of pages of testimony. In view of the ultimate disposition to be made of these proceedings, the examiner deems it impractical to rule upon each and every one of the specifications set forth in the motions. It is sufficient at this point for the examiner to indicate his general intention not to rely on such hearsay testimony. Specific instances of the evidence falling within this general rule will hereafter be adverted to.

C. The Complaint Practices

1. Cabinets (Facilities)

1. There are five allegations in Paragraph Six of the complaints dealing with the supplying of refrigerated cabinets for the storing of ice cream and other frozen products (such cabinets being referred to in the complaints as "facilities"). Basically, what the complaints charge is that respondents have supplied cabinets to dealers as an inducement for the dealers to handle respondents' products exclusively. Refinements of this basic practice are alleged to involve the sale, loan or lease of such facilities (a) with the understanding that the dealer will not handle the products of respondents' competitors, (b) with the understanding that only respondents' products will be stored in the cabinets, (c) on terms more favorable than could be obtained from regular facility dealers or (d) without direct profit or compensation to respondents.

The basic issues which arise with respect to supplying of cabinets by respondents, the supplying of which is not generally in dispute, are: (a) Do respondents use facilities as an "inducement" for dealers to handle or continue handling their products or, stated differently, does the supplying of facilities by respondents have the effect, whether intended or not, of inducing dealers to handle their products, and (b) has the supplying of such facilities involved any understanding as to exclusive dealing or has it had the tendency or effect, whether intended or not, of bringing about exclusive dealing. There is also presented an issue as to whether the supplying of cabinets under the circumstances alleged has had any effect on competition or is likely to have such an effect. Since most of the evidence in the record with respect to injury to competition cannot be segregated as between the various complaint practices, this question will be generally reserved for later consideration in connection with a general analysis of the evidence of injury. However, to the extent that claims of injury spe-

cifically attributable to cabinets were made, some reference to them will be made in this portion of the decision.

2. It is clear from the evidence that the mere fact of furnishing a cabinet to a dealer, either by sale, loan or lease, does not act as an inducement for the dealer to purchase his frozen products from respondents. This could be true only if respondents were the sole group of manufacturers or were part of a limited group of manufacturers who furnished cabinets to dealers. The contrary is, however, the case.

The evidence discloses that from the very infancy of the industry it has been customary for the ice cream manufacturer to supply the container in which the product was stored. This has been necessary because of the highly perishable nature of the product, which must be maintained at around zero degree temperature, and because of the unwillingness or inability of the dealer to provide the storage container himself. It has been considered to be in the manufacturer's interest to provide this facility since he has been held responsible, both by the dealer and the consuming public, if his product becomes unsaleable or unpalatable by virtue of melting and refreezing.

Thus in the very earliest days of the industry the ice cream manufacturer supplied a wooden tub in which the ice cream was stored, packed it with salt and ice, and kept it supplied with salt and ice. Around 1920 a wooden cabinet came into use, in which the tub, packed in salt and ice, was placed. This too was supplied by the ice cream manufacturer. During the 1920's the first electrical cabinets were developed by equipment manufacturers and began to be supplied by ice cream manufacturers in lieu of the old tubs and wooden cabinets. By the 1930's electrical cabinets supplied by ice cream manufacturers were generally in use in the ice cream retailing industry.

Up to the period of World War II the electric cabinets were relatively simple and inexpensive. They served primarily a utilitarian purpose of storing and preserving the ice cream until sold. However, subsequent to World War II manufacturers of refrigeration equipment began to develop newer and more attractive types of cabinets. The earliest types of such cabinets had a sliding top in place of the stationary cover over the openings in the cabinet. Later models had open tops and still later models had glass fronts and were self-defrosting. The latter types are generally referred to as display-types or merchandising cabinets, since they bring the ice cream into view of the purchasing public and are calculated to stimulate consumer appetite for ice cream. These more modern cabinets are larger and more expensive than the conventional pre-war types. However, many ice cream manufacturers felt that the additional expense was justi-

fied since ice cream is essentially an impulse item, and storing it in an attractive cabinet, conveniently placed in the store, has tended to stimulate ice cream sales.

3. It has been the general practice for ice cream manufacturers in most sections of the country to supply their customers with ice cream cabinets. These cabinets are customarily loaned to dealers on a rent-free basis. In the minority of instances where dealers do own their own ice cream cabinets the ice cream manufacturers generally grant them a special discount (sometimes referred to as a "refrigeration allowance" or an "iceless discount") in recognition of the fact that the manufacturer has been relieved of an expense which is customarily borne by him. The ice cream supplier loaning the cabinet usually undertakes to keep it in a proper state of repair by periodic inspection or service calls. Where dealers have desired to own their own cabinet equipment, in order to take advantage of a refrigeration allowance or for some other reason, it has been customary for ice cream manufacturers to arrange to sell them a cabinet. Customarily such cabinets have been sold on a time-payment basis, under a conditional sales arrangement.

The practice of leasing cabinets to dealers under a rental arrangement has largely ceased. This practice, which was used in certain sections of the country, particularly in rural areas, had begun to dwindle even before World War II. Some manufacturers have, however, continued to charge a rental to dealers who have a very small volume which does not justify the furnishing of a cabinet on a rent-free basis. The only area of the country where it is the general practice to lease cabinets on a formal rental basis is the State of California where, by statute enacted in 1939, a manufacturer is prohibited from furnishing a cabinet without making a rental charge therefor.

4. The competitor witnesses called by counsel supporting the complaint differed among themselves with respect to the desirability of the practice of ice cream manufacturers in supplying cabinets to their dealers. Some indicated that they preferred not to have to supply cabinets because of the expense involved. However, a number of others expressed approval of the practice for the reason that many dealers would not otherwise handle ice cream because they could not afford to purchase and maintain a cabinet, particularly small and medium-sized retail outlets. Some of the witnesses indicated that they had no objection to supplying cabinets if a rental charge could be made to defray the cost thereof. However, others indicated that the difference between supplying a cabinet free-of-charge and supply-

ing one on a rental basis was more apparent than real, since the dropping of the formal rental charge was usually accompanied by a price adjustment to take care of the fact that the manufacturer was no longer charging a rental to help defray his cabinet costs. Some in the latter group indicated that the bookkeeping and other expenses involved in collecting the rental largely offset the amount of the rental.

5. Most of the criticism of competitor manufacturers having to do with the practice of furnishing cabinets was directed not at the practice of furnishing cabinets as such, but revolved about the substantial increase in cabinet costs which occurred during the postwar period as a result of the fact that dealers began to demand the larger and more expensive display-type cabinets when they came into vogue. Many of these witnesses conceded that the newer types of cabinets had been helpful to the industry by boosting ice cream sales, thereby largely offsetting the increased cost thereof. However, some of them claimed that some manufacturers were supplying more cabinets than were required or larger ones than were justified by a dealer's volume. There was also criticism in some areas that manufacturers were supplying cabinets for use in storing frozen foods other than ice cream or were permitting frozen foods to be stored in ice cream cabinets which were too large for the dealer's ice cream needs.

The gravamen of the testimony of competitor witnesses who referred to the subject of cabinets was thus directed at the furnishing of "excessive" equipment (excessive either in number or type), rather than at the practice of supplying cabinets as such. This also appears to be the position of counsel supporting the complaint who interprets the complaints as alleging that respondents "supply better cabinets than are needed and more cabinet space than is required." To this extent counsel appears to have receded from the broad attack of the complaints on the supplying of cabinets as such.

6. Insofar as the basic practice of supplying cabinets is concerned, the evidence fails to establish that respondents are responsible either for its origination or its continuance. The practice originated before some of them went into the ice cream business and has been in vogue in some sections of the country where none of the respondents operated. The deeply ingrained nature of the practice and respondents' lack of leadership in it is demonstrated by the failure of efforts on the part of some of them to terminate or modify the practice. Thus, efforts by respondent Borden in New York City, in Phoenix, Arizona, and in Iowa to get out of the cabinet business by selling out their cabinets to dealers have met with no success. A serious effort by respondent Na-

tional in the upstate New York area to induce its dealers to purchase the cabinets which it had loaned them resulted in less than 3.5 percent of their dealers agreeing to purchase cabinets and the effort had to be abandoned. Similarly, efforts by respondent Arden to collect cabinet rentals in the Portland, Oregon, market, where it is a substantial factor, and by respondents Arden and Carnation to introduce the California practice of charging rentals in the Phoenix, Arizona, market, where they are leading factors, have been unsuccessful.

7. As already noted, the thrust of the testimony of competitor witnesses dealing with the subject of cabinets was not directed so much at the practice of supplying cabinets, but at the excesses which had allegedly arisen in connection with the furnishing of cabinets, i.e., that some manufacturers used cabinets as a vehicle for acquiring or retaining dealer accounts by making offers beyond what the dealer's normal needs require. It was asserted, for example, that newer-type cabinets were being supplied to dealers before their present cabinets had become obsolete, that dealers were supplied with more cabinets than required for their ice cream needs, that dealers were supplied with larger cabinets than their sales required, and that dealers were supplied with cabinets for use in storing products other than frozen dairy products.

In connection with such claims, it should first be noted that there is a large element of subjectivity involved, and that the size and number of cabinets will vary with the particular manufacturer's business judgment and method of operation. One manufacturer may feel that a small cabinet or a single cabinet of the non-display type is suitable for a particular dealer because of the dealer's small size and his location. Another manufacturer may feel that the dealer has a greater potential than his present sales indicate and that the supplying of a more modern type of cabinet will help realize his sales potential. One manufacturer may be extremely conservative in his cabinet policy and permit a cabinet to remain in a dealer's premises after it has become obsolete. Another may have a more progressive cabinet policy and feel that his sales will be aided by furnishing more modern cabinets as they are brought on the market, even though many of his cabinets are not yet obsolete. One manufacturer having a daily delivery schedule in a particular area may feel that a single cabinet or one of a smaller size is suitable for a particular dealer. Another manufacturer, in an effort to cut down on his delivery costs, which are a significant factor in the industry, may feel that it will ultimately be cheaper to furnish a dealer with an additional cabinet for storage or with a cabinet of larger size in order to accommodate the manufacturer's less frequent delivery schedule.

The evidence fails to establish in definitive terms that there are any recognized and universal norms of cabinet size and type against which the practices of respondents or of ice cream manufacturers generally can be measured. For this reason it is difficult to evaluate the opinions and conclusions of some competitor witnesses that certain of the respondents had furnished dealers with more or better equipment than these particular witnesses thought was justified. Such generalized opinion testimony is of limited value, except as it is related to specific accounts where the volume of the account is known and the delivery pattern of the manufacturer is disclosed, and where the size and type of cabinet alleged to have been improperly furnished are clearly established. It may also be noted, in evaluating such generalized claims, that it is not in the economic interest of an ice cream manufacturer to supply a dealer with more equipment than his volume will justify since equipment must pay for itself out of the dealer's purchases. There may be instances where a manufacturer will misjudge a dealer's volume and supply him with a cabinet which is too large and expensive for his needs. However, the simple economics of the situation will soon dictate to the manufacturer that he must rectify the situation. Where this happens the manufacturer will usually move the cabinet to a more suitable location and replace it with one more appropriate for the volume and type of establishment of the particular dealer.

It should also be noted that the mere fact that a manufacturer furnishes a cabinet to a dealer which is larger or of a more modern type than that of the dealer's former supplier does not necessarily mean that the dealer changed suppliers because of the cabinet. The evidence discloses that there are a great many reasons which cause dealers to switch having no connection with the complaint practices, such as greater consumer acceptance of the new supplier's products, a better merchandising program, better prices, better service, dissatisfaction with a salesman or driver, or better salesmanship. Very often where dealers change suppliers because of circumstances unconnected with the complaint practices, there is no discussion as to what type of cabinet the dealer will receive, it being implicitly understood that he will be furnished with an appropriate cabinet to replace that of his former supplier.

8. The evidence with respect to cabinets upon which counsel supporting the complaint relies falls into three main categories, (a) statistical evidence as to the amounts which respondents have invested in cabinets, (b) testimony by competitor witnesses concerning respondents' use of cabinets in acquiring accounts, and (c) testimony

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of dealer witnesses who were supplied with cabinets. Each is hereinafter discussed.

(a) *Cabinet Investment.* Counsel supporting the complaint cites the large amounts spent by each respondent for cabinets and suggests that such amounts are abnormal and beyond the reach of other manufacturers. The figures cited include each respondent's total investment in cabinets, as of December 31, 1955, and the amounts spent for cabinets in 1955 as follows:

	Total cabinet investment as of Dec. 31, 1955	Amount spent for cabinets in 1955
National.....	\$17,751,545	\$3,468,475
Borden.....	4,816,017	332,244
Foremost.....	4,596,177	407,873
Beatrice.....	18,792,638	² 2,884,407
Arden.....	1,081,586	221,602
Carnation.....	4,401,122	1,175,658
Fairmont.....	1,532,685	443,451
Pet.....	953,662	212,251
Hood.....	2,628,128	775,899

¹ This figure includes \$5,252,601 invested by companies having no affiliation with Beatrice, from which the latter leases the cabinets.

² This figure includes \$1,785,932 in cabinets leased from others.

The above figures, while indicating that each of the respondents has invested substantial amounts in cabinets supplied to dealers, establish nothing in themselves. Cabinet investment is a relative thing. It involves a relationship to the number of accounts served by a company and the gallonage of such accounts. There is no showing in the record that relative to the number of accounts which they serve and the gallonage thereof any of the respondents has an inordinate investment in cabinets. Counsel supporting the complaint argues that by reason of their financial ability, respondents are able to spend more for cabinets than their smaller competitors. The record does not, however, demonstrate that the respondents have in fact invested sums in cabinets beyond that normally expended by competitors generally. In fact there is no reliable and substantial evidence in the record as to the cabinet expenditures of other manufacturers in relationship to the gallonage figures of such companies.

It will be observed that there are wide differences in cabinet expenditures among the respondents themselves, with Pet's investment being under \$1,000,000, as compared to National's investment of over \$17,000,000. When it is noted that National's ice cream gallonage in 1955 was almost 86,000,000 gallons, while Pet's was approximately 4,000,000, the lack of significance of total figures of cabinet expenditures becomes apparent. There is no evidence that

relative to its frozen products business any respondent has an abnormal investment in cabinets.

Counsel supporting the complaint cites figures purporting to reflect the per gallon investment in cabinets by each respondent and suggests that the per gallon cabinet investment of respondents is unusually high. The figures cited by counsel have been computed by dividing each respondent's total cabinet investment by its total ice cream gallonage in 1955. This method involves two basic errors. First, in dividing by the gallonage for only one year, it is assumed that the cabinets involved have a useful life of only one year, which is contrary to the evidence. Secondly, except for Beatrice, counsel uses each respondent's hard ice cream sales as the divisor rather than its total frozen products sales, although the cabinets are used to store all frozen dairy products. This tends to exaggerate each company's per gallon expenditures. The extent thereof becomes apparent when it is noted that Carnation's hard ice cream gallonage figure (used by counsel as a divisor) is approximately 10,215,000 gallons, while its total frozen products sales are approximately 16,000,000 gallons.

Even accepting the figures used by counsel supporting the complaint, they vary so widely from company to company as to reflect no common pattern and to have no meaningful significance. Thus the per gallonage cabinet investment figures of Arden and Borden are 7.8 cents and 8.5 cents, respectively, while those of National and Hood are 20.7 cents and 31.1 cents, respectively. Such differences may readily be accounted for by the fact that one company may have a large quantity of older, depreciated cabinets in use which may shortly be replaced, while another may recently have replaced a number of its older cabinets. The figures cited by counsel supporting the complaint, both with respect to total cabinet expenditures and per gallon investment, fail to support any inference adverse to respondents.

(b) *Competitor Testimony.* There is relatively little testimony by competitor witnesses critical of the basic practice of supplying cabinets to dealers. For the most part competitor witnesses referred to it as a normal and traditional industry practice. To the extent that there was any criticism of the practice, it centered about certain excesses which had allegedly arisen. These, as already noted, involved the supplying of more or better cabinets than dealers required, or the furnishing of cabinets for use in storing non-dairy frozen foods.

In his brief, counsel supporting the complaint cites the testimony of several competitor witnesses purporting to be critical of the basic practice of supplying cabinets. One is a Seattle manufacturer who

testified in the affirmative in response to the leading question of counsel as to whether his investment in cabinets was a "drain on your capital structure." Another is an Atlanta manufacturer who expressed the opinion that the supplying of cabinets is no longer a necessary element in the development of ice cream sales. Still another is a Beaumont, Texas, dealer who testified that he would prefer to sell cabinets to dealers or to lease them rather than supply them without charge.

However, there were many witnesses called by counsel supporting the complaint whose testimony was favorable to the practice of supplying cabinets to dealers. These ice cream manufacturers indicated that many small and medium-sized dealers could not afford to purchase their own cabinets and would not carry ice cream if they were not supplied with a cabinet. While some of these expressed concern over the increased cost of cabinets, particularly the modern display-type cabinets, a number of them indicated that the increased sales resulting from the use of such cabinets justified the increased expense thereof. The Atlanta witness whose testimony is cited by counsel supporting the complaint agreed that the open display-type cabinets had been a factor in his company's substantial increase in sales. Likewise, the Seattle manufacturer whose testimony counsel cites conceded that the newer type cabinets helped increase sales in the modern stores where there is considerable customer traffic.

Insofar as the preference on the part of some manufacturers for leasing cabinets to dealers rather than supplying them on a rent-free basis, a number of the manufacturers indicated that the difference was one of form rather than of substance, since the price of the ice cream inevitably included the cost of the cabinet. Where a formal rental is charged, the price is somewhat lower than if the cabinet is supplied on a so-called rent-free basis. Some manufacturers indicated that the cost of collecting rentals largely offset the value of the formal rental charge.

Similarly, in the case of selling cabinets to dealers, there is little difference in the basic cost to the manufacturer. Since most dealers cannot afford to pay cash, the cabinet is paid for on an installment basis, with the ice cream manufacturer still bearing the same basic cost of the cabinet until it is paid for. The special refrigeration allowance generally granted to dealers who own their own cabinet results in a price reduction, which largely pays for the cabinet and is the substantial equivalent of a cabinet rental charge.

In any event, it is not the function of the Commission to act as an arbiter among the conflicting preferences of ice cream manufacturers.

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The basic question is not whether some manufacturers like or dislike certain practices or prefer somewhat different or better ways of selling ice cream, but (a) whether certain practices are basically unfair and inimical to competition, and (b) whether respondents are responsible for either initiating the practices or have used them unfairly to injure competition.

As has already been noted, the practice of supplying cabinets by ice cream manufacturers is an ancient practice in the industry and is one for which respondents are not responsible. The decline in the practice of charging rentals, which was formerly in vogue in some sections of the country, cannot be attributed to respondents. As already noted, efforts by some of the respondents to introduce or continue the practice of charging rentals have been unsuccessful. Likewise, efforts by some respondents to sell cabinets to dealers, rather than furnish them on a so-called free basis, have been unsuccessful. Ironically, while counsel supporting the complaint cites with apparent approval the testimony of the Beaumont manufacturer that he would prefer to sell cabinets than loan them, counsel called a manufacturer in Knoxville, Tennessee who criticized respondent Pet for doing precisely that, viz., selling cabinets to dealers who wished to purchase them.

The failure of the efforts on the part of some of the respondents to change or modify basic cabinet practices, in markets where such respondents are an important factor, attests to the deep-rooted nature of the practices and respondents' lack of control over them. This was confirmed by the testimony of competitors who conceded that even if respondents ceased supplying cabinets, many of their competitors would continue to do so. Such witnesses also agreed that any company which was prohibited from supplying its customers with cabinets would be put in a precarious competitive position.

As previously noted, the bulk of the testimony critical of the practice of supplying cabinets was directed at so-called excesses, rather than at the basic practice itself. Typical of such testimony is that of the Beaumont manufacturer cited by counsel supporting the complaint, who testified in the affirmative in response to the leading and suggestive question of counsel supporting the complaint as to whether: "Competition forced you to exceed what you thought was adequate and put in a still better cabinet?" Counsel supporting the complaint apparently equates the witness' reference to "competition" with "respondents", as he does in numerous other references to the testimony. However, not only did the witness make no claim that any of the respondents was responsible for the prevailing cabinet practices in

his area, but his principal complaint related to price competition and mainly involved a nonrespondent company.

To a large extent the claims of difficulties arising in connection with the supplying of cabinets were attributed to the increased cost thereof (as cabinets have become larger and more elaborate) and to the demands of dealers, rather than to the activities of particular competitors. Typical is the testimony of the Seattle manufacturer cited by counsel supporting the complaint, who stated that as the stores became larger and more modern they demanded more and better equipment. He did not, however, attribute this to any of the respondents but stated that all companies in the area were "in the same boat," insofar as being subject to the demands of dealers for better equipment.

While there were some witnesses who sought to attribute to respondents the use of cabinet excesses in the acquiring of accounts, their testimony was generally of a conclusory nature and, insofar as they sought to refer to specific accounts which they had allegedly lost or were unable to acquire because of such practices, their testimony consisted mainly of unreliable hearsay, conjecture and surmise. Typical is that of a witness from San Antonio, Texas, cited by counsel supporting the complaint, who claimed that respondent Carnation had supplied an account with a cabinet for use in storing frozen foods. Other than the witness' hearsay and conclusory testimony, there is no reliable evidence in the record as to the supplying of a cabinet to the account in question, for use in storing frozen foods, by Carnation. The witness conceded that it was not uncommon to find frozen foods in his own company's cabinets, despite its efforts to discourage such use by dealers. The testimony of other witnesses indicates that this is a problem shared by most ice cream manufacturers, including respondents.

With respect to the testimony of those witnesses who claimed that respondents had supplied larger or better cabinets than they considered proper, it has already been noted that the record contains no substantial evidence as to objective cabinet standards against which such subjective claims can be weighed. Moreover, in most instances there is no reliable evidence as to what cabinets were furnished by respondents to the accounts in question, nor as to the gallonage of such accounts. There is therefore no basis for determining whether the supplying of cabinets in such instances, if it occurred, extended beyond the exercise of sound business judgment with respect to appropriate cabinet size and type. The record is also lacking in reliable evidence that the furnishing of cabinets acted as an inducement for dealing with respondents in any substantial number of instances.

While some of the competitor witnesses claimed that certain dealers had advised them that the receipt of a cabinet by a respondent had been a factor in their choice of a supplier, the record is lacking in reliable evidence as to what type of cabinet, if any, such dealers had received. No weight can therefore be given to such testimony for the reasons heretofore indicated in the section entitled "The Motions to Strike."

While it may be that some of the competitor witnesses called by counsel supporting the complaint have a predilection against the supplying of cabinets, there is no substantial evidence that the practice has had an anti-competitive effect. Of the ten competitors whose testimony counsel cites in his main brief and proposed findings, only two have sustained a decline in sales in recent years and in neither instance does the evidence establish that such decline can be attributed in any significant degree to the use of cabinets as a competitive weapon by respondents. Moreover, the evidence fails to establish any injury to competition in any market area, aside from the alleged difficulties of a few individual competitors.

(c) *Dealer Testimony.* As has been previously indicated, the mere fact that a dealer receives a cabinet does not establish that this was his motive for dealing with a particular supplier, since cabinets are generally available from ice cream suppliers. Even the fact that he has received a larger or better cabinet than that furnished by a previous supplier does not by itself establish that this was his reason for switching. The evidence discloses that dealers will frequently switch for reasons having nothing to do with a cabinet, and that incidental thereto they may receive a better cabinet.

In apparent recognition of this, counsel supporting the complaint called a number of dealer witnesses for the ostensible purpose of establishing their reason for dealing with a particular supplier. In all, he called 73 dealer witnesses. While in almost every instance these dealers had received a cabinet from one of the respondents, there were only a handful of cases where there was any reference to a cabinet as having played a part in the dealer's choice of a supplier.

Three of the dealers in the latter category were from Bellingham, Washington. One had switched to Arden after a local competitor had failed to replace a 16-year-old cabinet, despite repeated promises to do so. Another also switched to Arden after the same local supplier failed to replace an old, leaking combination cabinet and fountain. A third switched to Arden after another local supplier failed to replace what the dealer described as an "outmoded" cabinet, which was too small. These instances hardly establish that respondent Arden

undertook to obtain accounts by offering excessive cabinets. So far as appears, it simply undertook to meet the normal needs of these dealers which were being neglected by their former suppliers. In at least two of the above instances the installation of appropriate cabinets resulted in an increase in the dealer's sales.

Another instance where the supplying of a cabinet was stated to have played a part in the dealer's choice of a supplier involved a dealer in Houston, Texas. The dealer stated he had switched to respondent Arden mainly because it supplied him with a display-type cabinet in place of a conventional cabinet furnished by his former supplier, who had advised him he did not think the more modern type was suitable for his drive-in establishment. Subsequent events confirmed Arden's judgment since there was a substantial increase in the dealer's sales.

The final instance involved a dealer in Knoxville, Tennessee who switched from respondent National to respondent Pet when the latter sold him a cabinet, which he wished to purchase in order to take advantage of the special five per cent refrigeration allowance. The significance of this witness' testimony is somewhat difficult to comprehend. Apparently it is the position of counsel supporting the complaint that National was acting improperly in loaning cabinets to its customers rather than selling them, but that Pet was wrong in selling cabinets rather than loaning them.

The record contains evidence of some other instances where dealers had received better cabinets from a respondent than they had had from a former supplier. However, in these instances it does not appear that the cabinet was a reason for the change, or the dealer specifically negatived it as his motive for switching. For example, a dealer in Houston had received two open-type cabinets from Carnation in place of two closed cabinets from another supplier. The dealer's primary reason for changing was Carnation's better discount schedule, rather than the cabinets. The dealer was shown pictures by Carnation's salesman of the type of cabinet which was thought to be appropriate for his establishment and was told it would sell more ice cream. The latter prediction was borne out by a substantial increase in the dealer's sales of ice cream. Another dealer in Knoxville had received a better cabinet from Pet than from a local supplier, but testified this had nothing to do with his switching. The dealer had not asked the local supplier for a better cabinet and had not discussed with the Pet salesman the type of cabinet he would receive. By the time of the hearing he had already switched to another local supplier because of his dis-

satisfaction with Pet service, and had received an equivalent cabinet from the new supplier. The testimony of the latter witness is typical of most dealer witnesses, who take it for granted that they will receive an appropriate cabinet and whose choice of a supplier is usually based on other considerations.

9. In the above discussion consideration has been given mainly to the evidence adduced by counsel supporting the complaint, without the benefit of countervailing evidence offered by respondents. The evidence offered by respondents establishes that their primary effort in the sale of ice cream is centered on improving their product, in building up consumer acceptance through widespread advertising, merchandising and promotional programs, and in aiding their dealers through educational programs and advice as to the best ways for displaying and merchandising ice cream, rather than on "buying" or "captivating" accounts as contended by counsel supporting the complaint.

Insofar as cabinets are concerned, they are supplied in accordance with established industry practice on the basis of respondents' business judgment as to the size and type of cabinet suitable to the particular dealer and with due regard to their delivery schedule in the area. Only a small percentage of the cabinets supplied by respondents are of the modern display type. They are mainly placed in accounts where it is felt sales will be stimulated and increased thereby. Most of such cabinets are placed in existing accounts, rather than in accounts obtained from competitors. For the most part cabinets are supplied to small and medium-sized dealers, since the larger supermarkets and chains usually prefer to own their own refrigeration equipment. Dealers are encouraged to own their own equipment by being offered a special discount therefor but, except for the larger outlets, they have been reluctant or unable to undertake the expense.

10. The survey of ice cream dealers conducted by National Analysts, Inc., which respondents offered in evidence, tends largely to support the claims of respondents that the supplying of cabinets plays a relatively minor role in the dealer's choice of his supplier. The survey covered 1,331 dealer outlets handling 1,784 brands of frozen products, sold by 1,514 different ice cream manufacturers. The dealer outlets included 620 which handle the brand or brands of the respondents (except respondent Hood) and 894 served by nonrespondent companies.⁶ So far as appears from the record, the survey was conducted

⁶Totals to more than 1,331 outlets because some carry multiple brands of more than one manufacturer.

in an objective, impartial manner and is statistically reliable.⁷ The dealers were asked, (1) why they were handling their present brand or brands of ice cream, (2) what other reason they had for handling the brand, in addition to the reason or reasons first given and (3) which one of the reasons given was the most important reason for handling their present brand and which the second most important. The reasons given by the dealers are expressed in terms of percentages of the total number of dealer-brand combinations involved (referred to as "brand mentions"), rather than as a percentage of the number of dealers because of the multiple brands handled by some dealers. In most instances the totals of the responses exceed 100 percent because of the multiple reasons given by some dealers.

On this basis it will be noted that in answer to the general question in which dealers were asked why they were handling their present brand, only 6.4 per cent of the brand mentions involving respondents' dealers (out of a total of 167.2%) gave the furnishing of a cabinet or the servicing thereof as a reason for choosing one of the respondents as a supplier. When the dealers were asked what other reason they had for choosing their present supplier, an additional 4.4 percent (out of a total of 128.8 per cent) referred to cabinets as a reason. When the dealers were asked which of the reasons given was the most important reason and which was the second most important, the responses referring to cabinets were only 3.2 percent and 1.3 percent, respectively. It is significant that the responses from dealers purchasing the brands of other companies were almost identical, percentage-wise, with those of respondents' dealers, indicating that the offering of cabinets as an inducement by respondents does not differ significantly from that of other companies and that in neither instance is it a major factor in the choice of suppliers.

The results of the survey also include a select group of dealers who had changed suppliers since January 1, 1955, which was within two years prior to the conducting of the survey. Although it might be expected that the results of this select group of dealers, who had recently switched, might show a larger proportion switching because of cabinets, the results were substantially identical as those of the larger group of dealers surveyed.

11. As has been heretofore noted, an essential element of the charges in these proceedings is the allegation of exclusive dealing. Insofar as cabinets are concerned, it is alleged that they are supplied pursuant

⁷The report of the survey, which was received in evidence without objection by counsel supporting the complaint, is part of the record of all of the above proceedings, except those involving respondents Pet, Fairmont and Hood.

to agreements which provide for the exclusive handling of the supplier's products or that the supplying thereof leads to exclusive dealing because of limitations of floor space. These allegations are considered below.

(a) *Exclusive Dealing Agreements.* It is customary for most manufacturers in supplying refrigeration equipment to a dealer to have him sign some type of form acknowledging receipt of the cabinet, compressor and related equipment. The nature and wording of such forms vary widely among the respondents and even differ among the various branches, divisions or subsidiaries of particular respondents. The forms bear such varying titles as "Refrigeration Equipment Agreement," "Loan of Equipment," "Bailment Lease," "Equipment Receipt," "Loan Receipt," "Delivery Receipt," "Installation Receipt," and "Lease Agreement." Some of the documents purport to be in the nature of formal agreements with undertakings by both parties. Others are more in the nature of simple receipts, some of which contain certain commitments on the part of the dealer. Some of the forms contain clauses which are in the nature of an exclusive dealing undertaking on the part of the dealer; others contain a more limited commitment, in the nature of an undertaking to store only the supplying manufacturer's products in the cabinet, but not prohibiting the dealer from purchasing the frozen products of another manufacturer; and still other forms contain no commitment whatsoever limiting the dealer's right to purchase competing frozen products or to store them in the cabinet of the supplying manufacturer. Set forth below is a brief analysis of some of the forms used by the various respondents, with particular reference to whether they contain any limiting clauses with respect to the dealer's right to purchase or store competing ice cream products.

(1) *Carnation.* Respondent Carnation uses a form in California entitled "Refrigeration Equipment Agreement" under which the dealer agrees that as long as he uses the equipment furnished him he will buy from Carnation exclusively all of his requirements of ice cream and other frozen products. This agreement is not for any fixed duration, and the obligation to purchase Carnation products lasts only "as long as he uses said equipment." A variation of this form, which is used in the Houston, Texas market, merely provides that the cabinet only will be used for the storage of Carnation products, but does not prevent the dealer from purchasing the frozen products of other manufacturers provided he does not store them in the Carnation cabinet. Another form which is used in Oklahoma contains no commitment by the dealer to buy his ice cream requirements exclusively from Carna-

tion or restricting his use of the cabinet to the storing of Carnation products.

(2) *Borden*. Respondent Borden uses a form of agreement entitled "Loan of Equipment," which provides that in consideration of the furnishing of mechanically refrigerated equipment for preserving ice cream and the furnishing of signs and advertising material the dealer agrees, during the term of the agreement, to buy his ice cream and other frozen commodities from respondent Borden "exclusively and to the extent of his requirements." An agreement of this type, having a term of five years, has been used by respondent Borden in the Philadelphia market. A similar form of agreement, having a more limited term of three years, has been used in the New York, New Jersey and Connecticut markets. A similar agreement, having a term of only one year, has been used in the Pittsburgh market.

Respondent Borden also uses a number of forms in connection with the loaning of cabinets which contain no requirement for exclusive dealing. Thus, an alternate form of document used in Connecticut entitled "Equipment Receipt" contains no agreement either with respect to exclusive purchase or exclusive storage of Borden products. A document entitled "Equipment Installment," used in California, and another entitled "Receipt", used in Iowa, likewise contain no exclusive provision, either with respect to the purchase or storage of Borden products. A "Lease Agreement" used in Wisconsin requires that the cabinet be used exclusively for storing Borden products, but contains no undertaking not to purchase competitive products. A form used in Florida likewise provides for the exclusive storage of Borden products in the cabinet, but contains no limitation on the purchase of the products of other manufacturers so long as they are not stored in the Borden cabinet.

(3) *Beatrice*. Respondent Beatrice and its subsidiaries have had in general use a form entitled "Equipment Receipt," which contains no provision that the dealer will buy his ice cream requirements exclusively from that supplier, although the form does provide that the equipment supplied to the dealer will only be used for the storing of products purchased from Beatrice. Counsel supporting the complaint cites in his brief a document entitled "Bailment", which contains a provision that the lessee of the equipment will, during the term of the lease, buy his ice cream and other dairy products from Beatrice "to the extent of his requirements for products of such nature." So far as appears from the record this form was used only in the Pittsburgh market and was abandoned in August 1953, prior to the issuance of the original complaints. Accordingly, it would appear that for over

five years respondent Beatrice has not used any form of agreement or receipt in connection with the supplying of facilities which requires that the dealer purchase his ice cream requirements exclusively from that respondent.

(4) *National*. Respondent National and a number of its subsidiaries have used a form of agreement in connection with the furnishing of cabinets and compressors which provides that for a term of one year the dealer will sell National products "exclusively to the full extent of Dealer's requirements". Other forms used by a number of the subsidiaries or divisions of respondent National, while containing a provision that the dealer will purchase his ice cream products exclusively from the company supplying the cabinet, do not obligate the dealer to do so for any specific term and give him the right to cancel the relationship at any time or after giving a brief notice.⁸

A number of the forms used by subsidiaries or division of respondent National contain no provision whatsoever for the exclusive purchase of National products, although in some instances the forms do limit the use of the equipment furnished to the storage of the company's products. Among the subsidiaries or divisions falling in this category is Southern Dairies, which operates throughout a wide area in the southeastern United States. The subsidiaries or divisions of respondent National which do not use any agreement or receipt containing a requirements or exclusive dealing clause serve 33.4 per cent of respondent National's dealers and sell 31 per cent of its volume.

(5) *Arden*. Respondent Arden has used a form entitled "Installation Receipt and Lease Agreement" in its Oregon and Washington State territories, which provides that during the term of the lease the lessee agrees to purchase all his ice cream and other frozen products from respondent Arden. This agreement is, however, terminable at will by either party. Another form, used in California and in Kansas, contains no provision with respect to exclusive dealing, but does require the dealer to use the cabinet only for the storage of respondent Arden's products. A form of receipt used by Arden's subsidiary, Melvern-Fussell, in Washington, D.C., contains no provision either with respect to exclusive dealing or exclusive storage.

(6) *Foremost*. A form in general use by respondent Foremost in many markets, including New York, South Carolina, Texas and Min-

⁸ A "Loan Receipt" used in Indiana, Ohio, Illinois, Kansas and Missouri, obligates the dealer to use Sealtest products only as long as the cabinet remains in his possession. A similar document used in Louisville, Kentucky, and another used in upstate New York and the New England States, are subject to cancellation on 30 days' notice. An agreement used in Wisconsin and parts of Illinois is terminable on five days' notice. Another agreement used in parts of Pennsylvania and West Virginia is terminable at will.

nesota, contains a provision that equipment will be used only for storing products of respondent Foremost, but does not prohibit the dealer from buying a competitor's products nor require that he buy his exclusive requirements from respondent Foremost. A form of lease agreement which was used in Tennessee by Foremost's subsidiary Southern Maid (which has since been dissolved), did require the dealer to purchase his ice cream supplies from Southern Maid. However, the agreement was cancellable at any time.

(7) *Pet.* Respondent Pet does not use any form of agreement, lease or receipt, in connection with the furnishing of facilities, which requires the dealer to purchase exclusively from that respondent. It did at one time use a form of "Equipment Lease" in its Wisconsin territory which required the dealer to buy his requirements exclusively from respondent Pet during the term of the lease. However, it has been stipulated that this form of agreement was superseded in 1952 by one which contains no such provision. Moreover, respondent Pet has disposed of its Wisconsin operation since the inception of this proceeding and the forms there used have not been adopted in its other operations. The form which is generally in use throughout Pet's primary market, in the southeastern part of the United States, contains no provision requiring the dealer to purchase his frozen products exclusively from respondent Pet nor prohibiting the dealer from storing other products in the Pet cabinet. A form of receipt used by respondent Pet's subsidiary Colville Dairy in the Utah territory, while not requiring the dealer to purchase his requirements exclusively from that company, does prohibit the dealer from using the cabinet for the storage of frozen products sold by any other company.

(8) *Fairmont.* Respondent Fairmont uses various forms of receipts and leases in connection with the supplying of facilities, none of which prohibit the dealer from purchasing or using the products of a competing manufacturer. Most of the forms do, however, provide that the cabinet supplied by Fairmont will be used only for the storing of its products.

(9) *Hood.* So far as appears from the record, respondent Hood uses no forms of agreement, lease or receipt in connection with the supplying of refrigeration equipment which prohibit the dealer from using another manufacturer's products or which require that the equipment be used only for the storing of Hood products.

(b) *Practical Operation.* As indicated by the foregoing, there is considerable variance among the forms used by respondents, insofar as the requirement for exclusive purchase of the suppliers' products.

The forms used by respondents Beatrice, Foremost, Pet, Fairmont and Hood contain no such provision. Some of the agreements used by respondents Arden and Carnation do contain the provision, but it is effective only as long as the dealer chooses to use the cabinet. Some of the agreements used by respondent National containing such a provision have a fixed duration of one year, while others are terminable at will or on short notice, and approximately one-third of its gallonage is not covered by such agreements. While respondent Borden uses some agreements of longer duration containing the questioned clause, in other areas the clause is not used.

It is the position of the respondents who use agreements containing the contested clause that, whatever meaning such agreements may have had in years past, during recent years they have not been enforced and serve mainly as cabinet receipts. The examiner finds it unnecessary to decide what legal significance such agreements have, either as binding cabinet agreements or as mere receipts. The evidence discloses that such agreements have no substantial practical impact on dealer-supplier relationships. In actual practice it appears to make little difference whether the dealer has or has not signed a cabinet agreement, receipt or lease, or whether the document contains an exclusive dealing clause, or whether it is for any fixed duration. The evidence indicates a high degree of volatility in dealer-supplier relationships and that leases, agreements or receipts have no practical effect in limiting the mobility of dealers.

The continuance of particular dealer-supplier relationships depends essentially on the dealer's satisfaction with the supplier's product, price and service. When a dealer becomes dissatisfied with his supplier, for whatever reason, he will switch to another supplier. So far as appears from the record, the existence of an exclusive dealing agreement is not an inhibiting factor in such switches. In fact many of the dealers who testified were not even aware that they had entered into any formal agreement with their supplier or that they were obligated to deal with him for any definite period or were prohibited from handling another manufacturer's products. The record does not contain a single instance of a respondent seeking to hold a dealer to an exclusive dealing agreement.

Counsel supporting the complaint argues that limitations of floor space have the practical effect of resulting in exclusive dealing, even without any formal agreement. In the opinion of the examiner the existence of a tradition of single dealing in the industry tends to defeat the argument of counsel supporting the complaint. It demonstrates that exclusive dealing agreements have little practical preclusive effect

since most dealers will deal with a single supplier anyway, irrespective of whether a formal agreement requires them to do so or not.

However, it does not follow, as counsel contends, that because of the single-dealing tradition the mere furnishing of a cabinet has a significant preclusive effect. It is preclusive only in the sense that a dealer who customarily handles a single brand will only purchase the products of the supplier furnishing the cabinet, for as long as he uses the cabinet. However, since there are numerous other suppliers ready, willing and able to supply another cabinet, such preclusion continues only as long as the dealer wishes it to, i.e., as long as he finds his relations with his present supplier satisfactory. In practical effect this results in considerable mobility among dealers, with the supplying of a cabinet having no essential tying effect.

It should also be observed that there have been considerable inroads into the tradition of single dealing in recent years. In many sections of the country it is becoming quite commonplace to find two, three and even four different suppliers' products in the same establishment, particularly in the medium- and larger-size food stores and supermarkets. Even some of the smaller retail stores have begun to split their ice cream business. The record contains instances where this splitting has occurred among retailers dealing with respondents, despite the existence of exclusive dealing agreements. There are also instances in the record of dealers placing another supplier's products in the cabinet of a respondent, despite a clause requiring the cabinet to be used only for the storage of the respondent's products.

Despite the fact that most retailers do deal with only one supplier, it is within their power to change suppliers almost at will. There is no evidence that any form of agreement, lease or receipt used in connection with the supplying of a cabinet has any significant effect in tying a dealer to a particular supplier. Nor is there any evidence that the supplying of a cabinet as such has any substantial preclusive effect.

12. Based on the foregoing, and the evidence as a whole, it is concluded and found that:

(a) The record fails to establish by a preponderance of the reliable, probative and substantial evidence that any of the respondents has attempted to induce or has induced retail dealers, to any significant extent, to handle, store, and sell such respondent's products, exclusively or otherwise, by selling, leasing, loaning or otherwise making available to them facilities for the storage and sale of frozen products.

(b) While facilities are made available to retail dealers by respondents, the furnishing of such facilities is not a substantial inducing factor in the dealer's choice of a frozen products supplier since such

facilities are generally available to dealers from most frozen products suppliers. Respondents did not originate such practice and there is no reliable, probative and substantial evidence that they have used it, to any substantial extent, as a competitive device in the acquisition or retention of retail dealer accounts.

(c) While some of the respondents, as more specifically above found, have used agreements purporting to require dealers to whom they supply facilities to use their frozen products exclusively, such agreements, with few exceptions, are of limited duration or are terminable at will or on short notice. Moreover, such agreements are not enforced in practice and dealers shift from supplier to supplier without regard to such agreements.

(d) The record fails to establish that respondents' practices in supplying facilities to dealers have resulted in injury to competition in any relevant market area or that there is any reasonable probability of such injury.

2. Financing

1. The complaints contain two main groups of allegations pertaining to practices which counsel supporting the complaint lumps under the heading of "Financing." The first group relates to the making of money loans to dealers and the other to the supplying of equipment. In connection with money loans it is alleged that such loans (a) are made with the understanding that the dealer will not handle the products of respondents' competitors, (b) are made without interest or other compensation and (c) are simply made to dealers. In connection with the supplying of equipment (which is generally sold on a time-payment basis) it is alleged that such equipment (a) is supplied with an understanding as to exclusive dealing, (b) is supplied without any profit to the respondent and (c) is simply supplied. The equipment referred to in this group of allegations consists of such items as soda fountains, store fixtures, and other items of equipment other than facilities.⁹ The issues which arise under these allegations are similar to those discussed in connection with the furnishing of facilities, viz., whether respondents use financial assistance as an "inducement" for dealers, whether the practice results in exclusive dealing, and whether there has been or is likely to be injury to competition.

2. The rendering of financial assistance to dealers by ice cream manufacturers takes two basic forms, (a) the loaning of money and

⁹ Such equipment is apparently referred to separately from facilities for the reason that it is usually sold to the dealer, while facilities are usually loaned and sometimes leased.

(b) the sale of equipment on a time-payment basis. Dealers generally borrow money to enable them to remodel or modernize their stores or to purchase needed equipment. Where the ice cream manufacturer arranges for the dealer to purchase equipment or sells it to him, the latter usually makes a small down payment and pays the balance in monthly installments, which are sometimes collected by a surcharge on ice cream purchases. The equipment sold typically involves a soda fountain or store fixtures. In the case of money loans the dealer usually signs a promissory note and gives the ice cream supplier a chattel mortgage on his store fixtures. In the case of larger amounts other security for the loan may be given, such as insurance policies or a mortgage on realty. Where the manufacturer sells the equipment to a dealer on a time-payment basis, this is usually accomplished by the signing of a conditional sales contract, pursuant to which title remains in the ice cream manufacturer until payment is completed. While some of the respondents have, in the past, not charged interest in connection with some financing transactions, in recent years it has been the usual practice to add an interest charge of four to six per cent.

3. As in the case of the supplying of ice cream cabinets, the rendering of financial assistance to dealers is not a recent innovation in the industry. An ice cream manufacturer from Danbury, Connecticut, indicated that manufacturers in his area had been rendering financial assistance to dealers since the 1920's. Another government witness, a manufacturer from Washington, D.C., testified that manufacturers in that area had been making loans to dealers since the middle 1920's. There was also testimony by a witness representing a large eastern ice cream manufacturer, with headquarters in the Philadelphia metropolitan area, to the effect it had been the practice in his area for a great many years to assist dealers financially.

The record fails to establish that respondents are responsible for initiating the practice of assisting dealers financially or that their activities in this regard differ materially from those of their competitors generally. All of the respondents render financial assistance to customers, either by way of money loans or financing the purchase of equipment. The same is true of most of their competitors, including a number who were called to testify against respondents. Respondents' lack of leadership in the practice was attested to by competitor witnesses in Portland, Oregon, and in Chicago. The testimony of one of the Portland manufacturers, that even if respondents Arden and Carnation (the two largest manufacturers in the area) ceased giving financial assistance to dealers, the practice would nevertheless continue, is indicative of the widespread character of the prac-

tice and the lack of leadership of the two respondents in question. A Chicago manufacturer indicated that although National's Hydrox Division had ceased giving advance rebates in the form of loans several years previously, the practice had nevertheless continued in the market. The same witness identified two large local companies as the "toughest" competitors in the area.

4. The rendering of financial assistance by ice cream manufacturers to dealers performs a two-fold function, (a) it enables dealers to remodel, modernize or expand their operations, thus putting them in a better competitive position and (b) it helps increase the sales of the ice cream manufacturer through more modern and expanded retail outlets. Counsel supporting the complaint suggests in his brief that it is not necessary for ice cream manufacturers to perform this function. While a small proportion of dealers might be able to obtain credit at banks and regular financial institutions for modernizing and similar purposes, a great many of the dealers do not have the financial standing or the necessary security required for bank loans. The only security most of them have is the equipment in their stores which banks would have difficulty in disposing of in case of default on the loans. The ice cream manufacturer, on the other hand, can either remove the equipment to another location which he is supplying or can find a buyer for the establishment through his many contacts in the industry.

The record demonstrates that the vast majority of the loans and other financial assistance is rendered to small and medium-sized dealers, and not to the large chains and supermarkets. The latter very infrequently ask for any financial assistance. They usually make their own arrangements with respect to financing or the purchase of equipment. Their primary interest is in securing a favorable price from the ice cream manufacturer. Many of the outlets which receive financial assistance are so-called "mamma and papa" grocery stores, which desire to modernize their establishment in order to remain competitive with the chain and supermarkets. Others are individually operated drug stores, which seek to modernize or expand in order to compete with the drug chains or other large outlets. One small dealer characterized the ice cream manufacturer as the dealer's "ace in the hole" when he gets into financial difficulty and needs help in a hurry. This attitude was echoed by a number of other dealer witnesses.

The record contains numerous instances where as a result of modernization and expansion, dealers have increased their sales very substantially, benefiting not only themselves but their suppliers. For

example, a loan to a dealer in Seattle by respondent Carnation for remodeling purposes enabled the dealer to increase his gallonage by 150 per cent. A dealer operating a small confectionery establishment in the District of Columbia was enabled, through a loan from respondent National, to open a new ice cream specialty shop in suburban Maryland which developed into a very large and successful operation. The latter dealer could not borrow the money required for this new enterprise from the bank and would not have opened his second establishment, but for the assistance received from his supplier.

5. As in the case of cabinets, the evidence upon which counsel supporting the complaint relies falls into three categories, (a) statistical evidence as to amounts involved in financing, (b) testimony of competitor witnesses regarding the alleged competitive effects of financing and (c) testimony of dealers who allegedly received financial assistance. These are discussed below.

(a) *Amounts Involved.* Counsel supporting the complaint cites the large amounts spent by respondents in various forms of financial assistance, as indicative of the fact that small manufacturers are placed at a competitive disadvantage because of their more limited resources.

Before indicating the extent of each respondent's commitments in financing, reference should be made to several questions which have been presented concerning the correctness of the computations used by counsel supporting the complaint. The first of these involves the inclusion, under the heading of financing, of loans made to dealers by banks or other financial institutions where a respondent has endorsed the note or otherwise guaranteed the credit of the borrower. This practice is not utilized to any significant extent by any of the respondents except respondents Arden and Carnation, whose financial assistance to customers by way of endorsement of credit exceeds the amount of direct money loans. It is contended by these respondents that since this does not involve any actual outlay of capital, as does the making of cash loans and the sale of equipment on a time-payment basis, the figures of amounts of loans guaranteed are not properly included under the category of financing. This argument finds support in the testimony of some competitor witnesses whose objection to the making of loans or financing of equipment was based on the claim that they did not have sufficient capital available for such outlays. This objection does not exist to the same extent in the case of the endorsement of loans, unless there is any substantial amount of loans on

which the borrower has defaulted. The record discloses, however, that the losses on loans are almost infinitesimal. For purposes of convenience the examiner has concluded that the amounts of loans guaranteed may be included under the general category of financing. However, the amounts thereof will be specifically indicated where applicable.

The second category of assistance as to which some question has been raised as being properly included in the category of financing is what is designated in various areas as "Trade Agreements", "Performance Contracts" or "Advance Rebates." In substance, the manufacturer advances to the dealer a certain amount which is usually designated as a "loan." It is agreed that if the dealer purchases a given amount of ice cream from the manufacturer or remains his customer for a given period of time the loan will liquidate itself. This practice is engaged in to a limited extent in certain large metropolitan areas and generally involves new accounts. The manufacturer, in effect, estimates what the dealer's volume will be over a given period and gives him his volume rebate in advance. In some instances, however, the dealer may also receive his regular volume rebate in addition to the cash advance. In either instance, the sum advanced is really in the nature of a price cut given to the dealer in return for his purchasing a given amount of ice cream or remaining a customer for a given period of time, rather than a true loan. There is no evidence in the record that this practice has been used at all by respondents Foremost, Arden, Carnation, Pet or Fairmont. It has been used to a very limited extent by respondents National, Borden, Beatrice and Hood. While it is dubious whether the amounts involved in such advances should be included under the category of financing, the examiner has so included them for purposes of the computations hereinafter made, but the extent thereof will be specifically designated.

The final item which is the subject of dispute among counsel involves the amount of each respondent's financially assisted gallonage. The figure which counsel supporting the complaint has used is a computed figure based on actual gallonage figures supplied by each respondent. Counsel supporting the complaint assumes that the period for repayment of the loans made by each respondent averages about three years and argues that the annual gallonage of each account should be multiplied by three in order to show the total gallonage which has been "induced" to deal with a respondent. In the case of

respondents National, Borden and Foremost, since the gallonage figures supplied by these respondents only include sales made after the date of financial assistance (this being the only portion which can be said to have been "induced" in any sense), counsel supporting the complaint argues that the gallonage figures should be multiplied by six, on the assumption that the average loan was made in mid-year.

None of the assumptions made by counsel supporting the complaint is correct. While the terms for the repayment of loans and equipment purchased sometimes extends beyond a year, there are very few instances in the record where the period extends as long as three years. Most of such transactions involve a period of eighteen months or less. This period of time is further reduced by the fact that in a number of instances the balances on loans or amounts due on equipment are prepaid for one reason or another, including circumstances where the dealer switches to another supplier. There is no accurate basis in the record for estimating the precise average period for the repayment of loans in the case of each respondent or for the respondents generally. Such evidence as there is would indicate that the period is closer to a year than to three years. In the case of respondents National, Borden and Foremost there is no basis for assuming that the average loan is made in mid-year, since loans are made at different times during the year and the gallonage of each assisted account may vary considerably. In any event, for purposes of demonstrating the order of magnitude of each respondent's financing operations on an annual basis, which is counsel's apparent purpose, its actual financing commitments for a particular year and the annual gallonage of the financially assisted accounts (based on actual figures in the record) constitute a reasonably accurate measure thereof. These are the figures which are hereafter used.

Set forth below is a table showing the amount committed by each respondent during the year 1955 for the financial assistance of retail dealers in the manner previously described, the number of accounts so assisted and the gallonage sold to such accounts. As previously indicated, the gallonage figures of National, Borden and Foremost include the gallonage actually sold to the assisted accounts in 1955 after the date of financial assistance, whereas in the case of the other respondents they also include 1955 sales made prior to the date of financial assistance.

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Initial Decision

FINANCING—1955

	Dollar amount	Number of accounts	Gallage of accounts
National.....	¹ \$3,510,436	1,803	1,417,204
Borden.....	² 2,741,721	1,367	1,435,174
Foremost.....	³ 848,390	418	1,007,108
Beatrice.....	⁴ 745,353	644	1,073,000
Arden.....	⁵ 841,664	262	489,546
Carnation.....	⁶ 484,362	227	323,947
Fairmont.....	⁷ 438,043	410	525,025
Pet.....	116,587	56	⁸ 100,230
Hood ⁹	306,952	238	823,794

¹ Above figures include advances or loans pursuant to performance contracts, trade agreements and similar arrangements amounting to \$21,317 and involving 53 accounts with a gallage of 39,542.

² Above figures include advances or loans pursuant to trade agreements, etc., amounting to \$62,199 and involving 173 accounts with a gallage of 149,265.

³ Above figures include guarantees and endorsements of loans made by others, amounting to \$10,000 and involving a gallage of 2,502.

⁴ Beatrice figures are computed by projecting the actual figures for a five-market area, which it was stipulated were typical. The computations are based on an average expenditure of \$.021 per gallon for financing in the five-market area (which represents 18 per cent of the company's total gallage and 17 per cent of its accounts). The figures include advances or loans pursuant to performance contracts and advance rebates amounting to approximately \$22,000 and involving an estimated 22 accounts with an approximate gallage of 40,000.

⁵ Above figures include guarantees and endorsement of loans made by others amounting to \$624,088 and involving a gallage of 276,794.

⁶ Above figures include guarantees and endorsements of loans made by others amounting to \$203,000 and involving a gallage of 46,605.

⁷ These figures are computed in part by a projection of actual figures representing equipment sales in a five-market area, accounting for 11 per cent of the company's total gallage. The record contains actual figures on a national basis for loan accounts but not for accounts to whom equipment was sold.

⁸ The record contains information with respect to dollar amount of sales to financially assisted accounts but not the gallage thereof. The gallage figure has been computed by dividing the amount of dollar sales by the average cost per gallon of \$1.60.

⁹ Above figures include loans made to peddlers and vending machine operators amounting to \$100,242 and involving a gallage of 364,238. Since such accounts are more in the nature of wholesale customers than traditional retail dealer accounts, this inclusion tends to exaggerate the figures. Also included are loans made pursuant to trade agreements, amounting to \$40,555 and involving 126 accounts with a gallage of 211,954. Excluded from the totals are overdue amounts from retail accounts of \$7,145, involving 19,257 gallons since these merely involve credit balances owing from delinquent accounts which, for bookkeeping purposes, have been acknowledged by a note.

The total amounts involved in the furnishing of financial assistance to retail dealers are obviously not insubstantial. However, like cabinet expenditures, such total figures establish nothing by themselves, but are significant only in relation to the size of each company's operations. Whether, as contended by counsel supporting the complaint, they involve amounts beyond the capabilities of the average ice cream manufacturer can only be determined by relating each respondent's investment in financing to its total business.

Using a figure of 8.3 per cent as being the percentage of dealers financially assisted by respondents (based on a misinterpretation of the National Analysts' survey figures) and an assumed average-sized loan of \$2,000, counsel argues that a small manufacturer with 300 accounts would have to furnish financial assistance to 25 accounts and expend \$50,000 a year in order to be competitive with respondents. Aside from the question (which will hereafter be discussed) of

whether the proper standard for measuring fair competition is what the small manufacturer can afford to spend, the actual figures in the record do not support counsel's argument. While the average amount invested in financing by some of the respondents is approximately \$2,000, the percentage of financially assisted accounts in most instances is under 2 per cent, rather than 8.3 per cent, as the table below indicates:

	Average amount of financial assistance per account in 1955 ¹	Percentage of accounts receiving financial assistance in 1955 ²
		<i>Percent</i>
National.....	\$1,945	1.91
Borden.....	2,005	1.89
Foremost.....	2,030	1.20
Beatrice ³	1,105	1.35
Arden.....	⁴ 3,210	2.03
Carnation.....	⁵ 2,175	1.71
Fairmont.....	1,065	⁶ 2.95
Pet.....	2,080	.54
Hood.....	1,290	2.38

¹ Computed by dividing total amount of financing by total number of accounts.

² Computed by dividing total number of accounts served by number receiving financial assistance.

³ Beatrice figures have been computed from the actual figures for the five-market area stipulated to be representative, rather than from the projected figures.

⁴ This computation is based on the inclusion of the amount of loans guaranteed by others, where no capital outlay by Arden was involved. If the amount of such guarantees were excluded, the average amount figure would be reduced to \$1,360.

⁵ This computation is likewise based on the inclusion of the amount of loan guarantees. If the amount thereof were excluded, the average amount figure would be reduced to \$1,325.

⁶ This figure is based on a comparison of accounts receiving financial assistance in 1955 with total number of accounts in 1952, that being the latest year for which the latter information appears in the record. Since the record indicates a gallonage increase of over 2 million gallons between 1954 and 1955, it may be assumed the number of Fairmont accounts has increased substantially since 1952. On this basis the above percentage is undoubtedly much higher than the actual percentage would be if available.

As is apparent from the above figures, the accounts which receive financial assistance from respondents represent a very minute fraction of the total number of accounts served by them, and the average amount involved in such assistance is relatively small. As will also be observed from the figures, the fact that some companies have a larger proportion of financially assisted accounts does not necessarily mean that they have a larger investment in financing. For example, while Hood and Fairmont appear to have a larger proportion of assisted accounts, the average amount invested by them per account is smaller than almost all the other respondents. Although the above computations involve a comparison in terms of number of accounts, rather than in terms of gallonage served, it seems clear that a comparison on the latter basis would also reveal the relative insignificance of respondents' financing operations. A precise computation on a gallonage basis is not possible for any of the respondents, other than

Carnation and Beatrice, since the gallonage figures of financially assisted accounts which are in the record include all frozen products, whereas the total gallonage figures are restricted to hard ice cream only (except for the two respondents mentioned). However, a comparison of figures of these two respondents, as well as a somewhat exaggerated comparison with total hard ice cream sales for the other respondents, indicates that in almost every instance the gallonage of financially assisted accounts represents well below 5 percent of each company's total gallonage.¹⁰

(b) *Competitor Testimony.* More of the competitor witnesses were critical of the practice of assisting dealers financially than was the case with respect to the supplying of cabinets, although in a number of sections of the country there was almost no reference to financing. Much of the testimony was of a general conclusory nature, consisting of expressions of opinion and preference, with little reliable evidence that any of the respondents were leaders in the practice, had used it aggressively to acquire accounts, or had caused competitive injury by reason thereof. Typical is the testimony of a large Toledo manufacturer cited by counsel supporting the complaint, who expressed the opinion that the rendering of financial assistance to retail dealers does not help develop ice cream business and indicated that he opposed the practice. In contradistinction to this is the testimony of a Danbury, Connecticut, manufacturer who, after first expressing a preference for not having to make loans, conceded that the smaller independent stores had to have financial assistance in order to obtain needed equipment. This manufacturer and others stated that the practice had been followed by ice cream manufacturers generally for a great many years. Not only is there no evidence that respondents originated the practice, but the evidence shows it was utilized in some areas before any of the respondents had entered them.

In addition to such general expressions of opinion, some of the competitor witnesses claimed that they had lost business because of the practice and, in some instances, sought to attribute such losses to various of the respondents. For the most part such testimony was of an unreliable nature, consisting of hearsay and unsupported conclusions. In the relatively few instances where there was any reliable evidence that some of the respondents had given financial assistance to specific retail accounts referred to by competitors, the record generally fails to establish that the rendering of such assistance was a

¹⁰ In the case of respondent Beatrice the percentage is 3.52 per cent, while in the case of Carnation it is 3.10 per cent including the gallonage of loan guarantee accounts. The exaggeration in percentages which could appear if the comparison were with hard ice cream gallonage only is demonstrated by the fact that a comparison on the latter basis reveals the Carnation percentage to be 4.84 per cent, as compared to 3.10 per cent.

material factor in the respondent's acquisition or retention of the account or that it resulted in competitive injury.

Indicative of nature of the evidence upon which counsel supporting the complaint relies is that of the Toledo manufacturer referred to above. This witness at first testified that his company had been losing "about 35 to 50 accounts per year because of, well, competitive practices in which we do not engage—making loans of money, of course, enabling a dealer to finance soda fountains and counters * * *." However, after this sweeping broadside, when the witness proceeded to particularize with respect to sixteen accounts alleged to have been lost by his company, financing was claimed to have been involved in connection with only one account, and the witness' testimony as to whether a respondent had assisted this account was pure hearsay. Furthermore, it developed on cross-examination that the "35 to 50 accounts" which the witness claimed he had lost every year was not a net loss but was normal turnover in a company having 1,600 accounts, and that the company had actually gained more accounts than it lost each year. The record also discloses that the company in question has enjoyed a very substantial increase in the number of its accounts and in its gallonage during the post-war period.

Cut from the same cloth are the broad-brush claims of the Washington, D.C., manufacturer, whose testimony is quoted by counsel supporting the complaint to the effect that he had lost "other customers" to "other companies" because of loans of money. Not only did the witness not identify the "other companies", but he could recall only a single account where a loan was a factor in the alleged loss, and there is not a scintilla of reliable evidence in the record that any respondent had loaned the account in question anything. The company has gained more accounts than it lost. While its gallonage has not increased significantly during the post-war period this is also true of the respondents operating in the Washington area.

The testimony of the other competitor witnesses referred to by counsel supporting the complaint is similar to that discussed above. Much of it is long in accusation (couched in broad general terms), but short in reliable proof when related to individual competitive situations cited in support of the general charges. In only a handful of instances is there any reliable evidence of financial assistance by respondents to any of the accounts referred to and in only a negligible fraction of these is there any reliable evidence to show that the financial assistance was a material inducing factor in the choice of a respondent as a supplier. The testimony of these witnesses fails to establish that respondents have used financing on a substantial scale as an aggressive

competitive device or that respondents' use of the practice has resulted in competitive injury.

(c) *Dealer Testimony.* A number of the dealer witnesses called by counsel supporting the complaint had received financial assistance from some of the respondents in the form of loans, sale of equipment or advance rebates. The respondents involved in these transactions were National, Borden, Beatrice, Foremost or Pet. None of the dealers called to testify had received financial assistance from respondents Arden, Carnation, Fairmont or Hood. While the fact that the dealers in question had received financial assistance from certain of the respondents is not in dispute, in only a few instances does it appear that the rendering of such assistance was an inducing factor in the dealer's choice of a supplier. For example, of five dealers called in Washington, D.C., who had received loans from respondent National, four were already dealing with respondent National at the time of receiving the loan. One of these was about to open an additional establishment and had received offers of loans from a number of other manufacturers, but preferred to deal with National because of his long association with that company and its products at his existing location. The single pioneer account involved had chosen respondent National as his supplier after having had a consumer survey conducted (at his own expense), which indicated that National's brand was the most popular one in the neighborhood. The dealer had received similar offers of loans from other suppliers, including one from a manufacturer who was called as a witness by counsel supporting the complaint.

Out of fourteen dealers who had received loans in the New York City area, approximately four were dealers who were already purchasing from the particular respondent at the time of receiving the loan from it. Three of the loans made to switch accounts merely involved the assumption of the balance of a loan due to the former supplier, where the evidence discloses that the account had decided to switch for reasons having nothing to do with the loan. Of the five remaining switch accounts, only two indicated that the loan had been a factor in their decision to switch. However, one of the latter two accounts later became dissatisfied with respondent National (from whom it had received a loan) and switched back to his original local supplier, who assumed the balance of the loan due to respondent National and even increased the amount thereof. In the case of one dealer in the Philadelphia area who had received a loan from respondent National in connection with the opening of a new establishment, other evidence offered by counsel supporting the complaint discloses that respondent

National's offer was made to meet a competitive offer by a local supplier which had been brought to the respondent's attention.

The foregoing demonstrates that a mere showing that a dealer has received financial assistance does not necessarily establish that this was the reason why he chose to deal with the company assisting him. In the case of existing accounts, there is almost no evidence in the record that the rendering of financial assistance acted as an inducement for such accounts to deal with respondents. In the case of switch accounts, while the evidence discloses that the furnishing of financial assistance did influence some dealers, others switched because they had become dissatisfied with their former supplier and had decided to switch to one of the respondents for reasons unrelated to financial assistance. Some instances involved merely the assumption of a balance due the former supplier on financing by him. Even in the case of pioneer accounts the furnishing of financial assistance is not necessarily the reason for the dealer's choice of suppliers. Several of the dealers had received offers of assistance from a number of suppliers, but chose one of the respondents for reasons unconnected with financing. In some instances the dealers had sought out the respondent because of some basic reason for dealing with it and had not even been approached by other suppliers. The record establishes that some of the offers of assistance by respondents were made after it had been learned that similar offers had been made by competitors.

6. The statistical evidence in the record tends to place in proper perspective the sometimes exaggerated claims of certain competitor witnesses and the testimony of that segment of dealer witnesses whose choice of supplier appears to have been influenced by the receipt of financial assistance. These figures disclose the relatively small extent to which respondents engage in the financial assistance of dealers and the fact that the bulk of such assistance goes to their own existing accounts, where there is the least probability that it is being used as an aggressive competitive weapon.

The total financing figures of each respondent have already been discussed above. From these it is fairly evident that respondents are not engaged on any mass scale in the furnishing of financial assistance to dealers. The fact that less than two per cent of the accounts of most of the respondents receive financial assistance in any year, representing a gallage of a comparable order of magnitude, hardly suggests that respondents are engaged in any all-out effort to obtain business through the use of financial aid to dealers.

The record also contains other statistical evidence, which tends to confirm the conclusions suggested by the overall figures, concerning the limited scope of respondents' use of financial assistance of dealer

accounts and the generally nonaggressive character thereof. These include a breakdown of the figures of financial assistance for some of the respondents as between existing, switch and pioneer accounts, and also indicate the extent to which accounts obtained from competitors receive financial assistance. Set forth below are some of the figures appearing in the record. As will be noted therefrom, the information in the record concerning National is somewhat more extensive than that for some of the other respondents. However, since that respondent does business over a wider area than the other respondents, and figured more extensively in the testimony of Government witnesses, it may be assumed that the trend indicated thereby is generally applicable to most of the respondents.

(a) *National*. A study of the loans and of the sales of equipment pursuant to conditional sales contract by seven of the plants of respondent National's subsidiaries or divisions (serving such representative cities as Newark, New Jersey; Memphis, Tennessee; Cincinnati, Ohio; Peoria, Illinois; Cleveland, Ohio; New Haven, Connecticut; and Providence, Rhode Island) reveals that out of 290 customers receiving such assistance in 1954 and 1955, 186 (or 64.3%) were old accounts and the balance were almost evenly divided between pioneer and switch accounts (18.3% being pioneer and 17.6% being switch).¹¹

The pattern above indicated is confirmed by a breakdown of the figures covering loans and financing of equipment by respondent National's Breyer Division, which does business over a wide area of the eastern United States, including such cities as New York, Philadelphia, Washington, D.C., and Richmond. Out of 542 accounts receiving financial assistance in 1954 and 1955, 360 (or 66.4%) were old accounts, 21 per cent were pioneer accounts and only 12.1 per cent were switch accounts. A similar pattern appears with respect to 42 accounts financed by respondent National's Southern Dairies Division, during 1954 and 1955, in Jacksonville, West Palm Beach and Miami, Florida, as to which evidence was offered by counsel supporting the complaint. Of the 42 accounts involved, 32 (or 76.2%) were old accounts, 8 (or 19%) were pioneer and only 2 (or 4.8%) were switch.

As is apparent from the above figures, the great preponderance of accounts receiving financial assistance are National's own existing ac-

¹¹ It should be noted that the above computations differ from those proposed by respondents, in that there is excluded from the category of old or existing accounts 35 accounts which received financial assistance during a period of from 30 days to one year after the account was acquired. It seems evident that some indeterminate portion of these accounts may be regarded as old accounts, although the exact proportion thereof cannot be determined from the record. If all of them were included in this category the percentage of old accounts receiving financial assistance would be increased to 76 per cent, and the other percentages would be reduced proportionately.

count, which would indicate that the great majority of loans are made defensively or are nonaggressive in character. This does not necessarily mean that the remainder are aggressive in character, since the evidence indicates that many pioneer and switch accounts who receive financial assistance choose their supplier for reasons unconnected with financing.

The above figures must also be viewed in the light of the fact that the order of magnitude of all accounts receiving financial assistance is only about two per cent per year of the entire number of accounts served. While the record contains no information as to what proportion of the entire number of accounts added each year receive financial assistance, such information is available with respect to switch accounts. Evidence offered by counsel supporting the complaint indicates that respondent National made 95 loans to switch accounts in 1952 and financed the sale of equipment for 27 accounts in the same year. The accounts receiving such loans represented only 1.8 per cent of the total number of accounts acquired by National from competitors in 1952, and those receiving financial assistance on the purchase of equipment represented only 0.5 per cent of the total number acquired from competitors in the same year.

(b) *Borden*. While the information in the record with respect to Borden is not as extensive as that pertaining to National, it appears to follow a similar pattern. Thus of 18 transactions involving loans or conditional sales of equipment to customers in Jacksonville and Miami, Florida, as to which evidence was offered by counsel supporting the complaint, all but two were to existing accounts of Borden. The two exceptions involved switch accounts where Borden merely refinanced the balance of a loan received from a competitor. Likewise, it appears that the 85 loans shown by counsel supporting the complaint to have been made to switch accounts in 1952, and the 102 loans made in 1953, represent only 1.5 per cent and 1.7 per cent respectively, of the total number of accounts acquired from competitors by Borden in each of these years.

(c) *Beatrice*. The record discloses that in a five market area, stipulated to be typical and including the cities of Chicago, Des Moines, Omaha, Cincinnati and Kansas City, existing accounts accounted for 88.5 per cent of the gallonage of all accounts receiving financial assistance in 1955 (not including financial assistance in the purchase of cabinets).¹²

¹² Since the gallonage of accounts purchasing cabinets is only 17,694 out of a total assisted gallonage of 314,252, it seems evident that this exclusion would not materially affect the above-indicated percentage.

(d) *Foremost*. In the case of respondent Foremost, evidence offered by counsel supporting the complaint discloses that it made only four loans per year to switch accounts in 1952 and 1953. Since the record contains no information as to the total number of loans made in those years, it is not possible to compute the exact percentage which these represent of all loans made. However, on the basis of a comparison with the number of loans made in 1954, this would represent only about 15 per cent of the total number of loans.

(e) *Pet*. Out of a total of 96 loans made by respondent Pet in 1954 and 1955, 61 (or 63.5%) were made to old accounts, 27 (or 28.1%) were made to pioneer accounts and only 8 (or 8.3%) were made to switch accounts.

(f) *Fairmont*. Evidence with respect to a five-city area in which Fairmont does business discloses that out of 31 loans made during the fiscal year ending February 28, 1956, all but two were made to existing accounts. One of the latter was made to an account which switched to Fairmont because of a preference for its advertising and merchandising program, and the second was made to the new owner of an existing store which had previously been served by respondent Borden.

* * *

Similar statistical information does not appear in the record with respect to the remaining respondents. However, there is no reason to believe that the financial assistance rendered by them is not also furnished primarily to existing accounts. Officials of several of them testified that it was their policy to assist mainly their own accounts and not to seek to obtain competitors' accounts by offering financial assistance.

Counsel supporting the complaint has suggested that loans to existing accounts may also be aggressive in character, by seeking to hold accounts which may be interested in switching to a competitor. There is, however, no substantial and reliable evidence in the record to support this thesis. The overwhelming portion of the complaints of competitors dealt with accounts which they had lost, rather than with those which they sought to obtain from a respondent. While there were a few accounts falling in the latter category, there is no reliable evidence that the receipt of financial assistance from a respondent was responsible for such accounts not switching to a nonrespondent competitor. On the contrary, the record contains a number of instances of dealers switching to a competitor despite the receipt of financial assistance from a respondent.

7. Additional evidence of the limited role played by financial assistance, in the choice of suppliers, appears in the report of National Analysts, Inc. (previously referred to at page 1329, par. 10). The report which is in evidence covers not only the general survey of 1,331 dealers discussed in connection with cabinets, but a separate survey of 405 dealers all of whom had received financial assistance in 1954 or 1955. The results of both surveys indicate that the rendering of financial assistance plays a minor role in the dealer's choice of supplier.

In the general survey, which covers dealers without regard to whether they had or had not received financial assistance, the furnishing of financial assistance by a respondent was referred to as a factor in the choice of supplier in a total of 6.8 per cent of the brand mentions.¹³ This result was produced by responses to three questions. The first question was a general "open end" question of why the dealer was handling his present ice cream brand or brands. In response to this question financial assistance from a respondent was given as a reason in 0.2 per cent of the situations involved. The second question, also of the open-end type, as to whether there were any other reasons involved, produced the result of 0.5 per cent in which financing was referred to as a reason. The third question utilized the "aided recall" technique and involved showing the dealer a printed card containing a list of possible reasons for choosing their present brand, including that of financial assistance, and asking the dealer which of these were of importance in handling their ice cream. This question produced the result of 6.1 per cent, in which financial assistance from a respondent was referred to.

The above results are of interest not merely because they indicate the limited role which financing plays in the choice of a supplier, but because of the fact that the results with respect to dealers handling the brands of nonrespondents were not significantly different from those applicable to respondents' dealers. The totals with respect to nonrespondent dealers who referred to financing as a reason were 8.0 per cent, as compared to 6.8 per cent for respondents' dealers. The total for all dealers, respondent and nonrespondent, who referred to financing was 7.5 per cent.

It is apparently on the basis of this result that counsel supporting the complaint makes the argument, previously referred to, that 8.3 per cent of all dealers are financed and that a manufacturer in order to be

¹³ As previously noted, the results of the survey are generally expressed in terms of brand mentions, i.e., brand-dealer combinations, rather than in terms of the number of dealers, because of the fact that some dealers handle the products of more than one supplier and more than one brand of ice cream.

competitive must have capital sufficient to finance that number of accounts. Aside from a question as to the accuracy of the percentage used by counsel, the above figures do not establish that at any given time a manufacturer must be prepared to finance the percentage of his accounts indicated thereby. Some of the dealers interrogated had been financed as far back as 1947 and had paid off their obligation. While they may have referred to financing as a reason, there was no financial obligation outstanding as of the time of their interrogation. The results of the survey do not indicate what proportion of this group of dealers actually had a financial obligation outstanding at any given time, but merely that at some undisclosed period they had received financial assistance from a supplier.

The 6.8 per cent figure for respondents' dealers, it should be noted, is an optimum figure which includes any reference to financing as a reason by a dealer, even though it may have played a very minor role in the dealer's choice of supplier. To establish the relative importance of the reasons assigned, the dealers were asked to review the reasons given by them and to indicate which was the most important, and which the second most important, reason for handling their present brand. The results were 2.1 per cent in which financing was given as the most important reason and 1.3 per cent in which it was the second most important reason. These results indicate that for most of the dealers who referred to financing it was not a reason of the first magnitude.

The second survey involved 405 dealers who had received financial assistance from respondents Arden, Beatrice, Borden, Carnation and National during 1954 and 1955. These were selected on a random sampling basis from a list of dealers who had received financial assistance from the five respondents during these two years. By the time they were interviewed 33 of the dealers were no longer handling the brands of the respondent which had assisted them. An additional 28 of the dealers were handling the brands of other manufacturers, as well as those of the respondents assisting them. Because of the multiple brands handled by some dealers there were 517 brand-dealer combinations among the 405 dealers interviewed.

The dealers were interrogated in a manner similar to that used in the general survey. In response to the question of why they were handling their present brand or brands, 6.0 per cent of the dealer-brand combinations involved referred to financing as a reason; in response to the follow-up question of whether there were any other reasons, an additional 1.0 per cent referred to financing; and in response to the "aided recall" question in which the dealers were shown

a card containing a list of possible reasons, including financing, 9.6 per cent mentioned financing.

While the aggregate of the responses, 16.6 per cent, is somewhat higher than that in the general survey, this is not surprising considering that all of the dealers had been financially assisted. The results do not sustain the position of counsel supporting the complaint that all or substantially all financially assisted dealers choose their supplier on the basis of such assistance. It must also be observed that the above figure is an optimum figure since it includes all references to financing, even though it was a factor of the lowest order of magnitude in importance. In this connection it should be noted that when the above group of dealers was asked which of the reasons given was the most important and which the second most important, references to financing were, respectively, 5.4 per cent and 4.0 per cent. Finally, in order to keep the above results in proper perspective, it must be recalled that the entire body of financially assisted dealers themselves constitute only a very minor fraction of each respondent's total number of accounts.

8. As in the case of the supplying of cabinets, an essential element of the complaints, with respect to the furnishing of financial assistance, is that it occurs in a context of exclusive dealing, i.e., that it is done pursuant to agreements which call for the exclusive handling of a respondent's products or that because of the nature of the industry the furnishing of financial assistance by a respondent necessarily results in the exclusive handling of its products. These allegations are considered below.

(a) *Exclusive Dealing Agreements.* The record discloses that it is customary for most manufacturers to enter into a written agreement with a dealer to whom they furnish financial assistance. The forms of agreement used by respondent which are in evidence indicate that there is considerable variance among them and even among different plants of a particular respondent, insofar as a requirement that the dealer handle only the products of the respondent giving him financial assistance is concerned. Set forth below is a brief analysis of the forms of agreement used by the various respondents, with particular reference to whether they contain a requirement for exclusive dealing.

(1) *Carnation.* The record contains two executed conditional sales contracts covering the sale of equipment to dealers in Phoenix, Arizona, and Seattle, Washington, both of which require the dealer to purchase Carnation products until the equipment is paid for. There is nothing in either agreement to prevent prepayment of the monthly installments

provided for. In fact the Arizona agreement specifically provides that it may be terminated at any time by payment of the balance due. In addition to these executed agreements, there are also in evidence unexecuted forms of conditional sales agreements used in Texas, Oklahoma, Washington and Oregon which require the dealer to purchase his frozen products exclusively from Carnation until the equipment is paid for. There is nothing in any of the agreements to prevent the termination thereof by prepayment of the balance due.

While the Arizona and Washington agreements referred to above contain exclusive dealing provisions, there is also in evidence a form of conditional sales agreement used in both states which does not contain such provision, although it does provide that only Carnation products will be stored in the equipment sold. A form of agreement used in California likewise contains no exclusive dealing provision, but does provide that during the term thereof the equipment sold may only be used to store Carnation products.

The above agreements all pertain to the sale of equipment on an installment basis. While Carnation also renders financial assistance in the form of money loans or guaranteeing bank loans, there are no agreements covering such transactions in evidence. It cannot therefore be determined whether they provide for either exclusive dealing or exclusive storage.

(2) *Borden*. There are several unexecuted forms of loan agreement in evidence used in the New York and New Jersey markets, which contain a provision that during the term thereof the dealer will buy his frozen products requirements exclusively from Borden. These agreements purport to be for a fixed term, but the range of the duration of the term thereof does not appear from the record. Some of the agreements provide for repayment of the loan by a surcharge on ice cream purchases and others provide for fixed monthly installment payments. It does not appear from the record whether agreements similar to these are used by Borden in connection with the making of loans in any of the other numerous markets in which it does business, other than New York and New Jersey, or whether the agreements in evidence are typical of those used elsewhere.

There are also in evidence forms of conditional sales contracts used by Borden in connection with the sale of equipment in New York, New Jersey, Wisconsin, Iowa and Indiana. These provide that the dealer will purchase frozen products exclusively from Borden during the term of the agreement. The range of the duration of the term of such agreements does not appear in the record. While requiring the exclusive handling of Borden products during the term of the agreement,

some of the forms (including those used in New York, New Jersey, and Indiana) permit termination of the arrangement by prepayment of the balance due.

In addition to the agreements used in connection with the sale of equipment in the states above mentioned, there are also in evidence agreements used in Florida and California, which contain no provision for the exclusive purchase or storage of Borden products. There is no evidence in the record with respect to whether agreements used in connection with the sale of equipment in the many other states in which Borden does business, other than those referred to above, contain exclusive dealing provisions.

(3) *Beatrice*. The record contains evidence of two forms of loan agreement used in New York City and two executed agreements used in Evanston, Illinois, all of which contain exclusive dealing clauses. One of the New York forms provides that the dealer will purchase his ice cream requirements exclusively from Beatrice for a specified period, while the other provides for exclusive purchase during the period of repayment of the loan. However, there is also in evidence a third form of agreement used in New York which contains no exclusive dealing clause, but merely provides that the dealer will purchase ice cream manufactured by Beatrice (the amount required to be purchased being unspecified), until the loan is repaid.¹⁴ Of the two Evanston agreements, one is for a definite two-year term, while the other requires exclusive purchase of Beatrice's ice cream for two years or until the loan is repaid. There is no indication in the record as to whether loan agreements used by Beatrice in other parts of the country contain exclusive dealing provisions.

While some of the loan agreements discussed above contain exclusive dealing provisions, there is no evidence that any of the agreements used by Beatrice in connection with the sale of equipment contains such a requirement. There are three forms of conditional sales agreement in evidence which are used in Muncie, Indiana; Galesburg, Illinois; and Great Falls, Montana, none of which contains any exclusive provisions. While an earlier form of agreement used in Montana did contain such a provision, it has not been used since 1947.

(4) *National*. The record discloses that some of respondent National's divisions use agreements in connection with the making of

¹⁴ Of 24 loan transactions in the New York area, five involved the use of the third form, which does not require the exclusive purchase of Beatrice products. It may also be noted that the period provided for repayment of the loans was one year in the case of 11 of the loans, 18 months in five instances, two years in 7 instances and three years in only a single transaction. It is also of interest that the majority of the transactions involved the acquisition of accounts from a respondent competitor, mainly from respondent National.

loans which contain exclusive dealing provisions. Evidence of such agreements involves the Breyer Division in New York City and Philadelphia,¹⁵ Consolidated Dairy Products Division also in the New York area, General Ice Cream Division in Upstate New York and New England, Clover Farm Dairy Division in Mississippi and Tennessee, and Detroit Creamery Division in Michigan. Some of these agreements require the dealer to purchase his exclusive requirements of frozen products only until the loan is repaid and some provide for purchase for a specific period. The terms of the agreements vary from a period of months to as long as five years. Outside of the agreements used in the above-mentioned areas, there is no evidence as to what types of loan agreement are used in the rest of respondent National's far-flung operations.

There is also in evidence a series of forms of conditional sales contract used by various divisions of respondent National in connection with the sale of equipment in New York, the New England States, Iowa, Nebraska, Wisconsin, Illinois, Tennessee, Arkansas, Michigan, Missouri and Kansas. These agreements all contain a provision requiring the exclusive purchase by the dealer of the products of respondent National or its divisions. The duration of such requirement varies. In some instances the requirement is to remain in effect until the equipment purchased has been paid for. In others the duration of the agreement is for a specific period of time or until the payment of the purchase price has been completed, whichever event occurs later. Others provide for a fixed term or until a specified amount of ice cream has been purchased, "whichever period is longer." The fixed term referred to in these forms varies from one year to five years. It does not appear whether agreements containing similar provisions are used in any of the other states where National does business.

(5) *Arden*. The only documentary evidence reflecting the type of agreement used by this respondent in the making of loans is three actual agreements with dealers in Portland, Oregon, and one with a dealer in Battleground, Washington. All four agreements provide that the dealer will purchase his entire requirements of ice cream from Arden during the term of the agreement, which term is specified to be until the loan is fully repaid but not in excess of a specified period of time. There is no evidence as to the provisions of loan agreements used by respondent Arden in any other area in which it does business, including those where evidence was offered against it such as Seattle,

¹⁵ The record also contains such an agreement involving the Breyer Division in Washington, D.C. However, the use of this agreement was abandoned in 1953.

Washington; Houston, Texas; Phoenix, Arizona; and Washington, D.C.

There are two forms of agreement in evidence used by respondent Arden in connection with the sale of equipment under conditional sales contract. One is a blank form of agreement used in Arizona and the other is an executed conditional sales agreement entered into with a dealer in Bellingham, Washington. Neither agreement contains any provision requiring the exclusive purchase of Arden products or the exclusive storage of such products in the equipment purchased.

(6) *Foremost*. The record contains documentary evidence with respect to only two loan transactions involving respondent Foremost. The first of these is an agreement entered into in connection with the making of a loan to a dealer in New York City in November 1952, and provides that during the term thereof the dealer will purchase from Foremost all the ice cream products sold by him. There is nothing in the record to indicate whether this executed agreement is typical of other agreements used by respondent Foremost in the New York area or elsewhere, in connection with the making of loans. The other documentary evidence involves a loan transaction with a dealer in Texas and consists of a promissory note and chattel mortgage, neither of which contain any provision that the dealer will purchase his ice cream requirements exclusively from Foremost, or any other provision of an exclusive nature. There is no evidence in the record concerning the type of agreement used elsewhere in the United States by respondent Foremost, in connection with the making of money loans to customers.

The record does contain several conditional sales agreements used by respondent Foremost in connection with the sale of facilities or other equipment on a time-payment basis. Those used in the Florida area do include a provision that the dealer will purchase all of his requirements of frozen products from Foremost until such time as the conditional sales contract is completed by payment of the purchase price of the equipment. However, several other agreements which are in evidence, involving the sale of equipment in the Houston and Dallas areas, contain no provision with respect to exclusive purchase or exclusive storage of Foremost products.

(7) *Pet*. While there are several agreements in evidence involving the making of loans by respondent Pet, none of them contains any requirement that the dealer will purchase exclusively from that company. There are also several forms of agreement in evidence involving the sale of equipment on a time-payment basis but, with one exception, none of these contains any requirement as to the exclusive

purchase or storage of Pet products. The one exception involves a form which was discontinued in 1952 and was used only in Pet's Wisconsin operation, which was sold in 1954.

(8) *Fairmont*. There are no agreements in evidence involving the making of money loans by respondent Fairmont, and there is no basis for any finding that this respondent requires the dealers to whom it makes loans to purchase their ice cream requirements exclusively from that company. The record does contain several forms of conditional sales agreement in evidence which are used in connection with the sale of equipment by Fairmont on a time-payment basis. One is a form used in Nebraska, Illinois, Michigan, and Wisconsin, and the other is a form used in Ohio and Texas. Neither form contains any provision obligating the dealer to purchase his ice cream requirements exclusively from Fairmont. However, both forms require that the equipment sold be used solely for the storage of Fairmont products purchased from that company. While the agreements are for a term of three years, it has been stipulated that the above provision with respect to storage of Fairmont products in the equipment was never enforced after the purchase price had been paid in full.

(9) *Hood*. The only agreement involving respondent Hood in evidence is a so-called "Trade Agreement", which provides that respondent Hood will loan the dealer \$2,500 with the understanding that if the dealer is purchasing its entire requirements of dairy products from the company on the due date of any of the annual payments required thereunder, he will be excused from such payment and the principal sum will be reduced proportionately. While the record establishes that this agreement is typical of other "Trade Agreements" entered into by the company, it does not appear what forms of agreement are used in connection with ordinary money loans or in the sale of equipment on a time-payment basis.¹⁶ Accordingly no finding can be made as to whether the latter forms of agreement contain any exclusive provisions.

(b) *Practical Operation*. The foregoing indicates that there is considerable variance in the forms of agreement used by respondents, insofar as exclusive dealing provisions are concerned. In the case of some of the respondents the evidence fails to disclose that they use such provisions at all. Some of the respondents use such provisions in connection with loans of money, but not in connection with the sale of equipment. In the case of some respondents the reverse is the case. While some respondents make use of agreements containing such

¹⁶ The record discloses that financial assistance through the use of trade agreements constitutes only 13.2 per cent of the entire amount of financial assistance by Hood in 1955.

clauses in some areas, there is no evidence that they use them in many other areas where they do business. There are also wide differences in the terms of such agreements, both among respondents and among the different plants or divisions of particular respondents. In some instances such arrangements can be terminated forthwith by repayment of any balance due, while in others the agreement continues for a theoretically fixed period despite repayment.

In actual practice, however, the inclusion or non-inclusion of such clauses appears to have little practical effect on dealer-supplier relationships. The relationship between dealers and those respondents who have entered into exclusive arrangements does not appear to differ significantly from that existing between dealers and other, or the same, respondents where such agreements have not been used. Likewise the relationship between respondents and their financially-assisted dealers does not appear to differ from that existing between dealers and non-respondent ice cream manufacturers generally, a number of whom also make use of exclusive dealing agreements.

The record discloses that dealers will split their frozen products business, despite the receipt of financial assistance from one of their suppliers and despite a contract requiring the exclusive purchase of the products of that supplier. It also appears that dealers will switch from a supplier despite the rendering of financial assistance by that supplier, even though there may be an unexpired contract requiring them to purchase the supplier's products for a given period of time. While it is the usual practice for dealers to pay off the balance of any outstanding financial commitment to a supplier before switching, this does not appear to raise any significant barrier to the switching of dealers. In most cases there are a number of other suppliers in the market ready, willing and eager to assume the balance of any outstanding amount due the former supplier and to arrange for the dealer to make payments to the new supplier or, in some instances, the dealers themselves will pay off the outstanding balance at the time of switching to a new supplier. The record discloses that losses from the furnishing of financial assistance to dealers are negligible. In fact since interest at current rates is now generally charged, the furnishing of such assistance has its profitable aspects.

Although the complaints challenge the practice primarily because of the exclusive dealing aspect thereof, there was almost no reference to the latter feature in the testimony of competitor witnesses. To the extent that competitors were critical of the practice, their criticism was directed at the practice as such, particularly at the expense attendant thereon, rather than at the fact that it involved exclusive

dealing. This likewise appears to be the position of counsel supporting the complaint, whose criticism of the complaint practices is based on the fact that they result in "very expensive competition" to the smaller companies.

The position of counsel supporting the complaint with respect to the exclusive dealing issue is that irrespective of any formal understanding as to exclusive dealing, the very act of financing a dealer results in "captivating" the account. This argument is apparently based on the single-dealing tradition which prevails in the industry and the sense of obligation which financial assistance allegedly instills in the dealer. In the opinion of the examiner any argument based on the single-dealing tradition in the industry is largely self-defeating. To the extent that a dealer, because of space limitations or custom, normally handles the products of only a single manufacturer any agreement which requires him to do what he is already doing is so much surplusage. This self-evident fact was taken note of in the testimony of a Portland manufacturer who indicated that he didn't usually require dealers to whom he sold equipment to handle his products exclusively since most dealers in the area normally handled only a single supplier's products. Moreover, he expressed the opinion that such agreements had little value anyway since "any time they want to pay us up in full they can pay us in full and kick us out."

The argument based on the dealer's sense of "moral obligation" toward the manufacturer likewise has little merit, insofar as establishing that the furnishing of financial assistance to a dealer necessarily tends to tie up the account on an exclusive basis. Counsel supporting the complaint cites in his brief the testimony of a Knoxville dealer (which appears only in the Pet record), to the effect he felt a sense of "obligation" toward Pet because of a loan which it gave him. However, the testimony of the same witness, as well as that of other dealers called by counsel supporting the complaint, indicates that any sense of obligation which stems from financial assistance received by the dealer is a slender reed upon which to rest a dealer-supplier relationship. Continuance of such relationships, as has been heretofore indicated in the discussion of cabinets, rests on the dealer's total satisfaction with the supplier's product, price and service. Should dissatisfaction arise for any reason, the fact that the dealer has received financial assistance has little effect, so far as appears from the record, in holding him. It is noteworthy, in this connection, that despite the loan from Pet, the dealer to whom

counsel makes reference later took on respondent National's ice cream in response to consumer demand.

The ephemeral and mercurial nature of dealer-supplier relationships is amply demonstrated by the following examples of dealers who switched away from respondent or split their business, despite the receipt of financial assistance and, in some instances, despite unexpired exclusive agreements:

(1) The operator of a drug store in Charlotte, North Carolina, switched to a local North Carolina company from respondent National when he became disappointed at the rebates he had received from the latter, despite the fact that there was an unexpired exclusive dealing agreement in effect at the time. The agreement provided that the dealer would buy all of his dairy requirements from National until payment of the purchase price of a soda fountain sold to him by National or "until the specified due date of the last installment of said purchase price, whichever is later." The dealer himself paid off the balance due and switched despite the fact that some time remained before the "due date of the last installment." It is noteworthy that the dealer in question, like a number of other dealers who testified, was not even aware that the agreement he had signed called for the exclusive handling of National's products for a specified period, and completely ignored this provision.

(2) The operator of a grill and soda shop in Winston-Salem, North Carolina, switched from respondent National to the same local North Carolina company mentioned above, despite an unexpired loan agreement with National. The new supplier enabled the dealer to pay off the balance of the National loan and even loaned the dealer an additional amount.

(3) Of 14 dealer witnesses called by counsel supporting the complaint in New York City who had received loans from a respondent, at least five later switched to another supplier despite an outstanding balance on the loan. In four instances the new supplier enabled the dealer to pay off the balance (even increasing it in one case) and in the fifth, the dealer himself paid off the balance. Since the respondents involved in these transactions were National and Borden, and since the record discloses that both use exclusive dealing agreements in connection with the making of loans in the New York area, it seems probable that the switches above discussed occurred despite the fact that such agreements had been entered into by the dealers.

(4) The owner of a drug store in Pittsburgh who had switched to respondent National after receiving a loan from it, switched back

to his former local supplier within six months thereafter, despite the fact that a substantial balance remained on the loan, because customers in the area favored the other brand. The local supplier enabled the dealer to pay off the balance of the National loan and even loaned the dealer an additional amount.

(5) A dealer in Evanston, Illinois, who had switched to respondent Beatrice from a local supplier because the latter refused to manufacture ice cream for him under a private label and who had obtained a loan from Beatrice (most of which was used to pay off the balance of a loan from the local supplier), switched back to the local supplier within a year, despite an outstanding exclusive dealing agreement requiring the purchase of Beatrice products for two years. The switch occurred because of dissatisfaction with Beatrice's ice cream and the dealer had no difficulty in obtaining a loan from the local supplier to enable him to pay off the balance due to Beatrice, the other supplier even increasing the amount thereof.

(6) The above all involve instances of dealers, who had been financially assisted by a respondent, switching to another supplier despite the fact that there was still a balance owing and, in many instances, despite an unexpired contract. There are likewise a number of instances of dealers splitting, despite the receipt of financial assistance from a respondent. One has already been referred to above, involving a dealer in Knoxville who added National's ice cream in response to customer demand, despite a loan from Pet. The largest loan made by Arden in Seattle was to an account which was split among three suppliers. The largest loan (a guaranteed loan) made by Arden's subsidiary in Houston likewise was made to a split account. Respondent Beatrice made a loan to a dealer in Evanston who was splitting his business between National and another supplier. Beatrice replaced National as a supplier in this instance, but the dealer continued to deal with his second supplier despite an exclusive dealing provision in the loan agreement with Beatrice. In the Florida area a dealer for whom National had financed a soda fountain continued to buy a portion of his requirements from another supplier.

The record does not contain a single instance where a respondent has sought to hold a dealer to an agreement, made in connection with the rendering of financial assistance, which required the dealer to handle the respondent's products exclusively or otherwise for any particular period of time. So far as appears from the record respondents have permitted such dealers to terminate the relationship with them or to split their business with another supplier without bringing any legal pressure to bear. The sole incident in the record of anyone seek-

ing to hold a dealer to such an agreement involves a nonrespondent competitor witness in Philadelphia, who threatened to bring suit in order to prevent a dealer to whom he had made a loan from switching to a respondent.

The lack of captivation resulting from financing, which the above-cited examples of individual accounts suggest, is confirmed by statistical information of a somewhat more extensive nature which appears in the record. Thus, the National Analysts' survey of dealers who had received financial assistance from respondents during 1954 and 1955 discloses that 38.1 per cent of the dealers involved had been lost or split by 1955, and 55 per cent were still operating and handling the same brand, while 6.9 per cent could not be interviewed. This accords with a separate analysis of the dealers of respondent National's Breyer Division, which discloses that of 223 dealers who had received financial assistance in 1954, 37.2 per cent had been lost by April 1957, and out of 319 dealers similarly assisted in 1955, 25 per cent had been lost by April 1957. A similar pattern appears with respect to a group of 42 dealers of National's Southern Dairies Division in Florida who had received financial assistance in 1955. By early 1957, 30.95 per cent of these accounts had been lost. These figures indicate a substantial loss-rate among financially assisted accounts. What is even more significant, however, is the fact that according to the uncontradicted and credited testimony of officials of Beatrice, Borden and National, the loss-rate among financially assisted accounts is no lower than that which exists among non-assisted accounts.

It seems evident from the foregoing that the furnishing of financial assistance to dealers, with or without any understanding as to exclusive dealing, does not result in the tying up, holding or "captivating" of accounts to any significant degree.

9. Based on the foregoing, and the evidence as a whole, it is concluded and found that:

(a) The record fails to establish by a preponderance of the reliable probative and substantial evidence that any of the respondents has attempted to induce or has induced retail dealers, to any significant extent, to handle, store and sell such respondent's products, exclusively or otherwise, by making loans of money, guaranteeing loans by others, or supplying or selling equipment on a time-payment basis or otherwise.

(b) While respondents do loan money to customers or guarantee loans, and do supply or sell them equipment on a time-payment basis and otherwise, their practices in this regard are in accordance with long-established industry practices. Such assistance is rendered pri-

marily as a service to dealers to enable them to increase and expand their sales of frozen products. The evidence fails to establish that any of the respondents has used the furnishing of such assistance, to any substantial extent, as a competitive weapon in order to induce retailers to deal or continue dealing with them or that the offering thereof operates, to any significant extent, as a substantial inducing factor in the dealer's choice of a supplier.

(c) While some of the respondents have to some extent, as hereinabove more specifically set forth, utilized agreements containing provisions which purport to require the exclusive use of the particular respondent's products until repayment of a financial obligation or for a definite period, such agreements in practice have no significant effect in the retention of dealer accounts on an exclusive basis or otherwise, and do not prevent the switching or splitting of accounts. So far as appears from the record, such agreements are not enforced by respondents and there is no practical difference between the mobility of such accounts and that of accounts which have not entered into such agreements. The record also fails to establish that, aside from such agreements, the furnishing of financial assistance, as such, to dealers results in or is likely to result in the exclusive handling or storing of respondents' products. So far as appears from the record the furnishing of such assistance has no significant effect in preventing the switching or splitting of dealer accounts.

(d) The evidence fails to establish that respondents' practices in rendering financial assistance to dealers, in the form of loans, equipment or otherwise, have resulted in injury to competition in any relevant market area or that there is any reasonable probability of such injury.

3. "Services of Value"

1. The complaints allege that respondents have performed or furnished "services of value for and to retail dealers", citing as examples of such services, "repainting of the interior of a dealer's * * * establishment, servicing facilities or soda fountain equipment, and supplying signs and advertisements." Such practices are alleged to be illegal, (a) when done with the understanding that the dealer will handle only the frozen products of respondent involved, (b) when done without receiving any direct profit and (c) when simply done. Counsel supporting the complaint characterizes the practices included under these allegations of the complaint as "Miscellaneous inducements" and cites, in addition to those services specifically alleged in the complaint, the following: Supplying "unwarranted" cabinets and compressors for refrigeration equipment, supplying cabinets for the

storage of frozen foods other than dairy products, black-topping drive-ways, supplying napkins and menus, granting advertising allowances and purchasing obsolete equipment from dealers at abnormally high prices.

2. Under the rule of *ejusdem generis*, most of the additional items referred to by counsel supporting the complaint can hardly be characterized as the performing or furnishing of "services of value for and to dealers", within the meaning of the complaints. For example, the supplying of "unwarranted" cabinets, compressors, or cabinets for frozen foods would appear to be properly challengeable, if at all, under the allegations having to do with the leasing, loaning or sale of facilities or other equipment. These matters have already been largely discussed above. However, brief consideration will be given to them at this point.

In connection with the challenge to the supplying of "unwarranted cabinets", it is not clear from counsel's argument whether he intends to concede that the supplying of "warranted" cabinets, i.e., cabinets which are genuinely needed for the storage and sale of frozen products of the manufacturer is a proper function for an ice cream manufacturer. If so, those allegations of the complaint having to do with the supplying of facilities would fall, unless they can be interpreted as being limited to supplying excessive equipment. Aside from whether counsel intends to make such a concession or not, it is not clear from his argument at what point he contends that the supplying of cabinets becomes "unwarranted" or excessive. As previously noted in connection with the discussion of the subject of supplying cabinets, there is a complete failure of proof with respect to definitive and recognized standards in the industry, against which it can be determined whether the supplying of any given number or size of cabinets is unwarranted or excessive. There is not a scintilla of evidence in the record to support counsel's ipse dixit that "10% of the cabinets placed with dealers by respondents [is] unwarranted." In fact, there is no reliable evidence in the record that any of the respondents has supplied any cabinets to dealers which, in terms of the size and potential of the account and the delivery pattern of the manufacturer, can be considered to be "unwarranted."

It may be that the reference to "unwarranted" cabinets is intended to be to the alleged practice of supplying cabinets which are used for storing non-dairy frozen products. This practice was referred to by some of the competitor witnesses in a few areas. In most instances, it did not involve the actual supplying of cabinets for frozen foods, but rather the practice of permitting dealers to place some frozen

foods in the ice cream cabinets. Some of the complaints involved old ice cream cabinets which are sometimes used for the storage of excess quantities of ice cream. Such cabinets are supplied primarily for the convenience of the ice cream manufacturer in order to obviate the need for extra deliveries on week-ends or during other periods of peak demand. From time to time dealers may use a portion of such storage cabinets, and sometimes even the regular display cabinets, to store frozen vegetables, juices, meats or other non-dairy foods, even though they may not have the permission of their supplier. Ice cream manufacturers generally, including respondents, seek to discourage dealers from doing this since the storage of other foods may give the ice cream an unpleasant odor. However, it is a situation which is difficult to police, as a number of the competitor witnesses conceded, and requires the use of the utmost tact on the part of the manufacturer lest he lose the account. While it is a somewhat annoying practice, it does not appear to constitute a major problem in the industry.

The record fails to establish that any of the respondents has, to any substantial extent and as an aggressive competitive practice, permitted dealers to store other frozen foods in the ice cream cabinet supplied by them or supplied a separate cabinet for frozen foods. Most of the testimony of competitor witnesses who referred to the subject was of a general complaining nature, like that above discussed in connection with cabinets, and was not directed specifically at the practices of respondents. To the extent that there was any reference to the respondents the testimony was, for the most part based on hearsay or on conclusion or surmise, and failed to establish that any of the respondents had supplied a cabinet with the understanding, express or implied, that it could be used for the storage of other frozen products.

The testimony of dealer witnesses does disclose three instances of the supplying of cabinets for the storage of frozen foods, involving two of the respondents, but these were obviously defensive in nature or appear to be atypical. Two of the instances involved respondent Arden's subsidiary in Houston, which supplied an additional old storage cabinet to two dealers for use in storing frozen foods, but in both instances the cabinets merely replaced similar cabinets which had previously been supplied to the dealers by two local manufacturers, from whom the dealers had switched for other reasons. The third instance involves an existing account of Foremost in Miami to whom that respondent supplied an old storage box during an emergency to prevent the spoilage of some frozen foods, but the box was also used to store other Foremost dairy products.

To the extent that the supplying of cabinets for the storage of frozen foods other than frozen dairy products may constitute a problem in the ice cream industry, the record fails to establish that any of the respondents has either initiated the practice or has used it, to any substantial extent, in the acquisition or retention of dealer accounts. It may be noted, in this connection, that in the National Analysts' survey only 0.2 per cent of all the dealer-brand combinations involved and only 0.3 per cent of respondent-dealer brands referred to the supplying of cabinets which could be used for the storage of other products, as a reason for dealing with their supplier. The evidence also fails to establish that the use of such practice by respondents has involved any understanding as to exclusive dealing or that it has resulted in competitive injury.

Counsel's reference to the supplying of compressors to dealers apparently is to the practice of ice cream manufacturers of supplying a compressor to operate a soda fountain or other refrigeration equipment, used primarily for the storage of dairy products. There was almost no reference to this practice in the testimony of competitor witnesses as constituting a significant competitive problem. It was referred to by only a single dealer witness in New York, who testified that respondent National had loaned him several compressors to operate some soda fountains, but that they merely replaced similar equipment which had previously been supplied by a local ice cream manufacturer and that the supplying thereof was in accordance with the prevailing practice of manufacturers in the New York area. The record fails to establish that the supplying of compressors represents a significant competitive problem, that it is used by respondents to induce dealers to handle their products, exclusively or otherwise, or that it has had or is likely to have any substantial adverse competitive effect.

The reference to "black-topping driveways" and to the supplying of napkins and menus, by counsel supporting the complaint, is apparently based on the casual reference to the former practice by a single witness from Louisville and to the latter practice by a witness from the Philadelphia suburban area. In each instance the witness mentioned the practice as being among a number of practices utilized in the area but made no effort to attribute either of the practices to any of the respondents, either generally or in connection with any specific competitive situation. There is not a scintilla of evidence that any of respondents has utilized the practices or that the practices constitute a serious competitive problem.

Counsel's reference to the granting of advertising allowances is based on the alleged granting of such an allowance by respondent Beatrice to a dealer in Washington, D.C., "with no supervision over how the advertising allowances were spent." The testimony of the dealer in question indicates that he received the allowance in lieu of the benefit he had been receiving from the radio and television advertising program of his former supplier, since Beatrice did not have such a program in the area. There is no evidence in the record to indicate that this practice is engaged in by respondents on any substantial scale or to indicate any adverse effect on competition. The competitor who lost the account in question is a very substantial operator in the Washington area and, although present during the hearings, was not called to testify by counsel supporting the complaint.

The final so-called "miscellaneous inducement" referred to by counsel, which does not fall within the scope of the complaints, involves the alleged purchasing of obsolete equipment. The incident cited by counsel is based on the hearsay testimony of a competitor witness as to the alleged purchase of such equipment from a dealer by respondent Carnation. There is a complete failure of proof that (a) Carnation did purchase the equipment, (b) that the price it paid was disproportionate to the value of the equipment or (c) that the purchase thereof acted as an inducement for the dealer to handle Carnation's products. Moreover, if the incident did occur, there is nothing to indicate that it is anything but an isolated transaction having no competitive impact.

3. The only practices falling within the scope of the allegations of the complaint dealing with the performing or furnishing of "services of value", as to which there was any significant reference by competitor witnesses, are the supplying of signs and the servicing of facilities and other equipment. Turning first to the practice of supplying signs, the record discloses that a number of the respondents do supply signs to the dealers handling their products, as do ice cream manufacturers generally. Such signs vary from small wooden, metal or plastic signs, to more elaborate neon or other illuminated signs. In most instances two-thirds of the sign is devoted to the name and brand of the ice cream manufacturer, and a panel about one-third of the size of the sign (which is referred to in the industry as a "privilege panel") contains the dealer's name or the nature of his business (e.g., "Grocery," "Drugs," etc.). The signs are generally hung outside the dealer's premises, but sometimes are displayed in his window. Most of these signs are stock signs running in cost from about \$30.00 to \$100.00. However, some of the larger neon signs range to \$200 and

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\$300. In some instances, special signs are supplied to meet the needs of specific dealers. However, in many of such instances the dealer is required to pay for a portion of the cost of such special signs. In almost all cases the dealer is required to pay for the cost of electricity used in the lighted signs. Most manufacturers also supply a variety of indoor display materials which primarily advertise their products.

There is no substantial evidence in the record that respondents have used signs as an inducement to dealers to purchase their products, or that the furnishing thereof by respondents constitutes a significant competitive problem. So far as appears from the record, respondents' practices in supplying signs to dealers do not differ materially from those of their competitors generally. Respondents advertise their products extensively through various media of mass communications, such as newspapers, radio and television. The supplying of signs to dealers is merely an extension of this advertising program. Having created a demand for their products by mass advertising, the respondents seek to inform the public as to the specific locations where their products may be purchased. This they are able to do by placing a sign outside of the dealer's establishment or in his window. Occasionally the sign may be painted on one of the exterior walls of the dealer's premises.

Counsel supporting the complaint appears to recognize the advertising value of placing signs, which advertise a manufacturer's product, in front of or near the dealer's premises. While the complaint appears to attack the furnishing of signs and advertising material broadly, the attack of counsel supporting the complaint in his proposed findings is limited to the supplying of signs "in excess of those recognized as justifiable for advertising purposes." Counsel singles out particularly the supplying of privilege panels on signs and contributing to the cost of more expensive signs. The record fails, however, to establish that any of the respondents has supplied signs "in excess of those recognized as justifiable for advertising purposes."

The supplying of a privilege panel containing the dealer's name is a practice which can be amply justified. It is the dealer's *quid pro quo* for allowing the ice cream manufacturer to place a sign on the dealer's premises, the greater part of which is devoted to advertising the name and brand of the manufacturer. Were the manufacturer to place an equivalent sign on the public highway or to advertise on billboards the monthly advertising rates therefor would be substantial. The dealer charges the manufacturer nothing for the space used to advertise the manufacturer's product. The dealer also pays

for the electricity consumed in the lighted signs. Giving the dealer a small privilege panel on the sign, containing his name or type of establishment, is a small price for the manufacturer to pay in return for the advertising value he receives from the sign. The few instances in the record of the supplying of special signs involved dealers situated on a national highway or in another strategic location where the increased advertising benefit to the manufacturer more than offset any additional expense that might have been involved.

There is relatively little evidence in the record critical of the practice of supplying signs to dealers. Most of the witnesses who referred to the practice of supplying signs did so in terms of approval, including the practice of furnishing privilege panels. In the few instances where competitors were critical of the practice, it was more on the basis of the alleged supplying of an excessive number of signs or of larger signs than they considered necessary being supplied. However, there is no reliable evidence that any of the respondents has engaged in or been responsible for the supplying of excessive signs.

Of the witnesses whose testimony counsel supporting the complaint cites, not a single one ascribed to a respondent any competitive difficulty due to the furnishing of signs. The manufacturer from Sac City, Iowa, whose testimony is cited, spoke of the practice as being of value to both the manufacturer and the dealer from an advertising standpoint, and indicated that it was unobjectionable so long as dealer demands were not excessive. The witness made no claim that any of the respondents was furnishing signs which he considered excessive, or that he had lost or been unable to acquire any accounts because of the furnishing of such signs by any respondent. The testimony of the manufacturer from the Eastern Shore of Maryland, cited by counsel, while more critical of the practice of supplying signs, was directed mainly at a large nonrespondent company and the witness made no claim to having lost any accounts to any of the respondents because of it. The manufacturer from western North Carolina whose testimony is cited, while also critical of the practice, could not name a single account where it had been involved in competition with any respondent. A witness from High Point, which is located in the same area, had no criticism of the basic practice, but indicated that the supplying of the more expensive neon signs recently was a troublesome innovation. However, he ascribed the initiation of this trend to a large North Carolina company and made no claim that any of the respondents had used it as an aggressive competitive weapon.

The record is wholly deficient, insofar as establishing that respondents have either initiated the practice of supplying signs or have used

it to any substantial extent as an inducement in the acquisition or retention of dealer accounts. The limited role played by signs in the choice of a supplier is indicated by the results of the National Analysts' survey in which 0.7 percent of the brand mentions referred to the furnishing of signs and displays as a reason for dealing with a respondent. This compares with a response of 0.9 percent of dealers handling the products of other manufacturers. Since these results are based on the supplying of relatively inexpensive display materials as well as signs, it seems probable that the above percentages would be even lower if based solely on signs.

4. Another "service of value" about which some reference was made is the servicing of equipment. It is the general practice for most ice cream manufacturers to service the ice cream cabinets and other refrigeration equipment furnished to dealers for the storage and sale of the manufacturer's products. There was very little complaint about this practice, except by those few manufacturers who complained about the basic practice of supplying cabinets and any expense attendant thereon. Most of the witnesses who referred to the subject were in agreement that if the manufacturer supplied a cabinet it was also desirable for him to maintain the cabinet in good running order. In fact, if he failed to do so, the basic purpose of supplying a cabinet (viz., to assure the product reaching the public in the same palatable form in which it was delivered to the dealer) would be frustrated.

Counsel supporting the complaint has apparently abandoned any attack on the servicing of manufacturer-owned ice cream equipment and has limited himself to the alleged practice of servicing dealer-owned equipment, including soda fountains, ice cream cabinets, meat cases and other refrigeration equipment owned by the dealer himself. Such testimony as there is on this subject involves a few witnesses in the Virginia-Carolina area who claimed that some manufacturers, in addition to servicing their own equipment, also serviced dealer-owned equipment without making any charge therefor. The testimony of these witnesses was of a general nature and there is no reliable evidence that the practice has been involved in any competitive difficulties with the respondents. A manufacturer from Danville, Virginia, testified that the practice was engaged in generally in that area and, while claiming that Pet was more troublesome in this respect than other manufacturers, he could not name a single account where this had been involved as a competitive problem. A manufacturer from Fredericksburg, Virginia, who also referred to the practice, conceded that it involved a matter of "slight expense" and was "just an inconvenience," rather than a serious competitive problem. The only reliable evidence

in the record with respect to the servicing of dealer-owned equipment by a respondent involves Pet, and the testimony of the dealer in question (the operator of a restaurant in Charlotte, North Carolina) discloses that he had to pay for any parts which were involved and also for labor if the repairs were extensive. The dealer had been a customer of Pet for 22 years and there is no indication that he was induced to purchase from it because of this incidental service.

To the extent that Pet or any other respondent doing business in the area has performed any service on dealer-owned equipment it has involved an occasional situation where the manufacturer's service man was already on the dealer's premises making a regular call to service company-owned equipment and, as an accommodation to the dealer, might have made some minor adjustment on the dealer's own refrigeration equipment if the dealer requested it. However, where any substantial repairs or dealer-owned equipment have been involved, the manufacturer has usually charged for parts which were supplied and for the labor of the service man. The evidence fails to establish that any of the respondents, as a matter of regular routine, has serviced dealer-owned equipment free of charge where substantial repairs were involved, or that such servicing as has been performed constitutes a significant competitive problem.

5. Unlike the statistical evidence pertaining to respondents' expenditures for cabinets and financial assistance to dealers, that offered with respect to the various "services of value" falling within the allegations of the complaint discussed above is meager, both in terms of the total and relative amounts involved and with respect to the respondents for which such evidence is offered. Such evidence was offered only with respect to respondents Beatrice, Pet, Fairmont and Hood and indicates that the only expenditures of any consequence for miscellaneous services of value are for signs containing privilege panels.

Counsel supporting the complaint has chosen to ignore the actual figures offered by him with respect to these respondents and has proposed in lieu thereof certain computed figures for all nine respondents. Compounded of a phantasmagorical combination of unfounded assumptions, estimates and sheer guesswork, the figures proposed do not have the remotest resemblance to anything in the record.¹⁷

¹⁷ Counsel's figures include estimates on "unwarranted" cabinets, compressors and frozen food cabinets. Aside from the propriety of including these items under the category of "services of value", the figures are based on the unfounded assumption that 10 per cent of cabinets supplied are "unwarranted." Furthermore, figures on these types of equipment are to a large extent already included under the figures for facilities and other equipment. Counsel's figures are based, in addition, on a series of estimates and

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The absurdity of the figures suggested by counsel supporting the complaint may be observed by a comparison with some of the actual figures which appear in the record. The evidence discloses that in a five-market area stipulated to be typical, respondent Beatrice in 1955 supplied signs with privilege panels to 23 accounts and some used cabinets for frozen foods to three accounts, out of a total of 8,579 customers in the area. These accounts had a gallonage of 31,300 gallons out of a total gallonage of 5,969,000 gallons sold in the area. Translating this to a national basis it would mean that in 1955 Beatrice had rendered miscellaneous services of value to 143 customers (compared to 4,693 suggested in the computations of counsel supporting the complaint), with the value of the services amounting to \$41,729 (as compared with counsel's proposed figure of \$1,674,650) and involving a gallonage of 185,984 (not 3,549,300 as proposed by counsel). On the basis of the actual figures it appears that 0.3 per cent of Beatrice's accounts in 1955 received assistance by the furnishing of miscellaneous services of value and that these accounts represented 0.5 per cent of that respondent's total gallonage.

The figures for respondent Pet disclose that in 1955 it furnished signs with privilege panels to 138 accounts at a total cost of \$23,569. The accounts so assisted represented approximately one per cent of the accounts served by that respondent. The figures for respondent Fairmont indicate that its total investment in signs of all types in a representative five-market area during 1955 amounted to \$10,185, such signs being supplied to 53 accounts. The accounts receiving such assistance had a total of 76,825 gallons, which represented approximately 5 per cent of the total gallonage of all Fairmont accounts in the area.¹⁸ For respondent Hood, the record contains the limited information that during the fiscal year ending February 1, 1954, it supplied signs and display material for use on ice cream cabinets having a value of \$21,097. Its total sales during this period were \$17,620,654. There are no meaningful figures in the record disclosing the amounts expended by respondents National, Borden, Foremost, Arden or Carnation for signs or other forms of miscellaneous service.

guesses concerning costs of servicing equipment and supplying signs for which there is no record basis and are contrary to actual figures in the record. In the case of a number of the respondents there is no evidence that they supply any equipment or services falling in some of the categories referred to.

¹⁸ It is not possible to compute the percentage which the number of accounts receiving signs represents of the total number of accounts, since the record contains no information as to the number of accounts served in 1955, either in the five-market area or nationally.

6. The record contains almost no evidence that any of the respondents, in supplying signs or performing other miscellaneous services of value, does so on the understanding that the dealer will purchase the respondent's products exclusively, nor does the evidence establish that the supplying or performing thereof results in exclusive dealing. The only evidence indicative of any agreement of an exclusive nature involves respondent Borden, and consists of the form of agreement entitled "Loan of Equipment", which has been previously referred to as being used in connection with the supplying of cabinets in the Philadelphia area. The form contains an incidental reference to the supplying of "signs and advertising material" and provides that the dealer will purchase his ice cream from Borden "exclusively and to the extent of his requirements, during the term of the agreement." However, as indicated in connection with the discussion of such agreements under the heading "Cabinets", such provisions have very little practical effect. Whatever is there stated with respect to the splitting and switching of accounts which have received cabinets, applies equally to those which have received signs.

Another agreement in the record, which involves respondent Foremost, provides that it will supply a sign to a particular dealer "for the duration of [the] business association" between them and that if the dealer decides to change to another dairy company he will pay Foremost for the cost of the sign and the installation charge. The agreement does not, however, contain any provision for the exclusive purchase of Foremost products during the period of the dealer's association with Foremost. Since the sign was apparently one that was especially made up for the dealer and was not useable by Foremost if the dealer switched, the provision requiring the dealer to pay for the sign in that case appears not to be unreasonable. This is, moreover, the only such incident in the record. There is no evidence in the record that any of the other respondents has used any exclusive dealing agreements, even on a pro forma basis, in connection with the supplying of signs to dealers or the performance of other miscellaneous "services of value."

7. Based on the foregoing, and the evidence as a whole, it is concluded and found that:

(a) The record fails to establish by a preponderance of the reliable, probative and substantial evidence that any of the respondents has attempted to induce or has induced retail dealers, to any significant

extent, to handle, store and sell such respondent's products, exclusively or otherwise, by performing and furnishing services of value for and to retail dealers, including such services as repainting the interior of a dealer's establishment, servicing facilities or soda fountain equipment, supplying signs and advertisements, or any other services of value.

(b) While some of the respondents do perform or furnish some services of value for and to retail dealers, such as the supplying of signs or the servicing of facilities or equipment furnished to dealers by such respondents, such services of value are performed and furnished in accordance with long-established industry practice. The evidence fails to establish that any of the respondents originated such practice or has used it as a competitive weapon to obtain or retain dealer accounts, or that the furnishing thereof operates, to any significant extent, as an inducing factor in the dealer's choice of a supplier.

(c) The evidence fails to establish that any of the respondents has, to any substantial extent, entered into agreements or understandings with retail dealers in connection with the performing or furnishing of any of the services of value above discussed, which require such dealers to handle respondents' products exclusively or which, by their operation, tend to require the exclusive handling of respondents' products.

(d) The evidence fails to establish that the performing or furnishing of services of value by any of the respondents for retail dealers has resulted in competitive injury in any relevant market area or that there is any likelihood of such injury.

4. Discounts and Rebates.

1. The complaints contain two sets of allegations dealing with the subject of discounts and rebates. The first revolves about quantity discounts and the element of exclusive dealing. It is alleged, in this connection, (a) that respondents have granted discounts and rebates on the condition, agreement or understanding that the dealer will handle respondents' products "exclusively" and (b) that respondents have granted discounts or rebates which are sufficiently large to constitute an inducement to dealers to handle respondents' products exclusively (apparently without regard to whether there is any actual agreement as to exclusive dealing or not). The second series of allegations have to do with the granting of discounts and rebates to

dealers who own their own ice cream storage facilities. It is alleged, in this connection, that respondents grant rebates and discounts to such dealers on condition that they handle respondents' products exclusively and, in the alternative, that rebates and discounts are made to dealers owning their own facilities which are not paid or offered to competing dealers not owning their own facilities.

2. Turning briefly to the second of the above group of allegations, dealing with the granting of discounts to dealers who own their own facilities, it would appear that the attack on this practice has been abandoned by counsel supporting the complaint. There was almost no complaint concerning this practice in the testimony of witnesses and it is not referred to in the proposed findings and brief filed by counsel supporting the complaint. The record discloses that most ice cream manufacturers throughout the country grant a special "refrigeration allowance" or "iceless discount" to dealers who own their own equipment. This is in recognition of the fact that by owning their own cabinets they have relieved the manufacturer of a cost which he ordinarily bears, viz., supplying a cabinet to the dealer and servicing such cabinet. Such allowances or discounts are made as an incentive for dealers to own their own cabinets. It is difficult to understand how the complaints can, on the one hand, attack the supplying of cabinets by ice cream manufacturers as an undesirable practice, and at the same time also attack as undesirable a practice which seeks to encourage dealers to own their own equipment.

In any event, there is no evidence in the record that the granting of discounts to dealers for owning their own equipment constitutes a significant competitive problem in the industry. If anything, it constitutes a boon to the smaller manufacturers who prefer not to have to supply their dealers with cabinets. As indicated above, it is a practice which is almost universally followed by ice cream manufacturers. There is likewise no evidence that the granting of such discounts is conditioned in any way on the dealer's handling the granting manufacturer's products exclusively, nor does it appear that the limiting of such discounts to dealers who own their own equipment places the dealers who do not receive such discounts at a competitive disadvantage. The whole purpose of the discount is to equate dealers who have the added expense of paying for and servicing their own cabinets with dealers who have been relieved of such expense by their ice cream supplier.

3. Turning next to the subject of discounts and rebates which are either granted with an understanding as to exclusive dealing or which, because of the size thereof, allegedly result in exclusive dealing, it would appear that the attack based on these allegations of the complaint has been substantially modified by counsel supporting the complaint. Whereas the language of the complaints appears to be directed generally at quantity or volume discounts, or at what is referred to in the industry as "sliding scale" discounts, the attack made in counsel's brief and proposed findings is limited mainly to what counsel designates as "Off List Pricing." Very little reference is made to discounts and rebates which are given pursuant to respondents' published price lists and discount schedules. While copies of these were offered in evidence early in the proceedings, they were not utilized to any significant extent by counsel supporting the complaint. Instead counsel requested respondents to submit further information concerning their off-list prices, and placed considerable emphasis on this subject in the examination of witnesses and in argument. It is not clear whether counsel now concedes that discounts and rebates given in accordance with published schedules are not an unfair competitive practice. It is clear, however, that the gravamen of his attack is directed at the off-list feature thereof.

4. The argument of counsel supporting the complaint revolves in large measure about statistical data obtained from respondents indicating the number of accounts which received the benefit of off-list prices and the gallonage of such accounts, with illustrations of the size of the discounts granted to particular types of accounts. Counsel contends that these figures establish that "respondents sell from 20% to 40% of their gallonage off list." Counsel further contends that the illustrative price data supplied demonstrates that amounts of the off-list discounts are unusually large, with that of respondent National averaging 20 cents per gallonage and those of the other respondents being equally large. The record does not support counsel's conclusions with respect to the proportion of respondents' accounts which are granted off-list discounts nor with respect to the size of such discounts.

5. Set forth below is a table indicating the proportion of each respondent's total number of accounts which received the benefit of off-list prices in 1955, and the proportion of each respondent's total gallonage which was sold off list in that year.

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OFF LIST ACCOUNTS AND GALLONAGE—1955

	No. of off list accounts	Percentage of total accounts	Off list gal- lonage	Percentage of total gallage ¹
		<i>Percent</i>		<i>Percent</i>
National.....	5,469	5.7	12,253,258	14.2
Borden.....	5,300	7.3	12,577,000	22.2
Foremost.....	1,604	4.6	2,450,415	9.0
Beatrice ²	1,643	3.3	4,436,625	12.2
Arden.....	866	6.7	3,363,059	24.2
Carnation.....	912	6.9	2,542,879	15.2
Fairmont ³			958,078	7.7
Pet.....	None		None	
Hood.....	2,518	⁴ 25.2	2,927,000	32.3

¹ The percentages in this column are somewhat overstated, except for Beatrice, Carnation and Fairmont, since they are based on a comparison of off-list sales of all frozen products, with total gallonage figures which are limited to hard ice cream only. Except for the three respondents mentioned, the only total gallonage figures in the record are for hard ice cream. The extent by which the above percentages may be overstated is indicated by the fact that in the case of respondent Carnation (for which the record includes total figures of both hard ice cream and all frozen products), a comparison of off-list sales of all frozen products with total figures of hard ice cream would result in increasing the percentage figure of that respondent from 15.2 per cent to almost 25 per cent.

² The percentage figures for this respondent are based on actual figures for a representative five-market area. The total figures of accounts and gallonage are based on a projection of these actual figures.

³ The percentage figure for this respondent is based on the actual figures for a representative five-market area. The total gallonage figure is based on a projection of the actual figures. While it does appear that 55 accounts were granted off-list discounts in the five-market area, it is not possible to compute the total number or percentage of accounts involved since the record contains no total figures of the number of accounts served in either the five-market area or nationally.

⁴ The exact number of accounts served by respondent Hood does not appear in the record. The only information in the record is that it serves approximately 10,000 accounts. The above percentage is computed on the basis of a comparison with this approximate number of accounts.

6. The above figures do not bear out the contention of counsel supporting the complaint that respondents sell "20% to 40% of their gallonage off list." Only one of the respondents even remotely approaches the 40% figure and the next two in order of magnitude are only slightly in excess of the 20% minimum figure cited by counsel. While the balance (except for Pet which makes no off-list sales) are considerably below the 20% minimum figure, it must be recognized that in terms of the percentage of total gallonage sold off list, the amounts involved are not insubstantial. This, however, is a matter of limited significance since a true insight into the competitive impact of off-list selling cannot be gained from these single-dimensional figures. Such figures by themselves mean little unless there is taken into consideration the extent to which the prices are off list and, more importantly, unless the base or list prices, from which such deductions are made, are compared. For example, deviations from list averaging two or three cents per gallon and involving as many as 50 per cent of a manufacturer's accounts may have less of a competitive impact than deviations averaging 20 or 30 cents per gallon and involving only 15 per cent of a manufacturer's accounts. Similarly, a price deviation of 20 cents from a base price of \$1.85 a gallon may have little or no competitive

effect on another manufacturer whose base price is \$1.65, but who has a smaller percentage of discounts or none at all.

7. The record likewise fails to support the assertion of counsel supporting the complaint that the off-list prices range as high as 40 cents off list, in the case of National, or that the average of the off-list prices of that respondent is 20 cents a gallon. In fact, there is no record basis for computing the average of the off-list discounts granted by any of the respondents. What the record does contain are illustrations or examples of the amount of the off-list discounts granted to certain unnamed customers falling into each of the following three categories of customers, (a) "Voluntary Group", (b) "Chain" and (c) "Individual Account." There is nothing to indicate that the figures in the record are typical of each group or that they represent an average of the amount of the off-list discounts granted to customers in each of the three categories. There is no information in the record as to the range of the distribution of the discounts in each category or as to the number of customers within each category receiving discounts in a particular amount, or any other information which would serve as a basis for computing a meaningful average figure.

The record does disclose that respondent National did grant a 40-cent a gallon discount from a \$1.85 list price on bulk ice cream to a single unnamed account. However, this account was entitled to a 19-cent a gallon rebate under the published schedule, based on the volume used by the account, so that the amount which was off list in this instance was 21 cents rather than 40 cents. Moreover, the 21-cent discount only applied to its bulk ice cream purchases, the amount of the off-list discount on package ice cream varying from two cents to 15 cents a gallon. The account in question falls in the "Individual Account" category. The record also discloses that respondent National granted a special discount to an unnamed "Voluntary Group" of thirteen stores. All of the stores received the benefit of respondent National's maximum discount in the area of 5 per cent. During 1955, nine of the thirteen stores actually earned the maximum discount based on the volume of their purchases, while some of the balance earned 4 per cent and a few earned only 2 or 3 per cent. On the basis of the list price of approximately \$1.70 a gallon they all received approximately 8.5 cents a gallon rebate, whereas some would have been entitled to a discount of only 3.4 cents a gallon under the published schedule. In this instance, the maximum amount off list was approximately 5 cents a gallon, rather than 8.5 cents a gallon. The third example in the record involves a chain of stores served by several different branches of respondent National, which received dis-

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counts on package ice cream ranging, by area, as follows: 13-15 cents, 2-5 cents, 13 cents, and 11-25 cents. In this instance the so-called off-list prices actually involved giving these stores the benefit, on package ice cream, of the regular schedule discount applicable to bulk ice cream. The record discloses that this price arrangement was due, in part, to an offer made to the chain by a competitor.

For the other respondents, the record contains examples of the off-list discounts or rebates granted by them to certain unnamed accounts falling within the categories mentioned above, as follows:

	Voluntary group	Corporate chain	Individual account
	<i>Cents</i>	<i>Cents</i>	<i>Cents</i>
Borden.....	15 ³ / ₄ -17	18-28	11-13
Foremost.....	14	18	10
Beatrice.....	10	5-6	5
Arden.....	5-17.8	5-12	5-14
Carnation.....	5	5-18	4-15
Fairmont.....	15	1-7	4-10
Hood.....	12	6-15	8

It should be noted that in a number of the above instances the discount was granted on a limited portion of the dealer's purchases, such as on a secondary brand, and in a number of instances the concessions were granted wholly, or in part, to meet competitive offers of other ice cream manufacturers. In any event, the figures in the record have very limited significance since, as above noted, there is no indication of whether they are typical or represent an average of the off-list discounts granted by respondents. Moreover, the probable competitive impact cannot be determined without a definitive comparison of respondents' base prices with those of competitors, which is not possible to any considerable extent on the basis of the evidence in the record.

8. In addition to the statistical information discussed above, counsel supporting the complaint also relies on the testimony of a number of competitor witnesses who referred to competitive difficulties allegedly arising from the matter of price. As in the case of much of the testimony of such witnesses relating to other aspects of the complaint, that pertaining to the matter of price was of a rather general nature, involving broad references to pricing practices applicable in the market and little of it pertained specifically to the practices of any of the respondents. In many instances the complaints made were with regard to low prices in general, it not appearing whether the complaints related to off-list prices, volume discounts or simply low base prices. In most instances where references were made to any of the respondents as being responsible for the loss of, or inability to acquire,

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specific accounts on a price basis, no reliable evidence was offered as to the price being charged by the respondent in the specific instances complained about. It cannot therefore be determined in most of such instances whether the complaint involved off-list prices, quantity discounts or lower base prices.

Indicative of the testimony upon which counsel supporting the complaint relies is that of a manufacturer in San Francisco, whose testimony counsel cites in his proposed findings and brief. The witness testified in broad-brush terms that "ice cream companies in order to acquire certain accounts have deviated from procedure, or are not charging the price out of the published price list." No reference appears in the testimony of this witness as to what ice cream companies he was referring to, nor was any reference made to specific accounts which this manufacturer lost or could not acquire due to such price practices. The fact of the matter is that under California statute deviations from published price lists are prohibited, except to meet competition, and then only if the deviating company files a notice with the state indicating the extent of such deviation and the reason therefor. It cannot be assumed, in the absence of specific and reliable evidence, that any of the respondents had deliberately engaged in a violation of the California law. No suggestion was made by the witness that he had filed any complaint with the California authorities charging respondents with price deviations in violation of law.

Another of the witnesses cited by counsel supporting the complaint, a manufacturer in Miami, Florida, referred vaguely to "high rebates" as a competitive practice. Yet the witness did not name a single account where this was involved in competition with the three respondents operating in the area, National, Foremost and Borden. In fact, he conceded that he had had no competitive problems with respondents Foremost and Borden for several years at least and that his only difficulty with respondent National was the alleged giving of an extra cabinet to a single account. The witness' testimony further indicates that his main competitive difficulties involve a non-respondent manufacturer.

There are a number of other references in the testimony of competitor witnesses to "price arrangements", "price", "low prices", "excessive discounts", and "chain store discounts", but very little of it pertains to off-list prices, very little of it specifically involves respondents and in very few instances is there any reliable evidence as to the prices of respondents which were involved in any competitive situation. One of the few specific instances as to which there was any reliable evidence offered is that cited by counsel supporting the complaint in his pro-

posed findings where a dealer in southern Florida was granted a 47-cent discount from base price by respondent Foremost. The testimony of a Foremost representative who was called as a witness by counsel supporting the complaint, indicates that the discount was computed on the basis of a projection of the dealer's anticipated gallonage and, in large measure, involved simply the application of Foremost's regular volume discount. It likewise appears that Foremost's base price is considerably higher than that of the supplier which formerly served the account, the actual difference in the net price of the two in this case being only 10 cents. In any event, the dealer himself testified that this was not his reason for switching to respondent Foremost, and that the former supplier had even offered to meet the Foremost price, but that it was his intention to switch to Foremost because of his former association with that company at another location and his preference for selling its brand.

The only other evidence in the record of off-list prices being involved in connection with any specific competitive situations involves two accounts of respondent Arden in the Houston market. In one instance the price, which was 15 cents off list, was granted by the respondent in response to an invitation to bid from a large food chain and was offered to meet the competition of a non-respondent company. In the other instance the price was the result of a bookkeeping error and was rectified as soon as it was discovered. In both instances, the chain stores were split with other suppliers by respondent Arden.

9. Basic to the allegations with respect to quantity discounts and rebates is the charge that they involve exclusive dealing, i.e., they are granted with an understanding that the recipient will deal only in the products of the manufacturer granting them, or that the discounts are so large as to induce such a course of dealing, irrespective of any specific understanding. This charge is not, however, borne out by the evidence.

The only evidence in the record of any specific agreement to use a particular manufacturer's ice cream exclusively in order to be entitled to a discount, involves respondent Borden. Several volume discount schedules used by the company and several subsidiaries in the New York and New Jersey area in 1952 contain the statement that the discounts will be paid only to dealers who use Borden's products exclusively. This statement does not appear on any of the other Borden discount schedules in evidence. The record does not indicate that the statement appeared on other discount schedules used in the New York area and New Jersey area after 1952. It does not appear that any dealer in that area failed to receive a discount because he

had split his business with another manufacturer. No reference was made to the subject by any of the considerable number of dealers from the New York area who were called to testify by counsel supporting the complaint. The testimony of such dealers indicates that it is traditional in the area for dealers to handle the products of a single ice cream manufacturer. On this basis, the reference of exclusive dealing on the volume discount schedules in 1952 would appear to have had no practical effect. No evidence was offered, through competing ice cream manufacturers within the New York area, to indicate that the clause in question had had any competitive impact on the market.

10. There being no evidence of any understanding as to exclusive dealing involving any of the other respondents (or in the case of respondent Borden, no evidence of any such understanding in any other section of the country) this next question is whether, irrespective of any actual understanding, the granting of off-list discounts, or even the granting of regular volume discounts, results in exclusive dealing. In this respect the record is almost completely deficient. Most of the testimony, even though lacking in specificity as to the nature of the price deviations or the identity of the companies involved, indicated that the problem of price competition existed mainly with respect to chain stores, supermarkets and other volume accounts. Yet the record indicates that a large proportion of such accounts are split between two or more ice cream manufacturers.

The most frequent reference in the record to price as a competitive factor was in the Texas area and in the Midwest area, including particularly Kansas and Missouri. Yet these very areas are the scene of some of the widest splitting of accounts of any section of the country, and the record indicates that local manufacturers are well represented in such split accounts. In areas where the tendency to split is not as pronounced, there is no evidence that the granting of discounts has been a factor in this situation. Even in these areas, which are mostly in the eastern section of the country, there appears to be a discernible trend toward splitting in the larger accounts, which are usually the ones receiving the discounts. There is no reliable evidence in the record that the granting of off-list prices or volume discounts has resulted in the exclusive handling of a particular manufacturer's products or may reasonably be expected to so result.

11. The record fails to establish that respondents have initiated the practice of granting off-list prices or quantity discounts or have used it as an aggressive competitive weapon for inducing dealers to handle their products. Their practices in connection with the granting of quantity discounts and deviating, to some extent, from their

published prices do not appear to differ materially from those of many of their competitors. While some of their competitors do maintain a single price system, without quantity discounts, the prices of such manufacturers in many instances are basically lower than those of respondents before application of respondents' discounts, and the granting of such discounts in many instances simply results in putting the respondents' prices in line with those of competitors. The evidence discloses a number of instances where the alleged lowering of respondents' prices, generally or in specific situations, was admittedly done in response to price cutting initiated by nonrespondent companies. This is particularly true in the Kansas and Missouri areas, where there was more emphasis on the problem of price competition than in most other areas.

Much of the testimony with respect to the matter of price did not involve either quantity discounts or off-list prices, but rather lower prices on secondary brands or on ice cream manufactured under private label. Such pricing practices are outside the scope of the complaints. The fact that some competitors prefer not to make a second brand or to manufacture private label ice cream, in accordance with the specifications of a particular outlet, is not an issue which is involved in these proceedings. There is no showing that such secondary brands or private label brands are comparable in quality to that of respondents' regular brands or that respondents have used such brands merely as a device for cutting price. Another complaint was based on the economic philosophy of certain competitors that the individual stores associated with a voluntary buying group should not be given the regular chain store quantity discount. This again does not involve off-list prices and has dubious relevance under the complaints.

12. Based on the foregoing, and the evidence as a whole, it is concluded and found that:

(a) The record fails to establish by a preponderance of the reliable, probative and substantial evidence that any of the respondents has, to any substantial extent:

(1) Granted discounts and rebates on sales of frozen products to retail dealers on the condition that such dealers will handle, store or sell such respondent's products exclusively;

(2) Granted volume discounts and rebates on the prices of frozen products sold to retail dealers sufficiently large to constitute an inducement to such dealers to handle, store, or sell such respondent's products exclusively; or

(3) Made allowances or payments in the form of discounts or rebates to retail dealers who own their facilities on the condition that such dealers will handle, store, or sell the frozen products of such respondent exclusively.

(b) While respondents do grant discounts and rebates in the sale of frozen products, the record fails to establish that they originated such practice or have used it as an aggressive competitive weapon to destroy competition, or that their practices in the granting of such discounts and rebates differ materially from those of their competitors generally.

(c) The evidence fails to establish that the granting of discounts and rebates in the sale of frozen products by any of the respondents has resulted in competitive injury in any relevant market area or that there is any likelihood of such injury.

D. Competitive Injury

1. The question of injury to competition resulting from the complaint practices has already been considered incidental to the discussion of each of the individual practices. At this point the question is considered in its broader aspect to determine whether there is any basis for a finding of competitive injury resulting from the combined effect of the practices. In order to justify such a finding it must appear (a) that competition in a relevant market or markets is an unhealthy state, and (b) that there is a definite causal connection between this condition and the use of the complaint practices by one or more of the respondents.

The evidence of economic unhealth rests largely on the claims by some competitors of loss of accounts or decline in gallonage, sales or profits, and to some extent on the departure from business of some companies. Counsel supporting the complaint also relies on an alleged increase in the market share of respondents, accompanied by a decline in that of smaller competitors. To establish a causal connection between these conditions and the complaint practices, counsel relies on the fact, (a) that respondents have used the complaint practices, (b) that some competitors claimed the complaint practices were a factor in their losses, and (c) that some competitors claimed that they had been informed by dealers that the loss of or inability to acquire specific accounts was due to the complaint practices.

2. Turning first to the question of causal connection, the mere fact that respondents have utilized the complaint practices in any market

does not mean that a competitor's claims of declines in business or losses of accounts can automatically be attributed to the respondents who do business in the area. As has already been observed, to the extent that respondents do engage in any of the complaint practices, their activities are similar to those of their competitors generally. In most market areas they have active and substantial competitors and it cannot be inferred that all or even a substantial part of the competitive difficulties of individual competitors are due to respondents and, more particularly, to their use of the complaint practices.

Nor do self-serving general accusations or opinions of competitors, unsupported by reliable evidence with respect to specific competitive situations, justify a finding that the competitive difficulties of individual competitors are attributable to respondents. A considerable portion of the testimony of competitors, as has already been noted, was devoted to general "gripes" about market practices. To the extent that these witnesses sought to attribute such conditions to any of the respondents, it was frequently based on unreliable hearsay, surmise, and opinion. Where there was evidence in specific situations that dealers had advised competitor witnesses that some form of assistance was a reason for switching to or dealing with a respondent, no independent evidence was introduced in most cases by counsel supporting the complaint to establish the fact of assistance. Where there was evidence of assistance there was frequently no evidence that it had played any role in the dealer's choice of supplier.

In addition to the weakness in the testimony of competitors, there is other evidence in the record which suggests a number of legitimate reasons for the adverse experiences of some competitors, or at least reasons having no connection with the complaint practices. For example, the evidence discloses the advent of additional competitors in some areas thereby cutting into the business of the older companies. The evidence also discloses that the growth of soft ice cream and counter-freezer establishments has made serious inroads in the business of hard ice cream manufacturers in some areas. Another factor has been the trend among some chain stores to establish their own ice cream manufacturing facilities, thereby depriving existing manufacturers of an outlet and adding to competition for the consumer's dollar. There is also considerable evidence that old-fashioned price competition, having no connection with the complaint practices, has played a part in the declines of some companies.

The weakness of the evidence in support of the complaint, combined with the existence of other market factors which also furnish a reasonable explanation of why certain competitors have declined or have

not made any progress, require the conclusion that, to the extent competitors have been experiencing competitive difficulties, the record does not support a finding that there is any substantial connection between such difficulties and the complaint practices. The nature of the evidence which is the basis of this conclusion has already been discussed to some extent and will be hereafter discussed in greater detail in the Appendix to this decision.

3. Turning to the question of whether the evidence establishes the existence of an unhealthy economic state in any relevant market (aside from the question of what caused it), the record is likewise deficient. As already indicated, the claim of injury rests in large measure on the testimony of competitor witnesses concerning declines in the number of their accounts and in their total gallonage sales or profits. Most of these claims rest on a comparison of recent sales figures with those of the peak early postwar years, 1946 or 1947. They are for the most part based on rough estimates and approximations of sales figures, unsupported by books and record. Irrespective of the dubious nature of some of the figures, the alleged declines in the sales of some competitors fail to establish an overall unhealthy competitive state in any market area.

Generally the declines of some competitors are counterbalanced by the advances of other nonrespondent competitors in the same market. In a number of instances the complaining competitors appear to represent small, marginal companies which are not truly representative of the market. Many of the claims of injury are based on the inability of the competitor to increase his sales commensurate with population increases, rather than on any actual decline. Yet the evidence discloses that despite population increases there have been no general increases in ice cream sales in a number of markets. In many of the instances where competitors claimed their sales had declined or had not increased proportionately, the record discloses that the respondents or some of them doing business in the same area have had a similar experience in their sales.

While individual companies have gone out of business in particular markets, the record fails to establish that there is any significant mortality among ice cream manufacturers. Frequently such companies have been replaced by new companies in the same market and sometimes by milk companies expanding into the ice cream business. While some of the departing companies have sold out to various of the respondents, many have sold out to other local competitors or to new entrants into the market. In a number of instances successor com-

panies have been successful in the same market where their predecessor failed.

Despite the problems of individual companies, the record fails to establish any significant mortality among so-called independent ice cream companies, or any such decline in their position in the various market areas where hearings were held as to support a finding that competition in these areas is in an unhealthy state. Equally important, the record fails to establish that such problems as do exist are due in substantial part to the use of the complaint practices by respondents. Further analysis of conditions in the various market areas involved, which are the basis for the above general findings, will be found in the Appendix to this decision.

4. Basic to the injury argument of counsel supporting the complaint is the assumption that any decline in sales since the early postwar years, or a lack of growth since then, bespeaks the existence of abnormal or unusual competitive factors in the market (his explanation therefor presumably being the complaint practices). However, there is considerable evidence in the record to indicate that the early postwar years were not typical or normal years. According to the testimony of a number of the competitor witnesses themselves, there was an unusual upsurge in demand during the first year or two after the end of World War II, which was never again equalled by most companies in many areas. This fact is attested to by the official production figures of ice cream manufacturers compiled by the United States Department of Agriculture (hereinafter referred to as USDA), which are in the record. The production of hard ice cream at wholesale declined from a peak of approximately 650,000,000 gallons in 1946 to slightly in excess of 500,000,000 gallons between 1949 to 1951. While it began to increase thereafter, it never again reached the 1946 peak, the maximum production in 1955 being approximately 575,000,000 gallons.

These figures are for the wholesale production of hard ice cream only. During the early postwar years the production of other frozen dairy products, such as milk sherbet and ice milk, was relatively small, accounting for less than 5 percent of all frozen dairy products produced. However, in the later period the production of these less expensive diet-apppealing frozen desserts began to increase, until they reached 20 percent of the production of frozen products in 1955. If the production of these other frozen dairy products is included, the 1946 production figure of 746,710,000 gallons for all frozen dairy products was again surpassed in 1955 when total production reached approximately 791,000,000 gallons. In substantially all of the intervening years the total

production of frozen dairy products remained below the 1946 figure. Such other desserts have been more popular in some markets than in others, thus accounting for overall increases in production in some markets after 1946, while other markets were experiencing a decline.

5. The USDA figures likewise tend to disprove the argument of counsel supporting the complaint that there has been a substantial decline in the number of manufacturers producing hard ice cream at wholesale. According to these figures the number of wholesale producing plants has remained substantially the same during the postwar period. While the number of plants is not coextensive with the number of companies producing ice cream for wholesale distribution because of the fact that some of the larger companies operate multiple plants, it is nevertheless some gauge of the number of companies in the business. It is particularly significant that there has been no substantial change in the number of plants which produce less than 100,000 gallons annually, these being the plants which are generally owned by small independent companies operating only a single plant. Set forth below is a table containing a comparison of the total number of wholesale ice cream plants and a breakdown of the number of plants in the three smallest size categories, for the years 1947 and 1954, the latter being the latest year for which figures giving a complete breakdown of plants by size groups is available in the record:

COMPARISON OF NUMBER OF WHOLESALE ICE CREAM PLANTS

	1947	1954
Total Number of Plants.....	13,137	3,105
Plants Less Than 25,000 Gal.....	1,020	1,027
Plants Between 25,000 and 49,999.....	569	539
Plants Between 50,000 and 99,999.....	489	506

¹ In making a similar comparison counsel supporting the complaint has used the figure 3,766 as the total number of plants in 1947. However, this is a tentative figure, which was later corrected by the USDA, and a release containing such change and prepared at the request of counsel supporting the complaint, gives the above figure as the correct number of plants. The argument of counsel supporting the complaint as to why this uncorrected figure should continue to be used is entirely without merit. It is based upon the fact that there is no revised figure for 1955 with which to compare the revised 1947 figure. There is, however, a revised 1954 figure which is the figure above used as the basis for comparison.

As is apparent from the above table, there has been no significant change, either in the total number of wholesale plants or in the number of small plants, i.e., those producing less than 100,000 gallons annually. The slight decrease in the total number of plants may be accounted for largely by the fact that there has been a tendency among the larger companies to consolidate their operations into larger-sized producing units. This tendency has continued during 1955 and 1956.

6. Counsel supporting the complaint takes the position that the USDA figures do not correctly reflect the situation with respect to

the changes in the number of plants in recent years, in that there have been erroneously included in the category of wholesale plants two groups of producers which he contends should not be classified as wholesalers but as retailers. These are (a) "captive" plants, i.e., plants which produce only for retail sale in their own affiliated retail stores, and (b) small producers of under 50,000 gallons, most of which counsel supporting the complaint contends produce for retail sale on the premises rather than for resale to independent outlets. Counsel contends that if the number of "captive" plants and those which he claims are essentially retail producers were deducted from the total number of plants, this would reveal a substantial decline in the number of wholesale plants between 1947 and 1955. The argument pertaining to the so-called "captive" plants presents no problem. The record discloses that there were estimated to be 481 such plants in 1947 and 471 in 1954. Hence, even if it were conceded that such plants do not belong in the wholesale column, a deduction of 481 plants from the 1947 total figure of wholesale producing plants and 471 plants from the 1954 total would result in no significant net difference between the total number of wholesale plants in the two years. In fact, there would be ten more wholesale plants in the latter year than there would be under the above table.

Counsel's argument with respect to the second category of plants, i.e., those producing under 50,000 gallons, has an unreal, metaphysical quality about it which is strangely reminiscent of "Alice In Wonderland." By a breath-taking series of factual assumptions, based on such nonrecord sources as "our information" and "our view," counsel reaches the conclusion that all plants producing less than 25,000 gallons, which USDA classified as wholesale, are actually retail plants, and that an appreciable number of plants between 25,000 and 50,000 gallons are likewise retail, although the number of the latter is not specified.¹⁹

¹⁹ Counsel's argument appears to be based in part on a distortion of a statement contained in the USDA release to the effect that where a plant produces 50 per cent or more of its products for sale at wholesale, its entire production is classed as wholesale, whereas if less than 50 per cent is produced for wholesale distribution, it is classed as retail. Counsel's confusion regarding this statement is compounded by misunderstanding of another statement that where USDA has no information on plants over 15,000 gallons, it classifies them as wholesale. Counsel suggests that the computations made by the Department of Agriculture are basically erroneous since all plants under 25,000 actually produce over 50 per cent of their products for sale at retail, as do a large part of those under 50,000 gallons. The representative of the Department of Agriculture testified that the Department had reasonably reliable information on all but about one hundred small plants, and that the likelihood of misclassification, on the basis of a plant which it classified as wholesale actually producing 50 per cent or more of its products for retail consumption, was very slight, since there are very few plants whose production falls that close to the dividing line. There is not a scintilla of evidence to warrant accepting the ipse dixit of counsel supporting the complaint, rather than the official figures of the USDA and the testimony of its official, who was called as a witness by counsel supporting the complaint.

Counsel supporting the complaint arbitrarily suggests that there are 1,000 such plants which should be considered as retail and should therefore be deducted from the number of plants classified as wholesale by the USDA. He further suggests that the number of such plants plus the multiple plants operated by respondents should be deducted from the total number of plants producing for wholesale in 1955, leaving a net of 1,767 plants for that year. Counsel concludes that comparing 1,767 plants in 1955 with 3,127 in 1947 indicates that 1,360 wholesale producing plants have "disappeared" from the scene since 1947. Aside from the lack of any record basis for counsel's claim that the USDA improperly classified 1,000 plants as wholesale and his further deduction of multiple plants operated by respondents (the reason for the latter deduction not being apparent from counsel's argument), counsel overlooks the fact that an equivalent number of plants should also be deducted from the 1947 total in order to make both figures comparable. The record indicates that there were substantially the same number of plants producing under 25,000 gallons in both years. Assuming arguendo that they were all retail in 1955, there is not the slightest reason to believe that they were not also retail in 1947. Hence, a deduction of substantially the same number of plants from 1947 and 1955 would leave the net number of plants in both years substantially the same.

7. By a process of reasoning similar to that discussed above, counsel supporting the complaint also seeks to establish that there has been a substantial decrease in the number of wholesale ice cream manufacturers between 1947 and 1955, as well as in the number of plants. Recognizing that the Department of Agriculture figures are in terms of the number of plants rather than companies, counsel seeks to reduce plants to companies. He does this by deducting from the 1955 official USDA figure of 3,008 plants, the following: 1000 plants which he claims are retail rather than wholesale (for the reasons indicated above), 241 multiple plants of respondents, and 95 multiple plants of nonrespondents (the figures on which counsel has obtained from an industry publication which is not in evidence). By this mathematical sleight of hand, counsel arrives at a net figure of 1,672, which he claims represents the number of wholesale ice cream producers in 1955. Then with an almost breath-taking disregard of elementary logic, counsel apparently compares 1,672 *companies* in 1955 with 3,127 *plants* in 1947, and claims that the number of *companies* in the United States "has been cut nearly in half" since 1947. Aside from the impropriety of comparing companies with plants, it is obvious that counsel has neglected to deduct from the 1947 figure an equivalent number of so-

called retail plants in the under 25,000–50,000 gallon category, and the multiple plants of respondents, as well as those of other companies operating multiple plants. Were this to be done there would be no significant difference between the two years. Based on the actual evidence in the record there is no way by which the number of companies in 1954 or 1955 may be precisely compared with those in 1947. However, from such evidence as does exist there is no reason to believe that the number of companies has declined significantly. The USDA figures with respect to the number of small plants give every indication that there has been no significant change in the number of small companies.

8. A considerable portion of the argument of counsel supporting the complaint is devoted to the proposition that the complaint practices have resulted in a trend toward concentration of the ice cream business in the hands of respondents. This is another way of saying that competition has been injured by a shift of business to respondents and away from competitors. Basic to this argument is the assumption that such shift has been due in substantial part to the complaint practices. The fact that a shift has taken place would not be legally significant in these proceedings unless a causal connection with the complaint practices is established. As has already been indicated, the record fails to establish any substantial causal connection between the complaint practices and the difficulties of competitors in any market area. Consequently there is no basis for a finding that the complaint practices have been a significant factor in any alleged trend toward concentration in the hands of respondents. Equally important, however, the record fails to establish any trend toward concentration, as suggested by counsel supporting the complaint.

9. The contention of counsel supporting the complaint that there has been a trend toward concentration among the respondents, rests on a comparison of the combined production shares of respondents in 1947 and 1955, with total United States production in those years. Aside from the basic impropriety of seeking to aggregate the production shares of all respondents as if they were one affiliated group of companies or as if this were a single conspiracy case, the mathematical inaccuracies and gratuitous assumptions on which much of counsel's argument is based result in production shares for both periods which are totally distorted. Contrary to the argument made by counsel supporting the complaint, there has been no significant increase in the aggregate production shares of the respondents.

According to counsel supporting the complaint, respondents' collective share of the national production of ice cream at wholesale in

1947 was 38 per cent and increased to 44 per cent in 1955, an increase of six per cent. Counsel then seeks to demonstrate that the increase is even greater than six per cent by eliminating from the total USDA production figure (which is the universe figure with which respondents' production is compared), production which counsel contends is non-wholesale. Counsel first eliminates the production of "captive" plants, thereby increasing respondents' 1947 production share to 40 per cent and their 1955 share to 47 per cent, or an increase of seven per cent.²⁰ Counsel then argues that the production of the 1,000 plants discussed above, which were allegedly misclassified by the Department of Agriculture as wholesalers, should also be deducted from the national figures of hard ice cream produced at wholesale. Counsel estimates the production of these 1,000 plants to be 37,530,000, based on a projection of the figures contained in a stipulation which was introduced in evidence solely in the Hood proceeding and which covers only the New England area. By thus distorting the 1955 figure of national wholesale production, counsel arrives at respondents' share of production in 1955 as 50.6 per cent, which he compares to a 1947 figure of 40.8 per cent in 1947, and claims that there has been an increase in respondents' production share of 10 per cent. Aside from the basic impropriety of making a computation based on data which is only in the Hood record, counsel's argument suffers from two fatal weaknesses. First, as has already been indicated above, there is no record basis for any assertion that USDA improperly classified 1,000 plants. Secondly, if they were misclassified, the same would be true basically of the 1947 figures, and if the production of these plants were deducted from both years, instead of only from 1955 as counsel has done, the result would indicate no significant change in production shares.²¹

In addition to the above errors, the basic computations of counsel supporting the complaint, on which the above refinements are based, contain a number of errors which affect counsel's basic argument with regard to increase in concentration. The figure used by counsel supporting the complaint as the 1947 total of respondents' production of ice cream is in error by 14,089,901 gallons. By using an erroneous figure for respondent National's 1947 gallonage (which was contained in an exhibit later revised), that company's 1947 gallonage is underestimated by 7,197,858. A further understatement of 6,892,043 results

²⁰ The production figures of "captive" plants are not included in the Pet, Fairmont or Hood records.

²¹ The actual figure in 1954 for 1,027 plants whose production was less than 25,000 gallons (these being the nearest thing to the group of plants counsel is referring to) shows a total figure of 12,345,609 gallons in that year compared with 11,278,031 gallons in 1947.

from a misstatement of the total 1947 gallonage of all respondents.²² This understatement of 14,089,901 gallons for 1947 is aggravated by an overstatement of respondents' gallonage for 1955 by 7,192,279 gallons. Thus, instead of respondents' share of the U.S. wholesale production in 1947 being 38 per cent and their share of production in 1955 being 44 per cent, as counsel suggests, the figures are as follows:

	1947	1955
Total Production of Ice Cream at Wholesale.....	577,026,000	574,376,000
Respondents' Total Production of Ice Cream.....	237,763,901	246,543,721
Respondents' Percentage of Total.....	41.2%	42.9%

As indicated by the above table, the net increase in respondents' production is 8,779,820, not 30,062,000, and the percentage increase is 1.7 per cent, not 6.0 per cent. This increase is more than accounted for by the fact that respondent Foremost's production figures, for 1955, include the gallonage of Golden State which it acquired in 1954, with a gallonage in excess of 10 million. If the production figures of companies acquired by other respondents after 1947 were also eliminated, it seems clear that respondents basically would be below their 1947 production figures for the equivalent number of plants in operation. In view of the inaccuracies in the basic figures used by counsel supporting the complaint, the further refinement of such figures by the deduction of captive plants and so-called retail plants are also obviously erroneous. The deduction of the gallonage of captive plants would not change the above percentages appreciably. There is likewise no basis for any deduction of the so-called 1,000 retail plants. As above indicated, there is no reliable evidence in the record that there is any such number of plants erroneously classified by the Department of Agriculture and there is, moreover, no reliable evidence as to the gallonage of such plants. Furthermore, if an equivalent deduction were made from the 1947 universe figure, there would be no significant increase in respondents' share between 1947 and 1955.

10. The above discussion of whether there has been an increase in respondents' share of national production has been considered in the context in which it has been presented by counsel supporting the complaint. His basic approach, however, is erroneous. Each group of respondents in each of these nine proceedings is a separate entity and the figures of each group must be separately considered and compared in order to determine whether their respective market positions have improved. It is manifestly improper to say that respondents as a group have increased their market position when a number

²² The correct figure is elsewhere set forth in Table III, page 19 of counsel's brief.

of them have actually declined in some markets and on a national basis. It is not proper to balance these declines by the increases of some respondents, either in local markets or nationally, and argue that respondents as a group have improved their position, particularly since some of the increases represent the gallage of acquired companies rather than true production increases.

On the basis of the data in the record it is possible to measure the separate fortunes of the respondents in three different ways: (a) In terms of whether their respective market shares have increased or decreased in key areas where evidence was offered against them; (b) in terms of whether their respective shares of state production in the states where they maintain manufacturing plants have increased or decreased; and (c) in terms of whether their respective shares of wholesale production of hard ice cream in the United States as a whole have increased or decreased. To a consideration of the data in the record in each of these categories the examiner now turns.

(a) *Market Shares In Key Areas.* There is in evidence statistical information showing each respondent's share of the market between 1950 and 1955 in a number of the areas where counsel supporting the complaint sought to show injury to competition. This information was prepared by Professor M. A. Adelman of M.I.T. from data supplied by respondents indicating their respective sales in these areas, and from computations made under his supervision indicating the total estimated sales in each of these markets. The market areas consist of the Standard Metropolitan Areas (SMA's) established by the United States Government, which are used by the Government and by industry for statistical purposes and market surveys. So far as appears from the record the market share information is sufficiently accurate from a statistical point of view as to furnish a reasonably reliable basis for measuring market share trends.

The primary objection to such data by counsel supporting the complaint was that the universe figures used were based on total production or sales, rather than on wholesale production or sales.²⁴ This objection, however, is not well taken for several reasons. In the first place there is some question as to the proportion of total production figures which is represented by retail production, and for purposes of measuring a trend it is more reliable to use total production figures than wholesale figures above.²⁵ In the second place retail production represents only a minor fraction of total production (less than 10 per cent) and while the deduction of such figures from the total figures for each year might indicate each respondent's share to be slightly

²⁴ See National Dairy record, p. 7073.

²⁵ Id. pp. 7056-7058.

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larger, it would not affect the trend revealed by the figures in evidence. If anything, the deduction thereof would tend to favor respondents because the wholesale component has tended to increase faster than retail production.²⁶

Set forth below is a table showing the percentage changes in market shares of six of the respondents in certain markets between 1950 and 1955, as revealed by the market share information in evidence.²⁷ The actual percentage which each respondent's share represents of such markets appears in the Appendix to this decision, in connection with the discussion of each such market. As noted above, the market areas are those concerning which counsel supporting the complaint offered evidence against the respondents. Where figures do not appear for a particular city with respect to a particular respondent, it is because that respondent does not do business in the area, unless otherwise indicated.

MARKET SHARE CHANGES, 1950-1955

	National	Borden	Beatrice	Foremost	Carnation	Arden
	<i>Percent</i>	<i>Percent</i>	<i>Percent</i>			
New York.....	-1.2	-4.7	+1.1			
Philadelphia.....	-9.3	-0.7				
Baltimore.....	+0.5	-2.8				
Washington, D.C.....	+0.5	+1.0	+1.0			
Richmond.....	-4.6		-1.6			+3.6
Charlotte.....	+4.8	+4.6	-0.7			+1.3
Jacksonville.....	-4.7	-3.9		-8.0		
Miami.....	-10.3	-5.4		+1.0		
Chicago.....	-0.3	+0.8	+0.7	+11.8		
Cincinnati.....	¹ +0.6	² +0.1	-1.0			
Houston.....		-0.7		-6.6	-1.5	+2.9
Phoenix.....					-2.4	-20.7
Portland, Ore.....					-1.2	-1.8
San Francisco.....		-1.4	-0.3	(?)	+0.5	+0.3

¹ The above percentage change is measured from 1951, data not being available for 1950.

² The above percentage change is measured from 1954, when Borden entered the market.

³ Foremost entered this area in 1954 by acquisition of Golden State Dairy. No figures are available as to Golden State's market share in 1950.

⁴ The above percentage is measured from 1953, when Arden entered market by acquisition of a local company.

As will be observed from the above figures, the respondents have, for the most part, lost rather than gained market position. Respondent National has gained in four areas but declined in six; respondent Borden has gained in four but lost in seven; respondent Beatrice has gained in three but lost in four; respondent Foremost has gained in two but lost in two; respondent Carnation has gained in one but lost in three; respondent Arden has gained in three but lost in three. For the most part, the gains are small and are offset by the losses in other areas. It will also be observed that while some of the

²⁶ Id. p. 7060.

²⁷ No similar information appears with respect to respondents Pet, Fairmont and Hood. However, information on a state basis which is hereafter discussed, gives some idea of their market trends.

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respondents have gained in particular market areas, others have lost in the same area although they have all used substantially the same competitive practices. The figures not only reveal no trend toward concentration in favor of any of the respondents, but the variety of the experiences of particular respondents in different markets and among respondents in the same market suggests that the complaint practices do not play a significant role in affecting market trends.

(b) *Trend of Production Shares In States of Production.* The trend in each respondent's position may also be measured by comparing their production in the states where they have plants, with the total production of frozen dairy products manufactured in such states. This is not a precise measurement of their market shares since the frozen products produced in one state may be sold in an adjoining state or states. Nevertheless, it is a helpful method of analyzing the trend in respondents' positions in the general areas where their business is mainly concentrated. Set forth below is a comparison of the changes in the share of production of frozen dairy products of each respondent, except Fairmont (for whom such data is not available), between 1947 and 1955 in all states in which they have plants. The production share figures of each of the respondents in a number of the individual states involved are set forth in the Appendix, in connection with a discussion of these areas.

PRODUCTION SHARES OF RESPONDENTS (IN STATES IN WHICH THEY PRODUCED)
IN RELATION TO TOTAL FROZEN PRODUCTS PRODUCED (IN THOSE STATES),
1947-1955

	1947	1955	Percent change
	<i>Percent</i>	<i>Percent</i>	
National ¹	22.5	17.5	-5.0
Borden ²	12.5	10.8	-1.7
Beatrice ³	5.1	6.1	+1.0
Arden ⁴	17.8	14.7	-3.1
Carnation ⁵	9.0	10.0	+1.0
Foremost ⁶ [1950].....	6.5	7.9	+1.4
Pet ⁷	8.9	8.9	+0.0
Hood ⁸	26.5	19.0	-7.5

¹ Production percentage of 24 states. In the 27 states in which National produced in 1932, its percentage of state production was 30.1 per cent. These states were substantially the same as those in 1947 and 1955.

² Production percentage of 23 states.

³ Production percentage of 17 states.

⁴ Production percentage of four states.

⁵ Production percentage of five states.

⁶ The Foremost figures are based on a comparison of its production share in the 11 states which it served in 1950, with its share in the same states in 1955. No equivalent data is available for 1947, except for hard ice cream. In 1954 and 1955 it began serving seven additional states, largely through the acquisition of other companies. Its share of production in these states increased by 0.3 per cent between 1954 and 1955.

⁷ Production percentage of three states.

⁸ The above figures are based on a comparison of the production of hard ice cream at wholesale in the New England States. The record does not contain any information on the production of frozen products by this respondent other than hard ice cream. The above figures do not include the New York State area, which was entered by this respondent in September 1953 when it acquired a small company in the eastern part of the state. Another acquisition of a somewhat larger company was made in September 1954. Hood's share of the wholesale production of hard ice cream in New York State as of 1955 was 1.07 per cent.

As is apparent from the above figures, there has been no significant increase in respondents' respective production shares in the states in which they produce. Counsel supporting the complaint would, presumably, quarrel with the figures because they are based on a comparison with total production in these states, including that of retail and "captive" plants. However, all that the exclusion of the production of such plants would accomplish would be to slightly increase respondents' respective shares of production in each of the two years used for comparison, but the figures of percentage change would remain substantially the same.²⁸ The above figures have significance as a helpful indicator of the trend in respondents' production shares between 1947 and 1955.

(c) *Shares of Wholesale Production of Hard Ice Cream in U.S.* The trend in respondents' shares of production may also be measured by comparing them with the total wholesale production of hard ice cream in the United States. This is essentially the basis of comparison used by counsel supporting the complaint, except that his method involved lumping the production of all of the respondents together instead of comparing each one's production, separately, with total national production. Set forth below is a table indicating each respondent's total production of hard ice cream in 1947 and 1955, and comparing it with the total wholesale production of hard ice cream, as appearing in official USDA figures.

POSITION OF RESPONDENTS IN RELATION TO TOTAL U.S. WHOLESALE PRODUCTION
OF HARD ICE CREAM, 1947-1955.
(Thousands of Gallons)

	1947		1955		
	Production	Percent	Production	Percent	Percent Change
Total.....	572,605	100%	574,271	100%	
National.....	101,209	17.7	85,871	15.0	-2.7
Borden.....	63,653	11.1	56,584	9.9	-1.2
Foremost.....	6,855	1.2	27,192	4.7	+3.5
Beatrice.....	20,138	3.5	27,682	4.8	+1.3
Arden.....	12,397	2.2	13,903	2.4	+0.2
Fairmont.....	10,751	1.9	12,128	2.1	+0.2
Carnation.....	8,033	1.4	10,215	1.8	+0.4
Hood.....	11,199	2.0	9,059	1.7	-0.3
Pet.....	3,529	0.06	3,910	0.07	+0.01

²⁸ The record contains no data on the production of retail and captive plants, except for hard ice cream. The production by retail plants accounted for less than 10 per cent of the total production of hard ice cream in 1947 and 1954. The production by captive plants accounted for approximately 5 per cent of the hard ice cream produced in 1947 and 6 per cent of that produced in 1954. Assuming similar proportions for other frozen dairy products, other than hard ice cream, it seems clear that the deduction of substantially identical amounts from the 1947 and 1954 production figures would produce substantially similar results, insofar as percentage change between the two years is concerned. While the latest year for which figures on both retail and captive plants appear in the record is 1954, there is no reason to believe that the 1955 figures would vary significantly.

As is apparent from the above figures, except for respondents Foremost and Beatrice, none of the respondent's shares of the wholesale production of hard ice cream in the United States has increased by as much as one per cent between 1947 and 1955. A large portion of the increase by respondents Foremost and Beatrice is due to their acquisitions of other companies, rather than by true increases in production. The same is true of some of the other companies represented above. Thus, for example, respondent Fairmont's gallonage in 1955 would have been below its gallonage in 1947, but for the acquisition of several other companies between 1950 and 1955 which had a combined gallonage of approximately two million gallons. The two largest companies, National and Borden, have actually sustained a decline both in absolute production figures and in relative production shares between 1947 and 1951, as has the respondent Hood. The figures fail to establish that there is any significant trend toward the concentration of the ice cream business in the hands of respondents.

Presumably, counsel supporting the complaint would quarrel with the above results because the total gallonage figures, comprising the universe with which respondents' gallonage is compared, include the production of "captive" or, as respondents call them, "affiliated" plants. Counsel supporting the complaint regards these plants as essentially retail, while respondents contend that they should be regarded as wholesale, which is the way the USDA classifies them. Assuming arguendo, the correctness of the position of counsel supporting the complaint and making the deduction which he suggests, the results do not differ significantly from the results and trend above indicated. Set forth below is a table in which there has been deducted from the total USDA figures of wholesale ice cream production, the production of affiliated plants. Such plants produced 28,909,000 gallons in 1947 and 35,992,000 gallons in 1955.²⁹

RESPONDENTS' POSITION IN RELATION TO TOTAL WHOLESALE U.S. PRODUCTION OF HARD ICE CREAM, EXCLUSIVE OF PRODUCTION OF "CAPTIVE" OR "AFFILIATED" PLANTS, 1947-1955

	Percentage of 1947 production	Percentage of 1955 production	Percent point change
National.....	13.6	16.0	-2.6
Borden.....	11.7	10.5	-1.2
Foremost.....	1.3	5.1	+3.8
Beatrice.....	3.7	6.1	+1.4
Arden.....	2.3	2.6	+0.3
Fairmont.....	1.9	2.1	+0.2
Carnation.....	1.5	1.9	+0.4
Hood.....	2.1	1.7	-0.4
Pet.....	0.06	0.07	+0.01

²⁹ The figure for the latter year is actually that for 1954, but it is the latest figures in the record on such plants, and is the figure used by counsel supporting the complaint in making his computations.

Since the above results do not take into account the production of the approximately 1,000 plants which counsel supporting the complaint also claims are retail (based on alleged misclassification by the USDA), he would presumably also question the correctness of the above figures. As previously noted, there is no record basis for counsel's contention that there has been any significant misclassification of plants by the USDA, nor is there any basis for his computation of the production of such plants. However, assuming, *arguendo*, that there has been a misclassification of plants in the category suggested by counsel, the record affords a basis for determining the gallonage of such plants. A recomputation which excludes the gallonage of such plants results in no significant change in the basic trend reflected by the above figures.

The computation made below is based on the assumption that *all* plants producing under 50,000 gallons are retail. Counsel has argued that all plants under 25,000 gallons are retail and that some indeterminate number between 25,000 and 50,000 are retail. The USDA figures reveal that there were 1,589 such plants in 1947 with a gallonage of 32,711,914 and 1,563 such plants in 1955 with a gallonage of 32,097,000. Deducting the production of all such plants from the figures used in the previous table, rather than the niggardly 1,000 plants suggested by counsel, the results are as follows:

RESPONDENTS' POSITION IN RELATION TO TOTAL WHOLESALE U.S. PRODUCTION OF HARD ICE CREAM EXCLUSIVE OF PRODUCTION OF "AFFILIATED" PLANTS, AND PLANTS UNDER 50,000 GALLONS, 1947-1955

	Percentage of 1947 production	Percentage of 1955 production	Percent point change
National.....	19.8	17.0	-2.8
Borden.....	12.5	11.2	-1.3
Foremost.....	1.3	5.4	+4.1
Beatrice.....	3.9	5.5	+1.6
Arden.....	2.4	2.7	+0.3
Fairmont.....	2.1	2.4	+0.3
Carnation.....	1.6	2.0	+0.4
Hood.....	2.2	1.8	-0.4
Pet.....	0.07	0.08	+0.01

For convenience in comparing the results achieved under each of the methods of computing respondents' production shares discussed above, there is set forth below a recapitulation of the percentage of change between 1947 and 1955 in each respondent's share under each such method. The first column discloses the change between 1947 and 1955 in each respondent's share of production as compared to the production of the states in which their frozen products are produced. In the second column the comparison used for reflecting the percentage of change is that between respondent's production of hard ice cream

and the total national production of hard ice cream by plants listed as wholesale by USDA. In the third column the comparison is with the total national wholesale production, less "captive" or "affiliated" plants, and in the last column the production of "captive" plants and those under 50,000 gallons have both been eliminated from the universe with which respondents' production is compared.

COMPARISON OF PERCENTAGE POINT CHANGES IN RESPONDENTS' PRODUCTION, 1947-1955

	Total frozen products production in States where respondents produce	Total U.S. hard ice cream wholesale production	Less "captive" plants	Less "captive" plants and those under 50,000 gallons
National.....	-5.0	-2.7	-2.6	-2.8
Borden.....	-1.7	-1.2	-1.2	-1.3
Foremost.....	¹ +1.4	+3.5	+3.8	+4.1
Beatrice.....	+1.0	+1.3	+1.4	+1.6
Arden.....	-3.1	+0.2	+0.3	+0.3
Fairmont.....	(²)	+0.2	+0.2	+0.3
Carnation.....	+1.0	+0.4	+0.4	+0.4
Hood.....	-7.5	-0.3	-0.4	-0.4
Pet.....	0.0	+0.01	+0.01	+0.01

¹ The above percentage is based on a comparison between 1950 and 1955 production figures, since there are no figures in the record for this respondent's total frozen products production in 1947.

² No figures.

As is apparent from the above table, with the exception of Foremost and Beatrice, none of the respondents has improved its production share by as much as 1 percent, irrespective of whether the production of respondents is compared with that of the states in which they produce or with the national production of hard ice cream at wholesale. Likewise, in the case of a comparison on the latter basis, the figures disclose that there is no significant difference between one based on total wholesale production as reported in official USDA figures, and one based on such wholesale production less the production of affiliated plants or less the production of both affiliated plants and plants under 50,000 gallons. The figures fail to disclose any trend toward concentration of the frozen products business in the hands of respondents, either individually or as a group.

In the case of Foremost and Beatrice, as already indicated above, the increase in their shares of production between 1947 and 1955 is accounted for largely by the production of companies which were acquired, rather than by any expansion in production or sales through their own plants. Several of the other respondents have also gained production by virtue of the acquisition of other companies, except for which some of their shares would be lower than above indicated. While some of these acquisitions may be subject to question under

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Section 7 of the Clayton Act, they are not directly involved in the instant proceedings, in which the question is whether respondents' production shares have been increased significantly by the use of the complaint practices.³⁰

11. In addition to the primary charge of injury, involving competing ice cream manufacturers, the complaints make oblique reference to two other groups as being adversely affected, viz., retail ice cream dealers and "regular licensed facility dealers." There is not a scintilla of evidence of any injury to either of the latter groups.³¹

12. Based on the foregoing, and the record as a whole, it is concluded and found that:

(a) The record fails to establish by a preponderance of the reliable, probative and substantial evidence that there has been any substantial injury to, or lessening of, competition in any relevant market, or that there is any reasonable probability thereof, as a result of the use of the complaint practices by any of the respondents.

(b) While individual competitors in certain markets may have experienced adverse business conditions or competitive difficulties, the record fails to establish, (1) that there is any substantial causal relationship between such difficulties or conditions, and respondents' use of the complaint practices or (2) that competition in the relevant markets involved (as distinguished from the position of individual competitors) has been or is likely to be substantially injured.

(c) The record fails to establish any trend toward concentration of the frozen products business in the hand of respondents, during the period covered by the evidence, as a result of respondents' use of the complaint practices or otherwise.

IV. Conclusions

A. *The Law of Unfair Methods of Competition*

1. The discussion up to this point has been with respect to the factual issues raised by the complaints. These are basically, (a) whether respondents have engaged in the complaint practices and, if so, to what extent, and (b) whether there has been any adverse competitive impact resulting therefrom. The consideration of these issues has assumed that the practices involved are unfair methods of competition,

³⁰ Such acquisitions might have indirect relevance if it were to appear that the complaint practices were responsible for any competitors selling out to respondents. However, as heretofore indicated, there is no evidence in the record to support an affirmative finding on this score.

³¹ In the case of "regular licensed facility dealers", there is no evidence as to who they are or that it has ever been customary to purchase or lease facilities from them.

within the meaning of the Federal Trade Commission Act. This, however, is a fundamental issue in these proceedings, and to a consideration thereof the examiner now turns.

2. As already indicated, the complaints challenge various forms of dealer assistance including (a) the furnishing of facilities and other equipment, (b) the rendering of financial assistance, (c) the performing or furnishing of other services of value, and (d) the granting of various discounts, rebates and allowances. These various forms of assistance have heretofore been referred to loosely as the "complaint practices." However, the complaints do not attack these practices in and of themselves. Basic to the challenge to such practices is the allegation that they occur in a context of exclusive dealing, i.e., that they are expressly conditioned on exclusive dealing or that they necessarily result in exclusive dealing.

3. The complaints in these proceedings are patterned essentially after the complaint in the *Hastings Manufacturing Co.* case, 39 FTC 498, which also involved the offering of various inducements to customers in order to obtain their business on an exclusive or preferential basis. The practices there involved included the making of loans to distributors, the guaranteeing of increased profits, and the purchasing of the distributors' inventories of competitors' products at cost (regardless of age) and then dumping them. The Commission's finding that these practices constituted unfair methods of competition was not predicated merely upon respondent's use of the practices, but rather upon the fact that respondent used the practices to induce distributors to handle its products "upon an exclusive basis or upon a basis highly preferential" to respondent. The Commission also found that respondent had initiated the practices in question as part of "an aggressive campaign to acquire new and, so far as possible, exclusive channels of distribution."

The court of appeals, in affirming the Commission's decision and order, specifically recognized that exclusivity was an essential element of the offense which the Commission had found, stating that the Commission had found the practices to be unfair—

* * * when done as an inducement to the distributor to discontinue handling competitive products and to handle the petitioner's products exclusively or preferentially. *Hastings Manufacturing Co. v. FTC* (C.A. 6, 1946), 153 F. 2d 253, 254. The court left no doubt as to its own position, that the element of exclusive or preferential dealing was a key element of the offense, in stating (at page 257):

* * * It is not illegal for a manufacturer to finance his retail outlets or to guarantee them profits, but undoubtedly the utilization of these expedients,

singularly or in combination, as an inducement to jobbers to throw out competing lines and to handle, exclusively or preferentially, the products of a manufacturer "from whom such blessings flow," may well be within the statutory concept of unfair methods of competition. Such inducements as constituent elements in a method of competition, are the "exclusive-dealing requirements" which Mr. Justice Brandeis so vigorously condemned * * *.

4. While the complaints are brought under Section 5 of the Federal Trade Commission Act, the essential element of the offense appears to parallel that under Section 3 of the Clayton Act, which proscribes the sale or lease of goods or equipment on the condition, agreement or understanding that the lessee or purchaser will not use or deal in the goods of a competitor of the lessor or seller (where the effect of such arrangement may be to substantially lessen competition or tend to monopoly). Presumably the present complaints were not brought under Section 3 of the Clayton Act because some of the practices do not technically involve the sale or lease of equipment, e.g., furnishing of facilities on a rent-free basis, rendering of miscellaneous services of value, and the granting of discounts. See *Curtis Publishing Co. v. FTC*, 270 Fed. 881, aff'd. 260 U.S. 568. However, it seems clear that the complaints are phrased in terms of a Section 3 Clayton Act type of violation, in order to come within the line of authority which holds that practices of the type that run counter to the public policy disclosed in the Clayton Act (or in the Sherman Act) may also be deemed to constitute unfair methods of competition under the Federal Trade Commission Act. See *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457; *FTC v. Motion Picture Advertising Service, Inc.*, 344 U.S. 392; *Carter Carburetor Corp. v. FTC*, 112 F. 2d 722 (C.A. 8, 1940).

5. That arrangements or practices which involve the element of exclusive dealing or other preclusive features fall within the category of practices which may be deemed to constitute unfair methods of competition under the Federal Trade Commission Act appears to be beyond cavil. See *FTC v. Motion Picture Advertising Service Co., Inc.*, *supra*; *Fashion Originators' Guild of America, Inc. v. FTC*, *supra*; *Hastings Manufacturing Co. v. FTC*, *supra*; *Carter Carburetor Corp. v. FTC*, *supra*. However, while such arrangements are of the type which may be considered to constitute unfair methods of competition, they are not per se illegal. *U.S. v. American Can Co.*, 87 F. Supp. 18, 31; see also Commission's decision in *Motion Picture Advertising Service Co., Inc.*, 47 FTC 378, 393. Irrespective of whether a proceeding is brought under the Clayton Act or Federal Trade Commission Act, a showing must be made with respect to the probable adverse competitive impact of such arrangements. An ul-

timate finding of illegality depends on a number of factors, such as the length of the contracts (*U.S. v. American Can Co.*, *supra*; *FTC v. Motion Picture Advertising Service Co., Inc.*, *supra*) and the proportion of the market tied up thereby (*Standard Oil Company of California v. U.S.*, 337 U.S. 293).

It has been suggested that in proceedings which are not specifically brought under Section 3 of the Clayton Act (in which it has been said that the courts have applied a somewhat automatic standard in determining probable competitive effect), a broader inquiry must be made into competitive conditions in order to determine the probabilities of competitive injury or tendency to monopoly.³² However, for purposes of the present proceedings it is unnecessary to determine whether there is any valid distinction between the injury test applied under Section 3 of the Clayton Act and that applicable to proceedings under the Federal Trade Commission Act. Counsel supporting the complaint has not presented the case in the narrow frame of reference of the "quantitative substantiality" test of a Section 3 Clayton Act proceeding, but has sought to demonstrate broadly the anticompetitive effects and tendencies of the practices involved. Furthermore, as will hereafter appear, there is no record basis for a determination of the question of injury in terms of the somewhat mechanical quantitative substantiality test.

6. The examiner entertains no doubt that in terms of the issues drawn by the pleadings the complaints state a cause of action under Section 5 of the Federal Trade Commission Act. In reaching this conclusion it must be recognized that in one respect the complaints, as amended, go beyond the theory on which the *Hastings* case was tried. The complaint and order in that case were restricted to challenging the practices when they were used as an inducement for distributors "to discontinue handling" the products of competitors and to handle respondent's products exclusively. In effect, the practices were challenged only when used in a context of pirating away the customers of competitors by offering them illicit inducements. In the instant proceedings, under the amendment to the complaints, the practices are challenged not merely when used to take away the customers of competitors, but also when used to assist respondents' own accounts and when used in obtaining new accounts never previously served by anyone. In this respect, the amended and supple-

³² See, e.g., *Report of Attorney General's Committee to Study Antitrust Laws*, 25, 141-142; *Times-Picayune Publishing Co. v. U.S.*, 345 U.S. 594; *Tampa Electric Co. v. Nashville Coal Co.*, 168 F. Supp. 456 (M.D. Tenn., 1958); *Dictograph Products Inc. v. FTC*, 217 F. 2d 821 (C.A. 2, 1954).

mental complaints extend beyond the original complaints in these proceedings which, like the complaint in *Hastings*, were limited to challenging the practices when used to induce dealers to switch.

However, in another respect, the amended complaints are narrower than the original complaints in these proceedings. The original complaints, while patterned after *Hastings* in the sense that the various forms of assistance were challenged only when used in connection with "switch" accounts, appear to go beyond *Hastings* in the respect that they did not limit the attack on the practices merely to situations where exclusive dealing was involved. Apparently in amending the complaints it was decided to recede from the broad challenge to the practices as such, and to question them only when used to induce exclusive dealing, in order to be able to broaden the challenge with respect to the *type* of account involved. It is not entirely clear what motivated this change of approach, except that it did become apparent very early in the hearings that an attack limited to switch accounts was not a very practical one since only a small fraction of respondents' expenditures in the complaint practices involved switch accounts. It may be that counsel decided to recede from a theory which was of dubious merit under *Hastings*, in order to make a more realistic attack with respect to the type of account involved even though the latter change involved an extension of *Hastings*. In any event, whatever may have been the motive in amending the complaints, the examiner is satisfied that as amended (with exclusive dealing an essential element of the charge), they are legally sufficient even though they are no longer limited to switch accounts but include existing and pioneer accounts as well.

7. However, the above conclusion that the amended complaints are legally sufficient does not resolve the issue. While the amended complaints are framed in terms of exclusive dealing, counsel supporting the complaint during the course of the proceedings has gradually sought to minimize and ignore "exclusivity" as an essential element of the offense.³³ In the brief filed by him he has come full circle to the position that the complaint practices constitute unfair methods of competition, as such, without regard to whether they are used in a context of exclusive dealing or not. The order which he proposes would seek to require respondents to refrain from using the practices, irrespective of whether they are used as an inducement for exclusive dealing. In this respect the order differs from *Hastings* in which the respondent was ordered to cease using the practices only when

³³ It may be noted that this change of approach largely coincides with a change of counsel in support of the complaint. Present senior counsel was substituted for earlier counsel immediately following the amendment of the complaints.

used to induce distributors "to discontinue handling all products competitive with respondent's."

It is not clear why counsel has abandoned the original theory of the complaints, patterned as it was after the *Hastings* case and the line of authority holding that exclusive arrangements of the type proscribed by the Clayton Act are also unfair methods of competition under the Federal Trade Commission Act. The statement in counsel's brief (page 70) that respondents have used exclusive dealing agreements "until recently", suggests a recognition on his part of the fact that such agreements have for the most part fallen into disuse. In fact, it is undisputed that a number of the respondents have never used such agreements. In any event, counsel recognizes that the theory which he now espouses, unlike the established exclusive dealing theory of the complaints, involves a foray into virgin territory. This seems apparent from his statement that (page 110): "The practices with which we are here concerned have never before been clearly labeled."

8. In seeking to classify as unfair methods of competition, practices which have "never before been clearly labeled", counsel supporting the complaint undertakes to develop a theory concerning the law of unfair methods of competition which has "never before been clearly" recognized. Counsel apparently concedes that the practices do not fall within either of the two broad categories of practices which the Supreme Court held to be encompassed by the words "unfair methods of competition" in *FTC v. Gratz*, 253 U.S. 421, 425, viz., (a) practices which are "opposed to good morals because characterized by deception, bad faith, fraud or oppression", and (b) practices which are "against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." While later decisions have questioned whether the Supreme Court did not go too far in substituting its own judgment for that of the Commission as to whether the particular methods of competition there involved were unfair (see, e.g., *Hastings Manufacturing Company v. FTC*, *supra*, at 258), and some decisions have expressed the basic concept of what constitutes unfair methods of competition somewhat differently than the language used in *Gratz* (see, e.g., *FTC v. Keppel & Bro., Inc.*, 291 U.S. 304³⁴), the broad criteria laid down in the *Gratz* case are still good law.

³⁴ In the *Keppel* case the Court expressed essentially the same thought as that appearing in the paragraph (a) above of the *Gratz* case when it stated (at page 311):

A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal, was thought to involve the kind of unfairness at which the statute was aimed.

Counsel supporting the complaint has suggested a new, additional and somewhat esoteric standard for determining whether specific practices may be characterized as "unfair." In addition to the two broad yardsticks suggested in the *Gratz* decision, counsel suggests a new crucible for testing whether practices are unfair, viz., whether they constitute "beneficial competition" or conversely, "worthless competition." This shiney new standard has suggested itself to counsel from a variety of words and phrases found in several cases and in other non-legal authorities cited by counsel.³⁵ Aside from the questionable nature of the alchemy by which counsel distills his new concept, it is not entirely clear what is accomplished thereby. It is difficult to understand how the terms "beneficial competition" and "worthless competition" shed any further light on the problem of what is meant by the phrase used in the statute, "unfair methods of competition." Presumably "beneficial" competition is equivalent to "fair" competition, and "worthless" competition to "unfair" competition, but having stated this, one has the feeling that he is back at the point where he started.

9. While the terms themselves shed very little enlightenment as to their application, counsel supporting the complaint has endeavored to supply an explanation thereof. Counsel suggests that "beneficial" competition should center around "quality and price", and that other practices, such as supplying dealers with cabinets and signs, and making loans or performing other miscellaneous services, involve "worthless" competition, which results in the public "paying higher prices for second-rate merchandise." Counsel's argument overlooks the fact that there are numerous other factors which legitimately enter into the competitive picture. Among the factors which have long been recognized as falling within the category of accepted commercial competitive practices, in addition to price and quality, are—

³⁵ These include the *Gratz* case itself, from which counsel takes the phrase "public policy" (which is used to introduce the (b) category referred to above, involving monopolistic practices), and interprets the phrase as being synonymous with "public interest"; the *Hastings* case in which there appears a reference to practices "likely to result in public injury"; the *Cement Institute* case (333 U.S. 683), in which the concerted maintenance of a basing point system was held to be unfair and in which reference is made to the traditional concept that Congress intended to outlaw any practice which "destroys competition and establishes monopoly" (clearly falling within the (b) category of unfair practices defined by the *Gratz* decision); a work by A. A. Berle entitled "The Twentieth Century Capitalist Revolution" in which it is suggested that the mighty should be held to a higher standard of conduct than the lowly; and a treatise on the Federal Trade Commission by Thomas C. Blaisdell, Jr. (Columbia University Press), in which reference is made to a similar notion, viz., that certain practices might be regarded as unfair only when committed by large companies (giving as examples tying contracts and price discrimination).

[M]ore extensive advertising, * * * better terms as to time of delivery, place of delivery, time of credit, interest or no interest, freights, methods of packing * * *, more attractive and more convenient packages, superior service, and many others * * *. (*Sinclair Refining Company v. FTC*, 276 Fed. 686, 688.)

It may be that counsel would also classify some of the above factors as involving "worthless" competition or, as he has sometimes designated such practices, "expensive" competition. Actually some of the competitor witnesses did complain because they could not advertise as extensively as respondents, thus putting them at a competitive disadvantage. Some complained about the expense of packaging, one even complaining about the expense of printing his company's name on the package. However, the examiner does not understand that the level of "fair" competition is determined by what the small manufacturer or any category of producer can afford. The mere fact that a practice is expensive or makes it more difficult to do business does not necessarily make it unfair.³⁶ While it was the intention of the law to insure "fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain", it was not intended "to compel all competitors to a common level." *FTC v. Sinclair Refining Co.*, 261 U.S. 463, 475-476.

Much of counsel's argument with regard to "beneficial competition" suggests that it is the function of the Commission to select from among the broad spectrum of competitive practices, having varying degrees of desirability, those which it deems most wise and beneficent. This, however, misconceives the function of the Commission. It does not "presume to run the economic railroad."³⁷ Its function is to *prohibit* practices demonstrated to be "unfair", not to *prescribe* "fair" ones.

Counsel's suggestion that the public has a stake in having competition limited to price and quality, and that it is paying more for "second-rate merchandise" is entirely without merit. While it is true that the cost of furnishing services to dealers, such as the supplying of cabinets and signs, must ultimately be reflected in the prices charged the dealer, it does not follow that the public is disadvantaged. If the dealer had to supply his own cabinets and service them, and pay for signs and other equipment, those costs would obviously have to be reflected in his price to the public. As far as the public is concerned it appears

³⁶ See *Sinclair Refining Co. v. FTC*, 276 Fed. 686, 689 (C.A. 7, 1920), where the court held that there was nothing in the law making it "illegal for one competitor to do that which is beyond the financial ability of another"; see also *FTC v. Paramount*, 57 F. 2d 152, 157 (C.A. 2, 1932), where the court held that the "mere fact a given method of competition makes it more difficult for competitors to do business successfully is not of itself sufficient to brand the method of competition as unfair."

³⁷ Annual Report of Commission, 1956, p. 6.

to make little difference whether respondents furnish equipment and services to the dealer or the latter supplies them himself. In fact, the indication is that if the dealer had to do these things for himself, many would be unable to do so as cheaply and efficiently as the ice cream suppliers and that there would be fewer outlets carrying ice cream, with the result that the public might well have to pay more for a scarcer product.

Counsel supporting the complaint has suggested during the course of these proceedings that possibly the assistance of dealers by ice cream manufacturers has resulted in an oversupply of retail establishments selling ice cream, and that it would be better if there were fewer establishments carrying the product, so that each one could sell more. The examiner cannot subscribe to this concept based on a theory of economic scarcity which is reminiscent of the proposals of a former Secretary of Agriculture who suggested that every third pig be put to death in order to increase the price of pork. The hearing examiner is confident that the natural operation of the economic laws governing our free competitive system will, over any given period, establish a proper balance between the supply of retail outlets handling ice cream and the public demand for such products, without the imposition of the artificial restraints suggested by counsel.

Counsel's suggestion that the public is paying a higher price for "second-rate merchandise" is likewise not supported by the evidence. If anything, the standards of ice cream today are higher than they were in former years for an equivalently priced product. It is true that most companies sell a second grade of ice cream with a lower butterfat content and higher overrun. However, this product sells at a price substantially below the standard brand merchandise. Conversely, some companies today are producing a premium brand which sells at a higher price. The public is given a wide choice in grade and price, and ice cream is made available at convenient retail outlets of all types.

10. Despite considerable argument in which it is suggested that the complaint practices do not involve "beneficial" competition and are therefore unfair, counsel finally concedes that an ultimate finding of illegality depends upon a showing of the adverse competitive impact of the practices.³⁸ This being so, it is difficult to understand the purpose of the extended discussion with respect to the new standard of

³⁸ Counsel states in this connection (p. 110 of brief):
It follows that methods or practices * * * which do not have the capacity to benefit the public * * * are unfair if, of course, the requisite degree of injury is found to exist as a matter of fact. [Emphasis supplied.]

"beneficial competition", since a showing of competitive injury would establish the illegality of the practices even under what counsel regards as the old-fashioned concepts of the *Gratz* decision, in which practices "against public policy because of their dangerous tendency unduly to hinder competition or create monopoly" are held to constitute unfair methods of competition. It would appear, therefore, that counsel has come full circle to a recognition of the fact that the complaint practices are not illegal in themselves, and that a finding of illegality depends on the context in which they were used.

11. It seems clear, therefore, that in order to find that the complaint practices constitute unfair methods of competition in violation of the Federal Trade Commission Act, it must either be found that they are basically opposed to good morals or that, in the context of their use, they have dangerous anticompetitive tendencies. While the governing principles are self-evident, their application to individual cases is difficult. As stated by the Supreme Court in *FTC v. Motion Picture Advertising Service Co., Inc.*, *supra*, at 396:

The point where a method of competition becomes "unfair" will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question.

The fact that a practice has been "openly adopted by many competing concerns" (*FTC v. Sinclair Refining Co.*, *supra*, at 475; *Motion Picture Adv. Serv. Co.*, 47 FTC 378, 389), and not merely by a single competitor as part of "an aggressive campaign" (*Hastings Mfg. Co. v. FTC*, *supra*, at 255), is a factor to be considered. Where a practice is not inherently anticompetitive, there must be a showing of a "purpose or power to acquire unlawful monopoly" or convincing evidence that the "probable effect of the practice will be unduly to lessen competition" (*FTC v. Sinclair*, *supra*, at 475; see also *Hastings Mfg. Co. v. FTC*, *supra*, where respondent's "aggressive" purpose was noted by both the Commission and the court). Where the legality of a practice depends on its effect and it is of a type not clearly recognized as anticompetitive (such as combinations and conspiracies), a finding that it has a dangerous tendency unduly to hinder competition or create a monopoly, should take into account "its effect as demonstrated upon the experience of competitors." *FTC v. Paramount Famous-Lasky Corp.*, 57 F. 2d 152, 158 (C.A. 2, 1932).

B. Summary

1. Illegality Based on Exclusive Dealing.

- a. The evidence discloses the use by some respondents of exclusive

dealing agreements in connection with some of the complaint practices. The evidence with respect to such agreements pertains mainly to the supplying of ice cream cabinets and the loaning of money or rendering of other financial assistance. To the extent that such agreements require a dealer to purchase "all" of his frozen products, or his "requirements" thereof, or to purchase such products "exclusively", from a particular supplier, they involve exclusive dealing arrangements of the type which has been held to constitute an unfair method of competition.

This does not, however, apply to agreements which merely provide that a dealer will use a cabinet or similar equipment supplied by his frozen products supplier only for the storage of that supplier's products. Such agreements are not considered to constitute exclusive dealing arrangements; nor are they illegal as "tying" contracts, since respondents do not have any patents or monopoly or enjoy any dominant position in the cabinet field, and the restriction is confined to the use of the cabinet and does not limit dealers, expressly or in practical effect, in the sale of competing products. *FTC v. Sinclair Refining Co.*, *supra*, at 474; *Judson L. Thomson Mfg. Co. v. FTC*, 150 F. 2d 952 (C.A. 1, 1945); cf. *United Shoe Machinery Corp. v. U.S.*, 258 U.S. 451; *International Business Machine Corp. v. U.S.*, 298 U.S. 131. Agreements of this type are sanctioned by the laws of a number of states, which prohibit or restrict the storing of one manufacturer's frozen products in the cabinet supplied by another.³⁹

b. While exclusive dealing arrangements fall within the category of practices which have been held to be unfair, they are not illegal per se. As already noted, where such agreements are of limited duration, meet the peculiar problems of an industry, and do not unreasonably restrain trade, they have been held not to be illegal. *U.S. v. American Can Co.*, *supra*, at 31; *Motion Picture Advertising Service Co., Inc.*, *supra*, at 392, and at 395 of 344 U.S. For the most part, the agreements here involved are of limited duration. Many of those used in connection with the supplying of cabinets are terminable at will or on short notice or are of a maximum fixed duration of one year. Many of those used in connection with the rendering of financial assistance are terminable at any time by repayment of the balance due, and even when they have a fixed duration are in practice termi-

³⁹ An example of such laws is the Pennsylvania statute which provides:

It shall be unlawful for any person * * * knowingly to supply or place or deposit ice cream * * * of one ice cream manufacturer or distributor in any equipment, cabinet, can, or other container belonging to another ice cream manufacturer or distributor. (Act No. 512 approved May 8, 1956, entitled "An act amending the Act of May 21, 1949, Pamphlet Laws 1594.)

nable by repayment of the balance. The requirement that the dealer purchase the supplier's products exclusively during the period the financial obligation is outstanding meets a practical need of the industry since the repayment schedule is frequently keyed to the dealer's ice cream purchases by a surcharge on such purchases or some similar arrangement.

c. The examiner finds it unnecessary to determine which, if any, of the exclusive agreements used by respondents should be classified as falling within the "unfair" category, or whether some may be excluded from this category under the above authorities by reason of the limited duration of such agreements or the economic justification thereof in industry conditions. As has already been noted, even where such arrangements are of the type which may be classified as unfair, it is nevertheless necessary to establish the probable adverse competitive impact of such arrangements before it can be concluded that they are illegal. Under the line of authority established by the Supreme Court in the *Standard Stations* case (*Standard Oil of California v. U.S.*, 337 U.S. 293), in order to justify an inference or finding that the use of such agreements may adversely affect competition, it must appear that a substantial proportion of the market is tied up thereby. The record in these proceedings fails to establish that a substantial portion of any market has been tied up by respondents' use of such agreements.

As has already been noted, there is no evidence that respondents Beatrice, Foremost, Pet, Fairmont or Hood use such agreements in connection with the supplying of cabinets or that Pet, Fairmont or Hood use them in connection with the making of loans or financing the sale of equipment. The evidence with respect to the other respondents is fragmentary, it appearing that some of them have used such agreements in some areas but not in others, and that some have used them in connection with some types of financial assistance but not others. It also appears that such agreements have little practical effect on the great bulk of small retail establishments, which customarily handle a single brand irrespective of the requirement of any agreement. It further appears that there is a growing trend toward the splitting of accounts, despite exclusive agreements, and that such agreements do not substantially affect the mobility of dealer accounts.

In any event, it is not possible to make any finding with respect to the probable impact of the use of such agreements, based on the quantitative substantiality test of the *Standard Stations* case, since the record fails to disclose what proportion of any respondent's gallonage in any particular market is affected by such agreements nor as

to the proportion which such affected gallonage represents of the entire gallonage sold in the market. Furthermore, it may be doubted whether such test would be appropriate in these cases in view of the fact that counsel supporting the complaint has not sought to rely on any inference of injury, but has sought to show actual injury in specific markets. The evidence introduced with respect to actual competitive conditions in these markets would tend to negate any possible inference of injury which might otherwise arise. *Purex Corp. Ltd.*, 51 FTC 100, 167.

2. Illegality Apart from Exclusive Dealing.

a. In apparent recognition of the fact that exclusive dealing arrangements play a minor role in the operation of the complaint practices, counsel supporting the complaint has largely abandoned this aspect of the case, and contends that the practices are illegal without regard to whether they involve exclusive dealing. To sustain a finding of illegality, it must appear that the practices are inherently illegal or that they are illegal because of the context in which they are used.

b. Aside from the fact that counsel's theory extends beyond the allegations of the complaints, the examiner finds nothing inherently illegal about the complaint practices as such. There is nothing about the practices which justifies characterizing them as "opposed to good morals." Most of the practices have been traditional in the ice cream industry. The record fails to establish that respondents are the originators of the practices or the only ones to use them. The court in the *Hastings* case specifically recognized that, apart from its use as an inducement for exclusive dealing, it is "not illegal for a manufacturer to finance his retail outlets." It is clear, therefore, that if the practices are illegal, it must be because of the context in which they are used. It must be because respondents have, as stated in the *Sinclair Refining* case, *supra*, exhibited a "purpose or power" to destroy competition, or because they have used the practices "aggressively" to substantially improve their position, to the detriment of competitors (*Hastings Mfg. Co. v. FTC, supra*).⁴⁰ This, in substance, is the gravamen of much of the criticism of competitors, whose fire was directed more at the excessive and aggressive use of the practices to the detriment of competitors, than at the basic practices themselves. Counsel supporting the complaint has also conceded that a finding of

⁴⁰ In the *Hastings* case it was found that as a result of "an aggressive campaign", in which the complaint practices were involved, respondent in the space of four years had grown from one of the smallest manufacturers in the field to the second largest.

illegality rests ultimately on establishing that the "requisite degree of injury * * * exist[s] as a matter of fact."

The records in these proceedings fail to establish the aggressive or excessive use of the complaint practices by respondents or that there has been any substantial injury to competition by reason of respondents' use thereof. While there is some evidence of competitive difficulties by individual competitors in some markets, the record fails to establish a substantial causal relationship between such difficulties and the complaint practices and, moreover, fails to establish any substantial injury to competition in any of the markets involved. The record also fails to disclose any significant improvement in the competitive position of any of the respondents, on an overall basis or in any market area, during the period covered by the evidence (1947-1956), or any trend toward concentration of the frozen products business in favor of respondents during this period.

CONCLUSION OF LAW

It is concluded that counsel supporting the complaint has failed to establish by a preponderance of the reliable, probative and substantial evidence that any of the respondents in the above-entitled proceedings has engaged in any unlawful conduct in violation of Section 5 of the Federal Trade Commission Act, as alleged in the complaints, and that the complaints should, accordingly, be dismissed.

ORDER

It is ordered, That the complaints in the above-entitled proceedings be, and the same hereby are, dismissed.

APPENDIX TO INITIAL DECISION

This appendix contain an analysis of competitive conditions in each of the market areas concerning which evidence was offered, with particular reference to whether the evidence discloses that the use of the complaint practices by respondents has resulted in competitive injury in any such market area. Counsel supporting the complaint called approximately 90 competitor witnesses and 73 dealers in 25 cities. In a number of instances these witnesses testified with respect to competitive conditions in areas other than the city in which they testified. Consequently this analysis of competitive conditions involves a number of other areas, in addition to the 25 hearing cities.

Before turning to a consideration of the evidence, certain preliminary observations should be made which are generally applicable to the evidence offered by counsel supporting the complaint. The first has to do with the representative character of the witnesses called in support of the complaint, particularly the 90 competitor witnesses upon whose testimony counsel supporting the complaint concedes "these cases rest largely" and who, he claims, are representative of independent ice cream manufacturers generally. While the sheer number of these witnesses and their geographic distribution give a surface impression of representativeness, closer analysis on a market area basis, in terms of the number of companies in the market and the position of some of the witnesses in the market, gives a considerably different picture. While in a few markets, such as Portland, Oregon, the competitor witnesses represented a good cross-section of companies in the market, in most areas the coverage was spotty and the witnesses left the impression of not being truly representative of manufacturers in the market. A number of the witnesses called were from small, marginal and unprogressive companies, which did no advertising and engaged in very little selling effort, but sought to attribute their difficulties to the sins of the larger company, rather than to their own inadequacies. In a number of instances representatives of companies, which the testimony of other witnesses revealed to be substantial and prospering, were excused from testifying after having been subpoenaed. In some areas, such as New York, not a single competitor witness was called.

Another serious deficiency from the standpoint of the distribution of witnesses was the lack of proper balance between competitor and dealer witnesses. In some areas all or substantially all the witnesses were competitors, with no dealers to corroborate hearsay testimony concerning relations between respondents and specifically named dealers. In other areas, such as New York, there was a plethora of dealer witnesses, but not a single competitor was called to indicate what competitive impact, if any, respondents' relations with the dealers in question had had in that area. When both competitors and dealers were called in an area, the dealers were frequently dealers who had not been involved in the competitive situations testified about by the competitor witnesses, or had been customers of manufacturers other than those who testified and sometimes of manufacturers who had been excused from testifying.

A final comment which should be made involves the general reliability of the competitor testimony. As has been indicated in the

main decision, much of the testimony of such witnesses consisted of uncorroborated hearsay with respect to what assistance various respondents had allegedly given accounts which they had lost or been unable to acquire. In addition, there was considerable testimony by some of these witnesses concerning alleged declines in their overall sales or profits. Frequently this involved a comparison of their sales figures in a recent year with those in 1946 or 1947, and sometimes reference was made to sales figures in intervening years. There was also reference to sales figures involving individual customers. Yet the witnesses were not requested to produce their books and records but, for the most part, testified from memory, giving estimates and rough approximations of sales figures going back as much as eight years when all but persons with unusually retentive memories would have little likelihood of being reasonably accurate.

In apparent awareness of the questionable reliability of some of the figures upon which claims of losses were based, counsel supporting the complaint argues in his brief that "books and accounts tell only part of the story" and that the "health of competition involves more than profit and loss statements", but rests on a number of factors "including the state of mind of participants." The subtlety of this argument escapes the prosaic understanding of this examiner. Either a man's sales or profits have declined or they have not. If they have, this will be best reflected in his books and records rather than in his state of mind. If they have not, his disturbed state of mind, unsupported by the realities of his profit and loss situation, is a matter of small moment in these legal proceedings, albeit it may be of considerable interest to those engaged in the fields of psychology, psychiatry or mental divination.

With these general observations concerning the nature of some of the evidence in the record, the examiner turns to a consideration of competitive conditions in the various market areas where counsel supporting the complaint sought to show the competitive impact of the complaint practices. The evidence in each area will be discussed in the same chronological order as the evidence was offered.

1. *Portland, Oregon*

The only respondents doing business in the Portland area are Arden and Carnation, the latter doing business under the name of its subsidiary, Damascus Milk Company. Each of the respondents has a manufacturing plant in Portland and sells in the Portland metropolitan area as well as in other sections of the state. In addition to

the two respondents there were approximately eight other manufacturers of ice cream selling at wholesale in the Portland market, as of October 1955, when hearings were held. These are Rogers Ice Cream Company (formerly known as Dairysweet Ice Cream Company), Dairy Cooperative Association (whose ice cream business is operated under the name Mayflower Ice Cream Company), Farmers Dairy Association, Jewel Ice Cream Company, Meadowland Dairy Company, Peter Pan Ice Cream Products Company, Polar Pie Ice Cream Company (an affiliate of Sunnybrook Farms Dairy Company), and Frostkist Ice Cream Company. A former substantial supplier in the market, Swift & Company, left the market in 1951.

In addition to the above manufacturers selling at wholesale, there are two large retail chains in the Portland area which manufacture their own ice cream, Safeway Stores and the Fred Meyers drug chain. Likewise, since the end of World War II there has been a substantial increase in the growth of roadside stands and other retail outlets which sell so-called soft ice cream made from vegetable fats and other ice cream substitutes, and retail establishments which manufacture their own ice cream in counter freezers from mixes purchased from others.

Counsel supporting the complaint called as witnesses seven of the eight ice cream manufacturers in the Portland area ⁴¹ and also one manufacturer from the state capital of Salem, which is outside the Portland trade area. No retail dealer witnesses were called from either area.⁴²

The testimony of a number of the Portland manufacturers was to the effect that it was becoming more difficult to obtain new accounts and to retain existing accounts because of the expense involved in meeting the requests of dealers, particularly for the newer type ice cream refrigeration cabinets and for financial assistance. Some of the manufacturers claimed that because of their financial inability to meet these demands their volume had either declined or had failed to keep pace with the increase in population, and that their profits were likewise declining. Most of the testimony was of a general nature, not directed at any particular competitor. However, in some instances the witnesses sought to attribute their problems in part at least to respondents Arden and Carnation (Damascus).

⁴¹ The only manufacturer not represented at the hearings was Frostkist.

⁴² Counsel supporting the complaint called a representative of the Oregon Independent Retail Dealers Association. However, his testimony was based largely on opinion and hearsay, and portions thereof were stricken. To the extent that his testimony has any relevance, it was duplicated in the testimony of other witnesses.

Insofar as the competitors' complaints involved the furnishing of ice cream cabinets to dealers by ice cream manufacturers, it should be noted that they were not directed at the furnishing of ice cream cabinets, as such, or at any agreements used in connection therewith requiring the exclusive use of the products of the manufacturer supplying the cabinet or that the cabinet be devoted exclusively to the storage of the supplier's frozen products.⁴³ They were directed rather at the expense of furnishing the more up-to-date cabinets and to the alleged practice of furnishing a dealer more equipment than he required for his ice cream needs.

In order to place the matter of supplying cabinets in its proper perspective, it should be noted that all manufacturers in the Portland area for a great many years have customarily supplied ice cream cabinets to their dealers, except for a small percentage of dealers who preferred to purchase their own refrigeration equipment. Prior to World War II it was the practice of many manufacturers to make a rental charge to the dealer for the use of the ice cream cabinet supplied by them. However, this practice began to dwindle during the depression years, and by 1948 most manufacturers had ceased collecting rentals in the Portland market, except from the smaller dealers whose volume did not justify a free cabinet.

There is nothing in the record to establish that respondents Arden or Carnation were responsible for the discontinuance of the collection of rentals. In fact, when the first manifestations of the practice appeared during the depression years, Carnation (Damascus) had not yet gone into the ice cream business in Portland, its operations being confined to the milk end of the dairy business. The testimony of the representative of Peter Pan Ice Cream Company indicates that all companies played a part in the abandonment of the practice of charging rental for cabinets, and that no particular company was responsible for it.

Aside from the question of whether the two respondents were responsible for or took a leading role in the abandonment of the practice of charging a rental on cabinets, the record does not establish any necessary relationship between such abandonment and the difficulties which any competitor may have experienced. While the Peter Pan representative did testify that his profits during the period when it was customary to collect rentals were "higher than they are now", this does not establish a cause and effect relationship between the two

⁴³ One of the few witnesses to refer to the subject, the representative of Polar Pie Ice Cream Company, expressed his opposition to permitting the placing of another manufacturer's ice cream in the cabinet supplied by his company.

facts. The cost of doing business, whether it involves the furnishing of cabinets free of charge or any other service, must eventually be included in the price of ice cream. This fact was attested to by witnesses in a number of areas who indicated that the abandonment of rental charges was generally accompanied by an upward price adjustment in order to take care of the increase in costs. As stated by the representative of Polar Pie Ice Cream Company:

[W]hen we give free cabinet rentals it costs my company some money. It has to be tacked on somewhere in the price of ice cream.

This same economic principle is recognized by the practice of most ice cream manufacturers who grant to dealers owning their own refrigeration equipment a special discount or refrigeration allowance, in recognition of the fact that the manufacturer is relieved of the cost of having to supply such equipment.

As indicated above, the complaints of competitor witnesses with regard to cabinets were centered about the increased cost thereof during the postwar period, when the more expensive display and merchandising cabinets came into vogue to replace the less expensive storage type cabinets previously in use. This, of course, is due primarily to the improvements in cabinets rather than to any action of respondents. The evidence discloses that the impetus for the use of such cabinets came primarily from the demands of dealers, who were frequently educated by salesmen representing cabinet manufacturers concerning the advantages of the newer cabinets. The record fails to establish that respondents initiated the practice of supplying the newer cabinets in the postwar period or that they used such cabinets as an aggressive competitive weapon in acquiring dealer accounts.

The only suggestion of any leadership in this practice was in the testimony of the representative of Rogers Ice Cream Company who testified, in response to the question "whether there was a leader in this offensive", that "there was a leader in the respect that the larger manufacturer was in a position to supply the more expensive equipment." He identified this so-called leader as Damascus. The examiner does not construe this to mean that Damascus was the leader in the sense of instituting the practice or of using it aggressively. In any event, the Rogers' witness was unable to back up his broad assertion of Damascus' leadership in the supplying of cabinets, by naming a single account he had lost or been unable to acquire due to this practice. The only specific instance that he could cite was an account which he endeavored to acquire from Swift & Company, which allegedly was able to retain the account by offering it a bigger cabinet.

While other competitors complained about the increase in the expense of furnishing cabinets, particularly to the larger accounts, they did not suggest that either of the respondents was responsible for this condition. A representative of Farmers Dairy Association specifically testified that he could not say "anyone would be more aggressive than anyone else."

A number of the witnesses recognized that the newer cabinets were of a definite advantage to the industry since they tended to increase sales by appealing to the buying impulses of the public and also cut down on delivery costs by providing larger storage space. Some of the witnesses took note of the fact that the cabinet manufacturers had played a part in educating dealers as to the desirability of the newer type cabinets, and that a good part of the impetus for the supplying of the cabinets had come from the dealers themselves.

The only reference in the record to any specific competitive situation where any respondent had utilized a cabinet as a vehicle for obtaining an account was in the testimony of the representative of Meadowland Dairy, who claimed that Arden had taken an account from him by furnishing them a self-defrosting cabinet in place of the "older-type equipment" which Meadowland had there. Outside of the witness' ipse dixit, there is no evidence in the record that the account in question had been induced to switch because of the self-defrosting cabinet or, in fact, that Arden had even supplied the account with such a cabinet. Furthermore, other evidence offered by counsel supporting the complaint indicates that the account in question had not switched, but was actually being served on a split basis by both Arden and Meadowland.⁴⁴

The evidence with respect to the supplying of cabinets simply boils down to the fact that cabinets are becoming more expensive and some manufacturers would prefer not to have to supply them. However, it was recognized that such cabinets have a legitimate objective to perform and may result in increases in sales and savings in costs. Moreover, there is no reliable evidence that the practice of supplying cabinets, either initially or during the more recent period, was instituted by either Arden or Carnation, or that either has used this practice as an aggressive competitive weapon to obtain accounts from competitors or to secure accounts in competition with competitors. The size and type of cabinet best suited to a particular account involves the exercise of a sound business judgment on the part of the ice cream supplier, and there is nothing to indicate that either Arden or Carna-

⁴⁴ The account in question is Slinger's Market; CX 175, page 4, identifies this as a split account.

tion acted contrary to ordinary business prudence in furnishing cabinets to dealers which were larger than were needed or of a better type than were needed, or that they were offered as an inducement for the dealer to become or remain a customer. Not a single dealer in the State of Oregon was called to testify that the supplying of a particular cabinet to him was the reason for his doing business with Arden or Carnation, or had any influence on his decision to do business.

There was no evidence offered that exclusive dealing or exclusive storage provisions in connection with the furnishing of cabinets presented any problem in the Portland market. The complaints relating to cabinets were directed at the expense involved, and not at any exclusive agreements used in connection therewith. The only witness who referred to the latter subject was a representative of Polar Pie, who indicated that such restrictive provisions had little practical effect since most of the dealers handled one brand only and that when either party was dissatisfied with the arrangement it could be readily terminated.

The other practice which was the target of considerable complaint was the matter of rendering financial assistance to dealers. While it did not appear to loom as large in the minds of competitors as the supplying of expensive cabinets, some of the competitor witnesses indicated that the lending of financial aid to dealers, either in the form of outright loans to assist them in remodeling or in financing the purchase of equipment, presented a serious problem to them. Those who placed the most stress upon the financing as a problem were Meadowland, Peter Pan and Polar Pie. As was the case with much of the testimony relating to the furnishing of cabinets, a large portion of the testimony on the subject of financing involved rather general complaints about the expense involved in rendering financial assistance to dealers and the financial inability of some companies to engage in it. There was little reliable evidence that the engagement in these practices by Arden or Carnation was responsible for the loss of, or inability to acquire, dealer accounts on any substantial scale.

The representative of Meadowland testified in general terms that the "biggest thing" he had to do to acquire accounts was "loaning money" and that he was losing his bigger accounts "mostly on financing." However, there is little or no evidence connecting the respondents with Meadowland's alleged difficulties. The evidence indicates it to be one of the smallest operators in the Portland market. It does very little advertising and the ice cream business appears to be one of several lines of endeavor in which the principals of this company are interested. The witness made no reference to Arden as being responsi-

ble for any of Meadowland's alleged difficulties due to financing. He did refer to two accounts into which Damascus had split, allegedly because of financing. However, his hearsay testimony concerning the assistance rendered to these accounts was largely contradicted by a Damascus representative who also was called in support of the complaint. According to the uncontradicted and credited testimony of the Damascus witness, one of the accounts received only limited assistance (less than one-fourth of the amount testified to by the Meadowland witness) in purchasing a refrigeration cabinet, and the other account not only did not receive any financial assistance, but did not even have an ice cream cabinet from Damascus in his place of business.⁴⁵ In neither case is there any evidence, even hearsay evidence, that the financial assistance or alleged financial assistance was a factor in inducing these accounts to add the Damascus brand. The Meadowland witness made no claim that he was so advised by either account and no representative of the dealers in question was called to testify.

The representative of Peter Pan testified generally that he had lost accounts or had been unable to acquire them due to his inability to make loans or finance equipment. Although he testified, in response to a leading question by counsel supporting the complaint, that he had lost such accounts to respondents Arden and Carnation, he could actually recall only a single account falling within this category, which he claimed was lost to respondent Arden. Not only is there no reliable evidence that Arden ever financed the account or that financing was a factor in the account's changing suppliers, but there is other evidence in the record that Arden did not acquire the account in question from Peter Pan but from another manufacturer.⁴⁶ The complaints of the Peter Pan representative with regard to financing were not limited to the respondents, but covered most of the other competitors in the field. In fact he indicated that he did not believe the practice of making loans or of supplying equipment would cease merely by the termination of such activities on the part of Arden and Damascus.

⁴⁵ The first account mentioned by the Meadowland witness was Joe Hanna, where Damascus allegedly had financed \$8,000 worth of equipment. According to the Damascus branch manager, the only assistance given to this account was the sale of a refrigeration cabinet for \$1,875, under a conditional sales contract. With respect to the second account, Rask Brothers, to whom Damascus had allegedly agreed to loan money for the remodeling of the store, the testimony of the Damascus manager indicates that no loan was made or offered to this account and that the account was not even supplied with the customary ice cream cabinet. According to the Damascus witness, both of these accounts had indicated dissatisfaction with Meadowland service and merchandising policies.

⁴⁶ The account, which was identified as McKeel's, was acquired in 1953 from Mayflower Dairy, according to the uncontradicted and credited testimony of the Arden manager, who was called as a witness by counsel supporting the complaint.

The representative of Sunnybrook Farms (Polar Pie Ice Cream Company) was somewhat more specific than the other witnesses in seeking to assess responsibility for a decline in his company's volume during 1954. According to the Sunnybrook witness, his company had lost approximately five accounts to Arden and two to Damascus because of loans or financing. He claimed that he had lost these accounts after first being asked to make loans by the owners and declining to do so. However, in only two of the seven instances referred to is there any reliable evidence that a loan was ever made to the accounts in question.⁴⁷

The representative of Rogers Ice Cream Company, while stressing primarily the supplying of cabinets as presenting the most difficult problem to his company, also claimed that his company found it difficult to meet demands from dealers for financing. The Rogers' witness could only recall a single account which his company had lost to a respondent because of financing. The account in question had switched to Arden in April 1954, and the record discloses that two months later it received a loan to assist it in remodeling a new store to which it was moving. No evidence was offered to establish that the loan entered into the decision of the dealer to switch to Arden. That such loan did not "captivate" the dealer, as suggested by counsel supporting the complaint, is indicated by the fact that despite a substantial balance on the loan, the account switched to Mayflower Dairy six months later. While the Rogers' representative sought to leave the impression that his own company's financing efforts were on a very modest basis, evidence offered by respondent Arden indicates that Rogers in fact has made loans as large as \$20,000 and \$30,000.

The only other competitor who indicated that the matter of loans presented a problem was Jewell Ice Cream Company. The representative of that company did not object to the practice of assisting

⁴⁷ Although specifying seven accounts as having been lost on account of loans, only five were specifically named by the witness. In two instances there is independent documentary evidence in the record and corroboration by an Arden official that Arden gave financial assistance to the accounts in question. One instance involved the VGA Market which received a loan from Arden, and the other was Rose Park Food Market where Arden had guaranteed a bank loan to the dealer. These loans were used for remodeling or expansion purposes. The Arden representative denied that his company had ever served the third account mentioned by Sunnybrook, viz., Stacey & Young. The fourth account referred to by the Sunnybrook witness, Harney Hill Grocery, did not receive any financial assistance at the time it switched to Arden in 1953, but the dealer did receive a loan two years later for the purpose of remodeling his establishment. This loan obviously could have had no connection with the account's switching. In the case of the only specific instance involving Damascus, viz., Schwary's Grocery, the Damascus representative testified that this account had been acquired from Farmers Dairy and not Sunnybrook. In any event, there is no reliable evidence that such account received any financial assistance.

customers financially as such. In fact, he indicated that his company had assisted customers in remodeling and that it had resulted in increasing the volume of these accounts substantially. Likewise, he indicated that his company had had very little loss from its loans. However, he claimed that a new practice had arisen recently of making loans without interest and this he objected to as tantamount to cutting the price of ice cream. The witness conceded that he hadn't "heard" of Arden making such loans, but claimed that he had lost an account to Damascus due to an interest-free loan.⁴⁸ There is not a scintilla of evidence in the record, aside from the witness' hearsay statement, that Damascus has made any interest-free loans in Portland.⁴⁹

The evidence indicates that many of the ice cream manufacturers in the Portland area make loans to assist their customers, particularly for remodeling purposes. The record fails to establish that Arden's and Carnation's activities in this respect are different from those of their competitors, except possibly insofar as they may have a greater number of customers than many of their competitors and therefore possibly may have made a greater number of loans, although this is by no means established by the evidence. Carnation makes approximately twenty loans a year in the Portland area, of which about 90 percent are made to their existing customers and the balance are distributed between new openings and customers of competitors. At the time of the Portland hearings, Arden had 10 loans outstanding out of a total of 500 to 600 accounts in the area. These figures hardly suggest that either respondent has engaged in an aggressive loan campaign to pirate customers away from competitors or to induce new dealers to trade with them.

There is not a scintilla of evidence that either respondent had anything to do with instituting the practice of assisting customers financially. On the contrary, the representative of both Peter Pan and Sunnybrook attributed the inception of the practice of making loans on any considerable scale to Swift & Compay. The extent to which others in the market engage in the practice may be judged from the testimony of the Peter Pan representative, who stated that the practice of making loans by ice cream manufacturers could not

⁴⁸ The witness did not identify the account in question, other than by referring to the street on which it was located. He conceded that he hadn't personally followed the ice cream business for ten years and didn't know what competitors were doing, except for what his partner-brother told him.

⁴⁹ There are no agreements in evidence used in connection with the making of loans by Damascus in Portland. Such evidence as there is concerning loans in the area indicates that interest is charged (CX 274, pp. 84 and 100). A form of agreement used in connection with financing the sale of cabinets likewise contains provision for the payments of interest (CX 271A).

be stopped merely by the termination of such activity by Arden and Damascus.

While the vast preponderance of the evidence at the Portland hearings related to the practices of supplying ice cream cabinets and making loans, several of the competitor witnesses referred to other miscellaneous practices as being troublesome. These included the supplying of cabinets for frozen foods other than ice cream or permitting the dealer to use ice cream cabinets for storing some frozen foods, the furnishing of signs, the painting of buildings, giving lower prices and giving gratuities. As was the case with so much of the other testimony, these complaints were of a most vague and general nature and almost none of it was directed at the activities of respondents Arden and Carnation.

The only specific evidence involving the supplying of frozen food cabinets related not to the respondents but to Swift & Company.⁵⁰ A number of the competitor witnesses indicated that dealers frequently used a portion of the ice cream cabinet for the storage of frozen foods and that it was a constant battle to endeavor to discourage them from doing so. There is not a scintilla of evidence that either Arden or Damascus are the leaders in this practice or that their activities in this respect are any different from any other manufacturers. In fact, there is no specific evidence of their engagement in the practice or that any of their competitors lost or were unable to acquire a dealer due to this practice.

With respect to the furnishing of signs, the record discloses that most manufacturers supply an identification sign to their customers, the major portion of which is devoted to the name of the ice cream manufacturer and containing a smaller "privilege panel" with the name of the retail customer. There is no evidence that the activities of Carnation or Arden in the supplying of signs are any different from those of any of their competitors. In fact, there is no specific evidence of their supplying signs or that any competitor lost or was unable to acquire any account because of respondent's engagement in this practice.⁵¹

Insofar as the other miscellaneous practices mentioned in the com-

⁵⁰ The representative of Rogers Ice Cream Company, who was formerly employed as manager for Swift, testified that his former employer had given a frozen food case to one of his accounts, which he later tried to acquire without success. He also testified that it had been Swift's policy while he was with the company to permit dealers to store frozen food in the ice cream cabinet if their volume was sufficiently large.

⁵¹ The only reference to signs was made by the representative of Sunnybrook (Polar Ple Ice Cream Co.), who testified that his company required all dealers to whom it supplied signs to enter into an agreement which required the exclusive purchase of its ice cream for a specific term.

plaint are concerned, the record is more vague and general and lacking in any connection with the respondents than the evidence above discussed. The representative of Sunnybrook (Polar Pie Ice Cream Company) testified generally to having encountered competition in the form of lower prices, painting, putting in a new floor or paying an advertising bill. Although this witness, in response to a leading question by counsel supporting the complaint, claimed that he had encountered these practices by Arden and Carnation, when pressed for specific instances thereof on cross-examination, he stated that his testimony on direct examination "was directed in a general manner to all competitors" and not to Arden and Damascus specifically. Later the witness purported to recall two accounts which had allegedly received assistance from Damascus falling within the above categories, one of which he claimed had received a \$100 gratuity and a home refrigerator for the owner, and the other had had its store painted by Damascus. Not only is there no evidence to corroborate the witness' hearsay testimony with respect to the giving of a gratuity by Damascus, but the Damascus representative specifically denied that his company had made such a gift.⁵² With respect to the alleged painting of a grocery store by Damascus, not only is the establishment in question not identified in the record, but the Damascus representative testified unequivocally that it was not this company's policy to paint stores for customers.⁵³

Although, as above indicated, some of the competitors in the Portland market complained about certain of the practices engaged in in that market, particularly the supplying of cabinets and the financing of accounts, and in some instances sought to attribute the loss of an account or their inability to acquire an account to these practices, the evidence as a whole fails to indicate any substantial injury to, or lessening of, competition in the market due to respondents' use of these practices. While certain of the competitors claimed that their volume of ice cream sales had declined, it also appears that the volume of other competitors has remained fairly constant and that in some instances competitors' sales have increased. Significantly, the volume of both respondents Arden and Damascus has declined in Portland

⁵² According to the Damascus witness the account referred to by the witness had formerly been a Damascus account and had been acquired by Sunnybrook on the basis of the latter giving the owner \$100 and an electric range for his home. Since this statement is based entirely on hearsay information received by the witness from the owner, no finding can be based on it any more than a finding can be based on the hearsay testimony of the Sunnybrook witness.

⁵³ This incident, involving the alleged painting of a grocery store, is of questionable relevance under the complaint since Sunnybrook was supplying the account with milk and not ice cream.

since World War II. Not only does the evidence not sustain any finding that the decline in volume of some competitors is due in any substantial measure to the practices complained of, but there is substantial affirmative evidence that other factors in the market have played a significant role in the competitive picture.

The only competitors who claimed that they had sustained a substantial loss of volume as a result of their loss of accounts were Meadowland and Peter Pan. Meadowland claimed that its volume had declined from 78,230 gallons in 1947 to 58,844 gallons in 1954.⁵⁴ Since this company's estimated volume for 1952 and 1953 was likewise approximately 58,000 gallons, it seems evident that the decline of approximately 20,000 a year must have occurred during the period from 1948 to 1951. The testimony of most of the competitor witnesses suggests that the supplying of cabinets and financing of accounts began to become a noticeable problem around 1952. It therefore seems apparent that Meadowland's decline prior to 1952 must have been due to other factors. The representative of Peter Pan estimated that his company's volume reached its maximum right after the end of World War II, at approximately 80,000 gallons, and that it had thereafter declined by approximately one-third. There is no indication in the record as to the rate of the decline or as to the period in which it occurred.

Two other competitors also indicated that there was some decline in their business, but the extent thereof was somewhat uncertain. The Jewell representative testified that his company's present gallonage was approximately 273,000 gallons and that this was somewhat below its 1947 gallonage, although the extent thereof was not indicated. The Rogers' representative, who was its salesmanager from July 1950 to September 30, 1954, indicated that when he came with the company its gallonage was approximately 300,000 a year, that the amount thereafter increased until it reached about 400,000 gallons in 1953, and that when he left the company in September 1954 it had begun to decline. The amount as of the time he left the company's employ, which was over a year prior to the Portland hearings, was somewhat uncertain, but apparently it was the same as the 1950 volume.

Contrasted with the experience of the above competitors is that of three other manufacturers whose entry into the ice cream business postdates that of most of the above competitors. The Dairy Cooperative Association, which entered the Portland market with ice cream in

⁵⁴ The above figures are apparently actual figures, of which the witness had made a memorandum before testifying. This represents one of the few instances where a witness had come prepared with some actual figures.

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1948 as Mayflower Ice Cream Company, built up its annual gallonage from nothing in 1948 to approximately 300,000 gallons as of the time of the Portland hearings in October 1955. The smaller Farmers Dairy began manufacturing ice cream in 1941, which it originally sold through its own store, and as of March 1955 (when the witness who was the former controller left the company's employment), its volume was approximately 100,000 gallons. This represented a doubling of its volume during the period between 1950 and 1955, when some of the other competitors were complaining that they were finding it difficult to compete. Sunnybrook Farms, which went into the ice cream business as Polar Pie Ice Cream Company in 1949, increased its volume from approximately 75,000-80,000 gallons in the 1949-1950 period to approximately 135,000 gallons in 1955. While the representative of this company at first claimed that its ice cream operations were not profitable, he declined to produce the pertinent records and later conceded that during the latest six-month period his company was making a substantial profit.⁵⁵

While it may be that a few of the competitors did suffer a decline in sales between 1947 and 1955 and that a few did not move ahead during that period, the record fails to support a finding that the practices charged in the complaint played any substantial part in this situation. On the contrary, there is considerable evidence in the record that other factors were responsible in large measure for this condition. Most of the competitor-witnesses were agreed that 1947 represented a highwater mark for the ice cream industry in the Portland area. Following the lifting of sugar rationing imposed during the war and the return to a peace-time economy, there was a tremendous upsurge in the pent-up public demand for ice cream and other frozen desserts.

With the increase in demand, new competitors began to become active in the market such as Farmers Milk, Mayflower and Swift & Company. In the next few years new competitors of another kind entered the market. These included the vendors of soft ice cream such as Dairy Queen, and retail establishments which manufactured their own ice cream in counter freezers. In addition, some of the chain stores, such as Safeway and Fred Meyers, began manufacturing

⁵⁵ This witness was subjected to strenuous cross-examination concerning the question of his increased costs, which allegedly prevented him from making a profit, and he finally agreed to bring in his records to substantiate his claims. However, during the interval provided for his obtaining the records he had a change in heart, due in part at least to advice received from counsel supporting the complaint, and he declined to produce any records to substantiate his testimony. In an apparent effort to avoid having to bring in his records, he conceded, for the first time, that his company was operating at a profit.

hard ice cream themselves, thus withdrawing as potential customers from some of the Portland manufacturers who had previously supplied them. That the competition from the soft ice cream establishments and counter freezers has become a substantial factor for the traditional ice cream manufacturers was attested to by the representatives of Mayflower, Jewell, Meadowland and Peter Pan. The representative of Jewell estimated that the counter-freezer operations and soft ice cream establishments now account for approximately 30 percent of the frozen dessert business in Portland. The representative of Jewell also acknowledged that during the period from 1952 to 1955 unfavorable climatic conditions had had an adverse effect on ice cream sales generally.⁵⁶

Some of the competitor witnesses indicated that their decline in volume was not due so much to a loss of accounts as to a decline in volume of ice cream sold per account. The Jewell representative attributed this decline in large part to the competition of counter freezers and soft ice cream establishments, which gave the consumer larger portions for the same price. Other manufacturers attributed the decline in sales per account to the fact that more ice cream was being sold in grocery supermarkets than had formerly been the case, to the disadvantage of the smaller grocery store and bulk ice cream establishment. While some of the competitor witnesses complained about their inability to get into the supermarkets because of the complaint practices, there is no substantial evidence to support these claims, most of which have been discussed above.⁵⁷ The aggressive, medium-sized companies appear to have obtained their fair share of supermarket business. The smaller companies, as the testimony of the Farmers Dairy representative indicates, never had many supermarket accounts even before the inception of some of the complaint practices.

The sales and production figures of respondents Arden and Carnation, which are in evidence, fail to establish any such improvement in their position as to suggest that they had been utilizing unusual, novel or aggressive practices during the period complained about. In fact the figures disclose that both companies were going through the same downward and sideward experience as some of their competitors. The sales figures for Carnation's Portland plant disclose that from a peak of 960,000 gallons in 1947, it declined to 772,000

⁵⁶ This witness testified that the summers from 1952 to 1955, which were the periods of heaviest consumption of ice cream, had been unusually cool and short.

⁵⁷ Although there was reference made to cabinets and other complaint practices as affecting the ability of competitors to get supermarket business, some of the witnesses indicated that there were other important factors, such as price, which affected their ability to obtain these accounts.

gallons in 1951. Sales in 1952 rose to 870,000 gallons but thereafter declined to 854,000 gallons in 1954. This decline occurred despite a substantial increase in its territory. In the year 1950 Carnation's share of the Portland market was 18.6 percent. By 1955 this had declined to 17.4 percent. Its experience in the state as a whole has been similar, with its production declining by 115,000 gallons between 1947 and 1954, and its share of state production from 10.8 percent to 8.8 percent during the same period. In the year 1955 it did experience an upturn of 65,000 gallons, but was still 1.3 percent below its 1947 production share.⁵⁸

A similar situation exists in the case of Arden. While its actual sales figures for the Portland market were not in evidence, it was estimated that its sales had declined by approximately 50,000 gallons between 1951 and 1954. Its share of the Portland market declined from 18.9 percent in 1950 to 17.1 percent in 1955. Its production of ice cream products in the State of Oregon declined by 326,000 gallons between 1947 and 1955, and its share of state production from 27.9 percent to 22.0 percent. The decline experienced by both companies took place in the face of a population increase of 22.63 percent from 1947 to 1955.

The record fails to establish any significant change in the ranks of competitors during the period when Arden and Carnation were supposed to be particularly active in the use of the complaint practices, viz., from about 1950 to 1955. During the postwar period there was the significant entry into the market of the local ice cream company, Mayflower Ice Cream, which enjoyed a rapid rise. The most significant departure was that of Swift & Company, a so-called national company of the type which counsel supporting the complaint contends has the capital to engage in the complaint practices. While the evidence indicates that four small local companies ceased doing business in the postwar period, there is no evidence to connect their departure with the practices complained about. Two of the companies, Westover Dairy and Holly Dairy, were acquired by Carnation in 1946, several years prior to the time when it was claimed the practices in question had become a competitive problem, and at a time when all companies in the area were experiencing their best sales. The third company, Broadview Dairy, with a relatively small volume of 40,000 gallons, was acquired by Carnation in 1951, there being not a scintilla of evidence that the complaint practices had anything to do with its selling out. A fourth company, Maplewood Dairy, ceased doing

⁵⁸ The 1954 figure is more nearly comparable to those of competitors since that was the latest year for which they gave any sales or production figures.

business at some unspecified time for reasons not disclosed in the record. It is not amiss to note that Carnation's increase in gallonage by almost 100,000 gallons, after reaching its lowest volume in 1951, coincides almost exactly with the gallonage which it purchased from two of its competitors.⁵⁹

To the extent that respondents Arden or Carnation engage in any practices falling within the scope of the complaint, the record fails to establish that they originated them or used them to the substantial detriment of competitors in the Portland market, or that there has been or is likely to be any substantial impairment of competition in the Portland market as a result of the engagement by said respondents in any of such practices.

a. Salem, Oregon

There are five companies selling ice cream in the state capital of Salem and the surrounding territory. Four of these, Arden, Carnation, Mayflower and Meadowland, have plants in Portland and distribute in the Salem area. The fifth is a local manufacturer, DeLuxe Ice Cream Company. Arden has sold in the territory for a great many years, while Carnation began selling there around 1950 or 1951.

Neither the Mayflower nor the Meadowland witness, who testified in Portland, made any reference to competitive conditions in the Salem market, their testimony being confined generally to the Portland metropolitan area. The only witness called by counsel supporting the complaint who testified concerning competitive conditions in Salem was a representative of DeLuxe Ice Cream Company. No dealers were called.

The DeLuxe witness referred to the increase in the expense of supplying cabinets due to the increased cost of such cabinets, and to the gradual disappearance of the former practice of charging rentals. He also testified that it was necessary to make loans to the larger accounts, a practice in which his company did not engage because of its alleged financial inability to do so. The testimony of the DeLuxe witness was directed at competition generally in the market and not at any particular competitor. He specifically stated that he did not know who started supplying customers with more expensive equipment and made no effort to attribute the decline in the practice of collecting cabinet rentals to any particular competitor.

The only effort which the witness made to attribute to any respondent the loss of, or inability to acquire, any account involved a single

⁵⁹ The gallonage of Westover Dairy was estimated at 40,000 gallons a year. Carnation also acquired 55,000 gallons by purchase from Swift & Company when the latter left the market in 1951.

account which he had endeavored to take away from respondent Arden, but regarding which his salesman later reported the owner had changed his mind about switching because Arden had "taken up half the note" which a fixture company had on the dealer's equipment. In the absence of testimony by the store owner or other reliable evidence to indicate that Arden had, in fact, financed the account in question, no finding can be based on the uncorroborated, second-hand hearsay testimony of what the witness' salesman reported to him concerning a conversation with the store owner, who in turn related what Arden had done for him.

Despite his alleged inability to acquire this account, the DeLuxe representative conceded that his company had acquired as many accounts from Arden as the latter had acquired from him. His volume had increased from approximately 73,000 gallons in 1947 to approximately 117,000 to 123,000 in 1954, and his 1955 volume was expected to exceed the previous year. While the witness claimed that his profit per gallon had decreased since 1947 due to increased distribution and manufacturing costs, he made no effort to attribute this condition to any of the complaint practices. On the contrary, he stated that a large part of his increase in expenses was due to increased labor costs. He made no claim that his over-all, as distinguished from unit, profits had declined.

There is no evidence in the record to establish that there has been any injury to competition in the Salem area as a result of Arden's or Carnation's engagement in any of the complaint practices. In fact there is no evidence that either respondent was able to acquire any customers in the area by the use of any of the complaint practices or has ever endeavored to do so.

2. Seattle, Washington

The hearings at Seattle involved witnesses from four different areas in the state, viz., Seattle, Snohomish County, Aberdeen and Bellingham. Each of these appears to be a separate market area, with substantially different groups of competitors and competitive conditions, except that respondents Arden and Carnation sell in each of the areas. Each of these respondents has a plant in Seattle and sells in the Seattle area, as well as other parts of the State of Washington.

a. Seattle Area

The competitors operating in the Seattle area include, in addition to the two respondents, Dairigold, Meadowsweet, Velva, Vita Rich, Richmaid, Horluck's, Happy Valley and Royal Dutch. Two other

competitors, Arctic and Vita Freeze, sell ice cream novelties only. There is also Regal Ice Cream Company, which is owned by Safeway. The only competitor witness to be called from the Seattle area was Royal Dutch. Witnesses from Dairigold (which is next in size in the area after Arden and Carnation) and from Horluck's Creamery were both excused at the request of counsel supporting the complaint after having been subpoenaed. Not a single dealer witness from the Seattle area was called to testify.

The main complaint of the representative of Royal Dutch was that during the past five years the cost of cabinets had increased from a range of between \$350 and \$400 up to \$600 and \$800, and that as a result of the more frequent changes in cabinet styles the life of a cabinet was now about five years as compared to the previous life expectancy of about ten years. He stated that as the stores became larger and more modern they demanded larger and newer equipment. The witness made no effort to attribute this condition to any of the respondents, but stated that all companies were "in the same boat" insofar as being subject to the demand of dealers. The Royal Dutch witness indicated that he would prefer to charge rentals for supplying cabinets, but indicated that this practice had begun to decline in 1940 and was no longer in vogue in the area. He made no effort to attribute the decline in the practice of charging cabinet rentals to any particular company, stating that his company found that it was generally not the practice to charge rentals. No complaint was made that the supplying of cabinets involves any exclusive arrangements.⁶⁰

The Royal Dutch witness gave no indication that his company had lost any accounts or was unable to acquire accounts because of cabinets, nor was any claim made that his company had sustained any loss in sales. On the contrary, the witness conceded that his company had grown in size since 1940. There is likewise no definitive evidence that the Royal Dutch Company has sustained any decline in the profitability of its operations. The witness did make the ambiguous observation that his company was "not any richer" as the result of the expense involved in furnishing the newer cabinets and that "if we don't make any profit we are going backwards." However, the examiner cannot infer from this vague statement that the company had actually sustained a loss in profits, or that if it had that the loss was substantial, or, more importantly, that such loss is attributable to the supplying of cabinets by respondents.

⁶⁰ The Arden sales manager testified that approximately half the accounts in Seattle were split, stating that this was particularly true of the larger stores. He estimated that 35 to 40 percent of Arden's larger accounts were split.

In any event, whatever may be the situation with respect to the individual competitor Royal Dutch, there is no evidence of any injury to competition generally in the Seattle market. As above indicated, none of the other seven competitors testified and the fact that two of them were excused, including particularly the third largest company in the area, hardly suggests that these competitors had any complaints regarding competitive conditions. Certainly it cannot be argued that the testimony of the two competitors who were excused could have been cumulative on the basis of the testimony of a single competitor from the area. The fact that counsel supporting the complaint in Portland called six of the seven competitors in the area hardly suggests that the excusing of two competitor witnesses in Seattle was due to cumulativeness.

There was no evidence introduced to indicate any undue mortality among competitors in the market. The so-called national company, Swift & Company, ceased operating in the area around 1951, but the reason therefor does not appear from the record. A local company, Alpine Dairy, sold out to Dairigold, whose representative counsel supporting the complaint excused. Dairigold is the most recent entrant into the ice cream business in the area and has worked itself up to the number three position in the market. Despite a 14.82 percent population increase in Seattle between 1947 and 1955, Arden's sales increased only 5.28 percent during this period. Its 1954 gallonage was 2.51 percent below its 1947 gallonage and was lower than its gallonage in 1926. The record contains no information with regard to Carnation's experience in the Seattle market although, as will hereafter appear, its position in the state as a whole has not improved significantly.

b. Snohomish County Area

Snohomish County lies directly north of Seattle. The principal competitors include Snohomish Dairymen's Association (a farmer's cooperative of Everett, Washington), respondent Arden and Meadow-sweet Dairy, also of Everett. Carnation only operates on a limited basis in the area. There are two other minor competitors, Horluck's and Happy Valley from Seattle. The only competitor witness called from this area was Snohomish County Dairymen's Association. No dealer witnesses were called on to testify.

The representative of the Snohomish County Dairymen's Association had no complaint against any competitor, unless his reference to the fact that the former practice of charging cabinet rentals had been abandoned within the past five years may be construed as a complaint.

However, he made no claim that any competitor was responsible for this condition. In fact he specifically stated that the abandonment of the practice was not due to Arden and Carnation and that he had abandoned it because it cost more to collect the rentals than it was worth. He also stated that the supplying of cabinets by Arden and Carnation had had no effect on his business. He further indicated that he expected the increased sales resulting from the better display cabinets to offset the cost thereof.

Snohomish County Dairymen's Association is the number one company in sales in the area,⁶¹ followed by Meadowsweet, Arden being number three. There is no indication of mortality among competitors or of any change in relative size of competitors in the area.

c. Aberdeen Area

The Aberdeen area is located about 100 miles southwest of Seattle. The principal competitors are Arden, Hay's, Newman's, Arland's, Dairigold, and Firlands. The only competitor called as a witness was one of the owners of Hay's Dairy. There were no dealer witnesses. The principal complaint of the representative of Hay's Dairy was that cabinet costs had gone up from about \$200 for the older type cabinets to about \$700 to \$800 for the modern open-top cabinets, and that he had to supply more of the latter to his customers. He was not prepared to state that Arden was the first company in the area to start using the more modern cabinets, but claimed that the practice of supplying cabinets on a more liberal basis occurred about the time that Arden entered the territory.

The evidence discloses that Arden came into the Aberdeen area in 1946 by the purchase of Smith's Dairy which was then the largest company in the area. Prior to that time, according to the Hay's witness, the competitors in the area had a "gentleman's agreement" that they would not offer one another's customers better cabinets. Although Hay's apparently would have preferred Arden not to have broken the gentleman's agreement by offering better cabinets, the witness conceded that the newer type of cabinets had actually helped his company sell more ice cream, that it probably was a good thing for the ice cream business, and that the supplying thereof had not caused his company any difficulties.

In addition to the matter of supplying cabinets, the Hay's representative indicated that some of the competitors loaned money to dealers, but that this was not a widespread practice. He did endeavor

⁶¹ While the Association's witness declined to reveal its gallonage, he conceded that it was in excess of 300,000 gallons.

to attribute to Arden his company's inability to acquire two accounts a year previously because it could not comply with requests for financial assistance, but his testimony in this regard was pure hearsay, there being no reliable evidence that Arden had offered any financial assistance to the accounts in question.

Despite Arden's alleged breach of the gentleman's agreement with respect to soliciting competitors' accounts, Hay's Dairy has been able to increase its volume by over 25 percent since 1947.⁶² Its profit picture has likewise improved between 1950 and 1955. While Hay's had been number two in the market, ranking behind Arden's predecessor (Smith's Dairy), it now has at least 50 percent of the volume in the area. The record is utterly lacking in any evidence to sustain a finding of injury in the Aberdeen area.

d. Bellingham Area—Whatcom County

Whatcom County is located in the northern part of the state, directly north of Snohomish County. The principal city is Bellingham. The main competitors are Whatcom County Dairymen's Association (a farmer's cooperative selling under the name Dairigold), Arden, Cyr Brothers and Metcalf Dairy, the latter being a recent entrant into the market. Respondent Carnation entered the territory a few weeks prior to the Seattle hearings and apparently had only a few accounts. Representatives of Whatcom County Dairymen's Association (Dairigold) and of Cyr Brothers were called to testify by counsel supporting the complaint. Likewise, for the first time during the hearings in the Pacific Northwest, four dealers were called.

Although Arden had sold in the territory for about 25 years, it was not too active until 1952. At that time it had about 5 or 10 percent of the Whatcom County market, as compared with approximately 90 percent held by Dairigold. In October 1952 it sent a salesman up from the Seattle territory to solicit new business. As a result of these sales efforts, Arden was able to acquire about 25 accounts during the period from 1952 to 1954, and to increase its volume to the point where it had about 20 percent of the market as compared with 70 percent on the part of Dairigold.

The representatives of Dairigold and Cyr Brothers claimed that they had lost accounts to Arden, mainly because the latter offered newer and larger cabinets, which in some instances were used to store frozen foods. Reference was also made to other inducements such

⁶² The witness at one point estimated the increase at 25 percent, but later conceded that it was possible his gallonage had actually doubled since 1947. He stated he could testify better if he had his figures with him, but had not been requested to bring any.

as outright gifts, signs and paid vacations. Most of the testimony as to what Arden had offered dealers was hearsay, being based on what dealers had allegedly told the witnesses Arden had offered them, and counsel supporting the complaint was advised by the examiner that it would be necessary to offer independent evidence as to the nature of the alleged offers made by Arden to dealers, in order to support a finding concerning such offers. The Arden salesman, who was also called as a witness in support of the complaint, testified that his sales approach was based on excellence of his company's products and its advertising and merchandising methods, and that the matter of cabinets was referred to only as an incidental matter in connection with assuring the dealer that he would receive a cabinet appropriate to his establishment to replace that from his present supplier. The witness indicated that he found a number of new style cabinets already installed in the territory.

The Dairigold witness claimed that his company had lost about 25 accounts and about 50,000 gallons in sales between 1952 and 1954, after Arden became more active in the territory. This, however, was not a net loss since his company regained about 13 accounts, including some it had previously served. It did this by becoming more active in advertising its product and by supplying its dealers with more modern equipment. The Dairigold witness conceded that the furnishing of better equipment to customers had increased their sales of ice cream, and that competition had forced his company, which previously had had little competition in the area, into becoming a better company. Its sales, which had allegedly fallen from approximately 200,000 in 1952 to 150,000 in 1954, increased again by approximately 17 percent in 1955 and were running at the annual rate of about 175,000 gallons.

Although counsel supporting the complaint called two Dairigold customers, neither was involved in the somewhat extravagant giveaway referred to in the hearsay testimony of the Dairigold witness. One witness, a woman who operated a food market with her husband in Bellingham, had changed from Dairigold to Arden in 1952 because her husband, whom she described as "the boss of the family", decided that Arden was a "better ice cream." The witness volunteered the fact that she concurred in the change because she "liked the new case." The owner of the other account, also a food market in Bellingham, testified that he had changed from Dairigold to Arden because the former's cabinet was inadequate, it being a small, storage-type cabinet intended primarily for frozen foods. However, he later switched back to Dairigold when he became dissatisfied with Arden's service and

because there was a considerable demand for the Dairigold brand in his territory. The latter supplied him with an equivalent cabinet, and agreed to service his frozen food cabinet, as well as its own ice cream cabinet, whereas Arden has serviced only its own equipment. Significantly, after this store had switched from Dairigold to Arden, it experienced an increase in sales, which the witness attributed to the open display feature of the cabinet.

The representative of the other competitor witness, Cyr Brothers, likewise complained about the fact that he could not meet the demand from merchants for the more expensive equipment. He conceded that much of what he heard from dealers concerning what other manufacturers were offering was "hearsay." Although testifying without the aid of books and records, the Cyr representative claimed that his company's gallonage had fallen from about 125,000 in 1945 to about 61,000 in 1954, and he estimated a further decline to 55,000 in 1955. It is evident from the testimony of the Cyr witness that this decline cannot be attributed wholly or primarily to the respondents since he lost 25 accounts during this period and only claimed that Arden was responsible for six of these and Carnation for two. These accounts were not further identified and there is nothing in the record to indicate that any of the complaint practices was responsible for the respondents' acquisition of such accounts, assuming *arguendo* that they were acquired by the respondents. The testimony concerning the loss of accounts to Carnation is particularly dubious since, according to the Dairigold representative, Carnation had only come into the area two or three weeks prior to the hearing.

In seeking to determine the true cause of Cyr's decline, it is significant that his company had had a gradual growth until 1951, at which time the company sold out the milk end of its business and continued only in ice cream. That the decline in ice cream began with the sale of the milk business is no mere coincidence, as the Cyr representative himself conceded in his testimony that part at least of his company's decline was due to the fact that it was now operating only in ice cream. Competitors in other areas stressed the advantage to a company of being in both milk and ice cream. Even accepting the witness' estimate of the number of accounts he had lost to Arden and Carnation, there are 17 other accounts which must be accounted for. It is obvious that other competitors have been active in the area. It may be noted in this connection that Metcalf, which was not represented at the hearing, is a recent entrant into the Whatcom County market.

The testimony of two dealer witnesses, who were former Cyr customers, indicates that the company was far from being an active and

progressive competitor. One of the witnesses, the operator of a restaurant in Bellingham, testified that he had an old bobtail fountain from Cyr which had a leaky sink and which was so small that he would run out of ice cream on weekends. He was thinking of quitting Cyr before Arden even appeared on the scene. Arden supplied him with a small fountain and also a small cabinet for the storage of package ice cream. The latter cabinet enabled him to increase his sales, since he had not been able to store package ice cream in the old-fashioned Cyr cabinet. The other dealer witness, a woman who operates a grocery in Bellingham, testified that she had a small, old-fashioned Cyr cabinet which was 16 years old, and that the Cyr driver had agreed that she needed a new cabinet, but, despite the fact she had been promised one for a year, nothing was done about it until the day after they had received a new cabinet from Arden. The testimony of the two dealer witnesses suggests that the statement by the Cyr witness that his company "has more or less been inactive, relative to sales" since 1951 has more than a grain of truth to it, although not for the reason he gave, viz., that his competitors had caused him to be less active.

The record is lacking in substantial and reliable evidence that there has been any injury to competition in the Bellingham-Whatcom County area. What it does show is that one company, Whatcom County Dairymen's Association (Dairigold), almost completely dominated the area, that it was able to maintain its position by the sheer momentum of history until Arden began a concerted selling campaign in the area. While this resulted in some loss of gallonage by Dairigold, it later regained a large part of its loss by modernizing its operation, including the adoption of an aggressive advertising campaign, doubling the number of its flavors and supplying its customers with more modern equipment where required. The activities of Arden caused Dairigold to become, in its own words, "a better competitor", and not to take its previous dominant position for granted. The advance of Arden from an insignificant share in the market to approximately one-fifth of the volume in the area, was primarily the result of a selling job on its part. The furnishing of cabinets by it was a secondary matter and simply filled the vacuum created by its competitors' failure to furnish dealers with adequate equipment appropriate to their needs. The other competitor, Cyr, apparently has still not adapted its selling methods to the times and has continued a policy of drift following the discontinuance of its milk business. Accepting at face value the testimony of the Cyr official, Arden was responsible for only six of the twenty-five accounts he lost, and there is no reliable

evidence that any of the complaint practices was used as an inducement to acquire those accounts.

* * *

Viewing the State of Washington as a whole, the record fails to disclose any substantial improvement in Arden's position at the expense of its competitors. On the contrary, its sales in the state have declined from 3,124,000 gallons in 1947 to 2,735,000 in 1955, while at the same time the population in the state had increased by 16.24 percent. In terms of its share of state production of frozen products, it sustained a decline from 25.88 percent in 1947 to 17.91 percent in 1955. Carnation has undergone a similar experience, although its decline was not as pronounced. Its share of state production declined from 16.0 percent to 15.0 percent between 1947 and 1955.

3. *San Francisco, California*

The hearings in San Francisco involved witnesses from five different markets in the Northern and Central California area: San Francisco-Oakland, Vallejo, Sacramento, Modesto and Lodi. Before discussing competitive conditions in these areas, it should be noted that the dairy industry in California is regulated by state law, so that certain practices which are commonplace in many parts of the country are prohibited or are permitted only under prescribed conditions. Among the practices regulated by state law are the making of loans, the sale of equipment, the furnishing of refrigeration equipment, and the charging of off-list prices.⁶³

Under the California statute the making of money loans to a retail ice cream dealer is specifically prohibited as an unfair practice. However, it is permissible to sell equipment to a dealer (including refrigeration equipment) for cash or under conditional sales contracts. In the latter instance one-third cash must be paid at the time of sale and the balance must be paid on a monthly installment basis for a term not to exceed eighteen months, with interest at current rates. Ice cream cabinets and other refrigeration equipment cannot be supplied free of charge, but may be supplied on a rental basis, in accordance with a schedule of rentals fixed by the state. The ice cream supplier may furnish only such refrigeration facilities as are reasonably necessary to preserve the frozen products of the supplier. The payment of secret rebates, refunds or unearned discounts is made an unfair practice. However, the meeting of a lawful competitive price in good faith is permitted, even though below the supplier's list price, but the

⁶³ Agricultural Code of California, Ch. 16, Sec. 4125-4143.

latter is required to submit evidence to the state of the basis upon which the special price is being offered.

a. San Francisco-Oakland Area

The ice cream companies doing business in the Bay area include Spreckels-Russell Dairy Company, Tomales Bay Creamery, Dreyer's Grand Ice Cream Company, Green Glen Ice Cream Company, Swift & Company, and the respondents Borden, Arden, Beatrice, Carnation, and Foremost (the latter doing business under the name Golden State Ice Cream Company). The evidence at the San Francisco hearings consists of the testimony of representatives of two competitors, Spreckels-Russell and Dreyer's, as well as testimony by an official of Borden and Golden State, respectively. Representatives of two retail chains were also called.

The evidence discloses that ice cream cabinets have been supplied to dealers in the San Francisco area at least as far back as 1929 when Spreckels-Russell entered the ice cream business. Most of the companies in the area at the time were so-called independent local companies, and they supplied the cabinets to dealers free of charge. This practice continued until the time of the passage of the California law which required that a rental charge be made.

The two practices mainly emphasized by the Spreckels-Russell witness were "financing" and price cutting. In the case of financing, his testimony was somewhat ambiguous, confused and contradictory. At first he appeared to be complaining about the increase in the cost of furnishing ice cream cabinets, which he claimed had risen from a former maximum of \$500 to as much as \$5,000 in the larger establishments. However, he later indicated that ice cream refrigeration equipment was not usually financed, in the sense of selling it to the dealer on a conditional sales basis, but was supplied under a rental arrangement. He conceded that the increase in the cost of such equipment presented no problem since he was able to collect a rental for the cabinets under state law to compensate him for the cost thereof. He also agreed that the newer type cabinets had helped considerably in increasing ice cream sales. The type of financing which he apparently regarded as objectionable was the sale of other equipment and of fixtures to remodel or open a new establishment.

Although complaining generally about "financing" and the increased cost thereof, the Spreckels-Russell representative made no reference to any particular company or companies as having initiated the practice or as having used it aggressively to acquire any of his accounts or to prevent him from obtaining accounts. He declined,

in response to the leading question of counsel supporting the complaint, to attribute the practice to the entry into the market of the "big outside companies", although he did claim that the practice became "progressively worse" after that time. However, the company or companies involved were not identified, nor was the nature of the so-called financing. As noted above, the California law permits the sale of equipment on a conditional sales basis, one-third down and the balance in eighteen months, with interest at current rates. It is not clear whether it was this practice about which the witness was complaining or some possible deviation from the state law. He expressed the opinion that some companies were guaranteeing bank loans, but conceded that his information was hearsay and that this would be a violation of state law.

With respect to the witness' price complaints, he referred in general terms to the fact that "ice cream companies" deviated from their published prices in order to acquire "certain accounts." However, no identification was made of which companies deviated from their published prices, nor is there any other indication in his testimony that any of the respondents were so involved. No specific accounts that Spreckels-Russell lost or failed to acquire by reason of such deviations were mentioned. As previously noted, the California law prohibits price deviations, except to meet competition, and then only upon a filing of notice of such deviation with proper state officials, giving a justification thereof. It is not clear whether the testimony of the witness involves deviations of this type. In any event, there is no evidence that the respondents were involved in such deviations.

Despite the Spreckels-Russell witness' general complaints, the company has managed to maintain a consistent pattern of growth. Although having no records available, its representative estimated that its ice cream gallonage had increased from about 300,000 in 1934 to 750,000 in 1955, and that its gallonage in 1955 was greater than it had been five years previously. The company's dollar volume of sales in 1955 was in excess of \$1,000,000. Its capitalization increased from approximately \$500,000 in 1929 to about \$1,000,000 in 1955. The company built a new plant in 1952 worth about a million and a quarter dollars. It has expanded its operations from San Francisco and San Mateo Counties into Marin and Santa Clara Counties. It serves a very substantial number of hotels and restaurants in the San Francisco area.

While the Spreckels-Russell representative complained that his company only served 15 or 20 supermarkets in the area, there is

no reliable evidence in the record as to the number of such markets in the area or anything to indicate that his company has an inordinately small percentage of such markets. In any event, there is no substantial evidence that any respondent or group of respondents is responsible for the company's alleged inability to acquire more of such accounts, or that such inability is due in any way to respondents' use of the complaint practices.

The other competitor called as a witness was Dreyer's Grand Ice Cream Company which does business principally in Alameda County (of which Oakland is the main community), although it makes some sales in San Francisco. The Dreyer representative complained that his company was prevented from getting into the newer stores in the area because of "financing arrangements or price arrangements." He did not further identify the nature of the "arrangements" or indicate that any respondent was involved in such arrangements. Approximately 20 percent of Dreyer's volume was estimated to be in the smaller, so-called independent stores, which Dreyer serves on an exclusive basis, and the balance is in the larger establishments which are split with other suppliers. Apparently Dreyer would like to serve more of the larger establishments. His alleged inability to do so, however, is not based on any refusal to "finance" such establishments since, admittedly, he was never asked to finance such accounts; nor is the company's inability to acquire more of such accounts due to any exclusive dealing arrangements with other suppliers, since many of them are split between more than one supplier, and the witness conceded that he was never advised that an exclusive dealing arrangement was the reason for any store's refusal to purchase his product.

Despite the vague insinuations of competitive difficulties with unnamed competitors, Dreyer has been able to make remarkable progress in its area. Prior to 1947 the company was selling under another name exclusively to a chain of retail confectionery stores. It reorganized under its present name in 1947 and began to solicit other types of establishments. From a volume of only 50,000 gallons in 1947, it had grown to approximately 225,000 gallons in 1955. This growth is all the more remarkable because the company sells only a single premium brand of ice cream of the high butter-fat variety, unlike most of its competitors who have a standard or so-called "price" brand, in addition to their premium brand.

There is no evidence of any significant mortality among competitors in either the San Francisco or Oakland areas since the war, although there were a number of mergers and consolidations in the

1930's. A new company entered the ice cream business in San Francisco in 1954, Tomales Bay Creamery. In the Oakland area, Dreyer is substantially a postwar entrant, since its prior operation was more or less that of a "captive" creamery in that its sales were made exclusively to a single group of stores. Challenge Creamery has also entered the Oakland market in recent years.

That the respondents who do business in the Northern California area do finance some of their customers, in the sense that they sell fixtures and equipment either for cash or under a conditional sales contract, is not disputed. However, so far as appears from the record, the sales are made strictly in accordance with the California law. The customer is required to pay at least one-third down and the balance within 18 months. In addition to such sales of equipment under conditional sales contracts, there is evidence that two of the respondents, Arden and Foremost, lease equipment other than refrigeration equipment, such as store fixtures and showcases, to retail establishments on a regular rental basis. In the case of Foremost, such leases are made by a wholly owned subsidiary, Acme Investment Company. The latter is primarily in the investment business, in that it makes loans to milk producers and distributors and owns stock in grocery supermarkets. In addition, Acme leases store fixtures and other equipment from equipment manufacturers or jobbers and, in turn, sub-leases such equipment to retail dealers. Arden makes similar lease arrangements with retail dealers. In none of such arrangements is there any requirement that the retail dealer must purchase his ice cream from the lessor.

The two retail dealers called by counsel supporting the complaint both involve instances where Foremost and Arden, respectively, had leased store equipment to a retailer. In the case of Foremost, the dealer was Littleman Grocery Store, which operates nine supermarkets or superettes in San Francisco and two in the adjacent counties. In its suburban stores, Littleman carries the ice cream of both Spreckels-Russell and Foremost's affiliate, Golden State. In its San Francisco stores it handles only Golden State. In Littleman's newest store in San Francisco, it leased \$15,000 worth of fixtures from Acme Investment Company on a regular rental basis. However, this was not responsible for the decision to deal with Golden State since, according to the testimony of the Littleman witness, his organization had been selling Golden State in its other stores in San Francisco for a good number of years and had found its merchandising and advertising program "very beneficial to our operations." So far as appears from the record this was its sole reason

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for continuing to deal with Golden State at its newest store in San Francisco. There is no provision in the lease requiring that Littleman purchase Golden State's products during the term thereof and, according to the witness "we can change [from Golden State] right now."

The other instance of the leasing of equipment involves a large drugstore in the heart of downtown San Francisco, owned by Milton F. Kreis Enterprises, which also operates four drugstores in other areas. At the San Francisco store, which represents an investment by the owner of approximately \$350,000, part of the equipment and fixtures having a value of approximately \$100,000 is rented from Arden at a monthly rental of approximately \$1,600. Although the lease is for seven years, there is no requirement that the lessee purchase Arden ice cream. According to Kreis:

We have no obligation to Arden at all. If their product does not come up to * * * specifications, we can throw them out.

The witness stated that seven manufacturers had tried to get the account and that he had chosen Arden because, after a visit to their very modern plant, he was convinced that they would manufacture the ice cream properly in accordance with his specifications and in the quantities which he required. It may be noted that Arden does not have a similar arrangement at the other stores of the chain, three of which are located in Southern California and are supplied by another ice cream manufacturer under an arrangement similar to that in San Francisco.

The record fails to show any marked improvement in the market position of respondents, as might be expected from some of the testimony of the competitor witnesses. Borden's share of the San Francisco market has actually declined from 12.3 percent in 1950 to 10.9 percent in 1955, while Beatrice's share has declined from 4.9 percent to 4.6 percent in the same period. Carnation has shown only a slight increase during the same period from 8.4 percent to 8.9 percent, while Arden's share increased slightly from 6.0 percent to 6.3 percent. No comparative figures are available for Foremost since it did not enter the market until 1954 by the acquisition of Golden State.

b. Vallejo Area

Vallejo is northwest of Oakland in Contra Costa County. The respondents doing business in that area include Foremost (Golden State), Carnation and Beatrice. Borden does not do business directly in the area, but sells through a jobber. The local competitors include Red Top Dairy of Vallejo and Milk Producers' Association, a

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farmers' cooperative. Red Top Dairy was the only competitor from the area represented at the hearings. No retail dealers were called.

The principal complaint of the Red Top Dairy witness was that most of his accounts were the smaller "mamma and papa" stores and that he couldn't get into the larger supermarkets, most of which are chain establishments. The principal chains operating in the area are Safeway, Hagstrom and Purity. However, there is not a scintilla of evidence that Red Top's inability to get into these chains has any connection with the complaint practices. Safeway and Hagstrom are "captive" outlets, i.e., they have their own ice cream manufacturing facilities and hence do not buy from outside manufacturers. Purity, according to the witness, buys from Beatrice, but the only reason the witness could give for their not buying from him was that "probably" they "just liked Beatrice." Red Top does sell to some of the independent supermarkets, a large percentage of which handle more than one brand of ice cream.

The Red Top witness also complained about his company's inability to sell to several drive-ins and hamburger establishments because one was allegedly financed by Carnation and the other by Golden State. Outside of the witness' hearsay testimony, there is no evidence in the record that Carnation or Golden State financed either establishment, nor is there any evidence that if they did, what the nature of such financing was, or that it had any connection with either establishment's choice of a supplier.⁶⁴ In the case of the establishment served by Golden State, the record discloses that the so-called financing occurred prior to the time that Golden State was acquired by Foremost, and the testimony in this respect was stricken from the record.

The witness also referred to two hamburger establishments served by Carnation, to which he stated he was unable to sell "because of price." There is no reliable evidence in the record as to what price the establishments in question were paying Carnation. Under the state law an ice cream manufacturer is required to sell in accordance with his established price schedule, except to meet the lawful price of a competitor, and then only upon filing evidence of the price reduction and the reason therefor. It cannot be assumed, in the absence of evidence to the contrary, that the so-called "price" of Carnation was other than a lawful price under the California statute. Despite the witness' hearsay and conclusory testimony that some of his competitors were not living up to their established schedules, there is not a

⁶⁴ The witness' testimony with respect to the Carnation account was based partly on what the owner allegedly told him, and partly on what he had learned from several former Carnation employees three years after they had left Carnation's employ.

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scintilla of reliable evidence in the record to support a finding to this effect in the Vallejo area, and certainly not with respect to any particular respondent.⁶⁵ Moreover, there is no evidence that the price arrangements were conditioned on exclusive dealing, as alleged in the complaints.

The record is lacking in evidence of any significant mortality among competitors in the Vallejo area since Red Top entered the ice cream business in 1944. One local company, Lakeside Dairy, has been taken over by another local company, Milk Producers' Association, for reasons which do not appear in the record. In addition, Carnation and Beatrice have entered the area, as well as the Borden jobber. It would therefore appear that more companies are competing for available business since Red Top's entry into the market. However, to counterbalance this, there has been a significant population increase in the area.

Despite Red Top's inability to acquire every account it has sought to get, the evidence indicates that it has made excellent progress in the competitive struggle. Starting with no accounts in 1944, it had managed to acquire 120 accounts by 1955, either exclusively or on a split basis. Its gallonage grew from zero in 1944 to 50,000 in 1950, then doubled to 100,000 by 1954, and it was still increasing in November 1955. From a market share in the Vallejo area of less than 10 percent in 1950 it had increased to approximately 20 percent in 1955. Red Top's growth is all the more remarkable because it sold only a single premium brand until 1954, when it began to manufacture a competitive standard brand.

Its president conceded that the company was holding its relative position among its competitors. His main concern seemed to be the drift of sales away from the smaller establishments to the super-markets. However, most of these, as above indicated, are captive establishments and therefore involve a situation which is outside the issues in these proceedings. With respect to the nonchain super-markets, there is no reliable evidence that the engagement by any of the respondents in the complaint practices has prevented Red Top from getting into these establishments.

c. Sacramento Area

The manufacturers selling ice cream in the Sacramento area include the respondents Arden, Carnation, Borden, Foremost (Golden State), and Beatrice, and the local companies Crystal Creamery, Home Milk, Country Maid, and Taylor Dairy. The only witness

⁶⁵ The witness conceded that "in many cases" when he had checked on reports that competitors were offering a better price he found it was "not a fact."

called from the Sacramento area was a representative from Taylor Dairy. A representative of Crystal Creamery was excused at the request of counsel supporting the complaint.

Most of the stores in the Sacramento area sell two and sometimes three brands of ice cream. Only about 10 percent of the accounts own their own ice cream cabinets. The balance rent them from their ice cream suppliers. None of the suppliers permit dealers to keep another company's brand in its cabinet. As in many other areas, there is a trend in the sale of ice cream away from the smaller establishments toward the chain stores and supermarkets. However, this has not hurt Taylor Dairy but has actually "helped" it because the company is in "all the local chains." The only national chain store in the area is Safeway, which manufactures its own ice cream. There is also a state-wide chain, the Lucky Stores, to which Taylor sells milk but not ice cream. The Taylor representative's only explanation for not selling them ice cream was that he "guessed" he was a "lousy salesman."

The Taylor witness claimed that he had tried to get into some supermarkets in the area (which he did not identify), but had been "told" that if "we would finance we could get in some." The financing was described by the witness as "financing equipment for stores." The Taylor representative failed to identify any respondent as being involved in such financing, and even conceded that "whether it was being done by our competitors, I do not know." The only account specifically referred to by Taylor as being involved in any competitive situation was a drive-in which had allegedly requested a loan of \$75,000, with the understanding that he would get this account as well as another establishment owned by the same individual. According to the Taylor witness he "laughed it off and that was the end of it." The establishment at the time was being served by Borden and later changed to Beatrice. There is no evidence that either of the latter two companies loaned the establishment anything or financed it in any way. In fact, under the California law, a loan of money would have been illegal.

Taylor made no claim that his company was having any serious competitive problems in the area. The company's profits have increased between 1952 and 1955, as has its volume. During 1955 its volume increased 17 percent over the previous year. This improvement in sales is particularly significant in view of the fact that Taylor's price is 15 cents a gallon higher than that of most of its competitors. Taylor's share of the market has increased from about 5 percent in 1946 to approximately 15 percent in 1955.

There is no evidence of any significant mortality among competitors in the area. The only company to cease operating since 1941 (when Taylor entered the ice cream business) is Home Ice Cream Company, which sold out to another local competitor, Country Maid. The latter company has entered the market since 1941, as have Carnation and Beatrice. The area is rapidly growing in population. The largest competitor in the area is a local company, Crystal Creameries, a representative of which was subpoenaed, but was later excused at the request of counsel supporting the complaint. The record is lacking in evidence that competition in the Sacramento area is anything but vibrant.

d. Modesto Area

Modesto is located approximately 93 miles east of San Francisco in Stanislaus County. The only wholesale ice cream manufacturer in Modesto is Velvet Ice Cream Company, which operates throughout most of Stanislaus County and in parts of San Joaquin County to the north and Merced County to the south. The other principal local company is Milk Producers' Association of Central California, a farmers' cooperative which sells ice cream under the name Peterson Ice Cream Company. In addition, two small companies, Richmaid of Lodi and Farm Maid of Madera, operate on the northern and southern fringes of the Modesto area. The respondents which operate in the area include Borden, Carnation, Arden, Beatrice and Foremost (Golden State). Likewise, the nonrespondent national company, Swift & Company, sells in the area. The only witness called from Modesto was a representative of Velvet Ice Cream Company. A representative of Richmaid also testified, but his testimony related primarily to the Lodi area and is discussed below.

Most of the testimony of the Velvet witness related to certain accounts which his company had allegedly lost or had been unable to acquire due to the activities of several of the respondents. For the most part, the testimony was of a hearsay nature as to what the witness had been told certain competitors had done for the accounts in question. The testimony with respect to three of the six accounts mentioned by the witness was so unreliable that it was ordered stricken.⁶⁶ The other

⁶⁶ One instance involved the alleged giving of free ice cream to offset the rental charge by Arden to a food market in Modesto. Another involved the charging of a "distributor's" price by Arden to another market which allegedly was not entitled to such a price. In both instances the information had allegedly been gleaned by the witness from a former Arden driver at the time he was seeking employment from Velvet. The third incident involved the alleged failure by Carnation to charge a rental on some of the cabinets which it had supplied to a market in Modesto. This information was allegedly reported to Velvet by an employee of the market. All three instances, if true, would have constituted violations of the state law. In only the last-mentioned incident did Velvet claim to have reported the incident to the state authorities. So far as appears from the record, the state authorities fail to sustain Velvet's complaint.

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three instances also involved hearsay evidence as to what a store owner or manager had reported to Velvet at the time an account was lost or could not be acquired. The evidence was received, subject to the offering of independent evidence that the three accounts had been favored in the manner indicated, but no such evidence was ever offered.

One of the three instances mentioned involved the alleged "financing" of a drive-in by Carnation, the nature, extent, or even the fact of which, was never established for the record.⁶⁷ The other instance involved a Chinese restaurant in Modesto to which Velvet had agreed to sell certain equipment on a conditional sales time-payment basis, but which Borden allegedly acquired by agreeing to "put up the money to pay for that equipment." According to the Velvet representative's testimony, the owner informed him of the Borden offer but agreed to give Velvet the account if the company would loan him \$10,000 to pay for the equipment. Not only is there no evidence to support the witness' hearsay testimony, but there is reliable affirmative evidence by a Borden official that what Borden did for the restaurant owner was precisely what Velvet had offered to do, viz., to sell him the equipment on a conditional sales basis, in accordance with the California law, one-third down and the balance within eighteen months, and that no loan was made to the owner.⁶⁸ The third incident involved the loss of a drug store in Modesto to Carnation because the latter had allegedly given it a chain store discount. Although the store was apparently part of a chain, the Velvet witness objected to the practice of giving a volume discount to the separate stores of a chain, based on the chain's overall volume, it being his opinion that the discount should be based on the volume of each separate store. There is no reliable evidence in the record as to what discount, if any, Carnation gave the store in question or that it granted special prices to any accounts in the area.

The record fails to establish any substantial loss of business by Velvet. The company's principal complaint was not that it had lost gallonage, but that its volume of approximately 200,000 gallons had not increased since 1947, despite a substantial increase in population in the area.⁶⁹ However, there is no reliable evidence that this static

⁶⁷ The witness at first claimed that the drive-in was financed "partially" by Carnation, but later expanded this to claim that the owner had informed him it was being "financed 100 per cent" by Carnation. The witness' suggestion that his testimony could be corroborated by subpoenaing the owner was not adopted by counsel supporting the complaint.

⁶⁸ The testimony of the Borden official indicates that his company had been serving the owner at another location, and that the owner had approached Borden for assistance in purchasing some equipment at the time he contemplated opening an additional restaurant.

⁶⁹ The Velvet witness was unable to give any exact figures as to his 1947 volume since he had no records with him, but he estimated his volume as approximately 200,000 gallons. The latter appears to have been merely a rough approximation of his gallonage during the earlier period.

condition is due to the use of any of the complaint practices by respondents. In fact, at least two of the three respondents referred to by the Velvet witness as having been involved in specific competitive situations appear not to have fared any better than has Velvet. The sales of Borden's Modesto Branch have declined sharply from 216,000 gallons in 1947 to 134,000 gallons in 1955. Arden has only ten or twelve customers in the area, with an estimated annual gallonage of 5,000-7,000, which has not changed much in recent years. No comparable information appears with respect to respondent Carnation. However, from its static position in the nearby San Francisco market (referred to above) and in the state as a whole (which will hereafter be discussed), there is no reason to believe that it has made any significant advance in the Modesto area. There is no information in the record with respect to Golden State's or Beatrice's volume in the market, but it should be noted that no claim was made by the Velvet witness that Golden State or Beatrice had been responsible for any of his company's difficulties.⁷⁰

The only significant recent change in the status of competitors, referred to by the Velvet witness, is the fact that Swift & Company "is gradually going out of business * * * for some unknown reason" and that a local competitor, Peterson Tracey, has sold out to another local company, Milk Producers' Association of Central California. There is no reliable evidence that these departures are connected in any way with the complaint practices.

e. Lodi (San Joaquin County)

Lodi is located in San Joaquin County which is directly north of Modesto. The only company manufacturing ice cream in Lodi is Richmaid Ice Cream Company. Several other local companies which have their plants in nearby areas also sell in competition with Richmaid. These include Milk Producers' Association of Central California (Peterson Ice Cream Company), Crystal Creameries of Sacramento, which competes in the northern part of Richmaid's territory, and Velvet Ice Cream Company of Modesto, which competes to a small extent in the southern part of the territory. In addition, respondents Borden, Arden, Foremost (Golden State), Carnation and Beatrice sell in most of the territory. Swift & Company competes in the Stockton area.

The only witness called from the area was the head of Richmaid Ice Cream Company. The Richmaid representative claimed that his

⁷⁰ The only reference to Golden State by the witness was that Golden State had replaced Borden in one of the chain stores which Velvet had been splitting with Borden. However, this had no effect on Velvet's sales to the establishment.

company's volume had gone down during the past year due to "financing and furnishing fancy equipment without compensation." He also claimed that his company could not compete for supermarket business because of "low prices and the type of equipment they are furnishing." There is little evidence of a specific nature in the record to sustain the blanket claims of the Richmaid witness, and no reliable evidence upon which to base any findings that any of the respondents are responsible for the company's alleged difficulties.

While at first claiming that his company's gallonage had declined during the past year (i.e., during 1954-1955), the Richmaid official later conceded that he had lost only one account during the year. He then claimed that he had lost a number of accounts to Carnation four or five years previously, soon after Carnation had entered the territory. Although this would suggest that his major decline occurred during 1950 or 1951, the Richmaid gallonage figures indicate that the company's sales increased from 65,000 gallons in 1950 to 80,000 gallons in 1951, continuing in the latter amount during 1951, and did not decline again until 1953 when they returned to 65,000 gallons.

Aside from this confusion in the testimony of the Richmaid witness, there is not a scintilla of reliable evidence to support a finding that the company's decline in gallonage is due to the use of the complaint practices by any of the respondents. Most of the Richmaid witness' testimony consisted of unsupported conclusions or hearsay. Indicative of the insubstantiality of such testimony is that relating to the one account which the Richmaid witness claimed he had lost during the past year. He claimed that the owner had asked him for a loan of \$10,000 to remodel the establishment and that when he refused he lost the account, which is now being served by Borden. Not only was no reliable evidence offered to indicate what, if any, assistance Borden gave the account in question, but the testimony of a Borden official affirmatively establishes that Borden did not finance the account in any way and, in fact, that the account later switched to a nonrespondent competitor. The evidence suggests that Richmaid's loss of the account may have been connected with the fact that the owner was considerably in arrears in the amount which he had owed Richmaid on its purchases of ice cream and that he resented the fact that the latter had started suit against him.⁷¹

Another specific instance cited by the Richmaid official was an account which he had sought to acquire from Arden but which later

⁷¹ Although the Richmaid witness denied that his company had instituted suit against the former customer, documentary evidence offered by respondent Borden establishes that such suit was in fact instituted.

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allegedly told him it had decided not to change because it was "all tied up with Arden." Not only was no evidence offered to indicate in what way Arden had "tied up" the account in question, but an Arden official denied that the account was tied to it in any way. As already indicated, Arden does not have any exclusive dealing contracts in California. Another instance cited by the witness to illustrate his general charges involved an account from which Richmaid had received a request for a loan, which it declined, and Carnation later acquired the account. The witness admitted that he did not know what, if anything, Carnation had done for the account. The final incident cited involved an account which had allegedly asked for a loan, so that the balance of a loan from Golden State could be paid off. Not only is there no reliable evidence to establish any loan from Golden State, but an official of Acme Investment Company, the Golden State affiliate, denied that his company ever made any loans. Moreover, such practice is specifically prohibited by state statute.

The Richmaid witness also claimed that he did not even try to get supermarket business because he could not meet the low prices that were being offered. However, no evidence was offered to show that such supermarkets were being served by any of the respondents or as to the prices being charged or that there was any element of exclusive dealing involved in such price arrangements.

Assuming the accuracy of the figures given by the Richmaid witness, which indicate a decline in gallonage of 15,000 gallons between 1952 and 1953, there is nothing to suggest that any of the respondents is responsible for this decline and, more importantly, there is nothing to indicate that their use of the complaint practices played a significant role therein. The Richmaid witness' reference to the fact that he couldn't meet the low prices in the supermarkets suggests that ordinary price competition was a factor in the company's difficulties. In any event, there is no indication that any of the respondents referred to by the witness has experienced any unusual improvement in its position in the area. The sales of Borden's Stockton Branch (which includes Lodi) remained almost constant between 1949 and 1953 (the period covered by the witness' testimony). Arden has only four or five accounts in the Lodi area, and the number and gallonage of its accounts in the area are smaller than in previous years. While there is no information as to the position of Golden State (the third of the respondents referred to by the witness), it was not acquired by Foremost until 1954 and, according to the Richmaid witness, his company's losses had occurred prior thereto.

The record contains no meaningful information with regard to any departures from business in the area during the postwar period. While the Richmaid witness did refer to seven companies he had seen "come and go", there is no indication as to when such companies ceased operating or as to the reason therefor.⁷²

* * * * *

The evidence offered at the San Francisco hearings fails to establish that competition in the northern and central area of California is being adversely affected by respondents and, more importantly, that any difficulties which are being experienced are due to the complaint practices. Four of the six competitors called have substantially improved their market position or sales in recent years. One has remained on an even keel, while the sales of one have declined somewhat.

The record fails to establish any significant improvement in the position of respondents in the area. Their position in the state as a whole likewise does not appear to have improved markedly. In fact the production shares of three of the respondents have declined between 1947 and 1955. Arden's has declined from 13.8 percent to 12.9 percent; Carnation's from 11.1 percent to 10.7 percent; and Borden's from 8.2 percent to 6.6 percent. Beatrice's share has increased from 3.1 percent to 7.5 percent. However, a large part of this increase is due to its acquisition of Creameries of America in 1953. Foremost's production share has increased from 16.84 percent in 1954, when it acquired Golden State, to 17.79 in 1955.

4. *Washington, D.C.*

The hearings in Washington, D.C., involved evidence of competitive conditions in four distinct areas, the Washington Metropolitan area, the Baltimore area, an area around Winchester, Virginia, and an area around Cumberland, Maryland. Each appears to be a separate market area, and the evidence with respect to each area is discussed separately below.

a. *Washington, D.C., Area*

The respondents doing business in the Washington area include National (Breyer and Southern Dairies divisions), Arden (Melvern-Fussell subsidiary), Beatrice and Borden. The local companies include Colonial Ice Cream Company, Washington Maid Ice Cream Company and Briggs Ice Cream Company. There are also a number

⁷² One of the companies mentioned was Peterson Ice Cream Company which, as previously noted, sold out to Milk Producers' Association of Central California, an active competitor.

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of substantial regional companies which have plants or sell in the Washington area, including Richmond Dairy, Abbotts Dairies, Delvale Ice Cream Company, Mayfair Ice Cream Company, and Hershey Ice Cream Company. In addition there are several "captive" manufacturers, which sell only through their affiliated stores, including High's, Giffords, Howard Johnson, Hot Shoppes, and Safeway. Counsel supporting the complaint called as witnesses representatives of two ice cream manufacturers, Colonial and Washington Maid, and eleven dealers. A representative of the other local company, Briggs, was present during the hearing but was not called.

The testimony of the two competitor witnesses indicates that it has been the practice of ice cream manufacturers in the Washington area to supply ice cream cabinets to their dealers since the earliest days of the industry, even before any of the so-called national companies entered the area. Both local manufacturers agreed that it was necessary and desirable for the ice cream manufacturer to furnish equipment for storing and merchandising the ice cream, and to service such equipment. The representative of Colonial was particularly emphatic in his testimony that the industry should furnish and maintain the equipment through which the ice cream is sold, for the reason that the product is highly perishable and that if the cabinets are not functioning properly the manufacturer will be called upon to replace the ice cream which has become spoiled. While the Washington Maid representative indicated that the cost of furnishing the cabinets represented a considerable expense to a smaller manufacturer, he also agreed that a great many dealers would not carry ice cream if the manufacturer did not supply them with a cabinet.

The Colonial witness claimed that when he entered the business in 1926 it was customary to make a rental charge of five cents a gallon to defray the expense of supplying a cabinet, and that this practice was discontinued around 1945 or possibly earlier, with the Breyer Division of National Dairy allegedly taking the lead in the discontinuance of such rental charge. The Washington Maid witness, however, testified that so far as he was aware, and going back to 1932, when his company was started, it had not been the practice to make any rental charge in connection with supplying ice cream cabinets. Irrespective of which of these versions is correct, it does not appear that the failure to make any rental charge has had any adverse effect on the industry since, as the Colonial witness testified, the price of the ice cream was adjusted to take care of the discontinuance of the rental charge "so that it did not make any difference finally to us one way or another."

While the Colonial representative did not feel that the matter of furnishing or servicing ice cream cabinets was a significant competitive factor in the ice cream industry in Washington, he did express disapproval of the practice of making loans to dealers. However, his testimony gave no indication that any of the respondents was responsible for this practice or had used it aggressively against his company. On the contrary, the testimony of the Colonial witness indicates that the practice has been utilized as far back as 1926, which antedates the period when the major national companies entered the Washington area, and that Colonial and other manufacturers in the area do make loans to assist their dealers. The Colonial witness conceded that the making of loans to independent retailers for modernizing purposes has helped such dealers compete with the larger chain establishments.

Although the Colonial representative did not refer to any of the respondents as having been responsible for his loss of any accounts or for his company's inability to acquire any accounts because of loans, counsel supporting the complaint called one retailer witness who had received a loan and whose testimony indicated that Colonial had sought to acquire the account. The dealer in question was the operator of a drugstore which had received a \$4,000 loan from Southern Dairies in connection with opening up his establishment. The proprietor had previously operated two other drugstores at different periods, in one of which he had carried Colonial's Wadrex brand and in the other Southern Dairies' Sealtest brand. Before opening up his newest establishment, the owner had had a consumer survey made, for which he paid \$100, and found that Sealtest was the most popular brand in the neighborhood. Based on the results of the survey and his own satisfactory experience with Sealtest at the latest of his two prior locations, he chose Sealtest. So far as appears from the record, the loan which was made to assist him in opening the store had nothing to do with his choice of Southern Dairies as his supplier. In fact he had received similar offers from other competitors, including one from Colonial Ice Cream Company, which had loaned him money at one of his prior locations. It seems apparent that the loan, which was amply secured by a chattel mortgage and which, so far as the witness was aware, contained no requirement that the dealer use Sealtest ice cream, was not a significant factor in his choice of suppliers.

The area where Colonial has been the weakest is in the supermarket and chainstore field. While claiming that requests for loans and equipment had been involved in these accounts, the Colonial

witness conceded that "price was the principal factor" which had prevented his company from obtaining such accounts. In fact, he conceded that the supplying of a large chain would be beyond the capacity of his company's present plant, and that he was reluctant to tool up the plant to serve such a chain because of the possibility that he might lose it if "all of a sudden somebody gives him a better price." When the wheat is separated from the chaff in the testimony of the Colonial witness, it is clear that the reason for the company's not obtaining the larger accounts was not the making of loans by competitors or any of the other complaint practices, but the fact that the company has not made any serious effort to obtain such accounts, as the witness himself conceded. The reason for this is that the company has had a very conservative business approach, feeling that it is "more safe in doing business with independent people than I am with the man that can walk and cancel an order on me for 200,000 gallons." It has apparently been the company's business philosophy that there is "security * * * [in] number[s]."

According to the Colonial witness, his volume has declined by about 50 percent since the peak years of 1947 and 1948. However, he made no effort to attribute this in any way to the respondents or to their engagement in any of the complaint practices. On the contrary, the record indicates that other factors were largely responsible. In 1948 about 60 percent of Colonial's sales were to drug stores where the ice cream was mainly sold in bulk. Since that time the trend in ice cream sales has been away from the drug stores to the food stores (where it is sold in package form). Within the food store category, there has been a marked shift in sales away from the smaller neighborhood grocery to the supermarkets and chain stores in the large shopping areas. Colonial's failure to sell to the latter establishments, so far as appears from the record, has been due to the fact that it has been reluctant to go after these accounts aggressively because of its "safety in numbers" philosophy, and its unwillingness to compete on a price basis for such business.⁷³ As the Colonial witness somewhat plaintively conceded:

[T]his development with the parking-shopping area and the chain store with its facilities today on a large-sized scale, has developed a new field for ice cream that heretofore we in the ice cream industry, some of us, missed, probably, and others saw the advantage and went ahead with it.

⁷³ The Colonial witness testified that while his company did give quantity discounts and had in fact initiated the practice in the Washington area, it would not give a special price to a chain or cooperative buying group, based on the total purchases of the stores, since that would be unfair to the independent merchant.

It seems evident from his testimony that the Colonial witness regarded his company as falling within the former category of those who had "missed" the boat. This cannot be attributed to the respondents or the complaint practices.

The evidence offered by the Washington Maid witness likewise fails to indicate any marked loss of business or inability to acquire business by reason of the engagement by any of the respondents in any of the complaint practices. While he testified in general terms that dealers asked for loans, rebates, bonuses and "everything else that you can imagine", his testimony was extremely vague insofar as establishing that any of the respondents had engaged in such practices or had caused his company any competitive difficulties. The Washington Maid representative cited only three instances where his company had lost or been unable to acquire an account because of the demands of dealers and in only one of such instances is there any evidence in the record to indicate that any respondent met the demands of a dealer.

One instance involved an alleged request for a loan by an account to enable it to move to another location. Although the witness claimed that the account was later acquired by Beatrice, there is no evidence in the record that the account received a loan or anything else from Beatrice. Another incident involved Washington Maid's alleged inability to acquire a drug store account, which it was soliciting, due to Beatrice's allegedly offering the owner a lower price. Not only is there no reliable evidence that Beatrice offered such a price to the account in question but there is no evidence that such price represented any deviation from Beatrice's regular price list or involved any exclusive arrangement. The third instance cited involved an account which had requested Washington Maid to put in some neon lights to light up the front of its establishment and later switched to Southern Dairies when the former refused. This represents one of the relatively few instances in the record where the dealer referred to by a competitor was called to testify. The witness in question, while testifying in response to the leading question of counsel supporting the complaint that he "guessed" that the lighting of the sign (which he estimated cost \$50) was one of the things that interested him in Southern Dairies, also stated that the fact that Sealtest had a national reputation and his feeling that he could get better service than he had been receiving were the basic reasons for his change. The testimony of the witness also indicated that his volume of sales had increased substantially after the change.

Assuming, without deciding, that the supplying of some neon lights worth about \$50 was the reason why Washington Maid lost this account, the record fails to establish this as a significant factor in Washington Maid's loss of accounts or in its inability to compete. Although the Washington Maid witness claimed that he had lost 70 to 80 accounts since 1947, he also conceded that he had gained more accounts than he had lost, so that he actually had about 300 accounts in 1955 as compared to 200 in 1947. His volume, however, has not increased since 1947 because of the fact that his individual accounts are selling less ice cream per account. Here again the reason is somewhat similar to that of Colonial. Washington Maid serves mostly small restaurants and groceries. As already noted, the trend in ice cream sales in the Washington area has been away from this type of establishment to the supermarket and chain store. It was these establishments which Colonial could not acquire, mainly because of price competition. There is no reason to believe from the evidence in the record that the situation is any different in the case of Washington Maid.

The fact that Washington Maid's volume has remained constant since 1947, while that of Colonial has declined by about 50 percent, does not necessarily mean that abnormal conditions in the market were responsible. The evidence discloses that 1947 and 1948 were the biggest years in the ice cream industry. The volume of ice cream sales in the area has declined by about 20 percent. In addition there has been a substantial increase in the number of competitors in the area. These include Briggs, which came into the area in 1953 by acquiring a local company and now has a substantial volume. Several regional manufacturers, including Hershey, Richmond Dairy, Abbotts and Mayfair have also entered the Washington market since the war. Safeway, Hot Shoppes, High's, and Howard Johnson, which have all expanded in recent years, likewise have been substantial competitors for the consumer's ice cream dollar. Despite Colonial's and Washington Maid's problems, both appear to be in good financial shape. The Colonial witness conceded that his company had not lost any money in its operations and expected to make a profit during the current year. Washington Maid is also operating at a profit, although its representative claimed that its profits were down in 1955. Both companies have paid dividends regularly to their stockholders. The record fails to establish any significant improvement in the market position of the respondents operating in the Washington area. Arden, which entered the market by the acquisition of Melvern-Fussell in 1953, when its market share was 11.9 percent, declined to 8.3 percent by 1955. Beatrice's share declined from 9.4 percent in 1950 to 7.8 per-

cent in 1955. Borden, whose share was a minute 0.4 percent, managed to increase modestly to 1.4 percent in 1955. National's share has remained almost static, being 24.9 percent in 1950 and 25.4 in 1955.

In addition to the two dealers referred to above (a former Washington Maid dealer and an account for which Colonial had been competing), counsel supporting the complaint called nine other dealers in Washington, none of whose testimony related to any of the competitor witnesses. Three of the dealers were the owners of drug stores and one the owner of a confectionery establishment, all four having received loans from either the Southern Dairies or the Breyer division of National Dairy in connection with the opening of a new store. In each instance the owner had been dealing with National Dairy at an existing establishment for a number of years and had approached National Dairy for a loan to assist him in opening a new store. In each instance a competitor had also offered to finance the dealer in opening a new establishment and, in some instances, had even offered more favorable terms than National Dairy's, but the owner preferred to deal with National because of the reputation of its brands (Sealtest or Breyer's), and the consumer demand therefor. In the two instances where counsel supporting the complaint broached the subject with the witness, the dealer indicated that he didn't know or hadn't paid any attention to whether he was obligated by contract to buy National Dairy products exclusively during the period of the loan. One of the dealers stated that if he desired to change from National Dairy for any reason he would pay off the loan and change suppliers. The owner of the confectionery establishment indicated that without the financial assistance received from National Dairy he never could have opened up his new, and much larger establishment, located in a suburban shopping center. While he also had received offers from other suppliers he was only interested in National (Breyer) because of his past highly satisfactory relationship with them over a period of ten years.

Of the five remaining establishments, one involved a large supermarket chain with 31 stores and a volume of approximately 200,000 gallons a year.⁷⁴ The evidence offered with respect to this account was that it had received a volume discount from Southern Dairies, based on the maximum discount in the latter's published schedule. In addition, the account received a discount in some of its stores for the use of dealer-owned equipment to store ice cream. The chain had been dealing with Southern Dairies for a number of years, and there

⁷⁴ The 200,000 gallon account to which the Colonial witness made reference, as being one which he would be reluctant to handle, was the dealer in question.

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was no testimony that the discounts had entered into the decision to choose Southern Dairies as a supplier or any evidence that exclusive dealing was involved in the granting of such discount. The fact that such discount did not have the effect of "captivating" the account is demonstrated by the fact that, within a year following the hearing, the account had switched to a local competitor, Briggs Ice Cream Company.

Two of the remaining witnesses were owners of small supermarkets who had received advertising allowances from Beatrice and had switched to that company from Briggs. In one instance the advertising allowance was \$2,000 and the owner was under no obligation to spend the money exclusively for advertising. The other establishment received a \$500 so-called advertising allowance for which it signed a demand note, which would be cancelled if the store stayed with Beatrice for two years. In the latter instance the granting of the allowance appears to have entered into the account's decision to switch to Beatrice. Both of the so-called allowances would appear to be suspect as legitimate advertising allowances, although apparently only one of them involved an exclusive dealing arrangement. However, it does not appear that this type of practice is engaged in to any substantial extent by respondent Beatrice, and, more important, it does not appear that it has had any significant effect in the Washington market. The company primarily affected by the switch of the two supermarkets, Briggs Ice Cream Company, was not called as a witness although a representative of the company was present in the hearing room. The lack of probability that the competitive position of this company has been seriously jeopardized is suggested by the fact that it was able to regain one of the two accounts approximately a year later, in addition to acquiring the 200,000 gallons of the 31-store food chain, referred to above, from National Dairy.

The last two dealers involved in the Washington hearings were relatively small accounts. One was a neighborhood grocery and the other a bakery, both of which had received some free ice cream from Breyer's at the time they switched from Briggs. In one instance the dealer was the new owner of an existing store to whom the Breyer salesman offered \$100 worth of ice cream, without charge, to help him get started in his new enterprise. The owner had initially approached Breyer about handling its brand. The owner of the second establishment received \$30 worth of ice cream, free, to assist him in making the switch from Briggs, to whom he still owed \$30 on a \$50 advance from that supplier. The furnishing of free ice cream, over and above what is required to replace the remaining stock of the former supplier,

would appear to be a questionable practice. It does not appear, however, that any exclusive dealing arrangement was a condition of such liberality. In any event, considering the small amounts involved and the fact that they related to the single supplier Briggs, there is no substantial basis for any finding of injury to competition.

b. Baltimore Area

The respondents doing business in the Baltimore area are Beatrice, Borden, and National. Borden does business under its own name and under the name of Hendler, a company which it acquired. National Dairy's products are distributed through its subsidiary, Marvadel Ice Cream Company, which distributes both the Breyer and Sealtest brands in the area. National Dairy's sales are limited to the area outside the city limits of Baltimore since a local ordinance prohibits sales within the city by any company not having its plant inside the corporate limits of the city. Local companies having their plants in the city and distributing in the Metropolitan area include Delvale Ice Cream Company, Eckels Ice Cream Company, Mount Vernon Ice Cream Company, and Brimer's Ice Cream Company (Good Humor). Likewise, the regional company, Abbott Dairies, which recently bought out the local competitor Bettar Ice Cream Company, operates in Baltimore. The only local company to testify at the hearings was Mount Vernon Ice Cream Company. In addition, four retail dealers were called as witnesses. A representative of Eckels Ice Cream Company was excused from testifying at the request of counsel supporting the complaint.

Mount Vernon Ice Cream Company is one of the smallest companies in the Baltimore area. It originally sold through its own retail store and later through vending machines. It began selling at wholesale around 1940. The company had an annual volume of approximately 50,000 gallons as of 1955, and the company representative estimated that it had been increasing at the rate of approximately 2,000 gallons a year since 1947.

The Mount Vernon witness testified that his company served only the smaller establishments and could not get into the bigger stores. He attributed this primarily to the fact that his brand was not too well known. While the witness also referred to the fact that his company was not in a position to supply customers with anything, other than a cabinet or sign, there is no evidence that this alleged inability has been responsible for his company's inability to acquire larger outlets. Although counsel supporting the complaint suggested that the company's inability to make loans had been an inhibiting

factor, the witness indicated that the company had been requested to make a loan in only one instance, which involved an account later lost to Borden. He conceded that outside of this account his information as to what inducements other companies were offering was "mostly hearsay". The witness could recall only one instance of soliciting a supermarket account. However, he conceded that he had not been asked for a loan or any other form of assistance by this account. He also conceded that the fact the company does little or no advertising was a major factor in its slow growth, stating that "the only way it is * * * possible to expand is to start advertising, the way I see it," since the "larger percentage" of the public buy "on a brand preference" basis. Indicative of the lack of demand for Mount Vernon's brand is the fact that even where the company has been able to get its product into a larger store alongside of one of the well-known brands, Mount Vernon's brand admittedly does not "move fast".

The only incident which the witness cited where a loan had been involved in the loss of an account involved a restaurant, the owner of which was also called as a witness by counsel supporting the complaint. The owner of the establishment had originally sought to do business with Borden because of the quality of its ice cream and its good reputation in Baltimore. However, the latter company refused the owner's request for a \$7,500 loan to assist him in opening the establishment, so he made arrangement to buy Mount Vernon's ice cream. The latter could not offer him a loan, but gave him a better price on the ice cream. Later when the business began to decline the owner sought to borrow \$500 from Mount Vernon. The latter refused because the owner already was in arrears for six weeks on his ice cream payments. The restaurant owner then persuaded Borden to assist him with a loan of \$3,000 and switched to the latter. This loan helped to keep the establishment in business for a few months longer, but it finally closed still owing Borden \$2,000. This undoubtedly is an instance where Borden was able to acquire the account of a competitor because of a loan. However, Borden did not solicit or seek the account but literally had it thrust upon it and would have been better off without it, as later events disclosed.

In addition to the restaurant which had been a Mount Vernon account where the owner of a small store, in anticipation of an increase in volume in the area by reason of the opening of a new school, asked for a bigger cabinet. When Mount Vernon refused, the owner switched to Borden which supplied him with a larger cabinet. Here again, Borden did not seek the account or offer it the inducement of

a larger cabinet, but was sought out by the owner and, so far as appears from the record, made a reasoned business judgment as to whether the man's anticipated increase in volume would justify a bigger cabinet. The witness also mentioned two other very small accounts which had switched to Borden. However, in both cases he was about to take out his cabinets because the volume did not justify them, and the witness conceded that neither account represented any real loss to his company.

In addition to the restaurant which had been a Mount Vernon account and which later closed down after receiving a loan from Borden, counsel supporting the complaint called three other dealer witnesses. However, none of these were former Mount Vernon accounts, or accounts which the latter had sought to obtain. Two were Borden accounts and one was a Beatrice account. In only one of these instances had the account been acquired from another ice cream manufacturer.

The first of the witnesses was the comptroller of a group of three food stores which had been receiving a discount of 10 cents a gallon from Borden on a portion of its ice cream purchases. The arrangement to pay this discount antedated the witness' employment with the food chain and he knew little about it, except that it was in the nature of a refrigeration allowance to compensate the stores for permitting Borden to use store-owned storage facilities for storing additional ice cream during periods of special sales and other periods of peak demand. Counsel supporting the complaint suggested that possibly the storage facilities were not actually used to any significant extent, and that the discount was therefore a subterfuge, but the witness indicated that this was a matter with which the store manager was familiar and that he had very little knowledge about it. In any event, there is nothing to indicate that the stores in question had chosen Borden as their supplier because of this arrangement or that any other supplier had lost or been unable to acquire the account because of such arrangement.

Another witness was the president of a group of supermarkets, two of which were company-owned and nineteen were operated under a franchise arrangement pursuant to which all purchases were made centrally. The chain had originally sought to purchase its ice cream from Borden, but had been unable to do so since it had been Borden's policy in prior years not to service supermarkets. Accordingly, the chain arranged to purchase its ice cream from Delvale. However, after the Borden policy changed, the chain in question switched to Borden. The witness' testimony indicates that the chain was receiv-

ing a quantity discount based on its total purchases, that it had also received a \$6,000 loan from Borden, and that Borden made a contribution toward the cost of the store's television advertising program. In no instance was any evidence offered that any of these represented more favorable treatment than the firm had been receiving from Delvale or that they operated as an inducement for the chain to change suppliers. Insofar as the quantity discount is concerned, the witness testified that the stores had received a similar discount from Delvale and that the net price of each company was the same. While he did buy his ice cream exclusively from Borden, the witness indicated that he had done the same when dealing with Delvale because he preferred to deal with a single supplier. The loan did not enter into the decision to switch to Borden, since it was not made until three years after the chain had changed to Borden. The contribution to the television program amounted to \$100 weekly, out of a total weekly cost of \$750, and represented Borden's proportionate share of the advertising which it received on the program, to which other suppliers of the chain likewise contributed.

The third dealer witness was the owner of a drug store who had received a \$15,000 loan from Beatrice when he opened his place of business three years previously. The witness indicated that he had borrowed money from the bank, but was in need of additional funds and went to Beatrice for assistance. He also received equivalent assistance from other suppliers in the form of merchandise on credit. There is no evidence that any other supplier was bidding for the account or was unable to acquire it on account of the loan. On the contrary, the witness testified that he had chosen Beatrice because of his family's close social relationship with certain of the local officials of the company and that he had made no effort to contact any other ice cream manufacturer. The evidence also establishes that the owner received a refrigeration allowance of 10 cents a gallon for ice cream stored in the owner's own refrigeration facilities. There is nothing in the record to indicate that this was anything but a bona fide refrigeration allowance or that it was an inducement for the owner to choose Beatrice as his supplier.

Counsel supporting the complaint also called as a witness an official of the National Dairy's subsidiary, Marvadel Ice Cream Company, which distributes Breyer's and Sealtest in the Baltimore suburban areas. The testimony of this witness establishes that the company has 25 loans outstanding out of a total of 378 customers, with the largest of these loans amounting to \$1,919. The Marvadel official testified that the company originally did not make any loans, but

that after several years experience in the area it found that it was necessary to furnish financial assistance to some customers in order to enable them to do a good merchandising job and to take full advantage of the merchandising assistance offered them by the company. Some of such customers had sought bank assistance unsuccessfully. The customers receiving such loans are required to purchase their frozen products from the company during the period of the loan, since the repayment of the loan is keyed to the purchase of ice cream, being based on a surcharge of 20 cents per dollar of purchases. However, the witness indicated that this had not prevented dealers from switching when they were dissatisfied with the company for one reason or another, and cited a recent instance where there was still a balance of \$1,700 due on a loan which the dealer paid off and switched to Delvale.

The record of the Baltimore hearing is wholly deficient insofar as establishing that the complaint practices have injured any competitor, let alone competition, in the area. The evidence with respect to the only competitor witness called, Mount Vernon, discloses that that company has made a gradual, albeit not a spectacular, improvement in its position. While the company has failed to make rapid strides in recent years, this cannot be attributed to the complaint practices, but rather to its failure to advertise and to popularize its brand, to its lack of an organized selling effort, and to an increase in competition generally in the area, including competition from some of its local competitors. Delvale Ice Cream Company, which advertises extensively, has made excellent progress and serves the A & P chain. While it does appear that respondent Borden managed to acquire a single account from Delvale, the record does not establish that this change was due to the complaint practices. Another local competitor, Eckels Ice Cream Company, has managed to build up a volume substantially in excess of Mount Vernon's. Although a representative of Eckels was subpoenaed to testify, counsel supporting the complaint excused the witness.

The record also fails to show any significant improvement in the position of the respondents in the Baltimore area during the postwar period. Borden has actually suffered a substantial decline in gallonage, with Borden's Hendler branch sales declining from 2,179,739 gallons in 1946 to 1,402,679 in 1955, and the Borden branch's Baltimore sales declining from 1,091,663 in 1946 to 799,526 in 1955. Borden's market share in Baltimore has declined from 30.8 percent in 1950 to 28.0 percent in 1955. Its share of production in the State of Maryland as a whole has declined from 36.0 percent in 1947 to

23.1 percent in 1955. The sales of Beatrice's Washington plant, which include its sales in the Baltimore area, have declined from 1,664,394 gallons in 1946 to 1,230,882 in 1955. Its share of the Baltimore market increased by only one percent between 1950 and 1955, being 14.9 percent in the latter year. Its share of production in the State of Maryland as a whole declined from 10.8 percent in 1947 to 9.5 percent in 1955. National's market share in the Baltimore market in 1955 was only 6.9 percent, as compared with 6.4 percent in 1950.

c. Winchester, Virginia, Area

The respondents operating in Winchester, Virginia, and surrounding areas in northwestern Virginia include National Dairy (Southern Dairy and Breyer divisions), Arden Farms (Melvern-Fussell), Borden, Fairmont Foods (Imperial), and Beatrice. Other companies operating in the area are Garber Ice Cream Company, Nicodemus, Brickstraw, Royal Dairy, Maine Ice Cream Company, Monticello Ice Cream Company, Hershey, and Penn Dairy. The only witness to testify from the area was the owner of Garber Ice Cream Company, which has its plant in Winchester. Another local competitor from the area, Nicodemus, was subpoenaed to testify but was later excused at the request of counsel supporting the complaint.

For the most part, the testimony of the Garber witness consisted of gossip, rumor and hearsay. He testified vaguely about the "big boys" and of having heard that dealers were being promised "everything from the sky down". Most of his testimony was of a highly subjective nature, relating to the supplying of more equipment to dealers than he thought justified, some of which he surmised was being used for frozen foods other than ice cream. The witness could name only two or three accounts where this was allegedly involved. One was a restaurant in Winchester to which Garber had supplied a six-hole cabinet and which later switched to Fairmont after allegedly receiving two six-hole cabinets, one of which the owner had told him could be used for "meats and stuff". On cross-examination it developed that the account had actually changed owners and that the new owner had picked Fairmont as his supplier. No evidence was offered to establish that the furnishing of an additional cabinet was a consideration for the new owner's selecting Fairmont, that it was supplied for the storage of frozen foods or that it was actually used for that purpose with the knowledge of Fairmont. In the same category is a diner in Front Royal, which the witness claimed he had tried to acquire from Fairmont but was unsuccessful because

the latter had allegedly supplied the account with an additional cabinet for frozen foods.

Finally, the witness referred to another restaurant on the highway outside of Winchester which he had allegedly lost to National Dairy (Breyer) because the latter had furnished it an additional cabinet. The witness conceded that he had no information as to whether Breyer had supplied the additional cabinet for the storage of frozen foods, and admitted that he found dealers placing frozen foods in his own cabinets, despite the fact that he did his best to discourage such practice. Not only is there no evidence to sustain the witness' hearsay testimony, but a National official testified that it was not the company's policy to supply cabinets for anything other than the storage of ice cream, and the Breyer salesman later testified that according to the company's records the account in question had only one "used" cabinet in its place of business.

It should be noted that the Garber witness' testimony was directed at the use of cabinets for the storage of products other than ice cream, and not at the practice of supplying cabinets as such. The witness indicated that it had been the practice for his company to supply ice cream cabinets for as long as he could remember and that there never was any rental charge made. Not only has the company supplied such cabinets, but it has serviced the cabinets and, as an accommodation to the dealer, has likewise serviced the dealer's own refrigeration equipment.

Another competitive practice referred to briefly by the witness was that of making loans, but he indicated that he knew of only one such instance. The witness' testimony in this respect was somewhat confused. On direct examination he referred to the fact that he had been informed by the owner of a new restaurant in Front Royal that Breyer had "loaned" him about \$14,000 "in equipment furnished." On cross-examination he referred to this account as involving a loan of money. However, he conceded that he didn't know who had made the loan, although the restaurant was serving Breyer's ice cream. There is no reliable evidence in the record as to what, if anything, the account in question received from Breyer's. The witness also referred to a 5 and 10 cent store in Winchester which he had been trying to get from Fairmont, but that the owner had informed him Fairmont's price was 32 cents a gallon below his. There is no reliable evidence as to what Fairmont's price was, or that it was anything other than its regular schedule price or that it was connected in any way with an exclusive dealing arrangement.

Despite the alleged loss of or inability to acquire the accounts referred to above, for whatever reason, there is no evidence that Garber has sustained any competitive injury in the area where it operates. While it allegedly was unable to obtain one 5 and 10 cent store in Winchester, it serves the stores of another such chain in both Front Royal and Winchester. Its volume has increased from about 9,000 gallons 22 years ago to 130,000 in 1947 and 160,000 in 1955. This may be compared with a decline in sales of approximately 190,000 gallons between 1947 and 1955 by National's branches operating in the area.

The Garber witness expected his business to keep improving in the future. He had just spent \$30,000 for a new hardening room in order to expand the company's capacity. His principal complaint was that he wasn't progressing rapidly enough since World War II. However, he did not attribute this to the complaint practices, but to the fact that so many additional competitors had come into the area since the war and that there are now "so many places handling ice cream all over the country and along the roads * * * and every hole in the wall in town * * * has got ice cream", with the result that each individual stop is selling less ice cream. Another factor which may have contributed to the company's lack of progress is the fact that the company employs no salesmen, and the owner only goes out three or four times a year to solicit accounts.

d. Cumberland, Maryland, Area

The respondents operating in the Cumberland, Maryland, area are National and Fairmont. There are two local manufacturers, Lear & Oliver, and Speelman Ice Cream Company. Several other non-respondent companies having their plants elsewhere also sell in the Cumberland area, including Walker, Hershey, and Hagan. The latter two companies entered the area from Pennsylvania after World War II. Both of the local manufacturers were called as witnesses at the Washington, D.C. hearings. In addition, two dealer witnesses were called to testify at hearings later held in Pittsburgh.

Franklin Lear, a partner in Lear & Oliver, testified that his company's gallonage had been steadily declining and was approximately 70,000 gallons in 1955, as compared to 100,000 gallons a few years previously. He attributed the decline primarily to the fact that there were more competitors in the area, which had resulted in more stops selling ice cream and less ice cream being sold per establishment. However, he also claimed that part of his company's decline was due to a loss of accounts. While he at first estimated he had lost six accounts in four years, he later conceded that this was not a net loss since

he had also gained some accounts during this period. Likewise, he at first suggested that he had lost "several" accounts because he could not lend them money to remodel, but on cross-examination it turned out to be a single account which he had lost to respondent National Dairy in 1950. The witness also spoke of competitors putting in more equipment than he could afford to do, but on cross-examination he conceded that he had lost only one account to a competitor for that reason. The competitor was unnamed and he could not recall the name of the account. The witness also attributed the loss of one account to respondent Fairmont in five years, but the name of the account and the reason for its loss was not given.

In addition to the loss of a few accounts, the witness also referred to his inability to acquire new accounts. He attributed this primarily to his company's unwillingness to supply the newer open-face cabinets which customers were demanding. His company likewise has made no effort to obtain supermarket business. He conceded that this was not because of the equipment involved, but because he couldn't "meet the price." While he indicated that respondent National serves the A & P and Acme stores in the area, there is no evidence as to the price being charged to these accounts or of any exclusive dealing arrangement in connection therewith.

The sole dealer whom Lear could recall having lost to a respondent was called as a witness in Pittsburgh. This was the dealer to whom National had made a loan. The evidence concerning this transaction indicates that it was more a lack of imagination, than a lack of finances, which was responsible for the loss of the account. The account in question was a combination general store and grocery. It had been steadily going down hill and had to either enlarge and modernize its premises in order to encourage new business or go out of business. The owner asked Lear, with whom he had been dealing for some time, for a loan. The latter was somewhat indecisive and indicated that he wanted to consider the matter. In the meantime, the store proprietor talked to the National Dairy salesman who had been calling on him from time to time and explained his predicament. After consulting with a company official as to the feasibility of assisting the account, National agreed to loan the owner \$4,000 at 6 percent interest, secured by a chattel mortgage. Shortly thereafter Lear advised the owner that his company would make the loan at 3 percent interest, but the owner had decided to deal with National. After completion of the repairs, which cost \$17,000, the business gradually improved until its ice cream volume had increased from 1,000 gallons a year to 3,000 gallons, and the balance of its sales increased proportionately.

While undoubtedly the loan was an important factor in the account's decision to change suppliers, the evidence demonstrates the sound business motivation for a supplier's willingness to assist an account in remodeling or modernizing its establishment. In any event, as the evidence as a whole indicates, this single transaction had no significant effect on the fortunes of Lear & Oliver. Aside from the factors adverted to above, there is more than a suggestion in the record that the decline in the fortunes of Lear & Oliver has coincided with the death of the former members of the family who had previously run the business.

The other local Cumberland manufacturer, Speelman Ice Cream Company, testified that about five years prior thereto his company's ice cream gallonage had started "slipping a little" (for reasons which he did not specify), but that he had added frozen foods to his ice cream line, "went out and plugged pretty hard", and that its gallonage thereafter improved to the point where it was "up to where it should be" (around 75,000 gallons). He did, however, complain that he had been unable to get two grocery stores because they were allegedly "tied up" with National Dairy due to a loan. In the case of one of the establishments, no evidence was offered to indicate that it had ever received any loan from respondent National. In the case of the other establishment, the proprietor was called as a witness in Pittsburgh and indicated that respondent National had loaned him approximately \$2,000 in 1950, after he had been dealing with them for about ten years, and that he received two additional loans of approximately \$4,000 in 1952 to help remodel his establishment in order to be in a better position to compete with a new supermarket that had moved into the area. Irrespective of what agreement he signed at the time, the witness was under the impression that he was under no obligation to continue purchasing National Dairy's ice cream, and that if he wished to switch he could simply make his monthly payments at the bank as he had been doing. He denied having advised any other ice cream company that he was tied up with National "because I never thought about it. It is the best ice cream there."

In addition to the two accounts which were allegedly "tied up" with National, the witness claimed that he couldn't sell to the A & P stores because the divisional manager of the stores had told him that the chain was going to deal with "one of the big ice cream companies that could make it national for them, over the country." The witness indicated that the A & P stores in Cumberland purchased their ice cream from National Dairy which makes it up under a private label. There is, of course, no allegation in the complaint which challenges the right to

sell ice cream under a private label or the right of a chain to deal with a single supplier in all or any portion of the country.⁷⁵ The witness also referred to the fact that the worst competition his company had in the area was the low price at which A & P was retailing its ice cream. However, there is no evidence in the record as to National Dairy's price to A & P and nothing to indicate that it involved an exclusive dealing arrangement.

Aside from not being able to obtain two accounts from respondent National Dairy, the witness could only recall having lost a single account which his company had lost to National in three or four years. He claimed that the owner had informed him National had given the store an additional cabinet for frozen foods. There is not a scintilla of evidence in the record to support this hearsay testimony. The witness also testified to having lost a few small accounts to respondent Fairmont (for reasons unspecified), but conceded that he had gained as many from them and thought he was about even as far as that company was concerned. He also conceded that he actually had more accounts than he had five years previously, but claimed that each account was selling less ice cream. This cannot, of course, be attributed to the complaint practices, but would appear to be due to the same condition referred to by the Lear & Oliver witness, viz., an increase in the number of competitors in the area and the number of ice cream establishments.

The evidence fails to establish that respondent National has used loans or cabinets as an aggressive competitive weapon in the Cumberland area, or that there has been any substantial injury to competition in the area from the few loans it has made or due to any of the other complaint practices. The record indicates that the sales of its Cumberland branch have actually declined by over 50,000 gallons between 1947 and 1955. The evidence is wholly deficient, insofar as establishing that respondent Fairmont has engaged in any of the complaint practices in the area, let alone been responsible for any injury to competition.

5. *Richmond, Virginia*

The respondents doing business in the Richmond area are Pet, Beatrice and National Dairy (Southern Dairies and Breyer divisions). Other companies selling in the area are Virginia Ice Cream Company, Awalt Ice Cream Company, Arnett Ice Cream Company, Perkinson Ice Cream Company, Richmond Dairy and Swift & Company. Repre-

⁷⁵ In point of fact, the witness was not properly informed since the evidence shows that A & P does deal with different suppliers in different sections of the country; e.g., in the Pittsburgh area a local manufacturer supplies the A & P stores in that area with all their ice cream.

sentatives of Virginia Ice Cream Company and Awalt Ice Cream Company were called as witnesses by counsel supporting the complaint. No dealer witnesses were called. However, respondent Pet, during the presentation of its separate defense, offered the testimony of 14 dealer witnesses in Richmond.

The testimony of the Awalt witness indicates that his company has made good progress in the Richmond market and is not experiencing any serious competitive difficulties. The company, which began manufacturing ice cream for sale through its own retail store in 1936, gradually began to sell at wholesale and the number of its customers became quite substantial during the period after World War II. The company is now at the peak of its gallonage. The Awalt witness was reluctant to state whether his company's gallonage was now in excess of 200,000 a year and merely commented: "Well, I make a pretty good living at it. I started with nothing and I make a pretty good living at it." He indicated that the matter of supplying cabinets had presented no problem to his company. It has been able to purchase the cabinets on credit from equipment manufacturers and has found that in the ordinary case ice cream sales will be sufficient to enable the company to pay off a cabinet in about two years. As of the end of 1955, the company had about 123 accounts, of which it has supplied cabinets to about 100. Customers who own their own equipment receive a special 10 cent a gallon discount. Awalt services all its own equipment and, in addition, services dealer-owned refrigeration equipment, charging the dealer only for replacement parts.

The advent of the newer type glass-front or open-top cabinets in the Richmond market does not appear to have caused Awalt any serious difficulty. The witness agreed that the newer type cabinets do sell more ice cream in the proper location, but indicated they were not suitable for the smaller grocery stores or service stations to which he mainly caters. While the witness did cite an instance where Beatrice had allegedly supplied an open-top cabinet in place of one of his conventional cabinets, no evidence was offered to establish that this was the reason why the owner had switched. Although the Beatrice cabinet was of the open-top variety, it was actually smaller than the cabinet Awalt had supplied the establishment.⁷⁶ The only other specific accounts cited by the witness were a school to which Beatrice had allegedly offered a lower price, and an unnamed account to which Pet had allegedly offered a lower price, both of which accounts he

⁷⁶ The witness also referred to the fact that he had been told Beatrice had furnished the account in question with a sign and other assistance. However, he conceded that this was "all hearsay" and did not know what the account had actually received.

was able to retain. There is no reliable evidence in the record to support the witness' hearsay testimony as to what Beatrice or Pet had offered these accounts.

While the Awalt witness testified that his company had lost two or three accounts in the last year or two, he also indicated that his company has been able to acquire about ten new accounts each year, so that its net position has gradually improved despite these small losses. The witness made no claim that the fact the company serves mainly smaller establishments is due to the respondents or to the complaint practices. Awalt has failed to solicit any of the national chains in the area because of its owner's alleged understanding that these chains prefer to deal with some big company on the basis of arrangements made through their central office in Chicago, New York or some other city. The company likewise has not solicited the local independently-owned supermarkets because, as stated by the witness, "I just don't have the time to call on them and call on them and call on them, so I just leave them go." While the witness also added that he was reluctant to seek such accounts because they allegedly requested advertising allowances and special prices in connection with special sales, he indicated that he had no personal knowledge of this, but had learned it from a "very close friend of mine" (who was otherwise unidentified). Despite its allegedly limited representation in the supermarket field, Awalt has made good progress in the Richmond market.

The evidence offered through the representative of Virginia Ice Cream Company was perhaps the most confused and contradictory of that received from any competitor witness. The owner of the company, a gentleman of Near East origin, had considerable difficulty in understanding questions addressed to him and in making himself understood. In addition, his account of alleged losses, unsupported by any records, was so confused as to merit little or no credence.

The evidence indicates that when the witness entered the ice cream business 25 years previously, his only competitors were National Dairy (Southern Dairies division), and Perkinson Ice Cream Company. However, a number of other companies, both local and national, have entered the market in the succeeding years, resulting in a substantial increase in competition in the market. The witness made the sweeping assertion that as a result of these changes: "The small people no given a chance." The primary basis for this sweeping claim appeared to be that competitors were servicing dealer-owned refrigeration equipment without making any charge therefor. The only specific instance which the witness could cite of this practice was an account

which had allegedly been taken from him by respondent National. Not only is there no reliable evidence in the record that respondent National acquired the account by agreeing to service the dealer's own refrigeration equipment free of charge, but, according to the uncontradicted and credited testimony of a National Dairy official, on the two or three occasions when his company had serviced the dealer's equipment it charged for both parts and labor, unlike the practice of many manufacturers (including the local manufacturer Awalt) who charge only for parts. The evidence also discloses that within a year after the loss of the account, Virginia Ice Cream Company was able to reacquire it. The witness conceded that he had not lost "much" accounts to National.

The witness was able to cite only one account which he had lost to respondent Pet, allegedly because of the financing of fixtures. His confused testimony concerning the transaction, based either on conjecture or hearsay information received from the fixture company, was stricken from the record. His remaining testimony with respect to the loss of unidentified accounts to Pet was so thoroughly confused and contradictory as to be unworthy of credit. At one point he claimed that Pet took "twenty to twenty-five" accounts from him by giving them "couple extra machines, couple extra stuff. He loaned them money." Then he asserted that "Richmond Dairy was the culprit" (rather than Pet). Thereafter he whittled the 20 to 25 accounts down to "two" and then increased it slightly to "five or six", but conceded that the customers "don't tell nothing" as to why they had changed suppliers. Nevertheless, the witness insisted that Pet must have "give something to take them". However, the witness finally conceded that Pet had not taken "much" from him since the accounts they had acquired were "just small stops" and that "I don't worry about them [Pet]." The witness also claimed to have lost "two, three small places" to Beatrice, but gave no reason therefor. After considerable backing and filling, the witness finally conceded that he had lost most of his accounts to Richmond Dairy and that they were his "best stops". It should be noted that during the period in question, Richmond Dairy was an independent local company, although it was later acquired by respondent Foremost following the issuance of the complaint in this proceeding.

Aside from the fact that the record fails to establish that any of the respondents has been responsible for any substantial loss of business by Virginia Ice Cream Company, the record is so thoroughly confused as to how much of a loss the company sustained that no specific finding can be made thereon. Testifying without records, the

witness at first estimated his 1946 gallonage as 58,000 and claimed that this had declined to 35,000 to 40,000 at the time of the hearing. At a later point he gave his 1946 gallonage as 55,000 gallons and his present gallonage as 20,000 to 22,000. However, when he was asked if his gallonage was less than it had been previously he testified: "I am not much hurt," and conceded that he had a "good business". The company still has about 120 accounts, which is approximately the number it had in 1946.

It is significant that during the period when Virginia Ice Cream was allegedly suffering a decline in volume, its more recent local competitor, Awalt, was able to build up a substantial volume and was still growing. It may also be noted that Virginia Ice Cream Company's experience is not dissimilar to that of respondent National. The sales of its Southern Dairies division in the Richmond area declined by 270,000 gallons between 1947 and 1955. Its share of the Richmond market declined from 33.1 per cent in 1950 to 28.5 per cent in 1955. Respondent Beatrice's sales have remained almost static between 1950 and 1955, and its share of the market has declined from 5.9 per cent to 5.2 per cent.

Counsel supporting the complaint also called as a witness the manager of Pet's Richmond plant. The testimony of this witness establishes that Pet makes loans to selected customers, a fact which is not in dispute. These accounts, for the most part, are drug stores which require assistance in remodeling, and are mainly Pet's existing accounts. Of the fourteen dealer witnesses called by respondent Pet during the defense hearings in Richmond, most had been acquired from respondent National. None were former Virginia or Awalt accounts. In most instances any loans which they received were made after the account had been dealing with Pet. In no instance was the account under any legal obligation to confine its purchases to Pet and, in one instance, was actually purchasing a portion of its requirements from another supplier.

The record wholly fails to sustain a finding that there has been any injury to competition in the Richmond market or that any decline which any competitor may have experienced was due to any of the complaint practices.

a. Danville, Virginia, Area

The respondents doing business in Danville, which is located in the extreme southern portion of Virginia near the North Carolina line, are Pet, Beatrice and National (Southern Dairies division). The only company with a plant in Danville is Danville Dairy Products Com-

pany. Several other competitors with plants in nearby areas are Quality Dairy and South Boston Creamery of Lynchburg, and Coble Dairy, Boston-Durham Dairy and Blue Ribbon Dairy of North Carolina. The only witness called to testify regarding the area was a representative of Danville Dairy.

The gallonage figures for Danville Dairy from 1950 to 1954 were given as follows: 1950—158,000; 1951—131,000; 1952—136,000; 1953—128,000; and 1954—134,000. The witness sought to attribute its decline in sales largely to a loss of accounts resulting from the fact that competitors were furnishing free refrigeration service on dealer-owned equipment. He also claimed that competitors were supplying elaborate signs and deep-freeze boxes, and were selling other equipment to customers at cost. The witness agreed that the making of loans was not a competitive factor in the area, and made no claim that the supplying of ice cream refrigeration equipment, as such, had caused his company any difficulty.

While conceding that no one company could be called the leader in the practice of furnishing free service on dealer-owned refrigeration equipment, the witness claimed that respondent Pet had given his company more trouble in this respect than any other competitor. However, there is no reliable evidence in the record to support the witness' bald assertion nor to support his other conclusory testimony as to why he had been losing accounts. The witness could name only a single account which he had lost to Pet in recent years. While seeking to attribute this to the furnishing of free refrigeration service, a new ice cream cabinet, a deep freeze for the storage of all frozen products and a fluorescent sign, the witness conceded that he had no direct knowledge of why he had lost the account (the facts testified to by him having been received secondhand from his salesman). Aside from the fact that the witness' testimony is unreliable hearsay, insofar as establishing what Pet supplied to the account or as to the reason for the switch, the witness' own testimony indicates that this incident was magnified out of all proportion to its significance. The witness conceded that the cabinet supplied by Pet was merely a replacement of a similar one which his company had furnished the account and that the so-called deep freeze was nothing but a depreciated ice cream storage cabinet whose actual value was substantially under \$100. It is customary for manufacturers to supply such cabinets to volume accounts for use in storing excess ice cream in the back of the store, and customers periodically avail themselves of the use of the box to store additional frozen products. The Danville witness conceded that his company had also furnished such depreciated cabinets to some of its customers. In

the case of the so-called fluorescent sign, it does not appear that it was anything more than the routine sign supplied by manufacturers for the primary purpose of advertising their ice cream.

Insofar as the primary charge of the witness, relating to the free servicing of equipment, is concerned, the record is wholly lacking in reliable evidence that this has been a significant factor in Danville's loss of business. According to the reliable testimony of a Pet official, it is not the regular practice of the company to service dealer-owned equipment. However, where a service man is on the dealer's premises servicing the company's own cabinet he may in some instances, as an accommodation, service dealer-owned equipment which has been giving trouble, but a charge is always made for replacement parts. The amount of time and money involved in this practice is too negligible to have represented a serious competitive problem to Danville Dairy. The Danville witness estimated that his company had spent approximately \$1,300 a year during the past several years in servicing all refrigeration equipment for customers, both dealer-owned and company-owned. The amount represented by the cost of servicing dealer-owned equipment presumably represented only a fraction of the \$1,300. It is inconceivable that the Danville Dairy could have lost any significant number of accounts because of its unwillingness to perform an additional service for its dealers in the order of magnitude referred to by the witness. Another manufacturer in the Fredericksburg area, who referred to this practice, indicated that it represented more of an "inconvenience" than an important competitive problem.

In addition to the single incident involving the loss of an account to Pet, primarily because of alleged free refrigeration service, the Danville witness cited another account which it allegedly lost to Pet because the latter had furnished a box for cold drinks. The hearsay testimony of the witness regarding this incident, based on the oral report of his salesman, was stricken from the record. However, it may be noted that Danville regained the account within a week without supplying an additional box for the storage of cold drinks. While it also appears that Pet supplied the account in question with a modern ice cream cabinet, the Danville witness made no claim that the supplying of the new cabinet was a reason for the switch to Pet. The witness made no complaint against the supplying of a modern cabinet as such. On the contrary, he indicated that he had been able to cut his loss of gallonage, resulting from the loss of accounts, by an increase in sales through his existing accounts due to supplying them with new glass-top display cabinets. He further conceded that he had acquired accounts from Pet by furnishing them with new cabinets and indi-

cated that the question of furnishing a particular type of cabinet involved the exercise of a sound business judgment on the part of the ice cream manufacturer, as to which cabinet was best suited to merchandise ice cream in the particular establishment.

The Danville witness made the bald assertion that he had had similar experiences in the loss of accounts to Southern Dairies, as those involving Pet. However, he could not name a single account which he had lost to Southern Dairies, and finally conceded that his problem with Southern Dairies was not one of losing accounts but of not being able to acquire some of Southern Dairies' accounts. He indicated that he had had no difficulty with the latter on account of price, since its prices were higher than his. Insofar as respondent Beatrice is concerned, the witness conceded that he had had no competitive problems with that company.

There is no evidence in the record, other than the witness' own unsupported conclusions, to support a finding that the use of any of the complaint practices by any of the respondents has been responsible for Danville's decline in gallonage. On the contrary, the witness' own testimony strongly suggests that other factors have played a role therein. As indicated by the gallonage figures cited by him, the principal decline in gallonage occurred in 1951 and his sales since then have fluctuated within a relatively narrow range, with 1954 being slightly above 1953. The witness conceded that a strike in one of Danville's large textile plants had resulted in a decline in consumer demand during 1951. In addition, he indicated that several new competitors had come into the area, including Coble and Blue Ribbon from North Carolina, both of which he admitted had given his company "severe competition." In addition, Boston-Durham entered the market in 1953 and became a substantial factor. It may be noted, in this connection, that Danville's gallonage dropped by 8,000 gallons in 1953, coinciding with the period when Boston-Durham entered the market.

The failure of Danville to make significant progress in recent years appears to have been due primarily, as in many other areas, to the entry of additional contestants into a hitherto relatively uncontested market. Such increase in competition has affected not only Danville Dairy, but also respondent National Dairy as well. From a gallonage of 187,002 in 1947, National Dairy's sales in the Danville area declined to 172,641 gallons in 1950 and then to 166,537 in 1951. While its sales climbed back to 180,447 in 1952, the downward trend was resumed in 1953, when they declined to 176,901 gallons, and then to 169,107 in 1954.

b. Portsmouth-Norfolk Area

The respondents operating in the Portsmouth-Norfolk area include National Dairy (Southern Dairies division), Pet, Beatrice, and Arden (Melvern-Fussell). Another so-called national company operating in the area is Swift & Company. Local companies in the area include Virginia Ice Cream Company, Birtchard Dairy, Rosedale Dairy and Best Ever. High's Dairy manufactures and sells through its own outlets. The only witness called was the owner of Virginia Ice Cream Company of Portsmouth (not to be confused with Virginia Ice Cream Company of Richmond).

The Virginia Ice Cream Company witness testified that business was "very good" until right after World War II, but that thereafter it began "to get slack because a lot of ice cream people came in." The exact extent of the decline in Virginia's gallonage is difficult to determine from the somewhat confused testimony of the witness, testifying as he did without the aid of any books and records.⁷⁷ At one point he claimed that during the period of the war his company was selling "500,000 gallons, maybe 400,000." However, in the next breath he stated that in 1948, after the war, "business was very good," although his gallonage had declined to approximately 175,000. If the witness' estimate of 500,000 gallons or "maybe 400,000" was even reasonably accurate, it is difficult to understand how business was still "very good" in 1948 when his gallonage was only 175,000 (representing a decline of 255,000 to 325,000 gallons). Nevertheless, he claimed that business continued "very good" until about 1952, when it declined to 150,000 gallons and business became "slow". How the witness' business could decline by over a quarter of a million gallons and remain "very good", and then decline by only 25,000 and become "slow" involves financial considerations which are beyond the comprehension of this examiner.

The witness sought to attribute the company's alleged decline in gallonage to the fact that competitors were giving customers "big" cabinets, "big" signs, and "anything to get a customer." The witness conceded that he too supplied customers with cabinets and signs, and when pressed for an explanation of what his competitors did beyond what he did for customers, he replied: "They give a lot of stuff which they ain't supposed to give. That is all; I don't know." He conceded he had no direct knowledge of what competitors were furnishing customers.

⁷⁷ The witness conceded that he was unsure of his company's gallonage since: "That's on the books, and I don't stay inside the plant. I am outside the plant."

Insofar as the furnishing of cabinets is concerned, the Virginia Ice Cream witness agreed that it was necessary to supply dealers with a cabinet in order to assure that the ice cream will reach the customer in the proper frozen state. His principal complaint in this regard appeared to be directed at the practice of furnishing more modern display cabinets to customers. This was not based on the fact that the furnishing of such cabinets is not desirable, since the witness conceded that when he had supplied such cabinets to customers their sales had increased. The ground of his complaint was rather that his company could not afford to supply more of such cabinets. However, the witness could recall only one account lost to a competitor because of the furnishing of a cabinet. He claimed to have lost this account to respondent Beatrice because of a cabinet for ice cream and a freezer for "storage". There is nothing in the record to indicate that there was anything unusual about the cabinet which Beatrice allegedly furnished, it being merely a six-hole cabinet, or that the freezer was intended or was used for anything other than the storage of ice cream. Moreover, there is no reliable evidence in the record to establish that the furnishing of such equipment was the reason for the account's change of suppliers.⁷⁸

With respect to his accusation that he had lost accounts due to the supplying of signs, the witness finally conceded that he couldn't recall any accounts which he had lost because of this practice, and that he was merely referring to the supplying of signs by other ice cream manufacturers to their own accounts. No particular competitor was singled out as supplying any more or any different signs than any other competitor.

One of the principal reasons for the decline of Virginia Ice Cream Company of Portsmouth appears to be the substantial increase in the number of competitors in the area. For many years his principal competitors were Southern Dairies and Melvern-Fussell (prior to its acquisition by Arden). In the last ten years Swift, Beatrice, Pet, Birtchard and Rosedale have entered the market. The witness agreed that Birtchard, in particular, had become a substantial competitor and while he declined to hazard a guess as to whether their gallonage had reached 500,000 a year, he agreed that they were "much bigger" than his own company, which has been in business since 1922. Birtchard, a local company, was recognized by the Virginia witness as "very aggressive", as having engaged in all the practices about which

⁷⁸ While the witness' testimony indicated that the account had changed to Beatrice, he made no claim that the account had informed him that it had switched because of the supplying of such equipment.

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he complained, and as having taken "quite a few accounts" from his company. Another factor contributing to Virginia's decline, according to the testimony of its representative, has been the fact that for several years business in general has been "slow" in the area, and not merely in the ice cream business. There is nothing to indicate that the extent of the decline of Virginia Ice Cream's sales has been any greater than that of business generally in the area. More importantly, there is no evidence in the record upon which a finding may be made that any such decline has been due, to any substantial degree, to the engagement by any of the respondents in the practices charged in the complaint.

The record fails to establish any significant improvement in the position of any of the respondents operating in the area. The sales of National's Norfolk plant (which distributes in Portsmouth) have declined from 745,000 in 1947 to 685,000 gallons in 1955. Its sales in 1951, when Virginia Ice Cream began experiencing its decline, were as low as 550,000 gallons. National's share of the Norfolk market declined from 20.5 percent in 1950 to 18.8 percent in 1955. Beatrice's share of the market declined from 1.2 percent to 0.9 percent in the same period, and Arden's from 10.5 percent in 1953 (when it entered the market) to 8.7 percent in 1955.

c. Fredericksburg, Virginia, Area

The respondents operating in the area of Fredericksburg, Virginia (which is located approximately half way between Washington and Richmond) include National (Breyer and Southern Dairies divisions), Arden (Melvern-Fussell), Beatrice and Pet. There is only one local manufacturer in the area, Farmers Creamery Company. In addition there are the Safeway and High chains, which manufacture their own ice cream, and a number of soft ice cream establishments such as Dairy Queen. The representative of Farmers Creamery was the only witness from the area called by counsel supporting the complaint.

The Farmers Creamery representative indicated that his company's gallonage had declined from approximately 330,000 in 1948 to 250,000 in 1954. This decline, however, has not been due to any loss of accounts, the company having more accounts today than it had five years ago, but to a decline in sales per account. The witness attributed this decline mainly to the fact that there were more competitors in the area than in former years and more establishments selling ice cream.

The witness cited as an example a change which had taken place in the downtown area of Fredericksburg. In former years his company had served a drugstore, which was one of the few ice cream

outlets in that section of downtown Fredericksburg. Thereafter, the F. W. Woolworth store located next door, which had not previously sold ice cream, expanded its store and began to sell Fussell's ice cream. Shortly thereafter, the J. J. Newberry store also began selling ice cream (the brand sold being unnamed by the witness). During this period the drugstore which Farmers Creamery had served went out of business and when it later opened up under a new owner it began to serve Breyer's ice cream. The witness made no claim that the choice of Breyer by the new owner was due to any of the complaint practices. He attributed it to "good salesmanship" and commented that he had "no complaint on it".⁷⁹

The witness did make mention of the fact that customers were now asking for more than they did in prior years, such as merchandising-type cabinets in place of conventional closed-top cabinets, service on dealer-owned equipment, and signs. However, he made no claim, nor does the evidence establish, that any of the respondents were responsible for these demands, nor that Farmers Creamery lost any accounts by reason of competitors supplying more than the witness felt justified.

Insofar as the furnishing of cabinets is concerned, the Farmers Creamery witness agreed that it was necessary for the manufacturer to supply the dealers with such equipment in order properly to merchandise their product, although he claimed that it was sometimes difficult to finance such cabinets. While citing an instance where he had allegedly had to supply one of his customers with a display cabinet because of a report from his salesman that Breyer's would get the account, there is no reliable evidence in the record as to whether Breyer's had in fact offered such equipment to the account. Moreover, in connection with another account which his own company had taken from Breyer's and to which it had supplied a display-type cabinet in place of a conventional-type cabinet, the witness stated that this had nothing to do with the account's switching. He conceded that there were many reasons for an account switching unconnected with the fact that it received a newer type of cabinet. In any event, the witness made no claim that he had lost any accounts or had been unable to acquire any because of his unwillingness or inability to supply an appropriate cabinet.

⁷⁹ While he referred to the fact that Breyer's had a large storage box in the back of the store, he made no claim that it was being used for anything but ice cream. He indicated that it was his understanding the box was put in for Breyer's convenience, rather than the owner's, since Breyer made only weekly deliveries to the store, whereas his own company had served the former owner daily.

While, as above mentioned, the witness also referred to the practice of servicing dealer-owned equipment, he agreed that this involved a matter of "slight expense" and was merely "an inconvenience". No claim was made that he had lost any accounts by reason thereof or that it presented a serious competitive problem to his company. Moreover, he made no effort to attribute this practice to any of the respondents. In the case of the supplying of signs, which he claimed was a more recent innovation, he conceded that they were a benefit to his company because of the advertising value. The cost thereof, including sign, pole, and labor charge, was estimated to be around \$40.00. No claim was made that he had lost any accounts or been unable to acquire any because of such signs.

Outside of the single drug store account, which had changed to Breyer's under its new ownership, and the account to which, according to the hearsay testimony of the witness, Breyer's had offered a display-type cabinet, the witness made no other reference to respondent National Dairy as having been involved in obtaining or seeking to obtain any of his accounts. No mention was made by the witness of any competitive difficulties with Arden or Beatrice. No claim was made as to having lost any accounts to Pet, although the witness did testify that Pet had obtained an account which he too was seeking to get, but no reason was given for the latter's success.

While it may be that the Farmers Creamery witness does not approve of some of the practices which he cited, it is clear from his testimony that they have had no significant effect on his company's decline in gallonage between 1948 and 1954. As already mentioned, the witness himself conceded that this was due mainly to an increase in the number of competitors and ice cream stops. Other factors have been the decline in ice cream sales generally in the area, the loss of the three Safeway stores in the area, which Farmers Creamery served on a split basis with Melvern-Fussell and which now make their own ice cream, the entry of the High stores into the market which make their own ice cream, and the growth of soft ice cream establishments in the area.

Despite these problems, Farmers Creamery has managed to retain 70 per cent to 80 per cent of the ice cream business in the Fredericksburg area. The company has also acquired a 51 per cent interest in another dairy operating in the Manassas area and a 100 per cent interest in another company operating in Westmoreland County.⁸⁰ In contrast to this, National Dairy's Southern Dairies division sales in

⁸⁰ A witness from the latter company was subpoenaed to testify, but was excused by counsel supporting the complaint.

Fredericksburg have declined from 12,107 gallons in 1948 to 3,358 in 1954. Breyer's sales in the area in 1954 were less than 10,000 gallons.

* * * * *

Counsel supporting the complaint has failed to establish any injury to competition by reason of the use of the complaint practices by any of the respondents in any of the areas above discussed or in the State of Virginia as a whole. The evidence in the record, for the state as a whole, establishes that none of respondents has made any significant improvement in its position. Of the respondents referred to most frequently by the competitor witnesses, respondent National's share of the state production of frozen products has declined gradually from 20.9 per cent in 1947 to 14.1 per cent in 1955. Respondent Pet, which had 6.3 per cent in 1947 and was able to increase its share to 10.5 per cent by 1951, thereafter began to decline and reached 8.3 per cent in 1955. These figures hardly suggest that these respondents are engaged in any aggressive campaign to take over the Virginia market.

6. *Easton, Maryland*

Easton is located in the center of what is known as the Eastern Shore of Maryland, separated from most of the rest of the state by the Chesapeake Bay. It has a relatively small static population, but during the summer months there is a considerable influx into the seashore and bay communities. The only respondents doing business in the area are National Dairy (Breyer and Southern Dairies) and Borden. The local companies include Cupid Ice Cream Company, Stoker Ice Cream Company, Cook's Ice Cream Company and Stephen's. There are also a substantial number of regional companies operating in the area, including Delvale Ice Cream Company of Baltimore and Washington, and Philadelphia Dairy, Penn Dairies, Abbotts Dairy, Hershey and Richman, all of Pennsylvania. The competitor witnesses called from the area included representatives of Cupid and Stoker, and the owner of another company, Shoremaid, which had sold out to Delvale. A witness subpoenaed from Cook's Ice Cream Company was excused at the request of counsel supporting the complaint. A single dealer from the Eastern Shore testified.

The local companies operating in the area are almost infinitesimal in size when compared to most of the other competitor witnesses who testified in these proceedings. They operate on a very marginal scale and have been slow in supplying customers even with the most rudimentary services. Most of their complaints revolved about the fact that competitors were supplying dealers with cabinets (not large

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merchandising cabinets, but ordinary electric storage cabinets) and with signs, which they claimed they could not afford to furnish. The evidence indicates that cabinets have been supplied by ice cream manufacturers in the area since the earliest days of the industry and apparently presented no problem when they involved the non-mechanical wooden cabinets. However, when the mechanical electric cabinets came into vogue during the middle 1930's some of the local companies were slow in making the change and lost many of their accounts. Very little of the testimony dealt with the activities of the respondents, as such, but involved competitive conditions generally in the area. The evidence indicates that there has been a considerable influx of non-respondent regional companies into the area in recent years, and that they have acquired a number of former local companies and have been very aggressive in their sales efforts.

In the case of Cupid Ice Cream Company of Greensboro, Maryland, the evidence indicates that it had begun to decline long before most of the companies now on the scene came into the area. By admission of its owner, it was among the last companies in the area to convert to electric cabinets, and from a maximum of 300 accounts in 1930 it had declined to 100 accounts by 1947, unlike the experience of most other competitor witnesses who testified that 1947 represented a high-water mark in sales. At the time of the hearing Cupid had approximately 60 accounts and its sales amounted to approximately \$45,000 a year. The company does no radio or newspaper advertising, although it does utilize name signs outside of its customers' places of business. It engages in little solicitation of new accounts. It manufactures and sells only four ice cream flavors, unlike most of its competitors who distribute a wide variety of flavors.

Cupid's decline has involved partly a loss of accounts and partly a decline in sales per account. The latter has been the result of an increase in the number of competitors in the area and in the number of establishments selling ice cream. As an example of this the Cupid witness cited the town of Greensboro, where the company's plant is located, which seven years previously had only four retail outlets selling ice cream and at the time of the hearing had 18 such establishments. Insofar as the loss of accounts is concerned, this has involved not merely the switching of accounts to competitors, but the fact that "quite a few" of the company's customers have gone out of business. Of the accounts which had switched to other competitors (estimated by the witness to be approximately 18), most had switched to the non-respondent companies, Penn Dairy and Philadelphia Dairy; several had switched to respondent National and one to re-

spondent Borden. No evidence was offered from which it can be found that any of the accounts which switched to the respondents did so because of the complaint practices. The witness conceded that the only reason he had ever been given by former customers for switching was that they wanted a more highly advertised brand. While the witness testified that customers were demanding new cabinets and signs, no reliable evidence was offered to establish that any of the witness' former customers had switched to any of the respondents by reason of such inducements.

The evidence with respect to Stoker Ice Cream Company indicates it to be microscopic in size. The present company is the successor of two companies, Cambridge Ice Cream Company (which was operated by the present owner's father) and Corkran Ice Cream Company (which was operated by his uncle). Stoker achieved its maximum volume around 1929 or 1930 and today is merely a shell of an operation. The witness indicated that most of the company's good accounts, which consisted of large fountain stops, were lost during the 1930's. It does not appear whether such accounts simply went out of business or were acquired by competitors or what the reason for the loss was. Today the company operates "more or less a back road business on the offbeat highways". The company has a gallonage of approximately 15,000 to 18,000 a year and is operated in combination with a wholesale candy business. It does no advertising, furnishes no point-of-sale material and does not even have its name printed on its package. While it did at one time supply signs to customers around 1934, it has ceased this practice also. The only way a consumer could know where the company's ice cream was being sold would be by word of mouth from persons in the community. So inactive and unaggressive is the company that when the community center in its home-town of Cambridge decided to put in ice cream, the company was not even asked to supply an ice cream cabinet, but a cabinet was obtained from Penn Dairies. Likewise, the local elementary school did not even ask the company to submit a bid, but obtained its ice cream from Penn Dairies.

The only respondent referred to by the Stoker witness was Borden, to whom he claimed his company had lost three accounts. The only indication given by the witness as to why such accounts switched was his understanding that some dealers had been told by Borden that if they switched to a nationally advertised brand their gallonage would increase. Since Stoker was already operating on a very marginal basis long before most of the present competitors entered the

area, it seems evident that reasons other than the complaint practices are responsible for its present moribund condition.

The third competitor witness, the owner of the former Shoremaid Ice Cream Company, entered the ice cream business in 1947 in Salisbury, Maryland, and sold out in March 1955 to Delvale Ice Cream Company. The "reasonably steady progress" which this small company admittedly made between 1947 and the time it went out of business suggests that factors other than the supplying of signs and cabinets were responsible for the sorry condition of the other local competitor witnesses who testified at the hearing. Compared to Cupid Ice Cream Company, which went into business in 1921 and declined to 100 accounts by 1947 and then to 60 accounts in 1955 with an annual gallonage of less than 40,000, and Stoker Ice Cream Company which had been in business since 1910 and had managed to work itself down to 75 customers in 1946 and to 50 in 1955 with a gallonage of 15,000 to 18,000, Shoremaid, starting with nothing in 1947, was able to achieve a gallonage of 50,000 in 1953 with 75 customers.

The Shoremaid witness gave as his reason for selling out the fact that he did not think he could compete with the bigger companies in the coming years. While he referred to a gamut of competitive practices, including the "buying of accounts", he conceded that his information was hearsay and that the only practice of which he had any personal knowledge was the furnishing of large signs to customers.⁶¹ The Shoremaid witness claimed that the furnishing of such signs was responsible for his loss of some accounts because he could not afford to supply them. Although conceding that it had been the practice to supply such signs to the bigger accounts "as long as I can remember", he claimed that the practice had been extended in recent years to the little country stores, which was the type of establishment he served. However, he singled out Penn Dairies as the initiator and "worst offender" in the use of this practice. While he included respondents National and the Borden Company, as falling within the category of "all the companies" who followed "after that", it is clear that the latter companies were merely following the pattern which had been set. The Shoremaid witness made no claim that either National or Borden had taken any accounts from him because of this practice. The only company specifically named was Penn Dairies, which he claimed was the "worst offender in the matter of extra ice cream cabinets and signs".

⁶¹ The witness estimated the cost of such "large" signs at approximately \$100.00, plus cost of erection which he estimated at \$50.00.

The Shoremaid representative claimed that his gallonage had declined by 8 to 10 per cent in 1954. However, he attributed this more to a decline in sales through his existing accounts than to any net loss of accounts. He indicated that his main problem was his inability to acquire any new accounts, since he could not afford to supply the equipment that was required. Shoremaid's competitive problems were made more difficult by the entry into the market of the additional contestants, Hershey and Delvale, in 1952 and 1953. With respect to the latter, it may be noted that it not only bought out Shoremaid in 1955, but earlier took over three other local competitors, Blossom Ice Cream Company, Gill Brothers and Delmarva Ice Cream Company.

The testimony of the only dealer witness on the Eastern Shore called by counsel supporting the complaint tends to support the hearsay testimony of some of the competitor witnesses concerning the role played by national advertising and national brands, as a factor in the switching of accounts. Presumably the witness was called to establish that he had been induced to deal with Borden instead of a local company because of a loan which he had received from the former. The dealer in question opened a restaurant outside of Salisbury on a main north-south arterial highway. In order to equip his restaurant with a soda fountain and booths costing \$12,528, the dealer put up \$5,000 in cash and received a loan from Borden in the amount of \$7,528, covered by a promissory note with interest at six per cent and secured by a chattel mortgage. There is no evidence that any local competitor ever solicited the account. The witness testified that he was only interested in an ice cream with a nationally established name since his restaurant is located on the U.S. highway to Florida and catered to a considerable transient, non-local clientele. Although the loan was paid off three years previous to the hearing, the establishment continued to handle Borden ice cream despite the fact that it was under no obligation to continue handling the latter's product. The dealer was also supplied with a plywood non-neon sign, which bore Borden's name in at least six places, as well as the name of the restaurant. It is clear that such a sign located on a main highway is of distinct advantage to an ice cream manufacturer and warrants the expense involved, which is insignificant when compared to the cost of billboard advertising on the highway.

Whatever may have been the cause of the difficulties of the local competitors on the Eastern Shore, whether it be a lack of sufficient capital to supply customers with such customary equipment as ordinary ice cream storage cabinets and signs indicating the brand of ice cream sold, or an increase in the number of competitors, or an in-

crease in the number of establishments selling ice cream, the record is lacking in reliable evidence that respondents National's or Borden's use of the complaint practices has been a significant factor in such decline. The record discloses that both of the respondents involved in the testimony, National and Borden, have experienced a very substantial decline in their own sales on the Eastern Shore. The sales of National's Salisbury, Maryland branch declined from 716,000 gallons in 1947 to 550,000 gallons in 1955. The sales of Borden's Laurel, Delaware branch declined from 284,000 gallons in 1947 to 181,000 gallons in 1955.

7. Charlotte, North Carolina

At the hearings in Charlotte, North Carolina, evidence was offered as to the competitive conditions in the west central portion of the state and with respect to several areas in South Carolina. Although the hearings were held in Charlotte, no competitor witnesses were called from that city, nor were any competitor witnesses called from the other larger cities of North Carolina such as Asheville, Durham, Raleigh, Winston-Salem or Wilmington. The only competitor witness from any sizeable community was Clover Brand Dairy of High Point. The other competitor witnesses were Mooresville Ice Cream Company of Mooresville, a community of less than 10,000 population, and Cabarrus Creamery of Concord, a community of about 15,000. Although a witness from Coastal Dairy of Wilson, in the east central part of the state, was subpoenaed, he was excused at the request of counsel supporting the complaint. In addition to the competitor witnesses referred to above, counsel supporting the complaint called three dealer witnesses from Charlotte, another from High Point and another from Winston-Salem. Since the evidence with respect to North Carolina and South Carolina involves different competitive areas, each is discussed separately below.

a. Western North Carolina Area

The evidence offered through the three competitor witnesses from North Carolina involves almost entirely communities in the west central portion of the state, including High Point, Greensboro, Burlington, Salisbury, Mooresville and Concord. None of the competitor witnesses operates throughout the area. Clover Brand does not operate in either Mooresville or Concord where Mooresville Dairy and Cabarrus Creamery operate, and the latter two did not refer to Clover Brand as one of their competitors. Cabarrus Creamery operates only in a small portion of the area served by Mooresville Dairy.

The respondents operating in most of the west central portion of the state are Pet, National (Southern Dairy) and Borden. Foremost does not compete with Clover Brand or Mooresville, but does sell in the area where Cabarrus operates. The non-respondent local companies include, in addition to the three competitor witnesses, Coble, Biltmore, Guilford, Lyndale, Buttercup, Dick's, Honeykist, Gastonia, Superior, and Carolina Dairy. Of these, only Coble and Biltmore operate throughout the entire area.

The largest of the competitor witnesses called is Clover Brand Dairy of High Point. The company appears to enjoy a very favorable position throughout the area where it operates. Its volume is between 200,000 and 300,000 gallons a year, and it has experienced a "pretty steady" increase over the five-year period prior to the hearings (early in 1956). Its volume of sales in 1955 represented an increase over 1954. The company is affiliated with a Virginia company of the same name, doing business in the southwestern portion of Virginia adjacent to North Carolina, and between them the two companies have a volume of over one million gallons a year. There are a greater number of companies doing business in the area where Clover Brand operates than when the company first entered business, with at least three local companies having entered from nearby North Carolina areas.

The Clover Brand witness indicated that it was the practice for all ice cream manufacturers in the area to furnish their customers with ice cream cabinets, signs and compressors for soda fountains, and to service the cabinets and compressors. Most companies also make some loans to assist customers. The cabinets are furnished without any rental charge, and there is no indication in the testimony of the Clover Brand witness that this practice has presented a financial burden or a competitive problem. The furnishing of neon signs containing the name of the ice cream manufacturer and a smaller panel with the name of the retail establishment has been a more recent innovation, although the furnishing of plain metal signs with privilege panels has been customary for a great many years. The witness did not, however, attribute the initiation of the practice of furnishing neon signs to any of the respondents. In fact, the first such sign which the witness noted in the area belonged to a local competitor, Buttercup. Respondent Pet does not use the more expensive metal neon signs, which range in cost from \$250.00 to \$300.00, but supplies its customers with a less expensive plastic sign. The witness made no claim that the furnishing of signs had resulted in his company's loss of or inability to acquire any accounts.

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The making of loans is not too widespread a practice in the area. Clover Brand makes loans to some of its customers and had about \$3,000 in loans outstanding at the time of the hearing. The only account which he claimed to have lost because of a loan was one which switched to respondent Pet. The establishment, a drive-in, had received a loan from Clover Brand at its original location and later tried to get a further loan to assist it in moving to a new location. However, Clover Brand refused to make the loan because there was still a balance due on the old loan and the account had not been prompt in its payments. The owner tried to get a loan from the bank but was refused. He thereafter approached Pet and received a \$1,500 loan. While the owner of the establishment, who was called as a witness by counsel supporting the complaint, claimed that his friendship with some of the Pet employees was a factor in his switching, it is clear from his testimony as a whole that the making of the loan was at least an important reason for the switch.

The only other indication of any competitive difficulty by Clover Brand was the claim of its representative that it has been unable to sell ice cream to the supermarkets and chain stores in the area. However, the witness made no claim that this was due to any of the complaint practices. He indicated that he had been advised by the stores that they preferred to handle a national brand of ice cream. Despite Clover Brand's alleged inability to acquire any of the larger supermarket or chain accounts, the company has, as already mentioned, made steady progress and increased its sales. It is now the number one company in sales in the city of High Point, which has a population of 40,000. The witness summed up its position by stating, in response to the question whether the company was in a "pretty sound and solid position", that "We are discounting our bills, and just getting along fine."

The evidence offered with respect to Mooresville Ice Cream Company indicates that that company also enjoys a favorable position in its market area. While its volume was not given, the witness stated that it had "increased appreciably since the war", despite the fact that "all ice cream men will agree [1946] was the Utopia of the ice cream business." The company had "nice increases in 1953 and 1954", although the witness anticipated that 1955 might be down "just slightly".

It is the common practice in the Mooresville trade area for ice cream suppliers to furnish their dealers with ice cream cabinets and to service them. The Mooresville representative expressed the opinion that most dealers would not go to the expense of purchasing an ice cream cabinet if it were not supplied by the manufacturer, because it

is a type of equipment that is not suited for the storage of other products and therefore has limited utility to the dealer.⁸² He also indicated that it was desirable for the manufacturer to own and maintain the equipment, since it encouraged the dealer to request maintenance service promptly in the event the cabinet began to act up, thereby assuring the manufacturer that his ice cream would reach the public in "saleable composition" and relieving him of the obligation of replacing defective ice cream. Most of Mooresville's customers are supplied by the company with an ice cream cabinet. The minority of dealers who own their own equipment receive a special discount of five per cent from the regular list price.

Mooresville also supplies its customers with a relatively inexpensive sign, which identifies its ice cream and also contains a panel with the name of the dealer. The witness expressed the opinion that the supplying of such signs was well worth the expense involved because of the advertising value thereof, and that the additional expense in providing a privilege panel for the dealer's name was justified on the basis of the advertising value of the sign. The company has expended \$3,000 for signs and, in addition, has supplied about 100 of its dealers with electric clocks for use inside the store, which advertise its brand of ice cream. Mooresville does not supply the larger neon-type signs, although it does have one in front of its plant. The witness had no recollection of being requested to supply such signs to any of its customers or of having lost any account for this reason.

Mooresville has between 2,500 and 2,600 customers. While, as previously indicated, the company has had a slight decline in sales in 1955, the company witness could not state whether this was caused by a decline in sales through its existing accounts or by a loss of some accounts. The company sells in some of the local independent supermarkets but, except for the A & P, does not sell in any of the national chains. The witness did not attribute this to the fact that such chains were receiving signs or equipment or loans. The only reason he had ever been given was that they wanted to receive the benefit of the national advertising supplied by the larger companies. Another reason given was that they were getting a better volume discount. However, the witness claimed that even though he had no volume discount his base prices were lower than the big companies', even after including their discounts. Another reason assigned by the witness for his in-

⁸² The witness stated that the ice cream cabinet is dissimilar from the home freezer because of its much heavier construction. He also indicated that the temperature at which the freezer operated in maintaining ice cream was different from that of a refrigerator utilized for milk or meat.

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ability to obtain the chain accounts is the fact that the choice of a supplier is not made by the local manager of the store but by the divisional manager, who may be located in another city or state. While the company has only a single food chain store account, it does serve a number of drugstore accounts and was able to acquire the most recently opened drug store in Mooresville.

In addition to a slight decline in sales in 1955, for which the witness could not account, the Mooresville representative indicated that his company's rate of profit had not increased since 1950 and had possibly declined some. However, he attributed this to the fact that its costs, particularly raw milk and cartons, had increased since 1950, while the price of ice cream had remained constant.

The Mooresville witness had no complaint about the activities of any particular competitor. The only company to which he made reference as having acquired any of his accounts recently was Coble Dairy, which he indicated was a big competitor in the area. Respondent Foremost has ceased coming into the area. The last time Mooresville had lost any appreciable number of accounts to Pet was back in 1932, for reasons not appearing in the record. Viewing the evidence as a whole, Mooresville Ice Cream Company appears to be in a relatively favorable competitive position in its trade area. In the main, it has enjoyed a steady growth and has not lost any appreciable number of accounts. While its representative would not confirm the fact that his company enjoyed 70 or 80 percent of the business in the Mooresville area, he conceded that it had "a good majority of the business".

The third competitor witness from North Carolina, representing Cabarrus Creamery, appears to have fared equally as well as the two other competitor witnesses. The company appears to be considerably smaller in size and operates principally in Cabarrus County. It entered the wholesale ice cream business in 1947, after having operated a retail store from about 1928. Purchasing 33 cabinets in 1947, which it supplied to various retail accounts as they were acquired, by 1955 it had a total of approximately 150 dealers with an annual gallonage of 75,000 to 80,000 gallons.

The witness testified in general terms to having lost some accounts because they had been supplied with "up-to-date cabinets" or neon signs, and as to having been advised by dealers which his company was trying to acquire that they were "financed or tied in some manner" to their present supplier. However, the names of the accounts and the competitors involved were not identified, except in two or three instances, and the witness conceded that his hearsay and conclusory testimony was not based on any actual knowledge.

One of the few accounts referred to by the witness was a supermarket which the witness' driver informed him had been lost to respondent National because the latter had supplied the account with a cabinet for storing frozen food. The witness conceded that he had no actual knowledge as to what National had furnished the account, and his hearsay testimony was stricken. The other instance involved the alleged supplying of a neon sign by Foremost to one of Cabarrus' accounts. There is no reliable evidence that the supplying of such sign, assuming it did occur, was the reason for the change of suppliers. The third instance involved an account having two stores which the witness sought to acquire from respondent Pet, but was allegedly unsuccessful because of the fact that Pet was giving the account a quantity discount based on the volume of both stores. There is no reliable evidence that the account (not identified in the record) received a discount from Pet or that, if it did, such discount was other than the regular quantity discount based on Pet's price list, or that such alleged discount was in any way tied to an exclusive dealing arrangement. The witness conceded that the practices of the local North Carolina companies, Biltmore and Coble, were comparable to those mentioned in connection with several of the respondents.

Despite his apparent lack of approval of some of the practices of his competitors, the witness' testimony indicates that the company's volume is still growing. He attributed this to the more aggressive advertising and merchandising policies which his company had adopted about two years previously, including radio and newspaper advertising and the emphasizing of special flavors. This has resulted in an increase in sales through its own accounts. While the witness claimed that most of the new accounts acquired were small grocery stores, he conceded that they served some chains and supermarkets, including A & P and Dixie stores. The company's ice cream business is admittedly operating at a profit and is, in fact, more profitable than its milk business. Within its trade territory it is at least second to respondent National Dairy in market share. Viewing the evidence as a whole, it does not appear that the company is in any serious competitive difficulty and, to the extent it is confronted with competitive problems, there is no reliable evidence upon which a finding can be made that this is due, to any significant extent, to the engagement by any of the respondents in the complaint practices.

As previously mentioned, counsel supporting the complaint called five dealers in addition to the three competitor witnesses. In only one instance did the testimony of these witnesses tend in any respect to support the allegations of the complaint. This was the High Point

dealer, previously referred to, who switched from Clover Brand to Pet after receiving a loan of \$1,500. However, while the loan may have been an "inducement" in the account's switching, the loan agreement contained no exclusive dealing requirement. Accordingly, there is no record basis for concluding that the account was induced to handle Pet's ice cream "exclusively". Furthermore, since Clover Brand itself had originally financed the account in the purchase of a fountain, its refusal in this case was based on the exercise of a business judgment, rather than a policy against loans.

Another dealer witness was the owner of six restaurants, five in Charlotte and one in Gastonia. Pet is the supplier for four of the restaurants and the local competitor, Biltmore, supplies two. There is no evidence that Pet has supplied the account with anything which is not customarily supplied by competitors in the area. The owner has handled Pet ice cream for 23 years in various establishments operated by him. In one of the restaurants, where there is a soda fountain, Pet supplies the compressor for refrigerating the fountain. As has already been noted, the local North Carolina company, Clover Brand, also supplies compressors for soda fountains to its customers. Pet services the refrigeration equipment used for selling ice cream in the stores handling its product and Biltmore does the same thing in the stores which it serves. The witness indicated that he was required to pay Pet for replacement parts and, in the case of extensive repairs, had to pay for both labor and parts. Since the dealer in question owns the ice cream cabinets in some of the stores, he receives the customary five per cent discount granted by most ice cream manufacturers. There is not a scintilla of evidence of any exclusive dealing arrangement between the account and Pet. The witness specifically denied the suggestion contained in counsel supporting the complaint's leading question that he was a "captive" of Pet, but stated that on the contrary "I could quit Pet Dairy tomorrow if I so elected."

The third dealer witness was the owner of a drug store in Charlotte who had purchased a fountain for \$1,850 from respondent National, under a conditional sales arrangement, at the time the owner opened up the establishment. There is no testimony that National induced the dealer to handle its products by the sale of the soda fountain on a time-payment basis. On the contrary, the witness testified that he had contacted the respondent with regard to purchasing its ice cream based on the recommendation of an official of a drug manufacturer or wholesaler. The agreement accompanying the sale does, in this instance, reflect an exclusive dealing arrangement since it requires the owner to purchase all of his dairy products from respondent National

until payment in full of the purchase price of the fountain or until the last installment under the contract falls due "whichever is later." However, despite this arrangement, when the owner became dissatisfied with National Dairy's rebate payments he repaid the balance on the fountain and switched to the local North Carolina manufacturer, Coble Dairy. Although respondent National could have insisted that the owner continue to deal with it under the "whichever is later" clause of the contract, because the date of the last installment (based on a 24-month installment period) was later than the date of the repayment of the balance, it nevertheless made no attempt to hold the account. Accordingly, in addition to the lack of evidence of "inducement", there is also a lack of evidence that the written agreement, in its practical operation, had any tying effect.

The fourth witness was the owner of a drug store in Charlotte, who had received a \$10,000 loan from respondent National to assist him in buying out his partner. He had been handling Sealtest ice cream since 1941 and when he moved in 1945 to another store, which had been handling Biltmore, he soon switched to respondent National. The loan, however, was not made until 1949 and there is no evidence that it constituted an inducement for the account to switch to, or deal with, respondent National. While the loan agreement did contain a so-called requirements clause calling for the exclusive purchase of the respondent's frozen products, the loan had been paid off several years prior to the hearing and the account had received no further assistance from National but, nevertheless, continued voluntarily to deal with it. There is no evidence that this transaction had any effect on competition in the Charlotte area, there being no evidence that any other competitor in the area sought to obtain or was unable to obtain the account. In fact, as above indicated, no evidence of competitive conditions in the Charlotte area was offered through competitor witnesses.

The final instance involves the owner of a grill and soda shop in Winston-Salem, who at different times had received loans from respondent Borden and respondent National, but who is now dealing with the local competitor, Coble Dairy. During the period when the account was handling Borden, it had received a "small" loan, the amount and terms of which do not appear in the record. Later the owner decided to open another establishment and asked Borden for a loan, which that company declined to do. The owner then obtained a loan of \$4,000 from respondent National and moved into the new establishment, transferring his ice cream business to that respondent. About a year later he needed additional assistance and turned again to respondent National, which this time refused the request. Thereupon,

the owner made arrangements to obtain a loan of \$4,500 from the local company, Coble Dairy, which enabled him to pay off the balance of the loan due to respondent National and gave him sufficient additional funds for his needs. While this incident indicates that a loan may be an inducement for an account to change suppliers, it also demonstrates the volatility of supplier-dealer relationships and the fact that a loan cannot hold a dealer if he wants to switch, despite the fact that he has signed an exclusive dealing contract. It also demonstrates that the two respondents involved do not make loans indiscriminately, for the purpose of acquiring or holding accounts, but do so only when they think the account is a good business risk. It further indicates the availability of financial assistance from local manufacturers.

The evidence offered with respect to North Carolina fails to indicate any weakening of competition or any marked improvement in the position of respondents. When Clover Brand entered the ice cream business in 1925 there were only two other local competitors in its area, Lyndale and Buttercup, and there were also two of the respondents doing business, National and Pet. Since that time additional local companies have entered the area, including Guilford, Dick's and Biltmore, as well as the respondent Borden. The only company to have gone out of business in the western part of North Carolina is Gibson, which was purchased by respondent Borden in 1949. Outside of the western portion of the state, there are approximately twenty other ice cream companies operating in North Carolina. One of these, Coastal Dairy, entered the business at the end of World War II and has "grown very substantially", according to the Cabarrus witness. A representative of Coastal was subpoenaed to testify, but was excused by counsel supporting the complaint.

The state production shares of respondents Pet and National have declined slightly between 1947 and 1955. Pet's production share in North Carolina was 7.7 percent in 1947 and 6.5 percent in 1955. Respondent National's production share was 24 percent in 1947 and 23.9 percent in 1955. Respondent Borden, which entered the North Carolina market in 1948 when it achieved 1.1 percent of the production of the state, was able to increase its share to 7.1 percent in 1951. However, since then its share has remained almost constant, with its 1955 share being 7.4 percent.

b. South Carolina

The respondents operating in South Carolina include Borden, National (Southern Dairies), Foremost and Pet. Another so-called national company operating in the area is Swift & Company. The local

companies include Purity Ice Cream Company of Charleston, Paradise Ice Cream Company of Orangeburg, Caromaid Ice Cream Company of Dillon, and Velvet Ice Cream Company of Newberry. In addition, the North Carolina companies Coble, Buttercup and Biltmore operate in portions of South Carolina. Counsel supporting the complaint called as witnesses from the area officials of Purity Ice Cream Company and Paradise Ice Cream Company. No dealer witnesses from the area testified.

The two competitor witnesses who are located in Charleston and Orangeburg, respectively, compete with one another and with the respondents above named, except that respondent Pet does not compete to any significant extent with Purity and the latter's competition with Foremost is limited to the area outside of Charleston. The evidence offered through the two competitor witnesses fails to disclose that they are experiencing any serious competitive problems. Purity did not enter the ice cream business until 1947 when it purchased Raphen Sanitary Dairy in Charleston. About a year later it acquired the machinery and equipment of Carolina Ice Cream Company, which was in the process of going out of business. Beginning with a nucleus of about 50 or 60 accounts and a gallonage of approximately 50,000 in 1947, Purity had managed to acquire 350 to 400 accounts by 1955. While the amount of the increase in terms of gallonage was not revealed by the witness, it is admittedly over 100 percent of the company's 1947 gallonage.

While the Purity witness indicated that his company had lost a few accounts to some of the respondents, there is no reliable evidence that the company has had any serious competitive difficulties arising out of the complaint practices. The witness identified two grocery accounts as having been allegedly lost to respondent National because of larger cabinets. Not only is there no reliable evidence to support the witness' hearsay and conclusory testimony (based on information received from his salesman) as to why these accounts had switched to respondent National, but there is affirmative evidence in the record offered by counsel supporting the complaint which directly contradicts the witness' testimony. In one instance where the witness claimed that his company's eight-hole cabinet had been replaced by a larger display cabinet, the evidence indicates that respondent National likewise supplied the account with an eight-hole cabinet. Moreover, the witness' testimony indicates that the account did not request a larger cabinet from his company and that the account switched to respondent National at the time when it joined a cooperative buying group of stores which was then being served by

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respondent National. A more likely explanation for the account's switching would be the fact that it became associated with the buying group already being served by National, rather than the furnishing of any cabinet. In the case of the other grocery establishment referred to by the witness, documentary evidence offered by counsel supporting the complaint directly contradicts the witness' testimony since it appears therefrom that the account received no cabinet from respondent National. The Purity witness recognized the advantages of the more modern cabinets because of the "better display", and indicated that company was replacing older ice cream cabinets with newer and better types, including some of the open-face variety.

The Purity witness also complained that he could not sell to drug stores because "it takes entirely too much advertising, billboards, neon signs, concessions, so we just let the others have them." The witness was able to identify only one drug store which had been lost to a respondent, viz., Borden, because the latter had allegedly supplied it with a soda fountain. However, he conceded on cross-examination that he had no direct knowledge of what, if anything, Borden had supplied to the account, or whether either Borden or National had financed any soda fountains for drug stores in the area.

The only reference made by the witness to respondent Foremost was that he had lost a group of two grocery stores to the latter when the stores became part of a chain which Foremost was servicing. There is no indication in the record that any of the complaint practices was responsible for Purity's loss of these two stores. Assuming that the chain is receiving a quantity discount (as to which there is no evidence in the record), it cannot be inferred that this was a factor in the account's switching since Purity also grants a quantity discount to a collective buying group of twelve or thirteen stores which it serves, based on the group's overall purchases. Outside of this incident, the witness indicated that his company competes only to a very limited degree with Foremost, since the latter does not sell in Charleston where Purity does the bulk of its business. While at first claiming that his company competed with Pet on the fringes of its territory, the witness finally conceded that they did not compete and that he had had no competitive difficulties with that company.

The evidence fails to disclose that the loss of the few accounts referred to by the witness has had any significant effect on Purity's competitive position. The company, as previously indicated, has grown from 50-60 accounts to 350-400 accounts in a space of approximately eight years. While claiming that his company's progress had been slowed somewhat in the past two years, the witness conceded that

he expected the figures for the latest year (1955) to reveal it to be one of the best and that he was "proud of it, tickled to death". What is particularly significant about this record of achievement is that two years previously the company had lost several government installations, which had accounted for approximately 25 percent of its volume, because of a lower bid by an unspecified competitor or competitors. Despite this, the company was able to improve its position to the point where the witness expected 1955 to be close to his best year. If the company's rate of progress has been slowed somewhat in the past few years, as claimed by the witness, the more obvious explanation would appear to lie in the loss of its valuable government business, rather than in the complaint practices. The Purity witness also conceded that his company made a "fair" profit. While claiming that the rate of profit had declined in recent years, the witness did not attribute this to the complaint practices but rather to increases in the cost of materials, gasoline and drivers' salaries and to an inability to increase prices.

The evidence with respect to Paradise Ice Cream Company likewise fails to disclose that that company is experiencing any serious competitive difficulties. On the contrary, the company appears to be making reasonably good progress and its sales are on the increase. While its representative also complained about some of the practices of competitors, his testimony was of a rather general nature and insofar as specific accounts were referred to, the testimony was for the most part based on unsupported hearsay information.

Paradise has approximately 350 accounts. While the company has made "some gain" since 1950, the Paradise witness claimed that in general it had been "standing fairly still, so to speak" since that time. Although no records were available against which to measure the witness' claim of "standing fairly still", he conceded on cross-examination that the latest year, 1955, was the company's best year and that the company had been increasing the number of its accounts. The evidence indicates that until the Paradise witness joined the company ten months previously as general manager and salesman, the company had had no sales staff and relied entirely on the incidental solicitation of its drivers to acquire new accounts. The fact that the company's sales resumed an upward trend following its institution of a concerted selling campaign, suggests that its lack of forward movement in the previous few years may have been due to a lack of selling effort. In any event, there is no reliable evidence upon which to base a finding that the claimed static situation which existed for a few years was due to any of the complaint practices.

The Paradise witness had no complaint about the practice of supplying customers with ice cream cabinets. In fact the witness agreed that some of the smaller stores would not carry ice cream if they had to purchase their own cabinets. The witness likewise had no complaint about permitting dealers to store other frozen foods in ice cream cabinets, since his company handles a line of frozen foods and permits its customers to place them in the company-supplied ice cream cabinet.⁸³ No complaint was made about the making of any monetary loans to dealers by any competitor.⁸⁴ The Paradise witness did, however, claim that he had been unable to acquire some drug store and other fountain accounts because respondent National had financed their purchase of soda fountains, a practice in which his company allegedly could not afford to engage.⁸⁵ The witness mentioned no specified drug store which his company had been unable to acquire, but did refer to two drive-in restaurants for which respondent National had allegedly financed a fountain. There is no evidence to support the witness' hearsay testimony concerning the alleged financing of fountains by respondent National in these two instances. Furthermore, after claiming that his company could not afford to finance fountain equipment, the witness admitted that in at least two instances his company had taken over the financing of the balance due on fountains which had been sold by respondent National when his company acquired such accounts.

Another practice to which the witness attributed his loss of accounts was the granting of volume discounts to chain stores. He indicated that one of the chains was being served by respondent National, another by respondent Foremost and the third by both his former employer, Coble Dairy, and respondent National, and that some of the store managers had advised him that "they were getting a volume rebate based on their volume sales, and if we were interested in doing that they would be glad to figure with us." No explanation was offered as to why the witness did not "figure" with these stores, it appearing that his company does give a volume discount to some of its larger accounts.

The record fails to support a finding that Paradise Ice Cream Company has experienced any serious competitive difficulties because of the engagement by any of the respondents in any of the complaint prac-

⁸³ The witness admitted that his company had obtained a grocery account from respondent Pet by installing a cabinet for both ice cream and frozen foods, after Pet had declined to furnish the account with a cabinet for frozen foods.

⁸⁴ The only reference to loans which the witness made was to his former employer, Coble Dairy, which he testified did make loans in the Columbia area.

⁸⁵ The witness acknowledged that he encountered no such problem with respondent Borden.

tices. The company was able to resume its upward climb by virtue of using ingenuity and sales effort, and had more accounts at the time of the hearing than it ever had. Although the witness claimed that these were mostly smaller accounts, he conceded that the company had a number of good accounts including a five-and-ten variety chain store in Orangeburg, and most of the other good accounts in that community. Its gallonage in Orangeburg is greater than that of any of its competitors. No claim was made that the company's operation is not profitable or that its profits are declining.

The evidence dealing with the South Carolina area fails to disclose any injury to competition in the area. Although counsel supporting the complaint sought to show that several South Carolina companies had gone out of business, most of these sold out to respondents' competitor, Coble Dairy, and there is no reliable evidence that any of these cessations was due to the engagement by respondents in any of the complaint practices. The evidence also shows that one of the competitors (Purity) was able to buy out a moribund company and the assets of another company, and build a thriving business in a competitive climate no different from that of the local companies which had sold out. The evidence also indicates that another small local company, Velvet Ice Cream Company, has recently entered the ice cream business in the Newberry, South Carolina area.

The only community in the state for which there is any market share information in the record is the state capital of Columbia. From this it appears that respondent Borden's market share has declined sharply from 53.0 percent in 1951 to 26.9 percent in 1955. Respondent National's share has declined slightly from 20.8 percent to 20.0 percent. Respondent Foremost's share has increased modestly from 11.2 percent in 1951 to 14.2 percent in 1955. The only respondent for which there is any state production share data in the record is Borden, which is apparently the only respondent with a plant in the state. Borden's share of state production has increased sharply from 11.3 percent in 1947 to 29.6 percent in 1955. This increase occurred in 1950 and 1951, and appears to be the result of its acquisition of the production of two other companies, rather than an increase in production by existing facilities.⁸⁶ Borden was unable to retain all of this increase, since its 1955 production share was 3.1 percent below that of 1951.

⁸⁶ As of June 30, 1950, Borden acquired Greenwood Creamery with sales of \$407,000, and Richland Dairies with sales of \$358,000.

8. Atlanta, Georgia

The evidence offered in Atlanta by counsel supporting the complaint involved three competitor witnesses, one representing an Atlanta company, another representing a company in the nearby Marietta area, and the third representing a company in Columbus, which is in the extreme western portion of the state. Two other witnesses, one representing French Ice Cream Company of Atlanta and another representing Happy Valley Farms of Rossville were excused at the request of counsel supporting the complaint. No dealer witnesses were called. Since the Atlanta-Marietta area appears to be an entirely separate market area from Columbus, involving substantially different groups of competitors, the two areas are considered separately below.

a. Atlanta-Marietta Area

The only respondents doing business in the Atlanta area are National and Foremost. Swift & Company is another so-called national company which operates in the area. The local companies include Irvindale Farms Dairy, Georgia Milk Producers Association, Atlanta Dairies, Greenwood Dairy, George Moore, French Ice Cream Company, Modern Ice Cream Company, and Druggists' Cooperative. The only Atlanta witness to testify was an official of Irvindale, a representative of French Ice Cream Company having been excused.

The evidence with respect to Irvindale indicates that the company has made very significant progress since it entered the ice cream business in 1947. Prior to that year the company had been solely in the milk business in Atlanta and entered the ice cream end of the dairy business in order to have an outlet for its surplus milk. Its principal operation is still in milk. Starting with no ice cream gallonage in 1947, it managed to reach a gallonage of slightly more than 100,000 by 1953, and in the last full year prior to the Atlanta hearing in January 1956, it had achieved a gallonage well in excess of 250,000. The Irvindale witness indicated that the company had all the ice cream business it could handle with its present facilities, and was in the process of building a new plant with a capacity of one million gallons.

Irvindale is well represented in the large grocery chains in Atlanta. It is the main supplier for the Big Apple Supermarket chain which has 30 stores in the Atlanta area. At one time the chain was served by respondent Foremost, but Irvindale was able to acquire the bulk of the business. Some of the stores are split with Foremost and some with the local competitor, Greenwood Dairy. Irvindale also serves

most of the 20 Kroger stores in Atlanta, although it splits some with respondent National and a few with respondent Foremost. It also serves 10 of the 40 stores of the Colonial Stores chain, and at the time of the hearing was "working" on getting into the other stores of the chain.

Irvindale supplies cabinets to most of its customers. Those who own their cabinets receive a 10-cent a gallon discount. Since it supplies 300 cabinets to approximately 225 customers, it is apparent that some of the larger accounts have more than one cabinet. There is, however, a trend among the chain stores to install their own cabinet equipment in order to receive the benefit of the customary discount paid to dealers who own their own equipment. This has been true of some of the more recently opened stores of the Big Apple and Kroger chains. The Irvindale witness indicated that he would prefer not to have to supply cabinets because of the expense involved, and that he would prefer to give the dealer a lower price in lieu thereof. However, this would not result in any significant benefit to the consumer since, as the witness conceded, the dealer would have to figure the cost of the cabinet in computing his retail price. Irvindale has its own service department and has a regular preventive maintenance program. The witness agreed that the ownership and maintenance of cabinets by the manufacturer helps him to preserve his product better. The Irvindale representative also made some reference to the fact that customers placed other frozen foods in the ice cream cabinets and indicated that it was a constant battle to keep customers from doing this. However, he conceded that he knew of no competitors who supplied cabinets specifically for this purpose.

The only testimony by the Irvindale witness regarding any specific competitive difficulty with any competitor related to the company's alleged inability to acquire a restaurant account because of the amount of equipment which respondent National had supplied. However, the witness conceded that he had no knowledge as to what equipment National had furnished the account other than the hearsay information which he had received from the owner. No finding can be made as to why Irvindale was unable to acquire this account, based on the hearsay, conclusory testimony of the witness.

While the Irvindale witness claimed that his company lost about ten accounts a year, he did not assign any reason for this and conceded that the company gained more accounts than it lost. Such losses appear to be part of the normal turnover experienced by all ice cream companies. The company, which employs three full-time salesmen, is steadily expanding its sales, both in the acquisition of new accounts and

in sales through existing accounts. The Irvindale witness attributed the latter increase, at least in part, to the use of open-top display cabinets.

The evidence as a whole fails to indicate anything but a bright future for Irvindale in the Atlanta area. Its own confidence in its future appears to be amply demonstrated by its recent construction of a plant which will enable it to increase its present production fourfold. The company has been able to acquire not only the Big Apple chain from respondent Foremost, but also one of the largest department stores in Atlanta. It has also succeeded in acquiring a 32,000 gallon account from respondent National. There is no reason to believe that the company will be unable to hold its own in Atlanta. There is no evidence in the record to indicate that the position of other local competitors in the Atlanta area is any less favorable than Irvindale's. It appears that at least one, George Moore, is a substantial factor in the market, having a greater number of delivery trucks and presumably a larger gallonage than Irvindale. Atlanta Dairies is an even more recent entrant into the market than Irvindale, having entered business in 1952.

In the Marietta area, which is approximately 25 miles from Atlanta, the position of local companies appears to be no less favorable than in Atlanta. In addition to Economy Ice Cream Company, a representative of which testified at the hearing in Atlanta, the other local competitors include Cobb Cooperative, which entered the market around 1950, and Aristocrat. There is also Drug Mutual which sells to many of the drug stores in the area. In addition, Irvindale of Atlanta competes in the Marietta market. The respondents doing business in the area are Foremost and National, and to a small degree, Borden. Swift & Company is also active in the area.

Economy Ice Cream Company, the only Marietta company represented at the hearings, has had a rapid rise in the market. Until World War II it sold almost exclusively through its own retail stores. Thereafter it disposed of most of these stores and began to sell at wholesale to non-affiliated retail accounts. At the time of the hearing the company had approximately 95 accounts, which was the largest number it had ever had since entering the wholesale business. The year 1955 represented one of the company's best years. While the company had lost a few accounts during the year, it was "not enough to amount to anything" and was "more than offset" by accounts which it had gained.

The witness identified only three accounts as having been lost to the respondents since it had entered the wholesale business. Two

were lost to Foremost, allegedly because the latter had supplied a cabinet for frozen food in addition to one for ice cream. There is no evidence outside of the witness' hearsay testimony as to what Foremost furnished the accounts in question. The witness also cited an account allegedly lost to respondent National because of a neon sign, but conceded that he had not yet seen the sign up, and there is no evidence in the record to support his hearsay testimony.

The only other complaint of the witness was with respect to his company's inability to get into the big supermarkets, which he claimed were being served by the "big dairies", viz., National, Foremost and Swift. His only explanation for not being able to get into these markets was that they "want the ice cream too cheap". There was nothing to indicate that these supermarket accounts (not specifically identified in the record) received their ice cream at other than National's and Foremost's published prices or that any price arrangement made with them was conditioned on their purchasing their exclusive requirements from these respondents.

The evidence as a whole indicates that Economy is making reasonably good progress in the Marietta market, considering its size and the recency of its entry into the wholesale ice cream business. There is a complete lack of reliable evidence that the engagement by any of the respondents in any of the complaint practices has been responsible for any significant competitive difficulties by Economy, let alone has resulted in injury to competition in the Marietta market.

b. Columbus Area

The evidence of competitive conditions in the Columbus area is barren of any suggestion of injury to competition by any of the respondents, for any reason. The respondents doing business in the area include National, Foremost and Borden. Swift & Company also operates in the area. The local companies include Kinnett Dairies, Columbus Ice Cream Company and Wells Dairy Cooperative. Velda (Plantation Food) of Florida also sells in the territory. With the exception of Foremost and Kinnett, all of these companies have entered the market since World War II. There are more companies operating in the area than there have ever been and there is no evidence of any business casualties in the area.

Kinnett Dairies was the only company from the area to be represented at the Atlanta hearing. The company is a substantial factor in the Columbus market, operating 12 to 15 delivery routes and having 1,200 to 1,500 accounts, with an annual gallonage of 600,000 to 700,000. The company's volume has been on the increase since the war and

it is now enjoying its maximum volume, except for a period during the war when it was servicing the military installations at Fort Benning, which the witness volunteered would not be an appropriate basis of comparison.

The only respondent to which the Kinnett representative made any reference as having been responsible for the loss of any specific account was respondent Borden, to which his company had allegedly lost a drug store, after declining to make the account a loan because it still owed his company several hundred dollars. The Kinnett witness conceded that he had no knowledge as to whether Borden had ever made the account a loan. Despite this loss, whatever may have been the reason, Kinnett serves a majority of the drug stores in Columbus. It also serves most of the grocery chains, including A & P, Colonial Stores and Kroger's. The witness indicated that his company had lost some of its chain drug store and variety-store accounts to respondents Foremost, Borden and National when the national headquarters of these stores began to enter into contracts for the purchase of ice cream on a national basis, rather than through the local managers. However, there is no evidence that the loss of these accounts was connected in any way with the complaint practices. Despite such losses the witness stated, in answer to the question of counsel supporting the complaint as to whether he was "holding his own" in the market, that: "I think I am doing better than holding my own." He indicated that while the company lost some accounts it had gained more than it had lost.

Aside from the single instance of an alleged loan by Borden, the only other complaint practice referred to by the witness was the furnishing of signs. He indicated that his company supplied his customers with signs, including some containing a privilege panel for the dealer's name, and that the company regarded it as an advantage to place signs with their name in a "strategically good spot". Kinnett has never lost or been unable to acquire an account because of the furnishing of a sign by any competitor. The witness also made oblique reference to the practice of supplying frozen food cabinets. He made no claim that his competitors supplied cabinets for this purpose, and commented that he would not be surprised to find his customers putting frozen food into his company's ice cream cabinets, despite the company policy of discouraging such practice.

Although Kinnett allegedly sells on the basis of "one-price policy", the company has been more than holding its own due to its aggressive selling program, and considers itself "the leaders in the field". The witness indicated that he felt that he could "hold my own with the

big boys". The only way in which he felt that he was at a disadvantage was when a contract was made by officials of a national retail chain on a national or regional level, rather than through local management. However, as above indicated, there is no evidence that the loss of some chain drug or variety store accounts has been connected with any of the complaint practices. In any event, any such losses have had no significant effect on the fortunes of Kinnett which has enjoyed a steady growth in sales since the war, and is now at its peacetime peak.

* * * * *

The evidence fails to disclose any injury to competition in either the Atlanta-Marietta market or the Columbus market or in any other area of the state. The evidence also fails to disclose any significant improvement in the competitive position of any of the respondents operating in the Georgia market. Respondent National's share of state production has increased modestly from 7.0 per cent in 1947 to 11 per cent in 1955. Respondent Borden, which did not enter the state until 1950 when it acquired two existing companies, has enjoyed a modest increase from 10.3 per cent in 1950 to 15.8 per cent in 1955. Comparable data for Foremost respondent does not appear in the record.

9. Jacksonville, Florida

The respondents operating in the Jacksonville market are Foremost, Borden and National (Southern Dairies). Foremost and National manufacture their product in Jacksonville and Borden has a distributing branch there. The ice cream sold in the area by these companies is manufactured entirely in the State of Florida. There are two local Jacksonville companies, J. R. Berrier Ice Cream Company and Dinsmore Dairy. In addition Velda, which operates throughout the State of Florida and in parts of Georgia, also sells in the Jacksonville market. Counsel supporting the complaint called as witnesses representatives of the two local Jacksonville companies. No dealer witnesses testified. However, counsel supporting the complaint was permitted to read into the record, by agreement of counsel, a list of accounts which had received loans (secured by chattel mortgage) or had been sold equipment on a conditional sales basis by respondents Foremost, Borden or National, as recorded in the Recorder of Deeds' office.⁸⁷

⁸⁷ The treasurer of Foremost, who approves all loans in the area, was produced as a witness but counsel supporting the complaint declined to examine him.

At the time of the Jacksonville hearing in January 1956, the Berrier Company was almost entirely out of the wholesale ice cream business, serving only four or five accounts which picked up their ice cream at the company's plant. The company was then distributing through three retail stores which it owned and was about to open a fourth. The owner of the company, Jefferson R. Berrier, is a somewhat quixotic individual who has had a rather checkered career in the ice cream business. Berrier had originally been in the ice cream business in Jacksonville during the 1920's, until he sold his business to respondent Foremost in 1929 and went into the ice cream business in Richmond, Virginia. While still continuing his Richmond operation, he returned to Jacksonville in 1936 and joined his brother who had a small ice cream business serving fifteen or twenty accounts. At the time of his resumption of business in Jacksonville he decided that he would not supply his accounts with ice cream cabinets, although he did sell cabinets to such accounts as wished to purchase them and also serviced customer-owner equipment without making any charge except for parts. Despite the fact that his was the only company which did not supply cabinets to its customers, Berrier was able to increase the number of accounts served to approximately 70-100 by 1952 or 1953. In 1953 Berrier decided that the wholesale ice cream business was not sufficiently profitable and ceased making deliveries to his accounts, with the result that it lost all but four or five who were willing to come to the plant to pick up their ice cream needs. The company at this point opened three stores and at the time of the hearing was in the process of opening a fourth. In the meantime, in 1950, J. R. Berrier discontinued the ice cream business in Richmond, Virginia, when he sold out to respondent Beatrice.

No finding can be made, based on the somewhat desultory testimony of Berrier that his company's decision to cease business in Jacksonville in 1953 was due to the engagement by any of the respondents in any of the complaint practices. While Berrier testified that his business had been going downhill because his bigger accounts were being taken away "by the big boys", which he identified as National, Foremost, Borden and Velda, he conceded that he had no knowledge as to why he lost these accounts, "I only know I lost them." The witness did refer to various practices which he had been told the "big boys" were engaging in, but no specific accounts were identified and there is no reliable evidence that any of the respondents acquired any of Berrier's accounts, whether due to the complaint reasons or otherwise.

The lack of probability that the activities of any of the respondents were responsible for Berrier's decision to go out of the wholesale

business is suggested by the fact that according to his own testimony, his company had reached its high point around 1952 or 1953, just prior to the company's termination of wholesale activities. While it had had a "bad period after the war" in which it lost money, the witness indicated that his "being out of town so much I guess contributed to it some". It therefore appears that the decision to go out of the wholesale ice cream business occurred after the company had resumed profitable operations.

Whether the company's unwillingness to supply its customers with cabinets was an inhibiting factor in its growth cannot be determined from the record. The reason for its adoption of such a policy appears to be wholly incomprehensible in the light of the Berrier witness' own experience in the business. By his own admission, it was he who first supplied customers with mechanical cabinets in the Jacksonville market in 1924, before most of the respondents had even come into the area. Likewise, during the period when he was in Richmond from 1929 to 1950, his company there had supplied its customers with cabinets. When asked why, in the light of this experience and background, he adopted a policy not to supply cabinets when he resumed business in Jacksonville in 1936, the witness gave the following response:

For some unknown reason I got by with it and made a little money. The reason I slipped was that I was just out of town too much, I guess. You see, normally I spent one-third of my time out of town and one year I spent over half of it out of town when I was putting machinery in in Richmond. [Emphasis supplied.]

The witness finally conceded that he "just wasn't a good enough man to take care of both places right", and that if he hadn't had his Richmond business and had concentrated on Jacksonville, he could have remained in the wholesale ice cream business. No finding can be made, based on the testimony of Berrier, that the engagement by any of the respondents in the complaint practices was responsible for his company's going out of the wholesale ice cream business.

The other Jacksonville manufacturer, Dinsmore Dairy, has made reasonably good progress considering the brevity of its experience in the ice cream business and its purpose in entering the business. Dinsmore operates a dairy farm of about 1,400 head of cattle and is primarily in the business of processing and selling milk. It went into the ice cream business around 1952 in order to have an outlet for its surplus milk. Dinsmore adopted a somewhat more realistic attitude than Berrier when it entered the ice cream business. Finding that it was customary to supply customers with cabinets, the company pro-

ceeded to do so, fixing its price at a level which would be sufficient to cover the cost of the cabinet. The Dinsmore representative estimated that it cost the company 10 cents a gallon to supply cabinets and those few customers who own their own cabinets receive a discount of 10 cents from the list price.

By January 1956, Dinsmore had been able to acquire about 30 to 40 wholesale accounts, plus a "reasonable share of the school business" in the area. It also delivers ice cream to an indeterminate number of its regular home milk customers. The record does not indicate what Dinsmore's gallonage is since the witness declined to supply this information. He claimed, however, that most of his accounts were small and that as soon as they were developed the other companies would take them away. The witness singled out Foremost and Velda as being responsible for acquiring most of the accounts which his company had lost, indicating that it had lost none to respondent National and, in the case of respondent Borden, was unable to obtain only one account for which both companies had competed.

While singling out Foremost and the non-respondent Velda, as being responsible for the loss of most of his accounts, the Dinsmore representative failed to indicate the number of such accounts which had been lost or the reason for such loss. While the witness did claim, at one point in his testimony, that he had been asked by customers and prospective customers for loans of money "several times" and for "special prices", and that unnamed competitors had painted stores and put in neon signs, his testimony was not directed at Foremost or at any other competitor, nor was there any indication that he had lost or been unable to acquire any accounts because of these practices.⁸⁸

The witness made reference to only two specific accounts during the course of his testimony, one of which involved respondent Foremost and the other respondent Borden. In neither instance is there any reliable evidence in the record to support the witness' claim that he was unable to acquire these accounts due to any of the complaint practices. The Foremost incident involved an account identified as A. J. Donelson which the witness claimed had asked him for a loan of \$2,300, out of which \$2,000 was to be used to repay a balance of a loan from respondent Foremost. There is not a scintilla of reliable evidence in the record to support the witness' hearsay testimony.⁸⁹

⁸⁸ It may be noted that Dinsmore does make loans in its operations, except that it limits them to the farmers from whom it obtains its milk and does not make them to retail stores. It also supplies its customers "with some signs."

⁸⁹ The examiner's ruling that he would not make any finding concerning a loan by Foremost based on the witness' hearsay testimony, brought forth the comment by the witness that "the way to get information direct is, just like the Examiner says, to subpoena the man, the customer. You don't have to go any further than you can throw a stone from this building * * *." The witness' suggestion was not adopted.

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The list of loans made by respondent Foremost in the Jacksonville area, which was placed in the record by counsel supporting the complaint, does not contain the name of A. J. Donelson. The second account referred to by the witness was one which he was allegedly precluded from obtaining by reason of the fact that respondent Borden had prevailed upon the account's milk supplier to make it a loan. Not only is there no reliable evidence to support the witness' hearsay testimony but, according to the credited testimony of a Borden official, Borden made no arrangements for the account to obtain a loan from the account's milk supplier (with which Borden has no connection) and, while the account requested a loan from Borden, the latter declined to do so and got the account without furnishing any financial assistance.

There is no reliable evidence in the record from which it may be found that Dinsmore Dairy has been injured or is likely to be injured because of the engagement by any of the respondents in any of the complaint practices. While, as above indicated, counsel supporting the complaint was permitted by agreement of counsel to read into the record a list of transactions involving respondents Foremost, National and Borden in which the latter had made certain loans or sold certain equipment under conditional sales contracts, this evidence furnishes no basis, either separately or in conjunction with other evidence, for concluding that any competitors were injured thereby. None of the dealers involved were called to testify that the assistance received from the respondents was an inducement for their dealing with the respondent. Neither of the two competitor witnesses referred to any of these accounts as being among those which they lost or could not acquire. It cannot therefore be assumed that any competitor was injured as a result of this financial assistance to customers. The record discloses affirmatively that within two years after the four transactions involving respondent National, that company had lost two of the accounts, and that in the case of respondent Borden, only one of the eleven transactions in which it was involved represented an account which had switched from a competitor.⁹⁰

Not only does the evidence fail to support a finding of injury to competition from the activities of respondents, but the likelihood thereof appears to be remote in the light of the evidence offered with respect to market share trends involving these respondents. Respondent National's share of the Jacksonville market has declined from 23.6

⁹⁰ The four transactions involving respondent National and the eleven involving respondent Borden represent the total number of accounts assisted by those two companies in the Jacksonville area during 1954 and 1955.

percent in 1950 to 18.9 percent in 1955, while respondent Borden's share has declined from 11.0 percent in 1950 to 7.1 percent in 1955. Respondent Foremost has increased its share only slightly from 32.1 percent in 1950 to 33.1 percent in 1955 in the Jacksonville market, in which one of the company's principal offices is located and where it is one of the oldest companies in the ice cream business.

10. *Miami, Florida*

The hearings in Miami involved mainly evidence of competitive conditions in the Palm Beach-Miami areas. The evidence discloses that there are a number of companies which do business in both areas and several whose operations are restricted to one or the other of the areas. In view of the considerable overlap of territories and the geographic proximity of the two areas, the evidence concerning both areas is herein considered together.

The respondents operating in the Miami-Palm Beach area are Foremost, Borden and National (Southern Dairies). Swift & Company also operates in the area. There are also a number of so-called independent, Florida companies which do business throughout the Miami-Palm Beach area. These include Velda, Alfar, Land O' Sun, Superior, DeConna and Rich. Several companies sell primarily in the Miami area, including MacArthur, Dressell and Weber. The Howard Johnson retail chain has recently gone into the wholesale ice cream business in the Miami area. There has been a considerable growth in the number of soft ice cream establishments throughout the south Florida area.

The only competitor witnesses called by counsel supporting the complaint were representatives of Rich Ice Cream Company and Weber Ice Cream Company. Officials of Alfar, DeConna, Velda and Dressell were subpoenaed to testify, but were excused at the request of counsel supporting the complaint. Three dealer witnesses from Miami also testified.

Rich Ice Cream Company, which was represented at the hearing by its owner, Willard H. Rich, and by its sales manager, has had what appears to be a reasonably good record of achievement. It entered the ice cream business in Lake Worth in 1947 and moved to a larger plant in West Palm Beach in 1950. In the following year it expanded into the frozen food business, including frozen bakery products. It gradually extended its territory from the area surrounding Palm Beach south to Miami. Originally storing its frozen products for sale in Miami in a large truck, it leased storage space in 1955, and

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in 1957, following the Miami hearings, it moved into a larger distributing plant in the area. Rich started business in 1947 with one truck and by 1956 it was operating six delivery routes. Its volume has been increasing steadily since it went into business and by the end of 1955 it had 675 retail accounts and its annual sales were approximately \$500,000. Rich supplies most of its customers with modern cabinets and with signs. It has also sold soda fountains to some of its customers on a conditional sales basis and supplies some of its frozen food customers with freezers which are paid for by a meter arrangement attached to the cases. It grants advertising allowances to some of its customers and gives a five percent discount to those customers who own their own ice cream cabinets.

The owner of Rich, who has not been too active in the sales end of the business for approximately five years, complained that the most difficult problem with which the company had to contend was the "tie-in relation of the milk and ice cream sales by some of the companies that have a joint operation with the two products." He explained this as involving the furnishing of extra equipment or the giving of a better price to an account in connection with its milk business in order to obtain its ice cream business and vice versa. To the extent that the additional equipment and more favorable prices involve the milk end of the business, the practices are not, of course, within the present complaints. Insofar as the witness' testimony was directed to the ice cream end of the business there was no reliable evidence offered to establish that the company's loss of ice cream accounts or inability to acquire accounts was due to any tie-in between milk and ice cream sales. While it is possible that Rich has been somewhat at a competitive disadvantage in competing with companies who operate in both milk and ice cream because of the preference of some customers to make their purchases of both products from a single supplier, this is a matter that is outside the scope of the complaints.

The testimony of Rich and his sales manager involved mainly an enumeration of approximately 17 accounts which they claimed the company had lost or been unable to acquire as a result of the competitive activities of the three respondents doing business in the south Florida area. It may be noted, initially, that approximately half of these accounts were drug stores or drive-in theaters who presumably make only limited milk sales and, accordingly, would not appear to involve any tie-in arrangement of the type which Rich claimed represented his main problem. Aside from this, however, in most of the instances referred to, the reason assigned for the loss of, or inability

to acquire, the account was not one falling demonstrably within the complaints. In nine or ten of the accounts mentioned, price was assigned as the principal reason or as an important factor in Rich's loss of, or inability to acquire, the account. However, in none of these instances is there any reliable evidence as to the price being charged by the particular respondent to the account in question, nor is there any evidence that such price was other than the regular list price of the respondent or that the granting of such price was connected in any way with an exclusive dealing contract or arrangement.⁹¹ Another account the loss of which would appear to have no relation to the complaints is one which Rich allegedly lost to respondent Foremost because the latter had extended the account credit, whereas Rich had put it on a C.O.D. basis after the account had become slow in its payments. Aside from the lack of apparent relevance of this incident, there is no reliable evidence in the record to support the hearsay testimony that the account had been extended credit by respondent Foremost.

Falling at least partially within the complaints were several accounts where it was claimed that one of respondents had either loaned money or sold equipment on a conditional sales basis, or supplied excessive equipment. One such instance involved an account which Rich and National had been supplying on a split basis, and which it was claimed was lost entirely because of a loan made by National. Not only is there no evidence to support the hearsay testimony of Rich's sales manager, but according to the credited testimony of a National official no loan had been made to the account in question in any way, shape or form.⁹² Some of the accounts involved the alleged supplying of more equipment than Rich thought justified. However, here again, no reliable evidence was offered as to what equipment had actually been furnished to these accounts and on what basis.⁹³

In only two of the instances referred to by the Rich witness is there any reliable evidence to indicate what assistance had been supplied

⁹¹ In several instances Rich, who has not been active in sales for five years, conceded that he did not know what his competitor's price was. In some instances Rich's information was based on hearsay reports received by his sales manager. Indicative of the lack of reliability of this hearsay and conclusory testimony is the conflict between Rich, who attributed the loss of a drug store account to respondent Borden's lower price, and his sales manager, who attributed the loss of the same account to respondent Foremost's lower price.

⁹² The only thing that respondent National had done for the account was to paint a sign, with its Sealtest emblem, on the outer wall of the account's premises, at a cost of approximately \$35.00. By the time of the defense hearings respondent National had already lost the account to the local competitor, Land O' Sun Dairy, which merely painted its own name over the Sealtest emblem.

⁹³ In several instances the Rich witness conceded that he was uncertain as to the nature of the equipment furnished by respondents.

by any of the respondents. One involved a drug store account to which respondent National had allegedly sold a fountain and which was reported to have told Rich's sales manager that it was "tied up on an equipment deal". The owner of the drug store, who was called as a witness by respondent National, denied making the statement attributed to him by Rich's representative and testified that he had already paid for the fountain purchased from National when the Rich representative called upon him and was under no obligation to National at the time, but continued to deal with the company because of friendship and his long, satisfactory relationship with the company. The second instance involved a drug sundry store, the owner of which had also allegedly told Rich's sales manager that the account was tied up with National because of the purchase of a fountain. The owner of the establishment, a woman, admitted having made the statement attributed to her by Rich's representative, but claimed that she did so merely as a way of getting rid of the salesman since she had no desire to change suppliers. While it does appear that respondent National had assisted the account in the purchase of a soda fountain, the witness testified that Rich's salesman had offered to "buy out" the fountain and meet respondent's price but that she, nevertheless, declined to change suppliers.

While corroboration does appear in the record for the testimony of the Rich witness concerning the assistance by respondent National in two of the instances cited, the evidence as a whole is too unreliable to support a finding that the respondents have been responsible, in any substantial number of instances, for Rich's loss of or inability to acquire accounts. It should be noted that in one of the two instances for which there was corroboration, National's assistance had already ceased at the time of the solicitation and the account denied the statement attributed to it. In the second instance, where both the fact of assistance by National and the statement made to the Rich representative were corroborated, the evidence discloses that Rich had offered to meet National's terms and that its inability to acquire the account was not due to the sale of the fountain but to the account's unwillingness to change suppliers. In the bulk of the instances referred to by the Rich witness the evidence of assistance by respondents was largely of a hearsay, conclusory nature, not warranting the basing of any findings thereon.⁹⁴

⁹⁴ The examiner can place no more reliance on such hearsay reports than can Rich himself who, when asked by counsel supporting the complaint if dealers could be giving him "imaginary figures [as to competitors' prices], in order to get you to come down in price", testified:

"Oh, I think there is no question about that. There is a great deal of that, yes, sir."

In any event, despite Rich's claims with respect to his company's loss of or inability to gain certain accounts, the record discloses that the company has been steadily growing and expanding. It further appears that the company has acquired a considerable number of accounts from respondents and has apparently had no difficulty in meeting the needs of these accounts. In fact, Rich's owner conceded that his company had acquired more accounts from respondents National and Borden than they had acquired from his company, and had supplied some of these accounts with signs and more modern equipment. While the witness claimed that his profit ratio was declining despite increased sales, he declined to produce any records for use in connection with cross-examination by counsel regarding the basis for such conclusion. However, he admitted that the decline was due to an increase in labor costs, packaging costs and materials such as fruits and flavors. These costs cannot, of course, be attributed to the complaint practices.

The other competitor witness called by counsel supporting the complaint was a partner in Weber's Ice Cream Company of Miami. This company has been in business since 1948, and specializes in a high-quality, catering-type ice cream, which it sells mainly to hotels and restaurants. It confines its business mainly to Miami Beach. It has an annual gallonage of just under 100,000 gallons.

The Weber witness complained that it was difficult to obtain accounts because the larger companies were furnishing excessive equipment, granting high rebates and were assisting accounts financially. However, when it came to designating the companies responsible for his difficulties, he conceded that he had had no competitive problems with respondents Foremost or Borden for at least several years. In the case of respondent National, the only competitive difficulty to which the Weber witness made reference was the loss of one hotel account, which he claimed had been supplied with an extra cabinet by respondent National. However, he conceded that he had no knowledge as to what equipment respondent had supplied the account and had "just surmised the fact" because the account threatened to make a change. Furthermore, it appears that the account was not a desirable one and the Weber representative indicated that he was "glad to lose it". No finding can, of course, be made as to the reason for the loss of this account based on the witness' hearsay conclusory testimony.

Not only does the record fail to disclose any serious competitive difficulties between Weber and any of the three respondents doing business in the area, but it appears affirmatively from the witness' testimony that the source of most of his company's alleged problems has been another competitor, Swift & Company. According to the

witness, Swift was the "worst" competitor in the area and had offered accounts which he had tried to get "the most fantastic propositions and deals, which is far beyond anything I could surmise". Further elaborating on his competitive problems the witness testified:

[M]y inability to make progress is due to the fact that the hotels have been solidly sold on deals, and I would say that Swift has taken the lead and has practically overpowered Borden, Sealtest and Foremost in those transactions. They have now come to the point where there isn't a hotel that isn't opened up on the Beach that you can say Swift hasn't got.

While no finding can, or needs to, be made based on the witness' conclusory testimony with regard to Swift's activities, it is clear from his testimony as a whole that the activities of the three respondents doing business in the Miami area have not been a significant factor in Weber's alleged inability to make more rapid progress. It may be observed, however, that considering that the company did not enter business until 1948 and has confined its activities primarily to the Miami Beach area, and that its main product is a high-grade, catering-type ice cream which has appeal only to a limited number of establishments, the fact that it has grown to approximately 100,000 gallons by early 1956 hardly bespeaks a serious lack of progress on the part of the company.

In addition to the two competitor witnesses, counsel supporting the complaint called representatives of three dealer accounts. One of the dealers was the operator of a soda fountain concession in a drug store located in the Miami area, which had switched to respondent Foremost from Alfar and had received a discount of 47 cents a gallon on most of his ice cream purchases. Presumably this testimony was offered by counsel supporting the complaint to show that the discount offered by Foremost was the reason the account switched. However, according to the uncontradicted and credited testimony of the witness, the price quoted by Foremost was not the reason he switched. The witness had handled Foremost ice cream at another location for eight years, and when he leased the fountain concession in his present location he found that the prior owner had been using Foremost milk and Alfar ice cream. Because of his former good relations with Foremost and his belief that it would sell better, he changed his brand of ice cream. There was also some dissatisfaction with Alfar's once-a-week delivery schedule. The witness indicated that Alfar and a number of other ice cream companies had offered to meet the Foremost price offer, but that he declined because of his preference for dealing with Foremost. A Foremost representative, who was also called as a witness by counsel supporting the complaint, testified that

the 47 cent discount had been computed on the basis of the account's projected gallonage. Because of the higher Foremost base price, the net price offered by it was only 10 cents a gallon below the Alfar price. Irrespective of whether Foremost's price was on or off list, the testimony of the witness indicates that it was not a factor in his switching suppliers.

The same dealer also testified that many months after he had changed to Foremost, the latter supplied him with an additional box for milk, pies and vegetables. The Foremost witness familiar with the transaction testified that it was not typical, since his company did not customarily supply cabinets for other than dairy products, but that this represented an emergency transaction where the account had had some products which were spoiling and that since Foremost had a storage box not in use it agreed to furnish it to the account. The box was used partly for storing milk which Foremost sold the account. It does not appear from the witness' testimony that the supplying of the box acted as an inducement for the account to continue dealing with Foremost. There is, moreover, no evidence that the supplying of the cabinet or the giving of discount was connected in any way with an exclusive dealing arrangement or contract. The only competitor affected by the situation, Alfar, was excused from testifying by counsel supporting the complaint.

The second dealer witness was the operator of two supermarkets in Miami. Prior to 1951 the account had been handling the milk and ice cream of White Belt Dairy (a company not referred to by any of the competitor witnesses). During 1951 the account switched to Foremost's milk, on which it received a price concession, and several months later it switched to Foremost's ice cream for which it paid the regular list price. Since the discount received on milk is outside the issues in this case, no evidence concerning this portion of the arrangement was permitted by the examiner. Insofar as the milk transaction involved an apparent understanding that Foremost would later get the dealer's ice cream business, it is likewise not covered by any allegation of the complaints, since the transaction regarding the sale of ice cream does not involve any of the complaint practices.

The third dealer witness in Miami was the operator of a drug store which had received assistance from Foremost in financing the remodeling of his store and the purchase of equipment. The amount involved was approximately \$7,510, of which the store owner paid \$2,000 in cash and the balance was financed by Foremost over a three-year period, under a conditional sales arrangement. The agreement provided that the account would use Foremost's products exclusively

until the balance was paid off. The record does not disclose what, if any, other company the account had dealt with prior to taking on Foremost's products. The dealer indicated that he had received offers of assistance from a number of other ice cream companies, including National, Borden, Swift and Velda. However, he chose Foremost because it sold a quality ice cream and because they were willing to allow him to choose his own equipment dealer, whereas the other companies wanted him to purchase his equipment at places which they designated. The witness indicated that he did not regard the assistance as anything unusual since, to his knowledge, ice cream companies in the area had been giving financial help to retail dealers "for thirty or more years". The evidence regarding this transaction fails to show that Foremost obtained this account because it was willing to finance it, while other companies were unwilling to do so. All that appears is that from among a number of competitors, all of whom were willing to assist the account, the owner chose Foremost because, among other things, he was given the latitude of selecting his own equipment dealer.

Counsel supporting the complaint also introduced in evidence a number of recordings of loans (secured by chattel mortgage) and sales of equipment under conditional sales contracts by the three respondents during 1955. However, with one exception, the last-mentioned witness, none of the dealers were called to testify. There is no indication that any of the other accounts were obtained from competitors or that other competitors sought to acquire the accounts. Since counsel supporting the complaint does not, apparently, contend that the transactions in question are illegal per se, the absence of any evidence to show any actual or probable effect of these transactions on competition in the Miami area makes them of marginal relevance.

The evidence adduced at the Miami hearings fails to demonstrate any significant adverse effect on competition in the area by reason of the engagement by any of the respondents in any of the complaint practices. The two competitor witnesses chosen can hardly be called representative of competitive conditions in the area. Rich operates mainly in the Palm Beach area and, moreover, the evidence indicates that the company has made reasonably good progress since its entry into the ice cream business, and has not experienced any serious competitive difficulties due to the complaint practices. The other competitor, Weber, operates primarily in a limited area around Miami Beach and caters to a limited clientele. This company likewise has made good progress within a relatively short time. Of the competitors who were excused, it appears that Alfar Creamery has a substantial part

of the business in the Palm Beach area and serves a number of the good drug store accounts. Velda is a sizeable company, selling both milk and ice cream, and serves a number of supermarkets, including the Food Fair stores. Land O' Sun is a "big factor" in the market, is in both milk and ice cream, and also sells in some of the supermarkets. No information appears regarding the other excused witness, DeConna.

So far as appears from the record, competition in the south Florida area is vibrant, with a good number of active local companies competing with one another and with the so-called national companies. The latter do not appear to have obtained any special advantage, particularly insofar as the use of the practices charged in the complaints is concerned. Of the three respondents doing business in the area, two have actually sustained a substantial loss in market position. Respondent National's market share in Miami has declined from 27.7 per cent in 1950 to 17.4 per cent in 1955. Respondent Borden's share has declined from 10.4 per cent in 1950 to 5.0 per cent in 1955. Respondent Foremost, on the other hand, has increased its position from 15.1 per cent in 1950 to 26.9 per cent in 1955. However, there is no evidence that this has been accomplished at the expense of its local competitors and, particularly, by the use of the complaint practices. Both National and Borden, who engage in the same practices, have actually declined during the period that Foremost was advancing. It is just as likely that Foremost's gain was at the expense of its fellow respondents than that it came out of the business of local competitors.⁹⁵ The testimony of the Foremost official called by counsel supporting the complaint indicates that the company's growth in the area has been due mainly to increased sales through its existing accounts, resulting from improved advertising and merchandising methods. The same witness indicated that most of the company's loans were made to its existing accounts to help increase the sales of such accounts.

For the State of Florida as a whole, two of the respondents have sustained a substantial decline in their share of state production between 1947 and 1955. Respondent National's share has declined from 30.1 per cent to 19.0 per cent, while Borden's share has declined from 18.7 per cent to 11.2 per cent. There is no state-wide data in the record for respondent Foremost. However, it does appear that its Division I, doing business in nine southern states, including Florida, had a production share of 6.15 per cent in 1950 and 8.27 per cent in 1955.

⁹⁵ It may be noted that Foremost's increase of 11.8 per cent is less than the combined decline of 15.7 per cent by National and Borden.

11. *Houston, Texas*

The Houston hearings involved testimony and evidence with respect to three separate market areas, the Houston area, the Beaumont-Port Arthur area and the San Antonio-Austin area. Each of these appears to be a separate market area, having substantially different groups of competitors, and each is separately discussed below.

a. *Houston Area*

The respondents doing business in the greater Houston area are Borden, Foremost, Carnation and Arden (Camellia). Swift & Company also does business in the area. The local Texas companies operating in the area include Oak Farms Dairy, Sun Up Ice Cream Company, Sanitary Farms, Lily Ice Cream Company, Lone Star Creamery and Velda Ice Cream Company. Three former local competitors have ceased operating. These are Shamrock Dairy, which sold out to Oak Farms Dairy in December 1955; Smith Ice Cream Company, which sold out to Lily Ice Cream Company in 1954; and Kline Ice Cream Company, which ceased operating at some indeterminate time for reasons not appearing in the record. A representative of the latter company was subpoenaed to testify, but was excused at the request of counsel supporting the complaint.

Representatives of four Houston manufacturers were called to testify. Two were from the now defunct companies, Shamrock and Smith, and two from the still active competitors, Lone Star and Sun Up. Representatives of five retail dealers were also called as witnesses. The evidence adduced at the Houston hearings fails to establish substantial injury to competition, or the reasonable likelihood thereof, due to the engagement by any of the respondents in the complaint practices. The evidence consists in large measure of unsupported opinions, conclusions and hearsay concerning the activities of respondents and, to a considerable extent, involves matters not covered by the complaints. The evidence offered through the various competitor witnesses is discussed below.

The testimony of the former owner of Shamrock Dairy involved mainly a recital of the facts relating to eight accounts which that company had allegedly lost to various of the respondents. Five of the accounts were alleged to have been lost to respondent Arden (Camellia), two to respondent Carnation, and one to respondent Borden. The principal reason or one of the important reasons assigned by the witness for the switching of the accounts in each instance, with one exception, was the fact that the account had received a discount

or rebate from one of the respondents. However, except for one account, there is no reliable evidence in the record as to what discount or rebate, if any, the account had received; nor does it appear that such purported price concessions were connected in any way with an exclusive dealing arrangement. The one exception involves a dealer who was also called as a witness by counsel supporting the complaint, and who testified that he had received a 10 cent a gallon discount from respondent Carnation, which made the latter's price "just a little less" than Shamrock's. However, the dealer indicated that an important factor in his decision to change suppliers was his feeling that Carnation "could do a better job" for him because of its advertising and point-of-sale program. The dealer's sales of Carnation did, in fact, increase substantially after he had changed suppliers. The price concession apparently had no significant effect on the account's loyalty to Carnation since by the time of the hearings in Houston it had already switched to a non-respondent supplier. It does not appear in this instance whether the discount was other than the regular scheduled quantity discount; nor is there any evidence that it involved any exclusive dealing arrangement.

The one instance where price was not referred to by the Shamrock witness as a factor in an account's switching was one where it was claimed that respondent Arden had agreed to supply the account with a sign valued at \$1,350, plus a large ice cream case and a cabinet for frozen foods. The testimony of the owner of the establishment, who was also called as a witness by counsel supporting the complaint, is at variance with the conclusional and hearsay testimony of the Shamrock witness. The owner of the establishment in question testified that the reason he had switched was because he had received a 10-cent a gallon discount from Camellia. The equipment which Camellia installed was substantially the same as he had had from Shamrock, consisting of a modern case to display ice cream and another old case for storage. With respect to the sign, the dealer testified that Camellia had not promised to give him any signs, but had agreed to contribute a portion of the cost of the sign (the amount not being specified). However, as of the time of the hearing, which was approximately five months after the switch had occurred, the dealer had not yet made any decision with respect to the purchase of a sign.

In several of the instances where price was alleged to have been an important factor in the loss of an account, the Shamrock witness also referred to the fact that Camellia had supplied the account with various types of equipment which he regarded as excessive. The testimony of the witness was based largely on his own opinion or

conclusions as to whether the equipment was excessive and whether the furnishing thereof was a factor in the account's switching. Furthermore, reliable evidence is lacking in most instances to establish what, if any, equipment these accounts received. No finding can be based on the witness' testimony, based on hearsay and surmise, concerning these accounts.

The evidence with respect to Shamrock's history indicates that the company started in the ice cream business in 1947 and by 1954 had built up a volume of approximately \$300,000, or 200,000 gallons. The witness claimed that in the following year his sales had declined by approximately \$75,000 and that he decided to sell out because he "saw the handwriting on the wall with all the give-away plans and secret discounts and marquee signs * * *". There is, however, little reliable evidence in the record to sustain the witness' broadly stated conclusions and opinions. To the extent that respondents furnish equipment or signs or grant discounts, it does not appear that their practices differ from competitors generally in the market.

Competitors in the area for the most part supply their customers with ice cream equipment, which equipment has become more expensive as the costly display-type cabinets have come into vogue. While dealers have apparently sometimes taken advantage of the equipment supplied to them, in order to store frozen products other than ice cream, this is a practice which ice cream manufacturers as a whole try to discourage, but not always with success. With respect to signs, the Shamrock witness said that he had no objection to the supplying of neon signs and giving the dealer a privilege panel, but did object to supplying signs on which the ice cream manufacturer's name does not appear. No evidence, however, was offered to indicate the existence of such a practice or that it was engaged in by any of the respondents. Insofar as "secret discounts" are concerned, there is no reliable evidence that the discounts and rebates referred to in the testimony involve anything other than the regular quantity discounts or rebates of the respondents. In any event, there is no evidence that any of the practices referred to is tied to an exclusive-dealing arrangement. On the contrary, the Shamrock witness complained that whereas for the first six years he had served accounts exclusively, the more recent trend in Houston was toward the splitting of accounts. His testimony in this respect is corroborated by that of some of the other Houston witnesses.

The fact that Shamrock sold its business is one which cannot be overlooked. However, the examiner cannot automatically infer from this fact that the engagement by respondents in the complaint practices

was a significant factor in Shamrock's decision to sell out. Nor can the examiner find this to be a fact merely because of Shamrock's generally stated accusations. The facts which he related do not legally support his broadly stated assertions. One of the most significant facts allegedly involved in the case of most of the accounts was price competition. Yet the complaint does not charge this to be illegal, as such, but only where used to induce exclusive dealing. There is no evidence that this was the purpose or effect of such price concessions.

The examiner is not obliged to make any finding as to why Shamrock went out of business, but only to eliminate the fact that the complaint practices were a significant factor therein. However, it may be noted that while selling out as Shamrock, the former owner of the company has remained in the selfsame market where he allegedly could not compete, as the assistant sales manager of Oak Farms Dairy, under a long-term contract and at a salary equalling that which he drew from his own company. This appears to suggest that the former owner preferred the security of working for another, larger company to bearing the brunt of the management of his own company with all of the responsibility which the latter entails in the rough and tumble of the competitive struggle.

Another competitor witness was the representative of Lone Star Creamery, which is in both milk and ice cream. Its annual ice cream sales were stated to be in the \$200,000 to \$300,000 bracket, and it was claimed that they had declined by approximately \$50,000 during the past five years. The Lone Star witness testified that the worst competitive practice which his company had to face was that of supplying customers with extra cabinets which were used for storing frozen foods other than ice cream. However, he indicated that he had not encountered much of that type of competition from respondents Carnation, Foremost or Borden. The bulk of the witness' testimony was directed at respondent Arden (Camellia).

The Lone Star witness referred to six accounts which his company had allegedly lost because of competitive difficulties. One account involved a drug store which he claimed to have lost to Camellia primarily because of a 10-cent a gallon discount. There is no reliable evidence (other than the witness' hearsay testimony as to what the owner told him) to establish that the account had in fact received a discount from Camellia, nor is there any evidence that such discount was off list or was conditioned on any exclusive dealing arrangement. While the witness also referred to two cabinets which the account had received and some lettering worth approximately \$75, no claim was made that these had motivated the account in switching. There

appears to be little likelihood that this was the case since the cabinets were merely a replacement for two which Lone Star had supplied to the account and the lettering was apparently a replacement for a neon sign with a privilege panel which Lone Star had furnished to the account. The witness also referred to another drug store account which he claimed had been lost to Camellia because of the supplying of a frozen food cabinet free of charge. No finding can be made, based on the witness' hearsay and conclusional testimony, that Camellia furnished a frozen food cabinet without charge to the account in question. Reference was also made by the witness to a Camellia account which he tried to obtain and was allegedly advised that Camellia had supplied the account with two cabinets and a sign. Despite these reported facts, Lone Star was permitted to install one of its own cabinets and to split into the account. It would appear from this incident that the supplying of cabinets and signs by Camellia is not tied to any exclusive dealing arrangement. The fourth account involving Camellia was one which Lone Star had been unsuccessful in obtaining because, as the account advised him, Camellia had moved some of the dealer's equipment from another location and had promised to service it. There is no reliable evidence to support the witness' hearsay testimony regarding this incident, nor does the evidence establish that this was the reason Lone Star could not obtain the account.

Of the remaining accounts referred to by the Lone Star witness, one involved respondent Carnation and the other respondent Borden. The witness claimed that he had lost a drive-in market to respondent Carnation because the latter had sold the account a cabinet for frozen foods. There is no reliable evidence in the record with respect to the alleged sale and, moreover, Lone Star was able to regain the account in question within a month thereafter. The incident involving respondent Borden pertained to a chain of stores to which Lone Star had sold ice cream cabinets with the understanding that they would be paid for out of the gallonage rebates. However, when the ice cream sales were not sufficient to meet the installments on the cabinets the account asked Lone Star to repurchase them, but the latter declined. The chain made arrangements later to have Borden serve a number of the stores and the latter supplied them with cabinets. The record is lacking in reliable evidence that the supplying of ice cream cabinets by Borden was the reason the account switched. The Lone Star witness indicated that he did not regard the supplying of cabinets for ice cream as an objectionable practice, although he did where they were supplied for other frozen foods. There was nothing unusual about Borden's supplying the account with ice cream storage

cabinets, in accordance with the prevailing custom in the area. The Lone Star witness himself conceded that it was not the usual practice of Borden to use cabinets as a selling weapon. If Lone Star is having any competitive difficulties, the record fails to establish that such difficulties are due substantially to the engagement by any of respondents in the complaint practices.

Another competitor represented at the Houston hearings was from Sun Up Ice Cream Company, which ranks fourth or fifth in volume in the market, according to the testimony of its president. Sun Up has an annual volume of approximately 600,000 gallons, with sales amounting to approximately \$778,000. The Sun Up witness' testimony consisted mainly of a recital of the facts with respect to his company's loss of eight accounts, six of which were lost to respondent Arden (Camellia), one to Foremost and one split with Borden.

The loss of most of the accounts involving Camellia was attributed primarily to the furnishing of equipment, including cabinets which could be used for storing frozen foods and, in one instance, a sign alleged to cost \$3,000. The witness made no claim that he was advised by the accounts in question that they had switched because of the furnishing of the equipment in question, but his testimony appears to have been based primarily on his own conclusions as to the accounts' motivation in switching. In no instance was any reliable evidence offered as to what equipment, if any, had been supplied to the accounts in question. Most of the establishments referred to were grocery stores affiliated with a buying group known as the Lucky Seven Stores. The witness conceded that in at least several instances the store owners had advised him they thought they should give their business to Camellia because the latter had agreed to spend substantial amounts in cooperative advertising with the group.

The testimony of a Camellia official who testified in the defense hearings indicates that the Lucky Seven group had invited bids from a number of ice cream manufacturers and that his company had submitted a bid calling for a discount of 15 percent off the list price and an agreement to spend a certain amount for cooperative advertising on television and in newspapers. The 15 percent discount was arrived at after Arden had learned that the price offered by its competitor, Swift, was lower than its own. It would therefore appear that the account was lost mainly on a price basis and not because of equipment. Not only is there no evidence of any exclusive dealing arrangement connected with Arden's bid, but the Arden official testified that his company only supplied 70 percent of the volume of the

stores, the balance being split with competitors who are in 40 percent of the stores.

The one account involving respondent Borden was also a member of the Lucky Seven group. The store was being supplied by Sun Up on an exclusive basis and had received two new automatic self-defrosting cabinets from Sun Up. The witness claimed that Borden was able to split into the account after selling the proprietor three cabinets similar to his own, his own cabinets being returned to him, and that the account stored his ice cream in Borden's cabinets and asked him for a refrigeration allowance. There is no reliable evidence in the record that respondent Borden did, in fact, sell any cabinets to the account or that this was the reason why the account switched. It may be noted that Sun Up's criticism is directly contrary to Lone Star's. The latter complained because Borden had furnished cabinets rent-free to an account to which it had sold cabinets, whereas Sun Up criticized it for doing the exact opposite, viz., selling cabinets to an account to which Sun Up had supplied cabinets rent-free. Apparently nothing Borden did would satisfy both of these competitors. In any event, both Sun Up and Borden were soon terminated as suppliers when the account switched to Camellia, for reasons not appearing in the record.

The final complaint of the Sun Up witness involved two of the Minimax stores, to which reference has already been made above in connection with the Lone Star witness. The Sun Up representative claimed that these stores had switched to Foremost because of a discount on milk and ice cream, and that the latter paid the balance due on several cabinets which Sun Up had recently sold the account. There is no reliable evidence in the record, aside from the witness' hearsay testimony, as to what, if any, discount the account had received from Foremost, nor is there any evidence that the transaction involved any exclusive dealing arrangement. In any event, by the time of the Houston hearings, the stores in question were handling Camellia and had ceased handling Foremost and also Borden, which had apparently later split into the account.

Despite Sun Up's alleged loss of accounts, the witness conceded that his company's sales in 1955, amounting to \$778,000, and its gallonage of 600,000 gallons, represented an increase over the past five-year period. He also conceded that the company had had a gradual increase in business since 1946. However, he claimed that the company's rate of profit had declined about 25 per cent from what it had been prior to 1947 or 1948. There is no reliable evidence in the record that this alleged decline in profit rate is due to the complaint prac-

tices. In fact, the witness conceded that his profits had been affected, to a large extent, by increases in the cost of manufacturing ice cream, including paper, labor and ingredients. He also conceded that profits in the ice cream industry as a whole had dropped after 1946 or 1947.

Another competitor witness, the former owner of Smith Ice Cream Company, testified briefly that his company had sold out in 1954 to Lily Ice Cream Company. The owner is now employed in a nearby community by another competitor, Oak Farms Dairy of Dallas. He claimed that he had sold out because "conditions got to where it was impossible for me to make money out of [the business]." The "conditions" were described by the witness as "finance deal[s] and the frozen food cabinets and the things like that that customers demand to have their business". No reference was made to any of the respondents as being responsible for any of these conditions nor for Smith's loss of or inability to acquire any specific account. No claim was made that Smith had lost any considerable number of accounts, or that it had sustained any substantial loss of gallonage prior to the time it sold out. On the contrary, it was at its peak gallonage (approximately 100,000) when it sold its business, having entered the ice cream business in 1941. The testimony of the witness has no substantial evidentiary value.

As above indicated, counsel supporting the complaint called representatives of five retail dealers in Houston. Three have already been discussed above in connection with the testimony of the Shamrock and Lone Star witnesses. The fourth witness was a former customer of Klein Ice Cream Company which had switched to respondent Camellia. While the testimony of this witness indicates that one of the three cabinets which had been supplied to him by Camellia was being used for the storing of frozen foods, it also appears that he had three cabinets from Klein, one of which was likewise being used for the storing of frozen foods. The principal reason given by the witness for his change to Camellia was that he wanted a more modern display cabinet for his ice cream and that Klein had refused to supply one. Following the change to Camellia and the installation of the display cabinet, the account's ice cream sales increased substantially. There is no evidence that the supplying of this equipment by Arden was in any way connected with an exclusive dealing arrangement. Assuming that Arden did supply the account with one cabinet to be used for storing frozen foods, its action was obviously calculated to meet the competition of Klein which had supplied a cabinet for a similar purpose.

The fifth dealer witness was connected with a drive-in grocery chain having 42 stores, the chain being the largest in the area. The chain handles at least two brands of ice cream in each of its stores, including Sanitary, Sun Up, Oak Farms, Carnation and Camellia. It receives a volume rebate from each of these suppliers. According to the witness, a salesman representing one of Arden's competitors had informed him that a competing supermarket chain was getting a better discount from Arden, and, after the witness had communicated with an Arden representative, the latter agreed to give him a discount in the same amount. However, according to an Arden official who testified during the defense hearings, the granting of the additional discount was due to a bookkeeping error and was later rescinded. This entire transaction would appear to have no relevance to the issues in these proceedings since there is no evidence that either the original discount or the increased amount was based on any exclusive dealing arrangement. The testimony of the witness does, however, serve to emphasize the tendency toward the splitting of accounts in the Houston area. It may also be noted that despite the Arden discount, its price to the chain was higher than that of two of its local competitors, Oak Farms and Sun Up. Furthermore, its sales to the chain represented only 2.75 per cent of the chain's ice cream purchases, compared with the 39.15 per cent share of its local competitor Sanitary.

Not only does the evidence concerning the Houston market fail to indicate any substantial injury to competition in the area or to any competitor, but it also fails to indicate any startling changes in market position in favor of respondents. Respondent Foremost's market share has actually declined substantially from 11.9 per cent in 1950 to 5.3 per cent in 1955. Respondent Carnation's share has declined from 16.3 per cent to 14.8 per cent during the same period. Respondent Borden's share has also declined during the same period from 14.2 per cent to 13.5 per cent. Only respondent Arden has shown any increase, viz., from 7.1 per cent in 1950 to 10.0 per cent in 1955. Its increase of 2.9 per cent is substantially less than the aggregate decline of 8.8 per cent of its fellow respondents. Presumably other competitors in the Houston market have been increasing their share of the market, while three out of the four respondents have been declining.

b. The Beaumont-Port Arthur Area

Beaumont is located approximately 90 miles east of Houston, and Port Arthur is approximately twenty miles east of Beaumont. Many of the companies operating in the area do business in both communities, although there are somewhat fewer companies in the Port Arthur

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area. Counsel supporting the complaint called two competitor witnesses from the area, a representative of Dairy Maid Ice Cream Company of Beaumont and a representative of Townsend Dairy of Port Arthur. No dealer witnesses from the area were called.

The respondents doing business in the Beaumont area are Carnation, Foremost, Borden and Arden (Camellia), the latter operating only on the fringes of the area. The other principal competitors include Swift, Bergen, Consumers, Sun Up, Oak Farms, Townsend and Dairy Maid. Dairy Maid Ice Cream Company of Beaumont is one of the largest companies in the area. Its gallonage had grown from approximately 200,000 gallons in 1947 to approximately 300,000 at the time of the Houston hearings in 1956. The Dairy Maid witness testified that its present gallonage represented a decline of approximately 10,000 gallons from its previous peak, but indicated that he did not regard this as a significant decline. He attributed the decrease mainly to the entry of new competitors into the market, naming specifically the non-respondents Swift, Sun Up and Oak Farms. The Dairy Maid witness testified that while his company's sales had increased substantially since 1947, its rate of profits in 1955 was one of the poorest it had experienced. The extent of such decline in profit ratio and the over-all profit position of the company was not, however, indicated. He attributed such decline to the "increased activity that came into our area." Such increased competition caused the company, according to the testimony of its representative, "to do things that normally we didn't need to, such as advertising", to increase its sales personnel and to change from the conventional type of cabinets to the glass-top and self-defrosting type cabinets.

The Dairy Maid witness attributed the bulk of his company's trouble to the non-respondent Swift and indicated that most of the business it had lost during the past year had been to Swift. He claimed that Swift had been able to obtain accounts "on a price deal" and by permitting customers to pick out their own slide-top cabinets from an assortment of cabinets transported on a Swift delivery truck to the dealers' premises. It is unnecessary for the examiner to make any findings with respect to the reliability of the witness' general assertions with respect to Swift since that company is not a respondent in these proceedings. However, it seems clear that the recent decline in sales and profit ratio which Dairy Maid has experienced cannot be attributed to the respondents, to any significant degree, in view of the fact that the witness himself attributed his company's losses to Swift "rather than to these other people."

The Dairy Maid witness did refer, in the course of his testimony, to several accounts lost to some of the respondents. Aside from the fact that such losses, by the witness' own admission, were of no significance, there is no reliable evidence that any of them was due to the complaint practices. Thus, the witness attributed the loss of a good account to respondent Foremost because the latter had supplied the account with a sign, but conceded that he had no personal knowledge as to whether such a sign had ever been supplied. In any event, it appears that Dairy Maid was later able to split back into the account with Foremost, despite the alleged supplying of a sign. Since Dairy Maid was able to split into the account, there was presumably no exclusive dealing arrangement involved in the account's dealings with Foremost. The witness also attributed the loss of a drive-in grocery account to respondent Foremost because of the latter's lower price. No reliable evidence as to Foremost's price was offered, nor does it appear that any such price was connected with an exclusive dealing arrangement. Furthermore, it appears that the loss of the account occurred shortly after Dairy Maid had raised its price to the account and that the putative lower price of Foremost was exactly the same as Dairy Maid's price before the increase. It would appear more likely therefore that the account was lost due to Dairy Maid's raising its price, rather than to any undercutting by respondent Foremost. The Dairy Maid witness attributed the loss of another grocery account to respondent Foremost because of the non-complaint reason that the wholesale grocery house which was supplying the account had put pressure on it. The witness conceded that his testimony concerning this incident was based "more or less [on] rumors along the same line" as the other two accounts described above. Moreover, he conceded on cross-examination that he actually had not lost the account but merely split it with Foremost and that when he later put into effect a 5 percent volume rebate he regained the account completely.

Prior to instituting the 5 percent volume rebate, Dairy Maid was on a single price schedule, although it did give a few of its volume accounts a lower price. The witness attributed the institution of the sliding scale type of price schedule in the area to respondent Carnation. However, he expressed the opinion that Carnation was to be "commended" because "it costs you just as much * * * to service a small account, as it does a large account and therefore when you bring more merchandise into a store why that man's entitled to a little better price." No reference was made by the witness to the loss of any accounts to respondent Carnation because of the latter's alleged quantity discounts, or for any other reason; nor was respondent Borden cited as

being responsible for the loss of any accounts. In the case of respondent Arden (Camellia), the witness indicated that his company competed with it only on the fringes of their territory and that he had had no competitive difficulties with that company.

The other competitor witness from the area was a representative of Townsend's Dairy of Port Arthur, which does business both in Port Arthur and Beaumont, as well as in the surrounding counties. The Townsend witness testified regarding competitive difficulties with the non-respondent Swift, which he characterized as "possibly the most damaging competition we have had." The only respondent referred to by the witness was Foremost, to which the loss of two accounts was attributed, one of which was a school district which was lost on the basis of a lower bid. When the witness declined to disclose to counsel for Foremost certain memoranda which he had used in testifying, most of his direct examination was stricken except for a portion which was not based on such memorandum.⁹⁶ The record fails to establish any injury to competition in the Beaumont-Port Arthur area as a result of the use of the complaint practices by any of the respondents.

c. Denton Area

Denton is located approximately 38 miles from Dallas and Fort Worth. The only witness called from this area was a representative of Brooks Dairy. The respondents who operate in the area are Borden, Carnation and Foremost. There are also four other Texas companies doing business in the area, in addition to Brooks Dairy, viz., Boswell, Vandervoor, Oak Farms and Cabell, the first two having their plants in Fort Worth and the latter two in Dallas. Swift & Company is also active in the Denton area.

The testimony of the Brooks Dairy witness fails to disclose that there has been any injury to competition due to the respondents use of the complaint practices or otherwise. Brooks has a volume of approximately 100,000 gallons and is the largest supplier in the area. Its volume has been increasing each year and its profits have been stable. While the witness indicated that the company's costs had increased due to the necessity of furnishing customers with more expensive equipment, he made no effort to attribute this to any of the respondents. His testimony indicated that Swift had been a leader in supplying customers with neon signs and refrigeration equipment and in granting rebates.

⁹⁶ The witness was later given an opportunity to have his testimony reinstated, after he had indicated that he might have understood the examiner's ruling as to what he was required to exhibit to counsel for Foremost, but again declined, with the concurrence of counsel supporting the complaint, to permit any examination of memoranda used to aid him in testifying.

The only respondent to whom the Brooks witness attributed the loss of any account was Carnation, which he claimed acquired one of his accounts after agreeing to purchase an old ice cream freezer from the owner of the establishment. Not only is there no reliable evidence (aside from the witness' hearsay testimony as to what the owner told him) that Carnation purchased the freezer or to indicate that the price which it paid was not commensurate with the value of the freezer, but the reason assigned by the witness for the alleged loss of the account does not fall within the scope of the complaints. The Brooks witness testified that his company had had no competitive difficulties with respondent Borden in recent years, characterizing that company's policies as very conservative. The only reference made to respondent Foremost was that it had taken one unnamed account from Brooks and had been troublesome to some extent in making Brooks meet its discounts. No specific accounts were mentioned and there is no indication that the prices being charged by Foremost were other than its regular list prices or that they were in any way connected with an exclusive dealing arrangement.

Insofar as the supplying of equipment is concerned, the Brooks witness indicated that it had always been the practice for ice cream manufacturers in the area to supply a cabinet without making any rental charge. The only problem that had arisen, in this connection, was that the cost of such cabinets had gone up sharply as the more modern display cabinets had come into vogue. The cost of signs has likewise increased. However, none of these increases can be attributed to any of respondents, and the witness made no claim that they had used cabinets or signs as a competitive weapon.

d. San Antonio-Austin Areas

The only witness called from this area was a representative of Jersey Land Creamery of San Antonio who had previously been connected with Polar Ice Cream Company of Austin. San Antonio and Austin are approximately 75 miles apart and there appear to be a number of different competitors in each area. However, in view of the fact that the sole witness' testimony related to both areas and there is some overlap in competition, the evidence with respect to these areas is discussed together below.

The respondents doing business in the San Antonio area are Borden, Foremost and Carnation. The local competitors, in addition to Jersey Land Creamery, include Knowlton, Metzger, Tiner and Gyer. Swift & Company is also active in the area. Jersey Land Creamery has approximately 380 accounts with a sales volume of approximately

\$250,000. The number of its accounts has been increasing and its volume has also increased. The company's rate of profit has been stable during the past few years.

All of the competitors in the area supply their customers with cabinets without making a rental charge therefor, and a number supply them with signs. Jersey Land is one of the companies which supplies its customers with signs, the witness expressing the opinion that such signs were worth the cost thereof because of their advertising value. The company supplies cabinets to all but 35 of its customers. It also sells cabinets to some accounts on a conditional sales basis. Customers who own their own refrigeration equipment receive a five-cent a gallon discount, that being Jersey Land's estimate of the cost per gallon of furnishing a cabinet. While Jersey Land does not supply cabinets specifically for frozen foods, the witness indicated that it was not uncommon to find customers storing such products in the ice cream cabinet, although the company endeavors to discourage the practice. Jersey Land, along with its competitors, grants its customers a quantity discount on a sliding scale basis. The supplying of cabinets and signs and the granting of quantity discounts do not appear to be connected with any exclusive dealing arrangement since the majority of stores in both San Antonio and Austin handle more than one brand of ice cream.

The Jersey Land witness spoke in broad-brush fashion about "a vicious price circle * * * amongst some of the majors", indicating that the prices of these "majors" (not otherwise identified) were quite "fluid." The only specific testimony about so-called fluid prices pertained to two accounts in which respondent Carnation was involved. One of the accounts was the Post Exchange at Randolph Field, where the witness cited the alleged price of Carnation as reported to him by someone at the Exchange. Not only is there no reliable evidence of Carnation's price in this instance, but there is not a scintilla of evidence of any exclusive dealing arrangement with the exchange. The other price incident involved a grocery account which had allegedly been granted a 10 percent discount by Carnation. Here again there is no evidence in the record, other than the witness' unreliable hearsay testimony, as to what discount, if any, the account received from Carnation. There is likewise no evidence that the alleged discount represented a departure from Carnation's price schedule or was in any way tied to an exclusive dealing arrangement.⁹⁷ On the contrary, despite the impression given by the witness that he had been unable to acquire

⁹⁷ As above noted, Jersey Land likewise grants quantity discounts to its customers on a sliding scale arrangement.

the account because of the alleged discount, it developed on cross-examination that his company had been able to split into the account despite the alleged discount and that, in addition to Carnation and his company, another local company (Knowlton) was also serving the establishment.

In addition to the above two incidents, allegedly involving price considerations, the witness also cited two other instances of competitive difficulties with Carnation involving the furnishing of equipment. Neither involved the loss of any accounts but pertained to accounts which Carnation was already serving and which Jersey Land was seeking to take away. Both involved the alleged supplying of cabinets (one allegedly for frozen foods) and signs by Carnation. There is no reliable evidence in the record, other than the witness' hearsay testimony, as to what Carnation supplied these accounts or to indicate that the furnishing of the alleged equipment was the reason the accounts chose Carnation as a supplier, or that the furnishing thereof was connected with any exclusive dealing arrangement.⁹⁸ The lack of any exclusive dealing arrangement being involved in these transactions is apparent from the fact that in one of the instances cited, Jersey Land was able to split into the account despite the alleged supplying of the cabinets and sign by Carnation.

The witness' testimony concerning the Austin area indicates that only two of the respondents, Borden and Carnation, do business in that area. Swift also is active in the area. The local companies include the witness' former connection, Polar Ice Cream Company, and Lily Ice Cream Company, Austin Maid, Superior and Oak Farms. The only account to which reference was made by the witness as having been lost by his former company involved the non-respondent Swift & Company. The witness also referred to a Carnation account which his company had sought to acquire, but was allegedly unable to obtain because Carnation had supplied the account with a number of cabinets, including several for frozen foods. There is no reliable evidence in the record to substantiate the witness' hearsay testimony concerning this account. In any event, despite this alleged competitive difficulty with Carnation, Polar has been able to maintain its position as the second largest ice cream manufacturer in the Austin area with an estimated gallonage of 400,000 gallons, as compared to an estimated gallonage of 80,000 gallons

⁹⁸ While the witness did claim that he had seen frozen food in some of the cabinets, this does not establish that Carnation had supplied the equipment for that purpose, since the witness himself conceded that customers put frozen food in his company's ice cream cabinets without permission. He also conceded that he had the experience of customers reporting things to him which turned out to be untrue.

for respondent Carnation. The largest company in the area is the local Texas company, Superior.

* * * * *

The evidence fails to show any injury to competition or to any competitor as a result of the engagement by any of the respondents in any of the complaint practices in any area in Texas. The evidence likewise fails to indicate any significant improvement in the competitive position of respondents due to the complaint practices. On the contrary it appears that Borden's share of state production in Texas has declined from 17.5 percent in 1947 to 13.3 percent in 1955. Carnation's share increased slightly from 2.6 percent in 1947 to 3.9 percent in 1950 and thereafter, following its acquisition of four local companies in 1951, 1953 and 1955, its share rose to 7.5 percent by 1955. Arden's share increased almost imperceptively from a minimal 1.1 percent in 1950, when it entered the state, to 1.6 percent in 1955. The record contains no separate information with respect to respondent Foremost's production share in Texas. However, it does appear that its share of production in Texas and Louisiana combined has increased only slightly from 7.11 percent in 1950 to 7.38 percent in 1955.

12. *Phoenix, Arizona*

The hearings in Phoenix involve evidence with respect to both the Phoenix and Tucson areas. The respondents involved are Carnation, Arden and Borden, which do business in both areas. Borden is a relatively recent entrant into the Arizona market. Swift & Company also operates in both areas. One of the local competitors, Lily Ice Cream Company, also does business in both Phoenix and Tucson. Other local competitors are Bratt, Frigid Products, Brik O' Gold and Star, which operate primarily in the Phoenix area. The local companies in Tucson include Sunset and Tucker. Representatives of Lily and Tucker testified at the Phoenix hearing. Representatives of Bratt and Brik O' Gold were subpoenaed, but were subsequently excused at the request of counsel supporting the complaint. No dealer witnesses were called.

The testimony of Lily Ice Cream Company relates mainly to the Phoenix area. The evidence indicates that it has been customary for manufacturers in the area to supply their customers with ice cream cabinets. Prior to 1948 such cabinets were supplied without a rental charge. Beginning in 1948, and apparently following the lead of the companies doing business in California where a rental

charge was being made, ice cream manufacturers in Phoenix began to make a rental charge for supplying cabinets. However, this practice was abandoned early in 1955. There is no evidence that any of the respondents, who apparently were instrumental in instituting the practice of charging a rental, had had anything to do with its abandonment. On the contrary, the testimony of the Lily witness indicates that his local competitor, Bratt, was one of the first to discontinue the charging of a rental and was the cause for his own company's discontinuance of the practice.

The record fails to establish that the respondents have been responsible for any significant competitive difficulties by Lily, arising out of the complaint practices. The only evidence offered of any competitive difficulties with the respondents involved four accounts in which Arden was a supplier and one where Carnation was the supplier. The four accounts involving Arden included only one which had actually been lost to Arden, the other three being accounts which Lily sought unsuccessfully to acquire. The witness sought to attribute the loss of the single account and the inability to acquire the other accounts to the making of loans by Arden. Unlike most similar testimony there is corroboration in the record of the witness' hearsay testimony, with respect to the making of loans by Arden to three of the four accounts referred to.⁹⁹ However, there is no reliable evidence that the making of the loans was the reason why the accounts had chosen Arden as a supplier. The witness' testimony concerning these transactions was based on information received from his salesman which, aside from being hearsay, did not even purport to reflect any advice from the dealers concerning their motive for dealing with Arden, but merely represented the witness' own conclusion or surmise concerning the accounts' motivation. The fact that in no case, including the single account which it lost, was Lily requested to make a loan suggests that the making of a loan by Arden was not a controlling consideration in the choice of suppliers. Not only is there no evidence of any exclusive dealing arrangement in connection with any of these transactions, but the fact that when one of the accounts later changed hands the new owner switched to Lily and nevertheless continued to pay Arden on the balance of the loan, would appear to be affirmative evidence of the absence of any exclusive agreement. The lack of probability that any exclusive arrangements were involved is further buttressed by the evidence concerning another account (not referred to by the Lily wit-

⁹⁹ Such corroboration appears in an extract from recordings appearing in the county recorder's office, which was read into the record by agreement of counsel.

ness) which despite a loan from Arden decided to purchase a portion of its requirements from the local competitor, Bratt. Despite the apparent criticism of Arden for the making of loans, the Lily witness conceded that his company also made loans to customers. No claim was made that Arden was the initiator or leader in the practice.

The single account involving respondent Carnation was one which the Lily witness claimed his company could not acquire because Carnation had given the account a guaranteed rebate which brought the price below that of Lily. Not only is there no reliable evidence as to Carnation's discount or rebate to the account in question (other than the witness' hearsay testimony as to what his salesman told him), but there is no evidence that the alleged rebate was connected with any exclusive dealing arrangement.

The few instances related by the witness, only one of which involves the actual loss of an account, had had no significant effect on Lily's fortunes. Despite the witness' reluctance to reveal his gallonage figures, he conceded that his company's sales amounted to "something like" 300,000 to 400,000 gallons a year. The company's production has steadily increased, albeit the witness claimed that the increase had not kept pace with the increase in population. The company is admittedly a substantial factor in the market and its products are well received by the retail stores and the public in the area. It has had to remodel its Phoenix plant several times in order to keep pace with its increased sales. It has recently acquired a competitor in the Tucson area and is building a new plant there. These facts hardly bespeak the existence of any serious competitive problems for Lily Maid.

The respondents involved in Lily's testimony have not fared nearly as well in the Phoenix market. Respondent Arden, which in 1950 had 40.4 percent of the Phoenix Metropolitan market, experienced a very substantial decline by 1955 to 19.7 percent. Respondent Carnation's share has declined from 24.2 percent in 1950 to 21.8 percent in 1955. No comparable figures are available for respondent Borden which has only recently come into the market and was not referred to by either of the two witnesses in Phoenix.

The evidence offered through the owner of Tucker Ice Cream Company of competitive conditions in the Tucson area is almost wholly without probative value. The Tucker witness was an elderly, semi-retired gentleman who had not called on any accounts for almost ten years and had turned over the operation of his business to a young man who made deliveries for him. While claiming that his gallonage had decreased by approximately one-third since 1951, the witness had no idea what his gallonage was.

The Tucker witness made the broad claim that he was unable to compete because competitors offered better equipment and because their products were "better advertised, nationally known, and we are local", but was unable to give any reliable testimony upon which a finding could be based that any of the respondents have been responsible for his competitive difficulties. One of the few specific accounts to which the witness made reference was lost to the nonrespondent Swift, for reasons not appearing in the record. While he also referred to respondent Arden as possibly being one of two competitors involved in some painting for another account which he had lost, he later recalled that the competitor involved was Swift, rather than Arden. After further inability to recall any accounts which his company had lost or been unable to acquire, the Tucker witness agreed that all he knew about the accounts "would be hearsay,—what my driver tells me", and suggested that the latter "would make a better witness than me because he has his fingers right on the pulse of everything." The Tucker witness indicated that his company had never done much advertising and that in recent years it did none whatsoever.

That the Tucker Ice Cream Company is in a moribund condition would appear to be strongly suggested by the evidence. However, there is not a scintilla of evidence that this has been due to any action on the part of the respondents. While not material to these proceedings, it seems apparent that the root of its difficulties is in the inactive role of its ownership due to age and state of health, and the lack of aggressive selling, merchandising and advertising programs.

* * * * *

The record is barren of any competitive injury due to the engagement by any of the respondents operating in the State of Arizona in any of the complaint practices. The only evidence offered outside of the testimony of the two competitor witnesses was a list of loans and sales of equipment under conditional sales contracts made by respondent Arden in various portions of the State of Arizona. However, no competitors were called from any of the areas involved, outside of Phoenix and Tucson, and there is no evidence that the making of such loans or the sales of equipment by respondent Arden has even produced a competitive ripple. Of the transactions appearing in such list, most involved the sale of cabinets to customers and, in a number of instances, the sale of trucks and equipment to non-retail ice cream distributors, who purchase respondent's ice cream for resale to retail customers. There were only 16 transactions from 1947 to 1955 in the entire State of Arizona involving loans to retailers and only 13 involving sales of soda fountain equipment to retailers. In no case was

evidence of exclusivity offered and, so far as appears from the record, all accounts involved may have been Arden's existing accounts rather than accounts acquired from others.

In any event, the making of such loans and the sales of such equipment do not appear to have resulted in any significant improvement in Arden's competitive position in the state, since its share of state production declined drastically from 45.0 percent in 1947 to 21.2 percent in 1955. This hardly suggests that respondent Arden is overwhelming its competitors in the State of Arizona. Respondent Carnation did not begin manufacturing in Arizona until 1951. In its first full year of production in the State, 1952, its share of production was 18.4 percent. By 1955 this had increased to 21.3 percent. Carnation's increase does not begin to offset Arden's substantial decline. Presumably other, nonrespondent competitors were increasing their share during this period.

13. *Los Angeles, California*

The only witness called at the Los Angeles hearings was a representative of Christensen Ice Cream Company, which is located in San Bernardino, approximately 60 miles east of Los Angeles. The respondents operating in the area are Arden, Foremost (Golden State), Carnation and Beatrice. Other competitors are Challenge, Big Bear, Balian, Kranila and Swift. The testimony offered through the sole witness called was substantially to the effect that (a) the California law requiring a one-third down-payment on the sale of equipment and the balance in eighteen months was working out satisfactorily; (b) some ice cream competitors in the area are in the wholesale grocery business and are liberal in extending credit to customers on their grocery purchases; and (c) some competitors own stock in retail outlets. The witness suggested that the practice of extending credit through grocery affiliates of ice cream companies constituted an avenue for evasion of the provisions of the California law limiting the extension of credit on ice cream purchases. The witness cited the existence of a subsidiary of respondent Arden, known as Market Wholesalers, which is in the wholesale grocery business and which he claimed some of his customers had told him had extended to grocers "greater credit than they could otherwise get" on their purchase of *groceries*. The witness acknowledged that he was not in a position to say whether such claims were true.

It appearing that such extension of credit involved the wholesale grocery business, and not the frozen foods business, and was therefore outside the scope of the complaints, objection to further interrogation

of the witness along these lines was sustained. Also sustained was an objection to testimony by the witness concerning the alleged ownership by respondents Arden and Foremost of stock in retail grocery stores, as being outside the scope of the complaints. Upon the sustaining of these objections, the witness was withdrawn and all other witnesses were excused by counsel supporting the complaint. No evidence was offered with respect to the use of the complaint practices in southern California, or as to the effect thereof on competition. There is, of course, no basis in the record for any finding of injury to competition in the San Bernardino area or elsewhere in southern California, as a result of the engagement by any of the respondents in any of the complaint practices.

14. *New York, New York*

The respondents doing business in the New York Metropolitan area are National, Borden, Beatrice and Foremost. The witnesses at the New York hearings consisted of sixteen retail dealers and sales representatives of respondents National, Borden and Beatrice. Although there are a considerable number of ice cream manufacturers in the New York area, counsel supporting the complaint failed to call a single representative of a competing ice cream manufacturer.

Of the sixteen dealer witnesses who were called, seven testified with respect to assistance from respondent National, and seven with respect to respondent Borden; two testified concerning both Borden and National, having done business with both at different times; and only two testified concerning respondent Beatrice. Most of the dealers were owners of small confectionery and candy stores or luncheonettes. Of the dealers who testified with respect to respondents National and Borden, thirteen had received loans from one or the other and, in two instances, from both. Most of the loans involved relatively small amounts of money ranging from \$100.00 to \$500.00. The loans were made mainly for remodeling purposes and, in some instances, meant the difference between a small dealer's staying in business and closing up. In only a few instances did the testimony reveal that the making of a loan or other assistance from a respondent was a factor in the account's decision to deal with the respondent. In three or four instances the loan was made to an account which was already being served by the particular respondent, and there was no indication that anyone else had sought to acquire it. In none of the latter instances did the witness testify that the loan had anything to do with his continuing to deal with the respondent. On the contrary,

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in the case of one of Borden's accounts, when it became dissatisfied with Borden it switched to a non-respondent supplier which assumed the balance of the Borden loan.

The evidence indicates that there is a very considerable switching around of accounts in the New York area and the fact that there is an outstanding loan does not appear to be an impediment to the acquisition of such accounts by local competitors since the latter also make loans to customers. In fact five of the loans about which dealer witnesses testified, involved merely the assumption by respondent Borden or National of the unpaid balance of a pre-existing loan received from a local competitor. In only one of these did the witness indicate that the making of the loan had anything to do with the account's switching. The decision to change suppliers in the other cases was precipitated by some other circumstance, such as dissatisfaction with the service or product of the other supplier or complaints from customers. In the one instance in which the witness testified that a loan from respondent National (which enabled him to pay off the balance of a loan from a local supplier) was "a very small factor" in his choice of suppliers, he also indicated that he had been seeking for sometime to obtain National's brand but had been unable to do so as long as another store in the neighborhood was carrying it.

In only five instances did the loan transaction involve an initial loan by National or Borden. However, here again, with possibly two exceptions, there was either no evidence that the loan was an inducement for switching, or it appeared affirmatively that other circumstances were responsible for the change of suppliers, such as dissatisfaction with the other supplier or a preference for the products of the particular respondent. Thus, one of the dealers (the operator of a drug store) whose testimony suggests that possibly a loan from respondent National for remodeling purposes may have been a factor in his decision to change suppliers, also indicated that when his local supplier learned of this he too agreed to make the loan, as did several other companies, but that he preferred respondent National's product because of its quality. Another dealer who testified that a willingness to loan him \$800 by respondent National was one of the factors which he took into consideration at the time he switched from a local supplier, also indicated that the local company's brand had been in the store when he recently purchased it and that because of his satisfaction with Breyer's (National) at his previous location he continued to handle the local company's brand "just as long as to make a transfer to Breyer's." However, when the dealer later had a personal difference with a Breyer salesman, he switched back to the local supplier, which assumed

the amount of the balance of the National loan plus an additional sum. Thereafter, when his sales of the local brand began to fall off he switched to respondent Borden, which merely assumed the balance due to the local supplier. Although the balance had since been paid off, the dealer continued to trade with Borden because of his satisfaction with that company.

There is no indication that the policy and practice of respondents in the making of loans is more liberal than that of competitors generally. On the contrary, the testimony of the dealer witnesses indicates that some of the respondents are more conservative than some of their competitors. Thus it appears that one of the dealers who had been dealing with respondent Borden sought a loan which the latter declined. He then switched to a local competitor, who loaned him \$1,200 with the understanding that it would not have to be repaid until the store was sold. When his sales began to fall off he sought to return to Borden and finally induced the latter to assume the competitor's loan. However, Borden did so only on condition that the dealer start repaying the loan on a regular installment basis. In another instance where the dealer had received a small loan of \$150 at the time of switching to respondent National from a local supplier, the respondent declined to later make another loan of \$500, and the dealer switched back to his old supplier which made the loan.

Most of the loan transactions involved conventional loans, secured by chattel mortgages, which had to be paid off. However, in three instances the dealers had received advance rebates which were treated as loans, but which did not have to be repaid if the account purchased a certain amount of ice cream or dealt with the respondent for a given period, usually a year. In only one of these instances, that involving respondent Beatrice, did the dealer indicate that the advance rebate was an inducement for his change of suppliers. In the second instance, also involving respondent Beatrice, there is no evidence as to whether the payment acted as an inducement since the agreement had been made by the witness' father and she had no personal knowledge regarding the transaction. In the third instance, involving respondent Borden, the so-called advance rebate actually was a price concession intended to equalize the difference in price between Borden and a local supplier's lower price.¹⁰⁰

Of the remaining dealers, one testified that respondent National had supplied him with a compressor for his fountain and had serviced it,

¹⁰⁰ Borden's price was 20¢ a gallon higher than the competitor's. It agreed to pay the dealer \$500 on condition that the dealer purchase 2,500 gallons. 2,500 gallons multiplied by 20¢ equals \$500.

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but indicated that this was a common practice by most manufacturers in the New York area. There was no indication given that the supplying of the compressor or the servicing thereof had anything to do with the witness' choice of suppliers. Another dealer testified that he had received no loans or advance rebates or anything else from respondent National, other than the regular schedule rebate, which was paid at the end of the year based on the witness' volume.

The dealer testimony fails to establish, except in a few instances, that financial assistance by any of the respondents or the payment of advance rebates was a factor in the choice of suppliers. The testimony does disclose that local competitors engage in the identical practices and that, in a number of instances, the assistance given by respondents was merely a defensive measure to meet the competition of local competitors. The amounts of the loans and rebates involved were, for the most part, so small that it cannot be assumed that local competitors were automatically precluded from obtaining or keeping the accounts. On the contrary, in at least five instances where a loan had been made by a respondent, a nonrespondent competitor was later able to acquire the account.¹⁰¹

The testimony of the retail dealers called actually added little to the documentary evidence previously produced by respondents, which indicated that respondents have engaged in these practices in the New York area. In the absence of testimony by respondents' competitors in the New York area indicating the effect or probable effect of these practices upon them, the examiner cannot assume that the practices have had or are likely to have an adverse effect. The testimony of the dealer witnesses, by itself, does not furnish the basis for any such inference. In fact, if the testimony of the dealer witnesses establishes anything, it establishes the widespread use of the identical practices by respondents' local competitors in the New York area and the fact that they have had no difficulty in acquiring accounts because of these practices.

As above indicated, counsel supporting the complaint also called sales representatives of three of the respondents. The testimony of these witnesses fails to add anything significant to that of the dealers who were called. While indicating that some of the complaint practices are utilized by the respondents in securing or retaining accounts, a fact which is not seriously in dispute, the testimony indicates that

¹⁰¹ In four instances the nonrespondent competitors assumed the balance of a respondent's loan, even increasing the loan in one case. In the fifth instance the dealer himself paid off the \$357 balance of a respondent's loan when he became dissatisfied and decided to change suppliers.

such practices are utilized only to a minor extent and are used to meet competition.

The first of the sales witnesses called by counsel supporting the complaint was the former sales manager of respondent Beatrice in the New York Metropolitan area. The witness had left Beatrice's employ six months prior to the New York hearings and there appeared to be a complete absence of any motivation for coloring his testimony. The witness indicated that the primary sales approach of the company's salesmen was to emphasize the merits of their product and of their company. However, in some instances, dealers sought to obtain something additional, such as a loan or some other form of financial assistance. Although having no records available to assist him and indicating that his testimony was based only on a "guess", the witness estimated that the number of new accounts where it was necessary to give the dealer something extra to obtain the account would not exceed 15 per cent of such new accounts. However, he also indicated that such accounts were mainly of the smaller variety, having a relatively small gallonage, so that in terms of new gallonage acquired (as distinguished from the percentage of accounts acquired), the percentage would be less than 15 per cent. He further indicated that the making of such loans or other forms of assistance were recognized industry practices in the New York area and were utilized by large and small companies alike, the latter having in fact initiated some of the more recent refinements of some of the practices, such as the payment of advance rebates.

The witness described advance rebates as involving the making of a payment to the dealer based on an estimate of his gallonage over a given period, such as a year or a year and a half, and applying the regular volume rebate percentage to such gallonage. Such payments were made in the form of a loan which the dealer was not required to repay if he remained with the supplier for a stipulated period necessary to earn the rebate. The Beatrice witness testified that during the period of his employment he could recall using this practice in only three or four instances out of "well over a thousand accounts."

The testimony of the National Dairy sales representative likewise fails to indicate any widespread or aggressive use of the complaint practices. The witness indicated that new customers were approached on the basis of National's quality and the advantages of carrying their merchandise, and that they preferred to "let sleeping dogs lie", as far as suggesting a loan or some other form of assistance to the customer. The only exception to this was in the case of accounts where the salesman felt that the gallonage could be increased by the installation of

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a soda fountain which would enable the account to increase its bulk sales of ice cream. However, any suggestions emanating from the salesman in such instances were restricted primarily to the company's existing accounts. The witness could recall only one instance in the past three years where he had suggested the sale of a soda fountain to an account, the cost of such fountain being approximately \$800.00.

The National Dairy witness also confirmed the testimony of the Beatrice witness concerning the existence of the practice of prepaying rebates, but it does not appear that the practice has been used to any extent by his company. He also referred to a refinement of the practice, known as a "performance contract", where a stipulated sum is advanced to the dealer in the form of a loan, the repayment of which is subject to being cancelled upon the dealer's purchasing a given gallonage or remaining with the company for a stated period. However, unlike the prepaid rebate, under a performance contract the dealer may also receive his regular gallonage rebate if his sales warrant it. This practice, in effect, involves a double rebate, one paid in advance and one as it is earned. However, the National Dairy witness indicated that he had utilized such a contract in only a single instance and that it did not involve a new account, but an existing account which one of the local competitors had sought to acquire on the basis of such a contract and whose offer National Dairy met in order to retain the account. The National Dairy witness indicated that in his experience customers who had signed performance contracts or received advance rebates or loans switched just as readily as accounts who had not.

The testimony of the Borden sales representative was limited to a single account which he had acquired in 1952 on the basis of a two-year "performance contract" in return for the payment of \$150.00. The witness indicated that it was his understanding that a dealer receiving such a payment did not receive any further rebate in addition to such payment and that the payment was, in effect, an advance rebate. He further indicated that this was the only account in the past three years which he had acquired by the use of such a contract.

If the evidence of the New York hearings establishes anything, it establishes the volatility of the dealer-supplier relationship and the frequent switches of dealers from supplier to supplier, both national and local and between national and local companies, despite loans, advance rebates, performance contracts or any other form of supplier assistance. The evidence indicates that the complaint practices are utilized only to a limited extent, that they are used by local companies as well as by the respondents and that the respondents do not use them

to any significant extent in an aggressive manner in order to acquire accounts from competitors.

The record is wholly barren of any evidence of injury to competition or the likelihood of such injury, in the New York area, by reason of the use of any of the complaint practices by any of the respondents. On the contrary, it appears affirmatively that such practices, to the extent they are utilized by respondent, have not had any significant effect insofar as improving the market positions of these companies. Thus, it appears that respondent Borden's market share in the New York Metropolitan area actually declined from 19.6 per cent in 1950 to 14.9 per cent in 1955, while respondent National's share declined from 17.8 per cent to 16.6 per cent. Only the market share of respondent Beatrice has shown any increase and that a modest rise from 2.4 per cent in 1950 to 3.5 per cent in 1955. Respondents National and Borden have both sustained a decline in their share of production for the state as a whole between 1947 and 1955. National's share has declined from 25.8 per cent to 23.8 per cent, while Borden's declined from 18.5 to 14.6 per cent. Respondent Beatrice's small 1947 share of 2.1 per cent increased to 3.6 per cent by 1955.

15. *Pittsburgh, Pennsylvania*

The respondents doing business in the Pittsburgh area are National (Rieck Division), Borden, Foremost and Fairmont. Among the non-respondent companies operating in the area are North Pole Ice Cream Company, Penguin Ice Cream Company, I. N. Hagen, Country Bell, Green Valley Co-op, Meyer & Powell, Forbes, and Taylor Ice Cream Company. Another local company, William Penn Ice Cream Company, was acquired by Green Valley Co-op in 1955. There is also a large chain of retail stores, Isaly's, which manufactures its own ice cream. Counsel supporting the complaint called as witnesses four dealers from the Pittsburgh area and one from West Virginia.¹⁰² He also called a representative of one of the Pittsburgh ice cream manufacturers, North Pole Ice Cream Company.¹⁰³

North Pole is in both the cold storage and ice cream business. The company sells to retail stores and also manufactures ice cream novel-

¹⁰² Two other dealers called in Pittsburgh had previously dealt with two Cumberland ice cream manufacturers who testified at the Washington, D.C., hearings. The testimony of these two dealers has already been considered in connection with the discussion of the testimony of these two manufacturers at the Washington hearings.

¹⁰³ The North Pole witness was called with some apparent degree of reluctance, after the examiner had indicated that the calling of dealer witnesses only in a market did not afford a sufficient basis for a finding of competitive impact.

ties for sale to other ice cream manufacturers. Its total sales in 1955 were approximately 550,000 gallons. The company had as many retail accounts in 1955 as it had in 1954. However, the North Pole witness claimed that the company's sales per account had declined in 1955, resulting in a decline of approximately 7 per cent in its sales to retail accounts. On the other hand, its sales of novelties to other manufacturers have increased, resulting in an overall increase in ice cream sales. Despite this overall increase, the North Pole witness claimed that 1955 was the least profitable year that the company had had since 1942. The extent of such decline was not indicated by the witness. However, the fact that the decline was not limited to the ice cream end of the business, but was distributed equally between the company's cold storage and ice cream business suggests that overall business conditions in the community were affecting the company's operations.

The North Pole witness made no effort to attribute the 1955 decline in retail sales and in profits to the respondents or to the complaint practices. On the contrary, he testified that the decline was the result of the fact that the retail chains with their lower prices and, to some extent, the soft ice cream stands, had taken away business from the corner grocer and drug store to which his company sold. North Pole apparently does not serve many chain stores. The witness made no effort to attribute its lack of sales to chain stores to any competition from the respondents. On the contrary, he testified that his company had not gone after the chain stores because it would entail a considerable gearing up of its equipment for increased production and the buying of additional delivery equipment. He expressed the opinion that the small unit of profit involved in such sales was not worth the risk of possibly being cut off after the company had expanded its business. The record does not show that the respondents are dominant in the chain store market in the Pittsburgh area. The A & P chain is served by the local competitor, Penguin Ice Cream Company. The Isaly chain makes its own ice cream. Respondent National at one time served a local chain known as the Thoroughfare stores, but lost the account to respondent Foremost. There is no evidence in the record that the latter chain received a special price from either respondent or that the price paid was in any way tied to an exclusive dealing arrangement.

The record indicates that North Pole furnishes its customers with cabinets and signs, and assists them financially through money loans or financing the purchase of equipment. The witness gave no indication that the furnishing of cabinets has represented any problem

to his company, although he expressed the opinion that he thought there were more cabinets in the field than were warranted by gallonage. He also questioned whether some of the signs were worth the advertising value involved. In the case of loans and financing, he appeared to have no objection if they were limited to the ice cream department of a store and to ice cream equipment, such as a soda fountain, which would result in increased ice cream sales.

Although the North Pole witness expressed some general conclusions and opinions regarding some of the complaint practices, he made no effort to attribute the leadership in these practices to any of the respondents nor did he attribute to them the loss of any accounts or inability to acquire accounts. In fact he made no reference to his company's loss of, or inability to acquire, any accounts. As above indicated, his company did experience a 7 per cent decline in dealer sales in 1955 as a result of a decline in sales per account, but there is no indication that the complaint practices were in any way involved. Furthermore, the witness indicated that his company's business had begun to improve in the last three months of 1955 and was continuing at the same rate in 1956. The company has expressed its confidence in the future by recently completing the construction of a new plant which will give it greater productive capacity.

Three of the five dealer witnesses called in Pittsburgh were or had been customers of North Pole. One was the operator of a drug store in suburban Pittsburgh. The dealer had purchased the equipment of a bankrupt store which had been served by North Pole. The latter held a chattel mortgage in the amount of \$6,700 on a soda fountain and equipment which the dealer purchased from the former owner. After a period of eight months the dealer switched to respondent National, which supplied him with a cabinet and sign (the latter advertising Sealtest ice cream and containing a privilege panel for the dealer's name). Respondent National also assumed the balance of the North Pole loan and increased it back to the original amount to enable the owner to do some remodeling work. There was no indication from the witness that the loan from respondent National or the supplying of a sign had anything to do with his change of suppliers. On the contrary, he testified that he had been handling National's products at other locations for many years and sought out the company with the expectation of increasing his gallonage. However, since the store was located in an area where North Pole was favored by customers, the store's ice cream sales began to decline after the switch to National. Within six months the dealer switched back to North Pole, which supplied him with a sign and took over the balance of the National loan,

increasing it to \$8,000. The dealer gave no indication that the increase of the loan by North Pole had anything to do with his decision to return to his former supplier.

The second dealer was also a pharmacist who had dealt with North Pole. The latter had supplied the dealer with neon tubing, costing about \$300, to illuminate the store. It had also paid the dealer approximately \$400 to cover the cost of transporting a Rexall sign, the dealer having recently become a Rexall store. However, the dealer, who had previously dealt with respondent National at other locations for some fifteen years, decided to change to that company hoping to increase his sales. The latter, which had been sought out by the dealer, agreed to supply neon tubing in place of that supplied by North Pole and to advance the dealer the transportation cost of the Rexall sign, which the dealer expected to have to repay to North Pole. There is nothing in the testimony of the witness to indicate that respondent National acted in an aggressive manner to acquire the account. On the contrary, the dealer had sought out respondent National, which merely met the assistance which the dealer had received from North Pole.

The third dealer was the owner of a retail dairy store in suburban Pittsburgh who had originally dealt with North Pole, later switched to respondent National and then switched back to North Pole. While dealing with respondent National, the latter furnished the dealer with a sign and with \$50.00 worth of ice cream in the new cabinet which it supplied to the dealer. However, when the dealer's customers began to demand North Pole ice cream and it appeared that National's price was higher despite an alleged rebate, the dealer returned to his former supplier. The latter furnished him with a wooden sign in place of the metal National sign. If the testimony of this dealer demonstrates anything, it demonstrates the importance of price and consumer preference to a dealer. When respondent National's price turned out to be higher than North Pole's and his sales declined, the sign and new cabinet furnished by National (neither of which were indicated by the dealer to have been in the nature of an inducement), were unable to hold him.

A fourth dealer was the owner of a drug store who had dealt in turn with respondents National and Borden. No other competitor was involved. The dealer at various times had handled National's and Borden's products, and had received loans from each. The testimony of this witness indicates that there is keen competition among the respondents for accounts, and tends to negate the impression left by much of the argument of counsel supporting the complaint suggesting that the respondents act as an organized group, which concentrates on

obtaining the accounts of independent producers and have a gentleman's agreement not to solicit each other's accounts. The latest loan received by the dealer was from National, with whom the account was then dealing. The dealer's store had burned down completely and a loan from National enabled him to reopen.

The fifth dealer was the operator of a restaurant in nearby West Virginia, who had been handling Fairmont's Imperial brand for many years. He switched to the competitor, Hagen, because of a dispute with the Fairmont delivery man. According to the dealer's testimony, Hagen promised him some "fancy signs" and told him he would "save money" on their ice cream. However, within two months, he decided to return to respondent Fairmont because the latter had a better volume rebate. While the latter furnished him with a better back bar for the cabinet, its cabinet was inferior to Hagen's. So far as appears from the witness' testimony, neither this nor a highway sign worth about \$50.00 had anything to do with his switching back to Fairmont, the controlling consideration being price. There is nothing to indicate that the Fairmont price was other than its regular list price or that it was tied in any way to an exclusive dealing arrangement.

The record is wholly barren of any evidence of injury or of probable injury to competition in the Pittsburgh area. There is no indication of any significant decline in the number of competitors in the area. While it does appear that National increased its market share, by four per cent, from 11.5 per cent in 1950 to 15.5 per cent in 1955, its sales in 1955 were actually 210,000 gallons below its sales in 1947. Similarly, while Borden's market share increased slightly from 5.4 per cent to 6.0 per cent in 1955, its 1955 frozen products sales were actually 460,000 gallons below 1947. No comparable data appears for Fairmont or Foremost. However, the former was referred to as being involved in competition for only a single account, and no reference was made to the latter by any witness.

16. *Philadelphia, Pennsylvania*

The respondents operating in the Philadelphia area include Borden and National (Supplee-Wills-Jones and Breyer divisions). While respondent Fairmont was present at the Philadelphia hearing because of its operations in the Scranton area, no evidence was offered with respect to it. Respondent Foremost has acquired Philadelphia Dairies since the date of the complaint, but it was not noticed for the hearing and was not involved in any of the testimony.

There are a number of regional companies which operate in the Philadelphia area. Among these is Abbott's, which is not only active in Philadelphia but operates as far north as New York City and as far south as Baltimore and Washington, D.C. Another large competitor in the area is Richman, which operates in Delaware, Maryland, eastern Pennsylvania, New Jersey and parts of New York. Other substantial regional competitors are Penn Dairies (Penn Supreme) and Hershey, which operate in the eastern Pennsylvania, south Jersey and Maryland areas. Additional substantial competitors in the Philadelphia Metropolitan area are Yuengling and Betsy Ross, the latter being owned by the Philadelphia Association of Retail Druggists. Other competitors in the suburban areas are Shearer, Nelson Ice Cream Company (of Royersford, Pennsylvania), Reading Ice Cream Company and Miller's (both of Reading, Pennsylvania), Brofhoff (of Pottsville, Pennsylvania) and Windsor Farms (of Hamburg, Pennsylvania). There are also a substantial number of soft ice cream establishments such as Carvel and Dairy Queen and a number of retail establishments which manufacture their own ice cream such as Howard Johnson, High's and the Hot Shoppes.

Counsel supporting the complaint called three competitor witnesses from the area. Two were from the suburban area, Nelson Ice Cream Company and Windsor Farms. The third was a representative of the regional company, Richman Ice Cream Company. A representative of Shearer Ice Cream Company was subpoenaed but was excused at the request of counsel supporting the complaint. Six dealer witnesses were also called to testify, three of whom had been customers of Richman.

Richman Ice Cream Company has its main plant in Sharptown, New Jersey. As above indicated, it operates in a wide area from New York on the north to Maryland on the south. The company sells to both retail establishments and to wholesale distributors, who in turn resell to retailers. Richman supplies its customers with cabinets on a rent-free basis, with signs containing privilege panels and with compressors for fountains. It also assists customers financially by loans of money and by the sale of equipment on an installment basis.

The Richman witness, its sales manager since 1954, had no criticism of the practice of supplying cabinets to customers. He particularly defended the furnishing of the more expensive modern glass-front display cabinets on the ground that his company had developed an attractive package and that it helped increase sales to have the package displayed, rather than hidden in an old-fashioned black-top cabinet.

The witness' criticism was directed mainly at the rendering of financial assistance to retail accounts, including loans and the sale of equipment. He conceded that the practice had been going on in the industry for "a long while", indicating that "it probably goes back before my memory of the ice cream business." He claimed that the extent of such assistance had increased since 1950, as the competition began "getting rougher." The Richman witness made no claim that any particular competitor was responsible for the practice or for the alleged increase in the tempo of its use. While he did refer to two accounts which his company had allegedly lost to respondent National (Breyer) because of financial assistance, and one which his company was able to retain despite an alleged offer of assistance from respondent National, there is no reliable evidence in the record to support the witness' hearsay testimony with respect to these accounts.¹⁰⁴ In any event, there was no claim made that respondent National had been a leader or an aggressor in the practice of assisting customers financially.

The Richman witness claimed that his company had lost approximately 500 out of 1500 or 1600 accounts which it had allegedly served in 1950, and that its sales to dealer accounts had declined by approximately 10 percent in 1955. The reliability of the witness' testimony in this respect is, however, open to serious question. In a pamphlet recently distributed by the company to its dealers, the claim is made that the company serves 3,000 retail accounts. The witness, while purporting to testify with respect to a decline which had occurred since 1950, actually did not enter the company's employment until 1953, when he was a salesman in the New York area, and did not occupy a managerial position until 1954. He conceded that the figures he gave were a rough approximation and were based on company records which he did not have with him. A request by counsel for one of the respondents that he produce the records against which the claims of loss of business could be verified was refused by the witness. While the examiner declined to direct the witness to produce the appropriate records, he indicated that he would take the witness' refusal to cooperate into consideration in determining the weight to be given his testimony.

Aside from the fact that there is some reason to question the witness' testimony with respect to the loss of 500 accounts, no claim was

¹⁰⁴ The witness' testimony with respect to one of the accounts did not even purport to be based on the information received from the owner of the establishment, but on second-hand hearsay information obtained from the president of his own company. His testimony with respect to the other two accounts was based on information received from his salesman, it not appearing where the latter had obtained his information.

made that the loss of such accounts was due exclusively or even primarily to the respondents or to the complaint practices. He attributed the decline to three factors, (a) some accounts went out of business, (b) some accounts were dropped by the company voluntarily because they were no longer profitable, and (c) others went to "competitive companies." The witness gave no indication as to the proportion which the latter represented of the overall number of accounts lost, or as to the proportion of such loss which was attributable to the respondents or to the complaint practices. Despite the alleged loss of retail accounts, the witness conceded on cross-examination that the company's overall gallonage had increased from well under a million gallons in 1953 to between one and two million gallons in 1956. He claimed that the increase was due mainly to increases in the company's wholesale, as distinguished from its retail, sales. While claiming that the former were less profitable than the latter, he conceded that the company's net worth had increased each year since 1953.

In view of the recency of the witness' employment in a managerial capacity, his obvious reliance on company records and reports from company officials to substantiate his claims of loss of accounts, his unwillingness to produce appropriate records, and the contradictory evidence in the record, the examiner can give little weight to the witness' claims with respect to the alleged loss of five hundred accounts. In any event, no finding can be made on the basis of witness' testimony that any substantial proportion of such loss of accounts has been to the respondents or that it has been due to any of the complaint practices.

In only one instance out of the three dealer witnesses who had been Richman customers is there any definite indication that one of the complaint practices was a significant factor in the acquisition of the account by a respondent. However, in that instance it appeared that Richman had already used the practice to acquire the account from respondent National and that the latter met fire with fire. The account, which had been dealing with respondent National from which it had previously received a loan, switched to Richman when the latter had agreed to pay off the balance of the National loan and to increase the amount thereof. Respondent National thereupon retaliated by offering the dealer a larger loan. When a Richman representative became apprised of National's offer he agreed to match it, but the dealer declined the offer.

The second account was the owner of a restaurant who had received a loan of \$4,200 from respondent National to finance the purchase of equipment in connection with the opening of his establishment, which

was located on a main north-south highway in New Jersey. Respondent National also contributed \$125.00 toward a sign costing approximately \$600, and \$25.00 toward the printing of menus. The dealer testified that he was only interested in handling one of the better advertised brands because the establishment was located on the main highway and that his choice had narrowed down to respondent National's Breyer brand and Richman. As between the two, he preferred Breyer because it was very well accepted in the Philadelphia area and he thought it would help his business. The company acceded to his request for a loan and a contribution toward the sign. In conversations with the Richman representative the latter had also indicated a willingness to cooperate in the furnishing of a sign and the making of a loan, but because of the dealer's preference for the Breyer brand he chose the latter as his supplier. In this instance the testimony indicates that both companies were willing to assist the dealer and that his choice was made on the basis of a preference for the Breyer brand.

The third dealer was the operator of a luncheonette in suburban Germantown who had originally handled Richman, but decided to switch to respondent National when the Richman service became poor. At the time of the change from Richman to respondent National the account owed Richman a balance of \$500 on a loan which he had received from the latter. Respondent National declined to assume the balance of the Richman loan, but the account nevertheless switched to the respondent. Richman thereupon threatened to sue the dealer for non-payment on the loan and the latter, after eight months, switched back to Richman. This incident involves one of the few instances in the record (none involving a respondent), where an ice cream manufacturer threatened to sue or brought suit against a dealer for failure to live up to the terms of a loan agreement.

None of these three incidents indicate that respondent National's activities in connection with the making of loans are any different from those of its competitor Richman. In the first instance it acted defensively to reacquire an account which Richman took away by the offer of a loan. In the second instance both companies had made offers of loans to a pioneer establishment, which made a choice of respondent National because of a preference for its products. In the third instance no loan at all was made by respondent National in the acquisition of an account to which Richman had made a loan.

The second competitor witness, the owner of Nelson Ice Cream Company, has his plant at Royersford, which is approximately 28 miles west of Philadelphia. It only operates to a minor extent within the city limits, having about 25 accounts in the outer reaches of the city.

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The company sells to retail ice cream dealers and also makes direct sales to the consumer by the home delivery method. In addition, it sells ice cream novelties to other manufacturers. The witness indicated that it was the general practice in the area to supply dealers with cabinets (on a rent-free basis), signs and compressors. He also testified that as competition became more keen manufacturers offered to assist dealers by supplying them with small things such as menus and napkins, painting their stores, making loans of money without interest and cash gifts. The most common of these practices, according to the witnesses, was the loan of money. He claimed that his company did not make outright loans, but that it did endorse bank loans made to its dealers.

The witness made no effort to attribute the use of these practices to any company or group of companies. On the contrary, he indicated that they were pretty generally engaged in by competitors in the area and that he could not single out any company as being more active in this respect than any other company. Among his competitors are not only respondents National and Borden, but Philadelphia Dairy (which was recently acquired by respondent Foremost), Richman, Penn Dairies, Betsy Ross, Shearer and a half dozen other unnamed companies. The witness had no objection to the supplying of cabinets to dealers and the servicing thereof, indicating that the average dealer could not afford to purchase such cabinets or service them. He also agreed that "a certain amount of sign work is necessary." His primary objection appeared to be to the making of loans, since his company did not have the resources to make such loans directly, although it did endorse bank loans made to some customers.

The Nelson witness claimed that his sales to dealers had declined by 5 to 10 per cent over the past three years. However, this involved mainly a decline in sales by his existing accounts rather than a loss of accounts. He attributed such decline in unit sales to the increase in the number of establishments selling ice cream in the area, and particularly to the shift in sales to chain stores. The witness made no effort to attribute his company's inability to acquire chain store business to any of the respondents or to any of the complaint practices, but rather to the fact that such chains prefer to make a contract with a single supplier covering a large group of stores (usually in excess of 100). He also indicated that his company did not have the facilities to serve such a large group of stores.

Despite the alleged decline in sales through retail outlets, Nelson's overall sales have increased from approximately 200,000 gallons in 1954 to 250,000 gallons in 1955. This in turn represents a substantial

increase over the company's gallonage of approximately 125,000 gallons in 1946 when it started business.¹⁰⁵ The more recent increases have reflected an increase in sales directly to the consumer and in the sale of novelties to other manufacturers. No claim was made that such sales were less profitable than those to retailers.

While the Nelson witness claimed that his company had lost some accounts due to the fact that a competitor might have made a loan to the account, he did not refer to any specific accounts or indicate that any substantial number of accounts were involved. He agreed that it was not unusual for a company to lose 8 percent of its accounts per year through normal turnover and estimated that his company might have lost thirty accounts in a five-year period, of which 10 percent might have represented accounts where a loan was involved, but that the company might also have acquired 20 to 25 percent in new accounts. Very little weight can be given to the speculations of the witness with respect to the possible loss of accounts due to the making of loans by unnamed competitors. The witness conceded that he had very little personal knowledge concerning the acquisition or loss of accounts or the reasons therefor, since he was not too closely connected with the selling end of the business and most of his testimony concerning competitive practices used was based on what his sales manager had told him. His own testimony indicates that the decline in retail sales was due mainly to a decline in unit sales, rather than to a loss of accounts. This, in turn, was attributed to an increase in the number of stores handling ice cream and a shift in sales to the food chains. The latter type of establishment is interested mainly in price concessions, rather than loans. The witness conceded that his company does not have the facilities to serve any large chain. The fact that the company does little newspaper advertising and none on radio or TV may also account for its recent inability to expand retail sales.

The record fails to indicate any injury to competition in the area in which Nelson operates. The representative of the Shearer company was excused from testifying and no other witnesses from the area were called. Although it appears from the testimony of the Nelson witness that two small competitors in the area have ceased operating, there is no indication that this was the result of any activity by any of the respondents. One of the companies, Smith Dairy of Doylestown sold out to the local competitor Shearer and the other company, Rickey

¹⁰⁵ The above figures are admittedly rough approximations since the witness testified without the aid of books and records. He indicated that he did not regard his records as confidential and would have been willing to produce them, except that he had not been requested to do so.

(of West Chester) sold out to another Pennsylvania company, Penn Dairies.

The third competitor witness called was the vice president of Windsor Farms of Hamburg, a company formed in 1950 by the merger of Smith's Model Dairy with Windsor Dairy. Windsor competes not only with respondents National and Borden, but with Penn Dairies, Yuengling, Shearer, Reading, Miller, Brohoff and Lehigh Valley (of Allentown). Windsor Farms supplies most of its customers with ice cream cabinets, in accordance with the general practice in the area. Those customers who own their own equipment receive a discount of 10 cents a gallon. Windsor built up a large part of its gallonage by the practice of leasing and rehabilitating stores and then subleasing them to a retail dealer, with the understanding that he would purchase Windsor Farm's ice cream. By 1950 the company had reached its maximum volume of 100,000 gallons and had about 100 accounts. However, the company's gallonage and number of accounts began to decline until, at the time of Philadelphia hearing in May 1956, it had 60 to 70 accounts and a volume of approximately 60,000 gallons.

The Windsor witness named only one account (in Allentown) as having been lost to a respondent, National's Supplee-Wills-Jones division. The account in question was one where Windsor Farms had leased a store and spent \$12,000 in remodeling it, and then subleased it to a retail dealer, who later switched to respondent National when the latter allegedly made some further repairs and rendered financial assistance to the dealer. There is no evidence in the record, outside of the witness' unsupported hearsay testimony, to indicate what, if anything, respondent National did for the dealer. In any event, shortly after the account had switched from Windsor to National it changed to another competitor, Abbott Dairies, indicating the lack of holding qualities of respondent National's alleged assistance. The witness conceded that this was the only account which he could recall having lost to respondent National. He made no claim to having lost any other accounts to any other respondent.

According to the witness' own testimony the explanation for the company's decline appears to lie not in the making of loans or furnishing of assistance by competitors, but in the fact that the company has not engaged in any active selling program and made little effort to acquire accounts. It likewise does no advertising to speak of. The witness, whose title was vice president in charge of sales, conceded that he "never was schooled in selling myself, and I never did a whole lot of selling when I had to approach other companies' customers." His efforts have been restricted mainly to following up inquiries re-

ceived from prospective accounts. The witness indicated that because he was "a little bit too timid * * * to go out after business * * * and was afraid to be rejected by somebody when I would try to sell to them," he developed the practice of leasing a vacant store, improving it and then subleasing it to a dealer on condition that the latter would use the witness' ice cream. This practice has now been largely abandoned and the witness conceded that his company's decline in volume might be attributable to the fact that the company had changed its method of acquiring business. He also conceded that the company had "not made a great effort in trying to improve the picture." Despite this, the company's sales have become stabilized in the past six months and the witness expressed the hope that it might increase "of its own accord." The record fails to establish that any of respondents have been responsible, to any significant extent, in the decline in sales of Windsor Farms.

Of the three dealers called in Philadelphia, who were not involved in competition between Richman and one of the respondents, only one had ever done business with a non-respondent company. This was the owner of a drug store in Philadelphia who had originally dealt with respondent National, but had switched to Betsy Ross because respondent National refused to replace the refrigeration equipment in the store when it became dilapidated. Since the Betsy Ross price was considerably lower than that of National the owner decided to purchase his own refrigeration equipment and to pay for it out of the price differential. However, his volume declined significantly due to competition from several well-known brands in the neighborhood, including particularly respondent National's Breyer brand. The owner later decided to sell the store but found that no one wanted to buy it if they had to purchase the refrigeration equipment. After about a year, he prevailed upon respondent National to buy the refrigeration equipment at its depreciated value and to resume selling to him. It can hardly be said that respondent National "induced" the dealer to deal with it in this instance. It had simply failed to supply the dealer with serviceable refrigeration equipment in the original instance, as is customary in the area, and the dealer after an unsuccessful experiment with another supplier simply returned to respondent National who, at the dealer's urging, took over the cabinet which had become a burden to him and paid him the depreciated value.

The other two accounts were dealers who had switched between respondents Borden and National. Both were owners of luncheonettes in Philadelphia. One had originally handled National's Breyer brand but switched to respondent Borden because of the allegedly poor

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Breyer service. Sometime after the switch the owner received a loan from Borden, which had nothing to do with his decision to change suppliers. He did, however, receive an advertising allowance of \$500 from Borden at the time of the change, which was to enable him to give his customers larger portions of Borden's ice cream. This was paid in order to overcome a customer reluctance to purchase the Borden brand after the store had handled Breyer's for ten years. The second dealer had originally handled Borden, but changed to Breyer's after about five years because business was slackening and he thought Breyer, which is a well-known brand in Philadelphia, would help improve business. At the time of the switch there was an outstanding balance of approximately \$350.00 on a loan from Borden which Breyer helped the dealer pay off. When the change to Breyer did not improve sales, the dealer decided to switch back to Borden. The latter gave the dealer an advertising allowance of \$150.00 to enable him to give his customers larger portions in order to help encourage Borden's sales. Both transactions involved only the respondents and there is no indication that any competitor sought to obtain any of these accounts or was unable to do so. In neither instance did the dealer indicate that he had been induced to switch because of the advertising allowance or a loan or a cabinet or any other complaint practice.

The evidence regarding the Philadelphia area fails to indicate that respondents have used any of the complaint practices in an aggressive manner to acquire business from competitors or that their engagement in these practices differs from any of their competitors. There is a total absence of evidence that they have injured any competitor, let alone competition in the area, by the use of the complaint practices, or otherwise.

The evidence indicates that both of the respondents involved in the testimony of the witnesses, viz., National and Borden, have sustained a decline in sales and market share in the area. In the Philadelphia Metropolitan area, where respondent National in 1950 had 42.0 per cent of the market, its share had declined by 1955 to 32.7 per cent. Respondent Borden's share of the market declined from 4.3 per cent in 1950 to 3.6 per cent in 1955. In the nearby Allentown area, which was involved to some extent in the testimony of the Windsor Farms witness, respondent National's market share declined from 8.9 per cent in 1950 to 5.9 per cent in 1955 and respondent Borden's share declined from 0.7 per cent to 0.6 per cent in the same period. In addition to the decline in sales on a relative market share basis, respondent National also sustained a substantial decline on an absolute gallonage basis, its gallonage declining from 8.3 mil-

lion in 1950 to 7.8 million in 1955. The sales of the Breyer Philadelphia plant, which comprises the bulk of its sales in the Philadelphia area, declined from 8.3 million in 1947 to 5.2 million in 1955. The number of Breyer customers declined from 8,444 to 7,875 between 1950 and 1956, and average gallonage sales per account declined from 1,309 to 1,016 during the same period. In the nearby Allentown area the gallonage of the Supplee-Wills-Jones Division declined from 549,000 in 1947 to 452,000 in 1955, and the Breyer Division sales declined from 796,000 in 1947 to 460,000 in 1955. The sales of Borden's Philadelphia branch have declined from 880,000 gallons in 1946 to 807,000 in 1955, and those of its Allentown branch from 270,000 to 219,000 gallons during the same period. These figures hardly suggest that either respondent National or Borden is tending to overwhelm the Philadelphia market. There is nothing in these figures to suggest that they are using the complaint practices in an aggressive manner to injure competitors.

17. *Knoxville, Tennessee*

The testimony and other evidence adduced at the Knoxville hearings involved primarily the Knoxville market.¹⁰⁶ The respondents doing business in the Knoxville market are Pet and National. Swift & Company is another so-called national company operating in the area. The local companies include Galo, Sani-Seal, French Broad, Broad Acre, Mayfield, Bacon, Kay's and Stoffels. The only competitor witnesses called by counsel supporting the complaint were from Galo and Sani-Seal. Three dealers were also called by him. Respondent Pet called a representative of French Broad as its witness during the defense hearings, as well as a number of dealers. The defense evidence offered by Pet is included only in its record.

¹⁰⁶ A single witness, who had formerly done business in Johnson City in 1946 or 1947, was also called to testify by counsel supporting the complaint. The witness' testimony was included only in the Pet Dairy record since that is the only respondent with whom the witness had competed. His testimony was to the effect that he had called on a number of accounts of his competitors and had been informed that the customers wanted financial assistance in order to agree to switch. The witness decided to sell out his business after five or six months. He conceded that none of the Pet accounts upon which he had called had advised him that they could not do business with him because of a loan from Pet. There is no evidence whatsoever in the record as to the making of any loans or rendering of other forms of financial assistance to customers by Pet in 1946 or 1947. Since there is no indication that Pet was involved in any of the accounts upon whom the witness called, it must be assumed that the accounts where loans were requested were customers of the witness' other competitor, Southern Maid Ice Cream Company, which was acquired by Foremost in 1952 but was then an independent company. The testimony of this witness has no probative value in any of these proceedings since none of the respondents appears to have been involved in his alleged competitive difficulties.

According to the testimony of the Sani-Seal Ice Cream Company witness, the company's gallonage declined from a peak of 220,000 gallons in 1946 to approximately 130,000 gallons in 1955, and the number of its customers declined during the same period from approximately 450 to about 300. The basic question for consideration is whether this was due, in any substantial degree to respondents' use of the complaint practices. When initially asked as to the reason for the decline, the witness answered: "More competition." The evidence in the record does support this testimony since it appears that between 1949 and 1953 there was a substantial augmentation in the number of companies in the area, including Pet, French Broad, Bacon, Stoffels, Broad Acre, and Mayfield. After further prodding and leading by counsel supporting the complaint the witness attributed his company's decline "in some respects" to the fact that he could not supply customers with sufficient cabinets because he did not have enough capital. However, further interrogation as to the reasons for his company's loss of accounts produced the response that it was due to "electrical signs, advertisements, television programs, newspaper advertisements, billboard advertising" and because he could not afford to "paint signs on all of the buildings." To such methods of advertising by unidentified competitors he attributed 80 or 90 per cent of his loss. Since the complaint does not charge the use of advertising by respondents to be illegal, the above reasons given by the witness would appear to fall outside the scope of the complaint, except possibly for the electric signs and painting of signs. Even as to the latter, it is clear from the witness' testimony that he was talking primarily about signs advertising the ice cream manufacturer's products, rather than signs supplied to customers containing privilege panels.

Aside from the confusion in the witness' testimony, his opinions and conclusions are of dubious value in view of his admitted lack of personal knowledge concerning the reasons for the loss of accounts since he never called on any of the accounts himself. This responsibility belonged to his former associate who had recently died and to his route salesmen. While some of the latter were present in the hearing room, they were not called to testify. Despite the witness' admitted lack of personal familiarity with reasons why his accounts had ceased dealing with his company, he nevertheless sought to assign reasons for the loss of four accounts to respondent Pet and for the loss of one account to respondent National.

The accounts acquired by Pet were alleged to have been lost because of loans or financing of equipment. The witness' conclusions in this respect were admittedly based on information gained while

listening to testimony given at the hearing. He admitted that none of the accounts had requested a loan from him and that he didn't know whether competitors had made loans or not. His testimony concerning one of the accounts, a drug store operating under the name Todd & Armistead, was contradicted by the owner who was also called as a witness by counsel supporting the complaint. The dealer testified that he had dealt with Pet at another location for a good many years and found National Dairy's ice cream (rather than Sani-Seal's) at a new establishment which he took over. Since he had dealt with Pet for many years at prior locations he had a personal preference for dealing with Pet. While the dealer admittedly had financed the purchase of a refrigerated back bar, fountain and related equipment through respondent Pet costing \$10,279, this was not the reason for his choice of Pet. He testified that he had made no effort to request assistance from his former supplier, since "I was going to switch to Pet, regardless of money." The other dealer mentioned by the witness, Medical Arts Drug Company, had purchased a fountain from respondent Pet for \$9,055. However, there is no evidence in the record that the sale of the fountain had anything to do with the account's switching. Furthermore, an exhibit covering this transaction, which was offered by counsel supporting the complaint, indicates that the former supplier was respondent National (Southern Dairies) rather than Sani-Seal.

The third account involving respondent Pet was a pharmacy operated by Clear Fork Coal Company of Middlesboro, Kentucky. According to the Sani-Seal witness, his company had lost the account to Pet because the latter had sold the dealer a fountain, after Sani-Seal had been requested to do so and declined. An exhibit offered in evidence by counsel supporting the complaint reveals that respondent Pet did not sell the account a fountain, although it did repair a fountain without charge. The operator of the store (who was called as a witness by respondent Pet and whose testimony appears only in the Pet record) confirmed the fact that Pet had not sold it a fountain. The dealer testified that he had asked Pet to repair the fountain after Sani-Seal had tried unsuccessfully over a two-year period to put the fountain in good running order. The Sani-Seal witness also referred to another drug store account in Knoxville, Smithwood Drug Store, as having purchased a new fountain from Pet. However, there is no evidence in the record to support the witness' hearsay testimony.

The sole account referred to by the witness which involved respondent National was a drug store which Sani-Seal had been serving at one location and which asked for its assistance in moving a counter to a

new location. The counter was apparently too large for Sani-Seal's truck. Later the account switched to respondent National, after the latter had hauled the counter as well as a fountain to the new location. The witness conceded that he did not know whether respondent National had paid for the counter or the fountain, and made no pretense to knowing why the account had switched. Although a representative of the drug store had been subpoenaed and could have shed light on the reasons for the switch, he was excused at the request of counsel supporting the complaint.

The evidence offered with respect to Sani-Seal wholly fails to establish that its decline in gallonage and in the number of its accounts has been due to the complaint practices. Insofar as respondent National is concerned, it has been in the market for a great many years with Sani-Seal and the latter was able to build up its gallonage during most of this period without any apparent difficulty with that respondent. The decline, which occurred mainly in 1950 and 1951, appears to have been due mainly to the entry of new competitors into the market and to Sani-Seal's lack of an aggressive advertising and merchandising program. The witness himself attributed 80 to 90 per cent of his loss to his company's inability to advertise as competitors did. In any event, 1951 represented the company's low water mark and it has since been able to increase its gallonage by approximately 10,000 gallons, despite the competition from respondents and other companies in the market.

The testimony of the second competitor witness called by counsel supporting the complaint, the president of Galo Products Company, indicates that the company apparently made good progress until the winter of 1953 when it allegedly ran into competitive difficulties with respondent Pet. It may be noted, parenthetically, that while the Sani-Seal witness claimed to have had his main competitive difficulties with Pet during 1950 and 1951, Galo apparently went through this period without encountering any noteworthy problems. Galo's period of travail occurred during the winter of 1953 and part of 1954 when respondent Pet allegedly took a number of its larger customers by selling them ice cream cabinets and granting them a 5 percent discount for owning their own refrigeration equipment. Galo's sales fell from approximately \$318,000 in 1953 to \$290,000 in 1954. In 1955 there was a further decline to \$261,000 and at the time of the Knoxville hearings in June 1956 the witness claimed his company's sales were running at the rate of \$250,000 annually.

Whatever may have been the cause of Galo's decline in sales between 1953 and 1956 (assuming the reliability of his estimated sales figures),

there is no reliable evidence in the record upon which to base any finding that respondent Pet or any other respondent was responsible therefor. The Galo witness was unable to identify a single account as having been lost to respondent Pet because of the sale of a cabinet. While the witness did have with him a memorandum, prepared from reports received from his driver and sales manager relating to the loss of certain specific accounts, none of these accounts involved the sale of cabinets by respondent Pet.

Aside from the lack of reliable evidence to support the witness' conclusory and hearsay testimony, other testimony by the witness as well as by a dealer witness called by counsel supporting the complaint, points up the lack of inherent probability in his claims. Thus, in connection with a specifically named account, which was allegedly lost to respondent Pet because the latter had granted it a 13 percent discount plus an additional 5 percent for owning his own cabinet, the witness conceded that despite the alleged 18 percent discount granted by Pet his own company's price was still lower than Pet's. The witness also conceded that there were other such instances where accounts had switched to Pet after allegedly receiving a discount, despite the fact that Galo's price was lower than Pet's. Aside from the fact that the uncontradicted testimony of a Pet official called by counsel supporting the complaint and other evidence offered by him establishes that Pet's maximum quantity discount is 10 percent (not 13 percent), the fact that these accounts switched to Pet despite the lower Galo price would appear to indicate that there must have been some other reason for the switch, other than that suggested by the witness' hearsay and conclusory testimony that it was due to Pet's better price. Similarly, since the dealers receive no price advantage from Pet, vis-a-vis Galo, by buying a cabinet in order to obtain a 5 percent refrigeration allowance, it seems obvious that some other factor must have been responsible for the switching of the accounts from Galo to Pet.

It may also be noted, in connection with the witness' testimony regarding the alleged sale of cabinets by Pet to some of his customers, that the basis of his complaint was not so much the sale of the cabinets as such, as it was the fact that the sale allegedly "tied them up for five or six years while they were making the payments." Yet one of the dealer witnesses called by counsel supporting the complaint, to whom Pet had sold a cabinet (who had switched from National not Galo), testified that the cabinet was sold for cash, not on time. An exhibit offered by counsel supporting the complaint covering this transaction corroborates this fact. Furthermore, even where Pet does sell on an installment basis, there is nothing in the

agreement which requires the dealer to purchase only Pet's products.

In addition to the one account referred to above, the witness claimed to have received reports of the loss of several other accounts, including a local school, because of discounts received from Pet. Not only is there no reliable evidence to support the witness' hearsay and conclusory testimony but, as above indicated, it appears highly improbable that the discounts were the reason for the alleged switches since Galo's price was lower than Pet's even with the maximum discount.

While conceding that respondent National was not involved in the loss of accounts due to the sale of cabinets (which allegedly was the factor responsible for the loss of most of the accounts), the Galo witness claimed to have lost two accounts to respondent National for other reasons. One was allegedly lost, according to the hearsay report of his sales manager, when respondent National furnished the account with a large display cabinet and another for frozen food. Not only is there no reliable evidence to support the witness' second-hand hearsay, but a National official testified that the account in question, which was actually being split with another supplier, had been supplied with a special cabinet for ice cream novelties (not for frozen food), and that when the dealer was found putting some frozen foods in the cabinet he was asked to remove them and complied. The other account involving respondent National was actually being split with respondent Pet and with the local competitor, French Broad. The alleged reason for the loss of the account by Galo was the fact that the account had received a 5 per cent discount from National for owning his own cabinet. Aside from the fact that there is no reliable evidence in the record to support the witness' hearsay testimony, the witness' failure to give this account a discount for owning his own cabinet is contrary to the practice of almost every competitor witness who testified in these proceedings. Furthermore, the complaint charges such practice be illegal only when it involves an exclusive dealing arrangement. Since the account in question was split there was obviously no exclusive arrangement involved.

Assuming, *arguendo*, that Galo lost a number of accounts to Pet because of the alleged sale of cabinets, there is no evidence that the latter was the leader or aggressor in this practice since the witness conceded that this practice, as well as the others about which he testified, were engaged in by competitors generally in the area. The witness named several accounts as having been lost to the local competitor, Broad Acre, because of the latter's alleged supplying of equipment. Galo itself admittedly sells cabinets to customers who wish

to buy them. There is no evidence in the record that Pet's terms to dealers are any more liberal than Galo's.

Only one dealer witness called by counsel supporting the complaint had dealt with Galo. The dealer's testimony indicated that Galo's ice cream was in a grocery store which he had purchased, and that within a short time thereafter he changed to Pet because he thought their ice cream was better. While the cabinet which he received from Pet was more modern than Galo's, the witness testified that there was no discussion about furnishing him with a better cabinet at the time he had arranged to switch. There is no indication that the dealer had asked Galo for a better box and been refused. While the witness testified that occasionally he would put some frozen food in the cabinet if there was room, he conceded that he had received no permission from Pet to do this. The lack of importance of the cabinet as a reason for the switch is indicated by the fact that the account later switched to French Broad when he became dissatisfied with Pet's service.

Despite the alleged competitive difficulties of the local competitors, Sani-Seal and Galo, during the period 1950-1951 and 1953-1954, respectively, another local competitor, French Broad (which had previously been only in the milk business), entered the ice cream business in April 1950 and was able to build up a substantial sales volume. Beginning with sales of approximately \$160,000 in the first year of operation, it increased to \$308,000 by the fiscal year ending June 1956. During the three-month period from July to September 1957, French Broad's sales were running in excess of \$175,000 which, on an annual basis, would result in an increase in sales over the year 1956. It thus appears that a new competitor, operating in the same market as Galo and Sani-Seal and competing with the same respondents, was able to double his sales volume during the period when those two companies were having alleged competitive difficulties. Several other competitors were able to enter the same market after French Broad, including Mayfield, Bacon and Stoffels, and no competitors have gone out of business. According to the French Broad witness, his company's sales were second or third in the market and Mayfield, which had entered after his company, was close to French Broad's volume. The French Broad witness attributed his company's progress to hard work, advertising and the development of an attractive package as a merchandising device. He referred to Sani-Seal and Galo and one or two other competitors as companies which did not advertise or send out salesmen and as not being "hard competitors." While he re-

ferred to respondent Pet as a "hard competitor", he also characterized them as "very fair."

The evidence with respect to respondent National's and respondent Pet's position in the market fails to show any such change in position during the period referred to by the complaining witnesses as to suggest the use of any unusual competitive devices by them. The sales of National's Knoxville plant have actually suffered a very substantial decline from 516,000 gallons in 1945 to 325,000 gallons in 1955. Its share of production in the State of Tennessee has declined from 20.4 per cent in 1947 to 15.2 per cent in 1955. While there are no figures on Pet's sales in the Knoxville area in the record, it does appear that its share of production in the State of Tennessee, which was 12.5 per cent in 1947, increased gradually to 15.3 per cent by 1950, and thereafter began to decline until it reached 12.2 per cent in 1955. There is nothing in any of the evidence involving the Knoxville area to suggest any injury to competition by the respondents or to indicate that the respondents are overwhelming the market.

18. *Chicago, Illinois*

The hearings in Chicago involved the testimony of three competitor witnesses and seven dealers operating in the Chicago Metropolitan area, and a single competitor witness from DeKalb, Illinois. Since the testimony of these two groups of witnesses involves different market areas, each is considered separately below.

a. *Chicago Area*

The number of companies manufacturing and selling ice cream in the Chicago area is almost legion. Respondents Borden and National (Hydrox division) are the only two respondents which operate within the city. Respondent Beatrice operates only in the suburban area. Among the larger local competitors in the area are Hawthorn-Mellody, Dean, Bowman, Bresler, Legion, Central-Highlander, Columbia, Goodman-American, DeLuxe, National Ice Cream Company (not to be confused with National Dairy), Goldenrod, Roney, and Drexel. The so-called national company, Swift & Company, also operates in the Chicago area. Representatives of three competitors, Columbia, Goodman and DeLuxe were called as witnesses by counsel supporting the complaint.

The testimony of the three competitor witnesses indicates that it is customary for most companies in the Chicago area to supply their customers with cabinets and signs, to assist customers financially by making loans or otherwise assisting them in the purchase of equipment,

and to pay rebates to prospective customers, including the advancing of rebates in the form of a loan based on an estimate of the customer's gallonage with the understanding that the amount advanced will be liquidated after the customer has remained with the supplier for a given period of time or has purchased a given quantity of ice cream. Many of the local companies operating in the area advertise the fact that they are willing to assist customers financially. As in other parts of the country, there has been a marked shift in the sale of ice cream from drug stores and other bulk stops to food stores and, within the latter category, from local grocery stores to the chain stores. There has also been a marked increase in the number of soft ice cream establishments in the area. A substantial number of companies have entered the Chicago market in the post-war period, including some which formerly were in the milk business alone.

The three competitor witnesses complained generally about the decline in sales or profits or their inability to increase sales after the peak achieved in 1946 or 1947. However, an analysis of their testimony fails to support any finding that the problems allegedly confronting these companies are due primarily, or even in substantial measure, to the activities of the three respondents operating within the Chicago area and, more specifically, to the engagement in the complaint practices by such respondents.

The principal stress of the Columbia Ice Cream Company witness was on the fact that the company had not been able to grow since 1947 in proportion to the increase in population. He indicated that its sales had probably decreased slightly, from approximately 400,000 in 1947 to somewhere between 350,000 and 400,000 gallons at the time of the hearing, and that the number of its accounts had likewise declined from approximately 750 to approximately 650. The Columbia witness sought to attribute his company's inability to grow to the fact that it had insufficient capital to spend in the acquisition of new accounts or the holding of existing accounts. He emphasized particularly the amounts which were involved in the making of loans and in the advancing of rebates to customers, although he indicated that the latter practice had become less prevalent than it had been in the immediate postwar period. However, the witness made no effort to attribute these two practices to the respondents or to any group of competitors. On the contrary, he indicated that competitors generally in the area engaged in such practices, including his own company, which has an advertisement in the Chicago telephone directory to the effect that it furnishes customers with "Fountains & Cabinets" and engages in "Financial and Store Planning." He conceded that his

company had even brought suit against one of its customers to which it had advanced \$1,000, in the form of an advance rebate on an exclusive dealing contract, when the customer stopped purchasing its product. This is the only instance in the record of such a suit being brought in the Chicago area.

The Columbia witness not only made no effort to attribute the practices in question to the respondents, but made no claim that his company had lost any accounts to the respondents. While he indicated that his decline in gallonage involved the switching of accounts to other manufacturers, as well as the fact that some accounts had gone out of business, no claim was made that any of his accounts had been acquired by any of the respondents through the use of any of the complaint practices. Although the witness did indicate that some of his competitors had increased their share of the market, he referred specifically to the local nonrespondent competitors Hawthorn-Mellody, Dean, and Bresler, and conceded that there had been a general decline in ice cream sales in the area since 1947.

The witness from DeLuxe Ice Cream Company likewise claimed that his company had sustained a loss in gallonage between 1947 and 1955, from 302,000 gallons to 248,000 gallons. However, in his case the decline was not accompanied by any decline in the number of accounts, it appearing that at the time of the Chicago hearing in June 1956 DeLuxe had a greater number of accounts than it had in 1947. The decline in gallonage was attributed to a decline in sales per account. This, in turn, was attributed to "increased competition" from chain stores and soft ice cream establishments, and only partly to the loss of some of the company's better accounts due to "advance rebates" and other forms of financial assistance by competitors. The latter practices were not attributed by the witness to the respondents or to any other group of competitors. On the contrary, the witness' original estimate that they were engaged in by "90 percent of the companies in the Chicago area since 1946", was later amended to read "100 percent" or "every company in this area." The witness conceded that his own company was among those which engaged in the practice and that during the year 1955 a single salesman of his company had acquired 25 "fairly good accounts" by giving them money "in the form of advance rebates" on condition that they would remain with the company for one to three years. The witness claimed that he later decided to discontinue the practice because of the expense involved.

Only three specific accounts were referred to by the DeLuxe witness as having been lost to competitors because of some form of financial assistance, one to the local competitor Bresler, and two to the respond-

ent Borden. In the case of the latter two accounts the witness conceded that both had originally been acquired from Borden by his company and that he had no personal knowledge as to what, if anything, the accounts had received when they switched back to Borden.¹⁰⁷ Despite the return of these two accounts to respondent Borden, the witness conceded that he had acquired twice as many accounts from respondent Borden as the latter had acquired from his company during the past three years. He described Borden as "clean-cut competition", and singled out two local companies, Hawthorn-Mellody and Bresler, as being his "toughest" competition. No reference was made to Beatrice since DeLuxe does not compete with it.

While it may be that the respondents have made loans or paid advance rebates in the Chicago area, it seems clear that they are by no means the instigators or leaders in such practices. On the contrary, according to the DeLuxe witness, respondent National had ceased the practice of making advance rebates several years previously, but the practice nevertheless continued. He expressed the opinion that the practice could not be brought to an end merely by stopping respondents Borden and National since the others would continue, as they had in fact despite respondent National's discontinuance.

Insofar as the decline in DeLuxe sales is attributable to the shift in business to the chain stores, there is no evidence in the record to establish that the two respondents doing business in Chicago have been able to corner the chain store market by virtue of using any of the complaint practices or have precluded DeLuxe from obtaining such business by the use of these practices. On the contrary, the evidence indicates that most of the chains in the Chicago area are served by other manufacturers. One of the largest grocery chains, National Tea Company, is served by Hawthorn-Mellody, which also serves Stineway Drugs, reputedly one of the largest drug store chains in the Chicago area. Dean Milk Company serves the Jewell Grocery chain; Bowman serves the Kroger stores; and Roney Ice Cream Company serves the Hi-Lo chain. The IGA chain is split between Dean and Central-Highlander. The latter also has the largest share of the Grocerland chain. National Ice Cream Company (not respondent National Dairy) serves the Centrella chain, which has about 180 stores. Of the respondents, only Borden serves a large chain, viz., the A & P chain. Respondent National, so far as appears from the record serves only Del-Farms, a relatively small chain.

¹⁰⁷ The witness indicated that he knew he had lost the accounts but "whether Borden had financed them or given any assistance, I don't know." He agreed that the best way to find out why the accounts had switched would be to call them as witnesses.

While bemoaning the shift from the smaller stores to the chains, the DeLuxe witness conceded that his company had not made any effort to acquire such accounts. He attributed this to the fact that his product was not nationally advertised and to the fact that the "price structure which exists today in the chain stores is a hard factor to meet." While suggesting that some companies did not publish a price list or adhere to one, he made no effort to attribute this to any of the respondents or to indicate that such pricing involved any exclusive dealing arrangements.

The third competitor witness, the general manager of Goodman American Ice Cream Company, was even more vague and less convincing in his testimony than his two predecessors, insofar as establishing any connection between the company's alleged difficulties and any of the respondents. The witness claimed that his company's gallonage had declined from between 500,000 and 600,000 gallons in 1946 or 1947 to approximately 300,000 gallons. This, however, was not accompanied by any decline in the number of its accounts, which are now at a peak, viz., 800 to 1,000. The decline in gallonage was attributed primarily to a decline in sales per accounts, resulting from the fact that the company has traditionally served the smaller merchants who have suffered a loss in sales to the chain stores. The witness claimed that his company could not sell to the chain stores or cooperative buying groups because they would not buy "from a local person." He also claimed that his company had lost some large accounts because of loans and the furnishing of new cabinets.

As above indicated, most of the chain stores in the Chicago area are served by nonrespondent local companies. The witness' explanation for the fact that such local competitors were successful in obtaining chain store accounts and were increasing in size despite their relatively recent entry into the market, was the fact that they were receiving financial assistance from "the same source" as respondents National and Borden. According to the witness these companies are part of a "trust", which has some sort of esoteric connection with the stockyards. The witness named most of the leading nonrespondent companies as being members of the mysterious "trust." He was uncertain as to who was not part of the trust, except for his own company. The witness' basic test for whether someone was or was not in the trust was whether they sought to acquire one another's customers.

In connection with the second reason for Goodman's decline in gallonage, viz., the loss of some of its better accounts due to loans and other assistance from competitors, the witness referred to only two specific accounts, one allegedly lost to respondent National and one to

respondent Borden. The loss to respondent National involved an unnamed account which had allegedly received a \$20,000 loan. There is, of course, no evidence in the record to support the witness' hearsay and speculative testimony regarding any such loss to respondent National. The loss to respondent Borden involved the concession at Soldiers' Field in Chicago which had switched to respondent Borden following a change in the management of the concession. The Goodman witness expressed the opinion that the account had switched because Borden had supplied it with modern cabinets to replace his own, which had been there for "many years." There is no reliable evidence in the record to support the witness' conclusions. A tender by respondent Borden of the official of the Soldiers' Field concession responsible for the change of suppliers was declined by counsel supporting the complaint. Since none of the other competitors referred to cabinets as a competitive problem in the Chicago area and there is no indication that Goodman had ever been requested to supply the account with better cabinets, it appears highly unlikely that the change of suppliers was brought about because of the furnishing of better cabinets. Outside of this single account, which had been acquired by Borden six years earlier, the witness was unable to recall a single other account lost to that respondent.

None of the dealer witnesses from the Chicago area had ever been accounts of any of the three competitor witnesses, nor is there any evidence that any of them were solicited by these competitors. One dealer was the owner of a small delicatessen who had received a \$75.00 payment in the nature of an advance rebate from respondent National, on condition that he would remain with the company for two years. The two-year period had already expired several years previously but the account was still dealing with respondent National, although under no apparent obligation to do so. There is no evidence in the record that this account had ever been served by another supplier, it appearing that the dealer had taken over a store which was already being served by respondent National.

The second dealer witness was the owner of two drug stores which had been handling the products of both Flint Dairy (a local competitor) and respondent Beatrice. The dealer had switched to respondent National after receiving a loan of \$10,000. Both Flint and Beatrice had declined to make a loan. While the dealer claimed that he had been considering changing to respondent National prior to receiving the loan, in order to get a better quality ice cream, and that certain financial difficulties had merely precipitated an early decision on his part to change, it seems reasonable to infer that the

making of a loan by National was a significant factor in the account's decision to change suppliers. However, the only companies which were affected by the change were another respondent, Beatrice, and a local competitor, Flint Dairy, which was not referred to in any other testimony involving the Chicago area. Although the loan had been paid off five years previously, the account was still dealing with respondent National.

The third dealer was the operator of a grocery store who had, in succession, handled the ice cream of three other members of the mysterious "trust", viz., Dean, Central, and Swift, who according to the Goodman witness' testimony were not supposed to solicit one another's accounts. The dealer testified that he had wanted to change to National for some time, but had been unable to do so until a nearby store which had been handling National's brand was sold. At that time he sent for the National salesman and induced the latter to make a payment of \$500 in the nature of a rental for the space allocated to the ice cream cabinet, similar to advances received from the dealer's bread company supplier for granting it a certain amount of shelf space. There was no testimony by the dealer that the payment in question constituted the reason or inducement for his change of suppliers.

The fourth dealer was the owner of a confectionery store which had been handling the products of Central Ice Cream Company and had changed to respondent National after the latter had sold it a second-hand fountain in place of a leaky 31-year-old fountain which the dealer had in his premises. It does not appear whether the account had requested Central to supply him with a fountain and the witness did not indicate that the fountain was the reason for his changing suppliers. While the witness signed a contract for the fountain, he had no recollection of its provisions.

Two other dealer witnesses called by counsel supporting the complaint were from Evanston, Illinois. Their testimony did not involve any of the Chicago competitors and no competitors from the Evanston area were called. One of the dealers was the owner of three restaurants which had switched from a local competitor Badger Ice Cream Company to respondent Beatrice, after Badger had declined to manufacture the dealer's ice cream under a private label. Respondent Beatrice took over the \$4,000 balance on two loans of \$15,000 and \$25,000 which the account had received from Badger, and loaned the account an additional \$1,000. The reason for the change from Badger to Meadowgold, according to the witness' uncontradicted testimony, was that he wanted a private label ice cream which Badger

declined to make for him. Despite a two-year exclusive dealing contract, the dealer decided to switch back to Badger within a year when the latter agreed to make its ice cream under a private label, and the dealer had become dissatisfied with Beatrice's ice cream. The dealer had no apparent difficulty in repaying the balance due on the Beatrice loan, and the latter made no effort to hold the dealer to the two-year contract.

The other Evanston dealer had been split between Dean Milk Company and respondent National and changed from the latter to respondent Beatrice, but continued to deal with Dean. While the dealer testified that he did not know why he had changed from respondent National to respondent Beatrice, an advance rebate of \$575.00 apparently was a consideration for the change. However, despite the fact that an agreement with respondent Beatrice required the dealer to purchase his frozen products requirements from Beatrice exclusively for a period of two years, he continued to deal with his other supplier, Dean Milk Company.

Another dealer called was a former grocer from Gary, Indiana, who had switched from the local competitor, U-Joy, to respondent Borden because of a "better price" (not otherwise identified in the record). While the latter also loaned the dealer \$158.00, this merely permitted repayment of the balance of a loan in that amount which was due to the local competitor U-Joy, and was not referred to as a reason for switching.

The above testimony serves to emphasize the volatility of the dealer-supplier relationship and the inability of a supplier to hold a dealer when the latter is dissatisfied. In only a few of the above instances does the testimony clearly establish that a loan or other assistance was a factor in the change of suppliers. Even the presence of an exclusive dealing clause did not prevent the recipient of an advance rebate from splitting his business with another supplier. When one of the dealers was dissatisfied with his supplier's product, as in the case of the Evanston restaurant owner, no contract could hold him. When the dealer was satisfied with his supplier's product he continued to purchase from the supplier even though a loan had long since been paid off.

Assuming that the evidence does establish that the making of loans or rendering of other assistance does motivate some dealers in changing suppliers or influences them in their original choice of a supplier, the evidence is wholly deficient insofar as establishing that the respondents have been responsible for instituting such practices or have been the leaders in the use of such practices in the Chicago area. The evidence

likewise fails to establish that there has been any injury to competition, or even to any competitors, as a result of respondents' utilization of any of such practices in the Chicago area. The evidence indicates that there are a large number of local competitors in the area, some of whom are substantial in size and several of whom are relatively recent entrants into the market. There is no evidence of any substantial casualties among competitors in the market. The few local companies which have ceased operating since 1947 have done so mainly by selling out to other local competitors and not to the respondents.

The respondents have not notably improved their position in the Chicago market. On the contrary, the Chicago area sales of both respondents National and Borden have declined substantially between 1947 and 1955. The former's sales from its Chicago plant in 1955 were 1,500,000 gallons as compared with 2,600,000 gallons in 1947. The sales of Borden's Chicago branch were 2,760,000 gallons in 1955 compared to 3,445,000 gallons in 1947.

b. DeKalb, Illinois

DeKalb is located approximately fifty miles west of Chicago. The respondents operating in the area are National, Borden, and Beatrice. Swift & Company also sells in the area. The local competitors include Illinois Valley, Valley Maid, Colonial, Shurtloeff, Badger, Holiday, and Hey Bros. The only competitor witness from the area called was a representative of Hey Bros. No dealer witnesses testified.

Hey Bros. operates two plants, one in DeKalb and another in Quincy. The testimony of the Hey Bros. witness apparently related only to the DeKalb operation. The witness, testifying without records, could not give his company's 1947 sales, but estimated its 1949 gallonage as being between 90,000 and 100,000. He indicated that there had been a gradual increase during the period of the Korean War to approximately 110,000 gallons in 1953, and that thereafter the gallonage declined to the 1949 volume. The company had about the same number of accounts in 1956 as it did in 1949, which the witness estimated roughly as between 150 and 200.

The Hey Bros. witness indicated that there was a certain amount of switching of accounts which went on at all times, most of which had nothing to do with any of the complaint practices. However, he claimed that the company had lost some accounts to respondents Borden, National and Beatrice due to some of the complaint practices. He indicated that the practices which he regarded as most troublesome were the making of loans and the supplying of equipment not related to the ice cream business.

The Hey witness referred to a number of accounts which his company had lost or been unable to acquire as a result of the alleged making of loans or the furnishing of equipment or the granting of a better price by respondents Borden, Beatrice and National. In most instances the witness' testimony did not even purport to be based on information received from the dealer in question, but on the witness' own surmise or on rumor or information received from his predecessor as manager. His testimony concerning the reasons for the loss of these accounts is so unreliable that no findings can be based thereon. Indicative of the lack of reliability of such testimony is that relating to a restaurant in Dundee, Illinois, to which Hey Bros. had allegedly declined to make an additional loan and which switched to respondent Beatrice because, according to the witness' "understanding", it had given the account such additional financial assistance. However, it was later stipulated between counsel that the only financial assistance received by the account in question from respondent Beatrice was a loan covering the exact amount necessary to pay off the balance due on the outstanding Hey Bros. loan. It seems obvious, therefore, that the reason for the account's switching could not have been the refusal by Hey Bros. to grant an additional loan and the willingness by respondent Beatrice to render such assistance.

Another account allegedly lost was a college which respondent National had allegedly acquired by giving a gratuity to the purchasing agent. This testimony was based on information allegedly received by the witness from certain unidentified persons at the college. Yet an exhibit offered by counsel supporting the complaint indicates that the account had been served by respondent National (not Hey Bros.) from 1944 to 1954, and that respondent National lost the account in October 1954 to its local competitor, Illinois Valley Ice Cream Company, on the basis of the latter's lower bid. Several other accounts were allegedly lost to respondent Borden because of reported special prices or the making of ice cream under a private label, none of which is supported by any reliable evidence in the record. The latter reason, viz., manufacturing under a private label, is not even a practice charged to be illegal under the complaint.

Despite the witness' complaints about the making of loans by competitors, he conceded that his company also made loans to worthy customers to help improve their sales. In fact, he indicated that the loans cost his company "very little" because most of the loans were discounted at the bank. Presumably there have been no substantial defaults on the loan payments so as to require the bank to seek recourse against Hey Bros.

Appendix

60 F.T.C.

Whatever may have been the cause of Hey Bros. alleged problems, there is no reliable evidence on which to base any finding that they are attributable, to any substantial degree, to the engagement by respondents in any of the complaint practices. In fact the witness conceded that most of his decline since 1949 was due to reasons having no connection with the complaint practices. The company's alleged competitive problems apparently have not interfered with its buying out at least two other competitors.

* * * * *

The evidence offered at the Chicago hearings, involving either the Chicago market or any other area in Illinois, fails to establish that the respondents have been responsible for any injury to competition or that their engagement in the complaint practices is likely to lead to such a result. The figures offered by respondents involving the state as a whole fail to indicate that any of them is gaining market position in the state. Respondent Beatrice's share of state production has remained almost constant between 1947 and 1955, being 7.5 per cent in the earlier year and 7.7 per cent in the later year. Respondent Borden's share has declined slightly from 10.1 per cent in 1947 to 9.4 per cent in 1955. Respondent National's share has declined significantly from 14.4 per cent in 1947 to 9.6 per cent in 1955.

19. *Des Moines, Iowa*

The evidence adduced at Des Moines involves three separate areas in Iowa, the Burlington area which is located in southeastern Iowa on the Mississippi River directly across from Illinois; Davenport and the Tri-City area, including Rock Island and Moline in Illinois; and several communities in western Iowa. Each appears to be a separate market area and each is discussed separately below. Competitor witnesses from each area were called, but no dealer witnesses testified.

a. *Burlington Area*

The respondents doing business in the Burlington area are National (Roszell division), Borden and Beatrice. Swift & Company also operates in the area. The main local competitors are Whitehouse Dairy, and Lagomarcino-Grupe Company, both of Burlington. Another competitor, Corso, operates on a small scale in the area. Representatives of both Whitehouse and Lagomarcino were called as witnesses.

There is no evidence of anything but a healthy competitive situation in the Burlington market. Both local competitors are vying for

first place in the area. The Whitehouse witness claimed that his company was first in the market and Lagomarcino-Grupe second, while the witness from the latter made the reverse claim. Actually, if the figures given by the witnesses are accurate, Lagomarcino has the greater number of accounts, while Whitehouse has the greater gallonage.

It is customary for manufacturers in the area to supply their customers with cabinets and with signs. While it was the practice prior to 1936 to charge a rental in connection with the supplying of cabinets, this practice has long since ceased. The cessation of the charging of a rental was not attributed by the witness to any competitor. Customers who own their own equipment receive a 10-cent a gallon discount. No complaints were made about the practice of supplying signs, with privilege panel. In fact, the Whitehouse witness indicated that he considered the practice to be "good ethics" and that his company considered it "good business—good advertising" to supply such signs.

The Whitehouse witness singled out the granting of "excessive discounts" and the supplying of "extra cabinets" as being two practices which he regarded as involving "bad ethics." However, no reliable evidence was offered to establish that any of the respondents have engaged in these practices in the Burlington area. The Whitehouse witness conceded that customers would frequently put meat and other products in his cabinets without permission. While claiming that his salesmen had told him of extra cabinets being offered, he conceded that he could not "remember where, or who it was." The witness' testimony was equally vague in connection with the matter of "excessive discounts." He could not recall a single account which he had lost on a price basis and conceded that his company granted quantity discounts ranging as high as 18 cents a gallon. While asserting that he had the "impression" that the "out-of-town people" were "more lenient" in the matter of discounts, the only specific reference to such leniency involved two accounts which his company had solicited, but which were acquired by the nonrespondent Swift. The only specific accounts referred to by the witness involving any of respondents were two accounts which Whitehouse had allegedly lost to respondent National and where the witness had been "told" that the latter had done some painting. No evidence was offered to support the witness' hearsay and conclusory testimony. It may also be noted that by the time of the hearing, Whitehouse had regained one of the accounts and Lagomarcino had acquired the other.

Despite some apparent minor annoyances, the Whitehouse witness agreed that his company had been able to maintain its position in the Burlington market. While its gallonage of 150,000 gallons was down from the 1946-1947 gallonage of approximately 200,000, he apparently did not regard this as significant since he indicated the earlier years were considered "banner years in the ice cream industry." Whitehouse is actually serving as many accounts as it did in the immediate postwar period, viz., 125 to 150. Despite some loss of accounts each year, the company has been able to gain at least as many accounts as it has lost and the witness regarded such turnover as normal.

The witness representing Lagomarcino-Grupe complained that his company had been unable to acquire any chain store accounts because the chains prefer a national brand name and because of price. No evidence was offered, however, to establish what prices the respondents were offering to the chains or to indicate that the prices were tied to any exclusive dealing arrangement. In fact, except for one instance, it does not even appear that the chains are being served by the respondents. The only chain referred to as being served by a respondent is a grocery chain which is actually being served on a split basis by the two local competitors along with respondent Borden, the latter making a private label brand for the account. Another chain mentioned by the witness is Walgreen, to which his company was selling ice cream under a private label, but which was allegedly acquired by the nonrespondent Swift on the basis of a lower price. Lagomarcino serves at least one other chain in Burlington, Kresge's.

The Lagomarcino witness also referred to the supplying of cabinets for frozen foods as a troublesome practice, but the only account which he cited involved the nonrespondent Swift. One of the accounts which he mentioned had been served on a split basis by both Lagomarcino and respondent National, and both allegedly had lost the account to Swift. The witness also cited an account which his company had lost three years previously to respondent Borden because of a "deal" that he had been told was "too good * * * to pass up", the nature of which was not otherwise identified for the record; and he attributed to respondent National his company's loss of a single account involving the alleged furnishing of equipment, based on a report which the witness himself conceded was "strictly hearsay."¹⁰⁸ As far as respondent Beatrice

¹⁰⁸ It may be noted that the witness was employed by the company as manager for only a year and ten months at the time of the hearing. Much of his testimony related to events that had occurred as much as three years or more prior thereto.

was concerned, the witness agreed that "[t]hey were fair competition, we get along pretty good."

Despite some alleged competitive problems Lagomarcino has been able to substantially maintain its gallonage and its position as one of the top two companies in the market. The witness estimated his gallonage as approximately 125,000, which he thought might be down by about 6,000 gallons from the previous year. While the company had lost about seventeen accounts during the year, thirteen of these represented accounts which had gone out of business, and only three or four involved accounts which had switched to competitors.

The record fails to indicate that competition in the Burlington area has been injured by reason of respondents engagement in the complaint practices. The two main local competitors appear to be in a healthy condition. No evidence was offered of any mortality among competitors in the area. The area is a fairly static one, population-wise.

b. Davenport (Tri-City) Area

The respondents operating in the Tri-City area include National, Borden and Beatrice. Swift & Company and Bowman of Chicago also operate in the area. Local competitors include Peerless, Illinois-Iowa Dairy, Baker, Downing and Model. Some of these companies operate from the Iowa side of the river and some from the Illinois side. The only witness from the area called to testify was a representative of Illinois-Iowa Dairy of Davenport, which is a farmers' cooperative. The company is primarily in the milk business and went into the ice cream business only recently. The reason given for its entry into the ice cream business was that it wished to have an outlet for its excess milk production and to take care of some of its milk accounts desiring to purchase ice cream.

Illinois-Iowa Dairy's volume in 1956 was approximately 40,000 to 50,000 gallons, which was the largest volume the company had ever achieved. It makes little effort to acquire new accounts since its plant capacity is limited and, according to the testimony of its representative, it does not care for additional business. Its sales are limited to accounts which sell its milk. The company supplies its customers with cabinets and grants a volume discount to large users. The Illinois-Iowa Dairy witness claimed that the biggest ice cream competitors in the area are Swift and respondent Borden. The only testimony by the witness which might be considered in the nature of a complaint related to a single account which his driver had reported respondent Beatrice had sought to acquire by offering it a lower price on both milk

and ice cream, and a newer cabinet. The witness had no idea what the Beatrice price offer was, nor whether it was less than its regular list price. He also conceded that the cabinet which he had supplied to the account was a "little agey." In any event, he was able to retain the account by giving it a five-cent a gallon discount on ice cream and supplying it with a newer cabinet. Outside of this single account there is nothing in the witness' testimony to indicate any competitive difficulties with any of the respondents.

The evidence concerning the Tri-City area wholly fails to establish any injury to competition or the likelihood of such injury. While the witness indicated that two local competitors in the area had sold out to respondent Borden and one to Fairmont, no evidence was offered to indicate that these companies had experienced any competitive difficulties with the respondents arising out of the complaint practices.

c. Western Iowa

The respondents operating in the western Iowa area include Borden, Beatrice, National (Harding Division) and Fairmont. Among the numerous local companies in the area are Sac City Creamery, Manning Creamery, Bluebunny Ice Cream, Rosedale Dairy, Boone Dairy, Jeffersonville Creamery, Audubon Ice Cream, Fort George Creamery and Nelson Ice Cream Company. Representatives of Sac City Creamery and Manning Creamery were called as witnesses by counsel supporting the complaint.¹⁰⁹

The furnishing of cabinets and signs to customers appears to be customary practices in the area. Cabinets have been furnished on a rent-free basis for at least twenty years. Customers owning their own cabinets receive a 10-cent a gallon discount. Neither of the competitor witnesses had any criticism of the practice of supplying cabinets or that of furnishing signs or claimed that they were being used as competitive weapons. The Sac City witness indicated that the furnishing of signs was of advantage to both the ice cream manufacturer and the dealer, to the former because it advertised its product and to the latter because it called attention to his store. The witness could not recall a single account which had requested a sign under circumstances where he felt the sign was not justified and where a competitor had supplied one.¹¹⁰ While at first estimating the cost of supplying signs as approximately three cents per gallon (computed

¹⁰⁹ The Manning Creamery witness testified at the hearing in Omaha, Nebraska, rather than in Des Moines.

¹¹⁰ The witness referred to one account where he had agreed to contribute one-half of the cost of a sign, but which decided to purchase its ice cream from respondent National. The witness indicated that he had no knowledge of what, if anything, National had done for the account.

by dividing the company's annual gallonage by its annual expenditure for signs), the witness later conceded that this estimate was too high since it assumed that the life of a sign was only one year. No reference to the furnishing of signs as a competitive problem was made by the Manning witness.

The principal complaint of the two western Iowa witnesses was directed at their alleged inability to acquire chain store accounts, through which an increasing proportion of the ice cream sales in the area are being made. However, these complaints were not directed at the respondents nor at the complaint practices. The Sac City witness' explanation for not being able to acquire chain store accounts was that "we just don't know the right people." The witness referred to respondent Borden as serving one chain and respondent Beatrice another, but did not know whether respondents National or Fairmont served any chains in the area. At least one of the chains referred to by the Sac City witness is being served on a split basis in some areas by a number of local competitors, as well as by respondent Borden. Particular stress was placed by the witness upon the practice of supplying some chain stores with ice cream under a private label. The witness indicated that if this practice continued to grow it would increase the costs of the smaller manufacturer for cartons and refrigeration space. However, this practice is beyond the scope of the complaint, except possibly insofar as it may involve quantity discounts, as to which no evidence was offered with respect to the western Iowa area. The Manning witness likewise stressed his company's inability to obtain chain store business. He attributed this to the fact that such chains operated over a wider area than that in which his company distributed its products, and that therefore he was unable to submit a bid in response to invitations which provided for service on an over-all area basis.

The Sac City witness made no reference to any account which the company had lost or had been unable to acquire by reason of the use of the complaint practices by any of the respondents. The Manning witness could recall only three accounts as being involved in competitive situations, none involving the complaint practices. One was allegedly lost to respondent National because, as reported by the store's manager, the account had gotten "a better deal", the nature of which the witness did not know. The second account was lost to the local competitor, Sac City Creamery, for unknown reasons. The third account was a chain store which was being served by respondent Borden and which Manning's salesman solicited but was unable to acquire for reasons not appearing in the record.

Neither of the two competitor witnesses claimed that his company was losing market position or was in any serious difficulty. Sac City Creamery operates several plants in western Iowa. It has built up its gallonage from an estimated 130,000-140,000 gallons in 1947 to approximately 200,000 gallons in 1955, and the number of its accounts has increased from about 200 to 300 during the same period. It now employs three full-time salesmen, compared to the earlier period when two members of the family operating the company did the selling. Counsel supporting the complaint conceded, in effect, at the Des Moines hearing that the company had not sustained any competitive injury, indicating that his purpose in calling the witness was to demonstrate that the absence of any financing practices such as those existing in Chicago makes it possible for smaller manufacturers to prosper. Presumably this would mean that the furnishing of cabinets and signs does not prevent successful operation by smaller manufacturers.

Manning Creamery has been able to maintain at least the same number of accounts over the past few years. However, the witness indicated that his company's gallonage had declined gradually over a five-year period from about 115,000 gallons to approximately 100,000 gallons. This was alleged to be due to a decline in the company's sales to cafes and a loss of several good accounts. While the Manning witness did not specify the reason for the company's decline in cafe sales, which represent a good proportion of its sales, the testimony of the Sac City witness indicates that there has been a trend away from sales to cafes and restaurants toward the food stores. The good accounts lost by Manning were (1) the Safeway account to whom the company had sold in excess of 3,000 gallons a year and which began to manufacture its own ice cream and (2) an unnamed "food account in Carroll", the reason for whose loss and the competitor to whom it was lost, if any, do not appear in the record.

* * * * *

There is a complete failure of proof, insofar as establishing that respondents have been responsible for any injury to competition in Iowa, whether due to the complaint practices or otherwise. The production share information which is in the record fails to indicate any significant improvement in market position on the part of respondents. Respondent Beatrice's share of production in the State of Iowa has declined from 15.6 percent in 1947 to 13.2 percent in 1955. Respondent Borden's share has declined from 24.2 percent in 1947 to 20.9 percent in 1955. Information with respect to respondent National's share does not appear in the record since it apparently does not have a plant in Iowa. However, it does appear that its sales in the Des Moines area,

which it entered during 1951, have declined from 19,000 gallons in 1952 to 13,000 in 1955.

20. *Omaha, Nebraska*

Although a hearing was held in Omaha, no witnesses were called from that area. Counsel supporting the complaint called a competitor witness from Lincoln and another from Superior, Nebraska. Three dealer witnesses were also called from the Lincoln area. An official of respondent Fairmont testified in Omaha, but his testimony involved the company's operations generally and did not relate to any specific trade territory. The evidence with respect to the Lincoln and Superior areas is discussed separately below.

a. *Lincoln, Nebraska*

The respondents doing business in the Lincoln area are Beatrice, Fairmont and National. Respondents Beatrice and Fairmont have manufacturing plants in Lincoln, and respondent National has a distribution plant in the city. Swift & Company also operates in Lincoln. The local competitors are Lincoln Dairy & Ice Cream Company, Smith's Home Dairy and Roberts Dairy. The only competitor witness called from the area was the owner of Lincoln Dairy. A representative of Smith's Home Dairy appeared, but was excused at the request of counsel supporting the complaint.

The Lincoln Dairy witness' testimony involved mainly a recital of the facts concerning approximately six accounts which his company had either lost or been unable to acquire as an alleged result of the competitive activities of Beatrice or Fairmont, mainly in 1954 and 1955. No reference was made to National as being responsible for any of his competitive difficulties. The witness' testimony was a maze of conjecture, surmise and hearsay, and except for one account, there is no reliable evidence to support his testimony.

Indicative of the lack of reliability of the Lincoln witness' testimony is that concerning an account operating a restaurant at the airport, which the witness claimed he was unable to obtain because of respondent Fairmont. Lincoln Dairy had previously served the owner at another location, and the witness claimed that the owner had requested a loan from him before opening the new restaurant, but that he was unable to oblige. Fairmont later obtained the account. Not only is there no reliable evidence in the record of any loan to the account by Fairmont, but the owner of the restaurant, who was also called as a witness by counsel supporting the complaint, denied that respondent Fairmont had not made him any loans and, in fact, had no recollection of having requested Lincoln Dairy to render any financial

assistance. No financing of equipment was required since all of the furniture and equipment in the establishment were supplied to the account by the City of Lincoln. The only thing the owner had received from respondent Fairmont was an old storage cabinet, which was used for the storing of excess quantities of ice cream, and a sign on the highway, the value of which does not appear. The Lincoln Dairy witness also claimed to have lost two other accounts to respondent Fairmont because of loans of money and equipment, but was unable to identify such accounts and there is not a scintilla of reliable evidence in the record to support the witness' testimony with respect to the two unnamed accounts.

Of the five accounts involving respondent Beatrice, only one involved an account which had been lost to that respondent, the remainder being accounts which Lincoln sought unsuccessfully to acquire. The Lincoln witness claimed that the making of loans or furnishing of equipment by respondent Beatrice were responsible for his lack of success in these instances. Indicative of the lack of reliability of such testimony is that involving two eating establishments owned by the same individual, which the Lincoln witness claimed he had sought unsuccessfully to acquire during 1954 or 1955, because Beatrice had financed the equipment in one establishment and made a loan to the other. A list of loans and equipment financed by respondent Beatrice to all customers in the Lincoln area during 1954-1955, which was offered in evidence by counsel supporting the complaint, fails to reveal any financial assistance to either of these accounts. The owner of both establishments, who had been subpoenaed as a witness by counsel supporting the complaint and could have shed light on these transactions, was excused from testifying at counsel's request. In the case of another account, a cafe which had allegedly received some unnamed form of assistance from respondent Beatrice, not only does the exhibit above referred to fail to reveal any assistance to the account, but the owner who was called as a witness by counsel supporting the complaint specifically denied that he had received any loans from respondent Beatrice or any other form of assistance in connection with his ice cream operations. The dealer had, however, purchased a milk dispenser from respondent Beatrice in connection with his milk business, but this had nothing to do with its choice of Beatrice as an ice cream supplier since he had been handling the latter's ice cream for six years. The dealer also denied having asked the Lincoln witness for any assistance.

The only account referred to by the witness where there is any evidence of a loan was a cafe, to which respondent Beatrice made a

loan of \$1,500 in March 1954 and which had been fully repaid by December 1954. There is no evidence, other than the Lincoln witness' opinion, that the making of such loan induced the account to deal with respondent Beatrice. Counsel supporting the complaint called as a witness, not the dealer who had received the loan from respondent Beatrice, but an individual who had since purchased the business. The present owner had received no loan or ice cream equipment from respondent Beatrice, but was nevertheless purchasing its ice cream.

Despite Lincoln Dairy's alleged competitive difficulties with respondents Beatrice and Fairmont, it has managed to maintain its gallonage of approximately 50,000 to 60,000 gallons over the past five-year period. The company limits its sales primarily to restaurants. In view of the testimony by competitor witnesses in various sections of the country of a trend away from bulk sales in restaurants and similar eating establishments in favor of food stores, this could readily account for Lincoln Dairy's static condition. In any event, there is no reliable evidence in the record to establish that the use of the complaint practices by respondents Fairmont or Beatrice has been responsible for Lincoln Dairy's inability to grow. There is no evidence in the record that the Lincoln area is an expanding area, so as to justify any expectation of growth on the part of the company. The evidence discloses that respondent Beatrice, which was the respondent most frequently involved in the testimony of the Lincoln Dairy witness, likewise has not improved its position in the Lincoln market. In fact, Beatrice's sales in Lincoln have declined from 397,000 gallons in 1946 to 289,000 in 1955. The evidence wholly fails to sustain a charge of injury to competition by respondents through the use of the complaint practices in the Lincoln market.

b. Superior Area

Superior is located on the Nebraska-Kansas state line. The only witness from the area called was a representative of Superior Ice Cream Company, which operates both in Kansas and in Nebraska. The respondents competing with Superior in both Nebraska and Kansas are Fairmont and Beatrice. Competing in Kansas only is respondent National. Local competitors in Nebraska are Holdredge (Nebraska Dairy Products Association) and Hunt Ice Cream Company. Additional local companies competing in Kansas are Belleville and Ideal. Respondent Foremost entered the Kansas territory approximately six months prior to the hearings by purchase of a local competitor, Decoursey Ice Cream Company. Outside of this

one situation no other companies have either gone out of business or entered business in the area since 1947.

The principal complaint of the Superior Ice Cream Company witness was directed at the fact that as an ice cream company selling only ice cream, it was difficult to compete with companies that sell both milk and ice cream because of the entree which the sale of milk gives to some companies to try to sell their ice cream. The fact that some of the respondents may have a competitive advantage by being in both milk and ice cream in some areas is not, of course, charged as an unfair method of competition. The only account referred to by the witness as having been involved in any competitive situation with a respondent was a food store to which Superior was selling ice cream, and respondent Fairmont was selling milk and frozen foods (the latter being in the frozen foods business as well as in milk and ice cream), and the owner allegedly advised Superior that he was going to switch to Fairmont's ice cream because the latter did not feel justified in coming into town unless it got the account's ice cream business as well. Assuming that the incident reported by the witness did occur, it is entirely outside the scope of the complaint.

The witness also expressed regret that he was unable to charge a cabinet rental to defray the cost thereof. He conceded, however, that it had always been customary in the area to furnish a cabinet without a rental charge. The witness claimed that as a result of the lower prices of ice cream due to pressure from wholesale grocers, the profit margin on ice cream had become too small to justify the supplying of cabinets without a rental. Since there is no evidence that the respondents are responsible for this condition (in fact, the witness conceded that they were not), this testimony has no probative value. In response to the leading and suggestive question of counsel supporting the complaint as to whether he was "able to get your share of the chain store business" in the territory, the witness answered in the negative. However, there is no showing that respondents operating in the territory have acquired more than their share of the chain store business or, in fact, that they serve any chain store accounts in the territory.

Superior Ice Cream Company has the same number of accounts as it had five years ago. While claiming that there had been some decline in his company's gallonage, the witness was reluctant to reveal his gallonage and would merely state that it was presently "below 100,000." There is no indication that the area is an expanding one. No finding of injury to competition by reason of the use of any of the complaint practices by respondents in the Superior

area can be made, based on the largely desultory and irrelevant testimony of the Superior Ice Cream witness.

* * * * *

The evidence with respect to the State of Nebraska wholly fails to establish any injury to competition within the state by reason of the use by the respondents of any of the complaint practices. There is nothing in the production share information pertaining to the respondent companies to indicate any significant improvement in their position. Thus, it appears that respondent Beatrice's production share has remained almost constant between 1947 and 1955, being 8.9 per cent in the former and 8.8 per cent in the latter year. Respondent National's share has increased slightly from 13.9 per cent in 1947 to 15.6 per cent in 1955.

21. *Cincinnati, Ohio*

The hearing in Cincinnati, Ohio, involved competitor witnesses from Cincinnati, Ohio; Toledo, Ohio; Louisville, Kentucky; and Lawrenceburg, Indiana. A single witness was called from each area. These areas appear to be separate market areas and the evidence concerning each is discussed separately below.

a. *The Cincinnati Area*

The respondents operating in the Cincinnati area include National, Beatrice and Borden, the latter selling in the suburban area and the balance of Hamilton County, but not within the city itself. Local companies engaged in the ice cream business in the area include French Bauer, Niser, Equity, Washington Courthouse, Mayfair, J. J. Schmidt, Cupid, Schmeising, Willson, and MacGregor. One of the local companies which had previously operated in the area, Lindner, was purchased by respondent Beatrice approximately one month prior to the hearing. Other regional or national companies selling in the area are Swift & Company and Cudahy Packing Company. A recent entrant into the market is Wayne Co-op of Richmond, Indiana. Another competitor, United Dairy Farmers, operates a number of retail establishments which it supplies itself. There are also a considerable number of soft ice cream establishments in the area. The only witness to testify from the Cincinnati area was an individual who is active in the management of both Willson Dairy and MacGregor Ice Cream Company. A representative of Niser was subpoenaed to testify but was excused at the request of counsel supporting the complaint.

Willson Dairy has been in the milk business for a great many years, but did not enter the ice cream business until October 1952. It does business mainly with hotels and institutions in downtown Cincinnati.

The company entered the ice cream business to enable it to make better use of its plant facilities and because it was felt it would be more advantageous to its milk business to be able to offer its customers ice cream. The individual who testified for the company is a partner and general manager, who had bought into the company several years previously. Prior to his joining forces with Willson he had purchased two defunct ice cream companies and, after building up their volume he joined Willson as a partner. The same individual is the general manager and a majority stockholder in MacGregor Ice Cream Company of Hamilton, Ohio, which is located in Butler County directly north of Hamilton County in which Cincinnati is located. Willson confines its operation to Hamilton County and MacGregor to Butler County. Most competitors operate in both counties, except for Cudahy and Equity (which operate only in Hamilton County).

The testimony of the Willson-MacGregor witness concerning competitive conditions in the area was of a loose and general nature, consisting of broad conclusions and hearsay information reported to him by salesmen. He complained generally about such practices as loans, the furnishing of extra equipment and the granting of low prices. In the case of loans he at first made the general charge that he couldn't acquire drug stores and similar accounts due to large loans of money. However, the only account he could cite, which he had been unable to acquire due to the making of a loan, involved the nonrespondent, Swift & Company. He was unable to recall any other accounts which he had lost or been unable to acquire because of loans and conceded that the account referred to was a "more or less" isolated instance. With respect to his charge of furnishing too much equipment, some of which was allegedly used for the storing of frozen foods, he claimed this was a general situation but was unable to name a single account where this practice had presented a competitive problem. He conceded that no one company was different from any other company in the market in the respect of furnishing such equipment.

The principal complaint of the witness appeared to be directed to the matter of price, particularly low prices and off-list prices. While making the general charge that "many large accounts" were purchasing bulk ice cream off-list, the witness conceded that he could not "name any one where they are cheap, because I don't know the price." Since the witness' charge involved the sale of bulk ice cream, it seems apparent that his primary complaint did not involve the largest users of ice cream, the food chains and supermarkets who handle only package ice cream, as to which the witness indicated there was "hardly any ice cream sold at other than list, less the schedule discount." Even

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with respect to bulk sales, the witness did not refer to any particular supplier or group of suppliers as being involved in off-list selling, but indicated that every one was involved including his own company.

Combined with the witness' claim regarding off-list pricing, was the assertion that, following a general price cut in the area which had occurred the year previously, prices generally were too low to permit the making of a profit. While at first attributing the leadership in the price cut to respondent National, the witness later acknowledged that the latter had acted to meet the competition of Wayne Co-op which had come into Hamilton County from Richmond, Indiana, selling ice cream at 69 cents a half gallon, which resulted in the Co-op's achieving a "tremendous volume" before other competitors met its price.

The testimony of the Willson-MacGregor witness wholly fails to establish that respondents' engagement in the complaint practices in Cincinnati has resulted in any substantial injury to his companies, let alone to competition in the area. The practices about which the witness testified are operative generally in the area. There is no reliable evidence that respondents are the leaders in the practices or have used them, to any substantial extent, to injure Willson or MacGregor or to injure competition in the area. The only evidence in the record concerning the extent of respondents' use of any of the complaint practices in the Cincinnati area involves respondent Beatrice. From this it appears that Beatrice's assistance to customers in the form of loans or financing of equipment involved only 1.28 per cent of its customers in 1954 and 1.11 per cent in 1955. In connection with the matter of off-list pricing and low prices, to which the bulk of the witness' complaints were directed, there was no showing that exclusive dealing arrangements were involved in connection with such pricing.

In any event, despite the problems referred to, both Willson and MacGregor appeared to have fared well in their respective areas. The witness representing those companies had entered the ice cream business five years previously with 14 or 15 accounts which he had purchased from two defunct companies. When he joined forces with Willson two years later, he had some 200 accounts. Since that time at least one hundred additional accounts have been acquired. No claim was made that Willson's gallonage had declined, the witness conceding that the company had had a "very good increase continuously" in volume and that his gallonage was at least twelve times that of the concerns he had purchased. He agreed that in the MacGregor operation they were "holding their own." While he asserted that it was

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difficult to make a profit in MacGregor, this was attributed mainly to the price decrease which had been precipitated by Wayne Co-op when it came into the market.

There is no indication that any of the other competitors have been experiencing competitive difficulties due to any of the complaint practices. The witness conceded that the local competitor, French Bauer, a farmer co-op, was one of the largest, if not the largest competitor in the area. The United Dairy Farmers which sells through its own stores was described by the witness as a significant factor in the market. The position of respondents has not notably improved in the Cincinnati area. In the Cincinnati market, which covers two Kentucky counties in which Willson and MacGregor do not operate, respondent National's share of the market has increased only slightly from 14.6 per cent in 1951 to 15.1 per cent in 1955. Respondent Beatrice's share has declined from 5.3 per cent in 1950 to 4.2 per cent in 1955. Borden's share of the same market is almost infinitesimal, being only 1/10 of one per cent in 1955. In the area which conforms more closely to Willson's and MacGregor's trading areas, respondent National's sales dropped 14.7 per cent from 1947 to 1955, and respondent Borden's sales have dropped 4.1 per cent between 1946 and 1955.

b. Southeastern Indiana Area

The only witness to testify from the southeastern Indiana area was a representative of Ritzmann Ice Cream Company of Lawrenceburg, Indiana, which operates in 17 counties in southeastern Indiana. A representative of Daum Dairy of Connorsville was also subpoenaed, but was excused by counsel supporting the complaint. The respondents competing with Richmond are National, Beatrice and Borden, the latter only competing in a fringe of the territory around Greensburg, Indiana. Also operating in the area are French Bauer and other unnamed Cincinnati companies, and Blue Ribbon Ice Cream Company of Indianapolis.

The Ritzmann witness, testifying without the aid of records, at first claimed that his company's sales had declined from about 60,000 gallons at the end of World War II to 40,000 gallons, and he devoted most of his testimony to explaining how this "decline" had come about. However, on cross-examination, it developed that the 60,000 gallon peak volume had been achieved prior to 1932, "in the prohibition era." The witness did not know what his company's gallonage was in 1946 or 1947 but "presume[d] it was somewhat more than what we have got now", although he conceded that if it was more than 40,000 gallons it was not very much more.

The Ritzmann witness conceded that his company had as many accounts as it ever had, but claimed that its sales per account had declined. His explanation for this decline was that it was "somewhat due to competitive conditions on price." This was explained to mean that one of the ice cream distributors in the area, which is supplied by the nonrespondent Blue Ribbon Ice Cream Company of Indianapolis, was marketing ice cream at so low a price as to have taken away business from Ritzmann's accounts. Another factor to which the decline was attributed was the increase in the sale of novelties to youngsters, which had resulted in a "rapid decline in the sale of bulk ice cream", the latter having therefore been a large factor in Ritzmann's sales.

The Ritzmann witness referred to the loss of a single account to each of the three respondents operating in the area. One was allegedly lost to respondent National after the latter had put in a display-type cabinet which Ritzmann had declined to furnish; another was lost to respondent Borden which allegedly paid off some debt in the amount of \$100.00 owing by the dealer to Ritzmann; and the third was lost to respondent Beatrice which had allegedly furnished the account with a display-type cabinet. No claim was made that Ritzmann had been requested and refused to supply the last-named account with the cabinet. Aside from the fact that there is no reliable evidence in the record to establish the reason for the alleged switching of these accounts, the Ritzmann witness conceded that the basic cause of his difficulties as a small manufacturer was not the supplying of cabinets, but the national advertising of the larger companies on television, radio and in magazines, which built up consumer demand for advertised products.

Viewing the Ritzmann testimony as a whole, it seems apparent that his main competitive difficulty is his company's inability to compete on price, which condition has resulted from the activity of a non-respondent competitor. In addition, the advertising program of his larger competitors has apparently created a consumer demand which is lacking in the case of his product. The matter of cabinets, if it is a problem, is not one of major significance. Even here it was not the furnishing of cabinets, as such, which was the heart of the problem but the demand of dealers for the more modern display-type cabinets to replace older equipment, based on the reputation of such cabinets for increasing sales. Ritzmann himself conceded that most companies were replacing the older cabinets with more modern equipment because "it helps the sale of ice cream." In fact he admitted that his

company had replaced two old cabinets in a former National account, which he had acquired, with a more modern type fountainette.

There is no basis in the record for attributing Ritzmann's difficulties primarily or in any significant degree to the complaint practices. Certainly there is no evidence of injury to competition in the area as a result of the engagement by any of the respondents in any of the complaint practices.

c. Louisville Area

The respondents doing business in the Louisville area are National, Borden, and Beatrice. The Louisville companies include Cream Top Creamery, Shively Dairy, and Blue Grass Ice Cream Company. Directly across the Ohio River in New Albany, Indiana, is Purity Maid Ice Cream Company, which is very active in the Louisville market. A recent entrant into the market is Dean Milk Company of Chicago. Another large competitor in the area is Swift & Company. The only witness from the area was a partner of Cream Top Creamery.

Although Cream Top has been in the milk business for many years, it did not enter the ice cream business until around 1950. Its sales increased gradually from \$173,000 in 1951 to \$194,000 in 1953. In 1954 its sales declined to \$173,000 and in 1955 to \$165,000.¹¹¹ The witness attributed the decline in 1954 and 1955 to a loss of customers which, in turn, he attributed to his company's inability "to meet the competition", including such alleged practices as "the loaning of cabinets, equipment, mortgaging, black-topping driveways." The witness enumerated 12 accounts which he had lost to competitors, allegedly because the latter had supplied cabinets to these accounts. Of these, five involved respondent National, four involved respondent Beatrice, two involved respondent Borden, and one involved the nonrespondent Swift. Reference was also made to four accounts which Cream Top sought to acquire, but was allegedly unsuccessful because of competitors, one account involving Purity Maid, another involving respondent Borden, and two involving respondent National.

With one exception, the witness' testimony was not based on personal contact with the dealers in question, but on discussions with his company's driver-salesman about a week prior to the hearing concerning competitive situations which had occurred a year or two earlier. It does not even appear whether the information received from the driver was based on conversations with the dealers concerning their reasons for changing or retaining suppliers, or was based on the

¹¹¹ Unlike many of the figures of competitor witnesses appearing in the record, these figures appear to be reasonably accurate, having been taken from the company's profit and loss statements by the witness.

driver's own opinion or surmise of as to why he had lost or been unable to acquire the account. The single account where the witness had actually talked to the dealer personally involved the overhearing of a conversation in which the dealer allegedly advised the National Dairy driver that he was going to use one of that respondent's cabinets to store meat. With this one exception, no finding can be made with respect to any of the accounts involved in the Cream Top witness' testimony, which was based at best on double hearsay, and at worst on the opinion and surmise of a third person. The unreliability of such testimony is pointed up by the fact that other evidence offered by counsel supporting the complaint, concerning one of the accounts which the Cream Top witness claimed his company could not acquire because of the furnishing of a display cabinet by respondent National, establishes that the dealer had in fact received no cabinet from that respondent since he had his own equipment in the store.¹¹²

Aside from the unreliability of most of testimony concerning the loss of accounts, it may be noted that in almost all instances the alleged reason for the loss of the account was solely the supplying of the cabinet by a competitor. No reference was made to the supplying of such cabinets on an exclusive basis, but simply to the supplying of the cabinets as such. In fact, one of the accounts about which the witness complained was one which was split between his company and Borden. Unlike most competitors in the Louisville area and in most sections of the country, where the supplying of cabinets by ice cream manufacturers is standard operating procedure, Cream Top has refused to supply its customers with cabinets. When it first entered the business six years previously it supplied about 15 or 16 cabinets to customers in accordance with the prevailing practice, but thereafter changed its policy and decided to sell cabinets to customers. Its policy in this respect was admittedly out of step with most of the industry, including Cream Top's local competitor, Purity Maid, which in one of the instances referred to by the witness had supplied the account not only with a cabinet but with a fountain. The Cream Top witness conceded that his local competitor, Purity Maid, was a substantial factor in the Louisville market, having about twice his own company's volume.

Despite the fact that it had only recently entered the ice cream business, Cream Top was able within a year to build up a sales volume of \$173,000 and to augment that for several years. The evidence in the record does not support a finding that the company's decline to

¹¹² CX 398, pp. 33 and 36, in the National Dairy record indicates that the account, Hale's Market, received no cabinet.

\$165,000 in sales during the past two years has been due in any substantial degree to the engagement by respondents in the complaint practices. Moreover, the evidence does not support a finding that there has been any injury to competition in the Louisville area. While two local companies sold out to Borden (for reasons not appearing in the record), two local companies have entered the ice cream business in recent years.

Of the three respondents doing business in the Louisville market only National has had a substantial increase in market share in recent years, its market share having increased from 24.2 percent in 1950 to 30.5 percent in 1955. However, for the State of Kentucky as a whole, its production share actually declined, from 22.1 percent in 1947 to 17.4 percent in 1955. Borden's share of the Louisville market has increased modestly from 15.4 percent in 1950 to 15.8 percent in 1955, while Beatrice's share has increased from 3.2 percent to 4.0 percent in the same period. For the state as a whole, Borden's production share has remained constant at 7.1 percent between 1950 (when it entered the state by acquisition of several other companies) and 1955.

d. Northwestern Ohio, Northeastern Indiana and Southern Michigan Areas

The only competitor witness called from these areas was the president of Page Dairy, which has its main manufacturing plant in Toledo, Ohio, and has four distributing branches in the territory. The company operates in a radius of approximately 50,000 square miles and its territory includes a number of different marketing areas, with different groups of competitors. Respondents National and Borden compete with Page throughout most of its territory. Respondent Beatrice competes in the Ohio and Indiana areas. Competition with respondent Fairmont is limited to the suburban Detroit area and area outside of Cleveland. Among Page's competitors in various portions of the Ohio territory are Driggs Dairy, Swift & Company, Esmond Dairy, San-a-Pure, Tiffin Pure Milk, Superior Dairy, Hubach Ice Cream Company, Dairymen's Ohio Farmers, Miller Goldseal Dairy (which has recently been purchased by Hawthorn-Mellody of Chicago), and Franklin Ice Cream Company. Competitors in the Michigan area include Ira Wilson & Sons, H. A. McDonald Creamery, Swift & Company, and Driggs. Among the Indiana competitors are Swift and Puritan Ice Cream Company.

Page Dairies is one of the largest companies represented at the hearings, outside of the respondent companies, having a gallonage of approximately two million gallons a year. The Page witness claimed

that his company had been losing between 35 to 50 accounts a year during the four-year period prior to the hearings in July 1956, allegedly due to his company's unwillingness to engage in such competitive practices as the making of loans, financing of soda fountains and furnishing excess equipment. He claimed that the most troublesome practice in recent years had been the supplying of cabinets which were permitted to be used, entirely or in part, for the storing of frozen foods other than ice cream.

The witness' testimony, in large part, involved an enumeration of 16 accounts which had allegedly been lost to the respondents, nine to respondent National, five to respondent Borden, and one each to respondents Beatrice and Fairmont. Except for two instances, the witness' testimony as to why he thought his company had lost these accounts was based on information received from his salesmen, rather than on personal contact with the dealer. It does not appear whether the salesmen's information was based on advice received from the dealers, as to their reasons for changing suppliers, or was based on their own conclusions and opinions as to why the accounts had switched. None of the salesmen or dealers was called to testify. In most instances, the witness attributed the loss of these accounts to the furnishing of a cabinet which could be used wholly or in part for the storing of frozen foods. The witness' testimony with regard to these accounts is a combination of unreliable hearsay and uncorroborated surmise and opinion, both as to the fact of whether the respondents had furnished the alleged equipment for the alleged purpose, and as to the fact of whether the furnishing of the alleged equipment was the reason for the change of suppliers. The witness himself, in some instances, was admittedly uncertain as to what the equipment had been supplied for or what assistance had been rendered by a respondent.

The two accounts as to which the witness had any personal knowledge both appeared to involve factors outside the scope of the complaint. One involved the operator of cafeterias in two industrial plants who had allegedly switched to respondent Borden because of a lower price and a promise not to raise prices for one year. There is no reliable evidence in the record as to what price Borden gave the account, nor anything to indicate that any exclusive dealing arrangement was involved. So far as appears from the record, this account involved a simple matter of price competition. It may be noted, in this connection, that the loss of the account occurred a month after Page had raised its price.

The second, and apparently the major account lost by Page, was the A & P chain, of which Page had served 58 stores. This loss occurred

because Page had decided not to submit a bid for the manufacture of A & P's ice cream under a private label, after that account decided to have its ice cream put up under a private label. While Page had no objection to making an offer based on the supplying of its own brand in a special package, it was not willing to make a private label ice cream in accordance with the A & P specifications, because the A & P requisites were "quite stringent" and Page did not think that a capital outlay of approximately \$30,000 would be justified from its own point of view. According to the witness, respondent National was the successful bidder, receiving an award on approximately 200 to 250 A & P stores in the Ohio, Michigan and Indiana areas. While Page claimed that his company could not make a bid covering all these stores because it did not have distribution throughout the whole area, he conceded that the invitation did not require a bid for the entire group of stores, and that he could have submitted a bid on the 58 stores which he had been serving. This loss, while unfortunate from the point of view of Page, has nothing to do with the complaint. There is no evidence that the National Dairy price to A & P represented a deviation from its price schedule. Assuming, arguendo, that price deviations were involved in the loss of the two accounts above discussed, such matters are not covered by the present complaints, although conceivably they might fall within the proscription of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

While at first complaining that his company had been losing 35 to 50 accounts a year during the past four years, the Page witness conceded on cross-examination that his company had actually gained more accounts than it had lost each year. The company increased the number of its accounts from approximately 596 in 1946 or 1947 to approximately 1,600 accounts in 1956, of which about 200 were split with other manufacturers. However, the witness claimed that his company's gallonage had not increased in the same proportion and, in fact, had declined recently. Page's gallonage in 1947 was approximately 1,200,000 gallons and by 1950 had allegedly declined to 960,000 gallons. At that time the company started an aggressive selling and merchandising program which involved a lowering of the price on its popular half-gallon package by 20 cents a gallon and a plan for featuring various flavors each month, with an even lower price for the flavor of the month. As a result of this aggressive program Page's gallonage increased in four years to 2,815,000 gallons. However, at the end of 1955 Page's gallonage had dropped down to 2,065,000 gallons, and in 1956 its gallonage was running at the rate of 1,700,000.

There is no reliable evidence in the record upon which a finding can be based that the more recent decline was due, in any substantial degree, to the complaint practices. The evidence suggests that the decline in 1955 resulted largely from the fact that Page's competitors had met its lower prices and that the campaign begun in 1951 had lost some of its steam. The continuing decline in 1956 was attributed by the witness himself largely to the loss of the 58 A & P stores. Despite this decline, the witness conceded that the company was making a greater profit than it had during the previous year.

Page has shown its faith in the future and in its ability to survive and grow by developing a newer and more expensive type of package. Despite the downward trend of prices it has recently raised its own price by 15 cents a gallon. Despite the fact that most competitors supply refrigeration equipment without charge, Page has undertaken during the month prior to the hearing to induce his dealers to own their own equipment by paying the dealer a rental for the use of space in the dealer's cabinet. Within a 15-day period, approximately 45 dealers were induced to join the new plan. In an article published in a trade paper, the company claimed that the newer methods had increased sales substantially during February 1956 over the comparable period in 1955. Despite some alleged competitive difficulties, Page ranks first or very close to first in the Toledo market. It has gradually expanded its trade territory, having entered the Detroit market most recently. There is no reliable evidence to establish that it has sustained competitive injury as a result of the use of the complaint practices by the respondents, or that competition in the areas where it operates has been injured.

While no evidence is available as to respondents' over-all position in the entire area where Page operates, such evidence as is available for representative sections of the territory fails to indicate any unusual improvement in the position of respondents in recent years. Respondent National's share of the Toledo market has increased only slightly from 11.9 per cent in 1950 to 12.8 per cent in 1955. In Canton, Ohio, its market share has declined from 15.1 per cent to 8.0 per cent in the same period. In the Youngstown area its share of the market has declined from 15.6 per cent to 13.6 per cent. Respondent Borden's share of the Toledo market has increased from 9.8 per cent to 13.4 per cent, but its share of the Canton market has declined from 28.1 per cent to 20.3 per cent. In the Youngstown area Borden's share has increased slightly from 10.1 per cent to 11.7 per cent. Respondent Beatrice, which was referred to in connection with only one of the

accounts lost by Page, has increased its share of the Toledo market from 1.1 per cent in 1950 to 2.0 per cent in 1955.

There is no evidence that the three respondents involved in the testimony of the Toledo witness are about to dominate the markets in the three states in which the witness operates. Except for a modest increase in the share of respondent National in Indiana, the production share of each of respondents in the three states has generally declined between 1947 and 1955, as shown by the following table:

	National		Borden		Beatrice	
	1947	1955	1947	1955	1947	1955
Ohio.....	17.8	10.9	17.5	13.8	2.3	1.8
Michigan.....	20.2	15.4	7.1	6.7	0.2	0.9
Indiana.....	6.1	10.0	21.6	16.6	7.7	8.2

22. *Kansas City, Missouri*

The hearings in Kansas City involved testimony by competitor witnesses from three different areas: Atchison, Kansas; Columbia, Missouri; and several overlapping areas in central Kansas. No dealers were called. Each area is discussed separately below. It may be noted in passing that although the hearings were held in Kansas City and some of the respondents were noticed for the hearings because they did business in the Kansas City area and several produced statistical information covering their operations in the area, not a single witness from Kansas City was called. The record does disclose, however, that there are a number of nonrespondent ice cream manufacturers operating in Kansas City, some of which appear to be sizeable operations. Thus it appears that Southern Ice Cream Company (not to be confused with Southern Dairies), which entered the Kansas City market in 1950, had grown by 1955 to an estimated volume of over a half million gallons. Several, at least, of the Kansas City manufacturers serve the major grocery chains, including Arctic Ice Cream Company which serves the A & P chain, and Adams Ice Cream Company which serves the Safeway stores.

a. *Atchison, Kansas, Area*

Atchison is located in northeastern Kansas about 50 miles from Kansas City. A single witness from the area testified, the manager of Velvet Ice Cream Company. The respondents operating in the area are National (Franklin Division), Beatrice, Borden and Fairmont. Respondent Foremost had entered the area shortly prior to

the hearing by the acquisition of a local company. Other competitors in the area are Adams Ice Cream Company and Arctic Ice Cream Company, both of Kansas City, and Western Dairy Company and Beatty Dairy, both of St. Joseph, Missouri.

The Velvet witness claimed that his company's sales had not increased since 1947 and had possibly decreased. Testifying without the aid of any records, he estimated his 1946 or 1947 gallonage as approximately 75,000 gallons, and his more recent gallonage variously as, "around 50,000," "between 50,000 and 75,000", "62,000", and "50,000 to 55,000 gallons." While at first claiming that the company's recent decline in gallonage was due both to a loss of accounts and to a decline in sales per account, he later conceded that it had gained at least as many accounts as it had lost and that the principal reason for the decline in gallonage was a decline in sales per account. No effort was made, however, to attribute this decline to any competitor or group of competitors or to any competitive practices.

The witness indicated that it was customary for manufacturers in the area to supply cabinets without a rental charge. While he claimed that it had been the practice up to 1950 to make a rental charge and that this practice had gradually ceased, he made no effort to attribute the cessation of the charging of rentals to any competitor, indicating that it was simply an industry-wide development. The Velvet witness referred to the fact that his company had ceased serving chain store accounts during the past few years. However, there is no evidence that the respondents or the complaint practices are responsible for this. One of the accounts which his company had lost was Safeway. Safeway is now manufacturing its own ice cream and also purchases some of its requirements from the nonrespondent, Adams Ice Cream Company of Kansas City. The A & P chain, which the Velvet witness claimed his company had lost, is being served by the nonrespondent Arctic Ice Cream Company of Kansas City. Another account referred to was a single I.G.A. store, which was allegedly lost to respondent National. In no instance did the Velvet witness attribute the loss of any of the chain store accounts to the complaint practices. While testifying that some retail stores were selling ice cream as low as 39¢ a half gallon, he did not claim that he had lost any of the chain accounts because of this. Furthermore, he did not attribute the low prices to any of the respondents. The only attempt to assign responsibility for such prices was to a nonrespondent, Beatty Dairy of St. Joseph. While claiming to have lost all its chain store accounts, the witness conceded that the company was still serving the Woolworth store in Atchison.

Population in the Atchison area has remained static, which may well account for Velvet's lack of growth. The fact that 1946 and 1947 were admittedly the best years for all companies in the area suggests that Velvet's position is no different from that of its other competitors. It is still the number one company in Atchison. While it is possible that it has lost some business because of its inability to compete with the low prices of competitors, there is nothing in the record to suggest that the respondents have had any significant responsibility for this and, more importantly, there is no evidence that such low prices involved exclusive dealing-quantity discount arrangements of the type covered by the complaint.

The market share information in the record with respect to the Kansas City market area discloses that respondent National's sales have been almost static between 1951 and 1955, and that its market share has declined from 13.4 per cent to 11.7 per cent during this period. Respondent Borden's sales have declined by about 100,000 gallons between 1946 and 1955. Its market share has declined from 8.5 per cent in 1950 to 5.0 per cent in 1955.

b. Columbia, Missouri, Area

The principal Columbia companies are Central Dairy Company and State Dairy Products Company. The former operates within a radius of approximately fifty miles of Columbia. The latter is a larger company and operates in a broader area in central and northeastern Missouri and in part of western Illinois. The respondents operating generally in this area are National and Beatrice. There is also some slight competition in parts of State Dairy's territory with respondents Borden and Foremost. Other competitors in various parts of the area are Adams of Kansas City, Pevely Dairy of St. Louis, Swift & Company, and a number of smaller local companies.

Of the two Columbia companies called, only Central Dairy appears to have sustained any serious loss of business. After experiencing a peak gallonage of approximately 100,000 gallons in 1946, the company declined to 80,000 gallons in 1948 and by 1955 had reached a low of 40,000 gallons. Even allowing for the fact that 1946 was not a typical year, since it was admittedly one of the best in the industry, Central's continued substantial decline after 1948 suggests that factors other than a "return to normalcy" have been responsible for the company's present predicament. It has also sustained a loss in the number of its accounts from approximately 100 to between 50 and 75. While the loss of volume and accounts are not facts to be controverted, the reason therefor is a horse of another color. The

witness himself conceded that he didn't "know for sure" why his company had lost accounts, and attributed its decline in volume to an increase in the number of competitors which had entered the market. He referred to the fact that the company had lost some of its chain store accounts and that ice cream was being sold in the market at prices below his. However, the record fails to afford any basis for attributing Central's difficulty to the respondents and, more particularly, to respondents' engagement in any of the complaint practices.

Kroger, the main chain store account which Central had served, was lost to the nonrespondent local competitor, State Dairy Products, for reasons not appearing in the record, except that such loss occurred at or about the time when Kroger had moved to a new location. While Kroger was later split between State Dairy and respondent National, there is no evidence that such *ex post facto* splitting had anything to do with Central's loss of the account or that it was due to any of the complaint practices. On the contrary, the splitting of the account is the direct opposite of the exclusivity allegation of the complaint. The other chain account lost by Central was A & P, which is now being served by respondent Beatrice. The record fails to establish when Beatrice acquired the account or that Central lost the account to Beatrice or that such loss was due to any of the complaint practices. Central also lost the State University account with a volume of approximately 5,000 gallons a year, but this was lost to the nonrespondent local company, State Dairy, allegedly on the basis of a lower price bid.

In addition to a loss of accounts, the Central witness also complained about his company's inability to obtain several chain accounts which it solicited, including Woolworth and Newberry, both of which were being served by respondent Beatrice. No reason was suggested by the witness for his company's inability to acquire these accounts, except that possibly his price was not low enough. There was no evidence presented as to Beatrice's price or as to any exclusive dealing arrangement with these stores. No claim was even made that the matter of price was referred to by a representative of any of the accounts, the witness merely testifying in connection with the Woolworth account that the manager had informed him that the decision as to a choice of supplier was made by the company's headquarters. The Central witness also referred to his company's inability to obtain the I.G.A. account because the account wanted a brand name and wanted distribution throughout the State of Missouri, neither of which Central could supply and neither of which involves the complaint practices.

In connection with the witness' reference to low prices in the territory, not only was there no effort made to connect this with the complaint practices (in fact it appears that a number of the accounts are actually being split), but the witness pointed the finger of accusation not at the respondents but at the nonrespondent company, Adams of Kansas City, which he claimed had brought low-priced ice cream into the territory when it began selling to Safeway and "broke the ice cream market in town." The only reference made by the witness to the price of a respondent's ice cream was to the fact that respondent National's ice cream was being sold in the Kroger chain for the same price as his own company's brand was selling.

The major reason for Central's decline would appear to lie in a decline in sales through its existing accounts, plus its loss of, or inability to acquire, chain store accounts. The witness himself confirmed the trend away from the drug stores and other bulk accounts which he had formerly served, and stated that three food markets in town had 75 to 80 per cent of the food business, including ice cream. These stores were not further identified, but assuming that they include Kroger (which is split between respondent National and State Dairy), the A & P account served by respondent Beatrice, and the I.G.A. account served by Swift, there is no evidence that the complaint practices were involved in any of these accounts. The record wholly fails to establish that Central Dairy's difficulties are due to respondents' use of any of the complaint practices.

The other competitor witness from Columbia, State Dairy Products, has also sustained a decline in gallonage between 1947 and 1955, from 460,000 gallons to 302,000. However, most of this occurred around 1948, during which year a loss of about 30 per cent was experienced, due to a return of the market to a more normal condition than that which had prevailed during the immediate postwar years, 1946 and 1947. The witness attributed most of his company's decline since 1948 to the entry into the market of a number of new companies, many of which were small dairies that had formerly not handled ice cream. State Dairy, unlike its local competitor Central, serves a number of chain accounts, mostly on a split basis, including Kroger, Safeway and I.G.A. The company maintains a graduated scale of quantity discounts, except to the Kroger store to which it sells at a flat negotiated price.

While the State Dairy witness indicated that his company's profit ratio was not as large as it had been formerly, he attributed this largely to the change from bulk ice cream to package ice cream. The latter involves additional packaging costs not present in the case of

the former. Another factor referred to by the witness as affecting his company's profits was the relatively low price of package ice cream. He did not attribute this to the respondents, but to the small dairies which had entered the ice cream business in recent years and were selling lesser-known brands of ice cream. This has caused State to put out a cheaper brand of ice cream to compete with the lesser-known brands of the smaller dairies.

The evidence concerning the Columbia areas is wholly deficient insofar as establishing that the use of the complaint practices by the respondents has been responsible for any injury to any competitor or to competition in the area. The record fails to establish any decline in the number of competitors. On the contrary, the number has increased. There is no information in the record with respect to respondents' market shares in the Columbia area. However, for the State of Missouri as a whole it appears that they have not substantially improved their position. Respondent National's share of state production has declined from 16.4 per cent in 1947 to 11.8 per cent in 1955. Respondent Borden's share has declined from 8.6 per cent to 7.7 per cent during the same period. Respondent Beatrice has had a modest increase of 3.1 per cent from 8.9 per cent in 1947 to 12.0 per cent in 1955.

c. Central Kansas Area

Counsel supporting the complaint called four competitor witnesses operating in central Kansas: Jo-Mar Dairies of Salina, Jackson Ice Cream Company of Hutchinson, Sterling Ice Cream Company of Sterling, and Armstrong Creamery of Wichita. The territories of these companies are not precisely coextensive, but they operate in an overlapping area of about 200 miles in the central part of the State. The respondents operating in various portions of the area include National, Borden, Beatrice, Fairmont and Foremost. Respondent Carnation operates in Oklahoma, where it competes to a small extent in the northern counties with Armstrong Creamery of Wichita. Swift & Company also sells in the central Kansas territory. There are a considerable number of local companies operating in the area, including Steffen Dairy, Strahan, Bogaart's, Artesian Valley, Hyde Park, Gardner, Russell, Bennett, and Schluer.

The only one of the four competitor witnesses to have sustained any substantial decline in gallonage was Jo-Mar Dairies of Salina. That company's gallonage has declined from approximately 300,000 gallons in 1947 to 200,000 gallons, as of the time of the Kansas City hearings in July 1956. This decline has not been due to any loss of

accounts since the company has a greater number of accounts than it ever had, but rather to a decline in sales through the company's existing accounts. According to the Jo-Mar witness, 65 to 70 per cent of the company's sales had been to drug stores, confectionery stores, restaurants and institutions whose purchases consisted largely of bulk ice cream, and the sales to some of these accounts had declined in recent years by as much as 75 per cent as a result of the shift in ice cream distribution to the food stores and particularly to the large supermarkets.

The Jo-Mar witness complained that his company had not been able to get into the supermarkets. His testimony suggested that low prices or off-list prices by his competitors were preventing him from selling to these accounts. He referred particularly to a reduction in price by respondent National, which was later restored, and to a "rumor" that respondent National was granting certain discounts or rebates, as to which he admittedly had no definite knowledge. Despite the insinuations in the witness' testimony, which was largely based on hearsay and surmise, as to respondent National's possible leadership in the charging of lower prices, he conceded on cross-examination that it was a local company, Bogaart, which had actually been the leader in low prices in the Salina market and that it had been followed by another local company in this practice, Strahan.

Irrespective of who was the leader or whether respondent National participated in the lowering of prices, there is not a scintilla of evidence that this price competition involved any exclusive dealing type of arrangement, such as is challenged by the complaints. On the contrary, according to the Jo-Mar witness' own testimony and that of other competitor witnesses in the area, most of the large supermarket accounts are being served on a split basis. Thus the Dillon stores to which the witness claimed he was unsuccessful in selling ice cream, handles not only respondent National's ice cream but as many as three and four other brands in some of the stores, including respondent Fairmont and the local competitors, Jackson and Sterling. The Mammel chain to which Jo-Mar does sell (despite the witness' assertion that he could not sell to chains) ¹¹³ is split with respondent Fairmont and with the local competitor Strahan. Of the chains which are not split, Minimax (having about eighty stores) is served by the nonrespondent local company, Bogaart, and Safeway is served by the nonrespondent, Swift.

¹¹³ In addition to selling to the Mammel chain, Jo-Mar also sells to some of the I.G.A. stores and to a regional chain of 5 and 10¢ stores.

The Jo-Mar witness also was somewhat critical of the practice of supplying cabinets to customers, claiming that the dealers could afford to purchase their own cabinets. However, he later conceded that the larger accounts, which are actually the ones able to purchase their own cabinets, do in fact, own their own equipment in order to take advantage of the 10-cent a gallon equipment discount, and that the supplying of cabinets was limited mainly to the smaller accounts which, in many instances, are not able to afford a cabinet. The Jo-Mar witness had no criticism of the practice of allowing customers to put frozen foods in ice cream cabinets since his company sells frozen foods and permits its customers to do this. He conceded that the supplying of signs was not a factor in his company's loss of or inability to acquire business. The witness spoke vaguely of loans and of the sale of equipment, but did not refer to any account where this had been a competitive problem or identify any competitor as being active in these practices. The witness also criticized the practice of granting price concessions to grocery chains affiliated in a cooperative buying group, but identified no accounts or any respondent as being involved in this problem. The apparent root of Jo-Mar's difficulty appears to be the matter of price competition, and there is no evidence in the record that this is based on any exclusive dealing arrangement such as is attacked by the complaints.

The smallest of the four competitor witnesses, Sterling, has apparently fared better than Jo-Mar in making the transition from bulk to package sales and from the drug and confectionery account to the food stores. In 1946 Sterling had a gallonage of only 86,000 and was serving mainly fountain accounts. When the change in the channel of distribution to the food stores began, Sterling acquired a number of trucks and began to sell to the food stores. It was able to get into the Dillon chain, to which Jo-Mar claimed it could not sell because of respondent National. It also was able to serve the Mammel chain on a split basis with respondent Beatrice and later with respondent Fairmont. While there is evidence of price competition in Sterling's area, the record does not establish that it involves the quantity discount-exclusive dealing type of arrangements to which the complaints are directed. Despite such price competition Sterling appears to have made reasonably good progress. It is selling to approximately 150 accounts, which is the largest number of accounts it has ever served. Its gallonage gradually increased from 86,000 in 1946 to 100,000 gallons in 1954. While it experienced a slight decline in 1955 to 96,000 gallons, this trend was reversed during the first six months of 1956 when it was running at a rate in excess of 100,000 gallons. So far as

appears from the record, Sterling is prospering and is holding its own in the competitive struggle in its area.

An even better record of performance is that of Jackson Ice Cream Company of Hutchinson. That company has increased its gallonage from 100,000 in 1950 to between 250,000 and 275,000 gallons in 1956. The company sells to the Dillon chain, some of whose stores it splits with respondent National, some with respondent Fairmont and some with respondent Beatrice. In certain of the stores it splits with both respondents, National and Beatrice, but admittedly gets the bigger end of the space. Despite the claim that the company lowered its price to the Dillon stores in order to meet respondent National's price and the fact that its profit ratio per gallon is allegedly lower than it was formerly, the company's overall profits are greater because of the increase in total sales. The only thing that is preventing Jackson from expanding further is the fact that the age of its owner has disinclined him from increasing his capacity. There is not a scintilla of evidence of injury to competition in Jackson's area due to any of the complaint practices.

The largest of the competitor witnesses called was Armstrong Creamery of Wichita, which sells not only in central and southern Kansas, but also in the Joplin, Missouri, area and in northern Oklahoma (where it competes with respondent Carnation). Armstrong sells to a number of chain stores in its area, including Safeway, Kroger, Farha Brothers, Mammel, Food Town, and a number of the I.G.A. stores. Its sales increased from 553,000 gallons in 1947 (which the witness agreed was one of the best years in the ice cream industry) to 820,000 gallons in 1954. Its 1955 gallonage had declined by approximately two per cent, which the witness attributed to the widespread sale of "undergrade ice cream" at lower prices than the regular grades. However, he made no effort to attribute this to any competitor or group of competitors, but indicated that practically all of the companies were selling a second grade of ice cream, including his own company and other local competitors such as Schluer, Jackson, Hyde Park and Steffen. No evidence was offered to indicate that any of such sales by any of the respondents involve exclusive dealing-quantity discount type of arrangements, such as those challenged by the complaints. The sale of such "undergrade ice cream", of presumably lower butterfat content, appears to involve simply a matter of price competition, which the present complaints do not cover. In any event, despite an alleged small decline of 2 per cent in gallonage in 1955, Armstrong's sales for the first six months of 1956 were running at a rate above that of the previous year.

Viewing the evidence of the Kansas area as a whole, it wholly fails to sustain any of the allegations of the complaint. The competition primarily involved in the area was price competition, not falling within any of the allegations of the complaint. Moreover, there is no evidence of any injury to competition in the area or the reasonable likelihood thereof. While one of the competitors has experienced a substantial loss in gallonage, the other three have improved their position (two of them quite substantially). In contrast to this, respondent National, which was the only respondent referred to to any substantial extent, has actually experienced a marked decline in its sales in the Kansas area covered by the testimony of the witnesses who appeared. The gallonage of its Franklin Division has declined from 2,100,000 in 1947 to 1,500,000 in 1955. The only respondent for which the record contains production share data is respondent Beatrice, it apparently being the only one with a plant in Kansas. Such data reveal that its share of state production has declined from 18.2 per cent in 1947 to 15.3 per cent in 1955.

23. *New England Area*

Hearings were held in two New England cities, Portland, Maine, and Hartford, Connecticut. No competitor witnesses were called from either of the hearing cities. At the Portland hearing a single competitor witness was called, respectively, from Barre, Vermont, and Ellsworth, Maine. At the Hartford hearing a single competitor witness was called from Danbury, Connecticut. No dealer witnesses testified. The evidence with respect to each of the above areas, which appear to be a separate market area, is discussed below.

a. *Barre-Montpelier Area*

The respondents doing business in the area are National (General Ice Cream Division), Borden and Hood. The largest local competitor is Granite City Cooperative Creamery Association of Barre. There are also two or three other competitors who sell in portions of the territory. A representative of Granite City Co-op testified at the hearing. Granite City Co-op has the largest sales of any of the competitors in the area, having approximately 475 customers and a gallonage of approximately 216,000. The company's witness had no criticism of the practice of furnishing cabinets, expressing the opinion that it is desirable for the ice cream supplier to furnish a cabinet because it is the only proper way to insure the product's reaching the consumer in good condition. He indicated that the cost of the cabinet was figured into the price of the ice cream.

The Granite City witness claimed that he had lost to respondent Hood several retail grocery accounts, which were affiliated with a voluntary buying group known as the Red and White Stores. The witness' testimony was somewhat confused as to whether the loss of the stores was due to price or to the furnishing of equipment. His testimony with respect to one of the accounts suggests that the reason for the switch was "pressure" from the buying group itself which, of course, is outside the issues in these proceedings. In any event, there is no reliable evidence in the record to support the witness' hearsay testimony with respect to what assistance, if any, these accounts received from Hood.¹¹⁴ The witness also referred to two accounts which had been lost to respondents National and Hood, respectively, because of the alleged financing of soda fountain equipment. There is no reliable evidence in the record to support the witness' hearsay testimony concerning the assistance of these two accounts by the two respondents in question.

The record fails to establish that Granite City Cooperative is experiencing any serious competitive difficulties or that such problems as it is encountering are due to the complaint practices. The company's gallonage as of August 31, 1955, was 216,000 gallons, which was 26,000 gallons higher than its gallonage in 1953. While it has lost some accounts, it has also gained at least as many, including some from the two respondents to which it allegedly had lost several accounts. Its representative's main complaint was that the company was not expanding as fast as it thought it should. However, there is no indication that the respondents are expanding in the area. The sales of National's plant in nearby Burlington and in its other branches in the state have declined from 890,700 gallons in 1947 to 642,700 gallons in 1955. While it is still a dominant factor in the State of Vermont, National's share of state production has declined from 53.8 per cent in 1947 to 46.3 per cent in 1955.¹¹⁵ The sales of Borden's Burlington, Vermont branch declined from 103,000 gallons in 1946 to 77,000 gallons in 1955. The record contains no separate figures for Hood's Vermont operation. However, the figures for its northern region, which includes Maine and Vermont, show a decline in sales of 134,150 gallons between 1950 and 1955.

¹¹⁴ The witness conceded that he did not have any firsthand knowledge of the actual prices being charged by competitors.

¹¹⁵ It may be noted that National's 1947 production share was only two per cent above its 1932 production share.

b. Ellsworth, Maine

Although hearings were held in Portland, Maine, no witnesses from that area were called. A competitor witness from Fairfield, Maine was subpoenaed, but was excused at the request of counsel supporting the complaint. The only witness called from the State of Maine was a representative of Hancock Creamery of Ellsworth. Another local competitor in the area is Edwards of Rockland, Maine. The only respondents operating in the area are Hood and National. Borden does not sell in the territory.

The Hancock witness claimed that his company had lost several grocery stores, affiliated with the IGA and Associated Grocers groups, to respondent Hood. The witness thought these accounts had received a better price due to some sort of special arrangement between Hood and the groups. However, the witness, who had only been with the company for about five months at the time of the hearing, conceded that he had no personal knowledge as to what prices his competitors were charging. In fact, most of his testimony related to accounts which had been lost prior to his coming with the company. No finding with respect to the loss of these accounts or the reason therefor can be based on the unsatisfactory testimony of the witness.

The record discloses that Hancock's sales increased steadily from approximately \$165,000 in 1947 to \$189,000 in 1953. During 1954 the company experienced a decline to approximately \$150,000 but the following year its sales increased to \$172,000 and this improvement continued into 1956. There is no evidence that either of the two respondents has experienced any improvement in its sales in the area. The sales of National's branches in nearby Bangor and Machias have declined by approximately 50,000 gallons between 1947 and 1955. As indicated above, the sales of Hood's northern region, which includes Maine, have also declined substantially between 1950 and 1955.

c. Danbury, Connecticut, Area

Although hearings were held in Hartford, the only witness called from Connecticut was a representative of Rider Dairy Company of Danbury, which operates in portions of southern Connecticut and several counties in the adjacent sections of eastern New York. The respondents operating in the area include National, Borden, Hood and Foremost. There are also a number of other local and regional companies selling in the territory.

The Rider witness indicated that the supplying of cabinets and signs was a general practice of almost all companies in the area. He had very little criticism of the furnishing of this type of equipment, except

for one instance where National had furnished a sign, valued at about \$100.00, to an account on a U. S. highway which the witness did not feel was warranted by the account's gallonage. Most of his criticism was directed at the alleged loaning of money or financing of equipment for dealers. The Rider witness' testimony regarding the alleged financial assistance of several dealers by Borden and National was largely based on unreliable hearsay. He conceded that his own company also assisted customers in the purchase of soda fountain equipment and that the loaning of money in the territory by competitors went back as far as the 1920's. While somewhat critical of the financing of dealers, the Rider witness conceded that the smaller independent stores needed financial assistance in order to obtain necessary equipment. In addition to the matter of financing, the witness also alluded to the granting of off-list prices and of price cutting in the territory. However, he conceded that he had no personal knowledge of this and was unable to identify any respondent as being involved in this practice.

Rider's gallonage in 1955 was approximately 130,000 and its dollar sales about \$250,000. The witness claimed that his company's volume had remained static during most of the postwar period. He conceded, however, that this was due largely to a shift in business away from the old-line soda fountain and restaurant bulk-type establishment (which his company had traditionally served) to the supermarket food outlets. The witness indicated that competition for the latter type of establishment centered mainly about price. No evidence was offered to show that pricing practices of the type alleged in the complaint were involved in the acquisition of these accounts. In fact, no evidence of any kind was offered as to who served the supermarket accounts in the area or as to what prices were being charged.

The record fails to establish that respondents have significantly improved their position in the area in which Rider operates. The sales of respondent Borden's branch in Stamford, Connecticut, which serves a considerable part of the area, have declined by 115,000 gallons between 1946 and 1955. The sales of its Poughkeepsie, New York branch, which serves areas of eastern New York State adjacent to Connecticut, have declined by 90,000 gallons during the same period. Its share of production in the State of Connecticut has declined from 16.0 per cent in 1947 to 10.7 per cent in 1955. Respondent National's share of the state production in Connecticut has declined from 35.7 per cent in 1947 to 22.5 per cent in 1955.¹¹⁶ The sales of respondent Hood's

¹¹⁶ It may be noted that respondent National's share of production in the State of Connecticut in 1932 was 52.4 per cent.

southern region, which includes Connecticut, have declined by approximately 285,000 gallons between 1950 and 1954. For New England as a whole, respondent Hood's share of the wholesale production of ice cream has declined from 30.2 per cent to 24.03 per cent between 1947 and 1954. Its share of production of all frozen dairy products for New England has declined from 26.5 per cent in 1947 to 19.9 per cent in 1955.

24. *Rapid City, South Dakota*

The only respondent doing business in Rapid City and the Black Hills area is Fairmont. Respondents National and Beatrice have sold in the territory for brief periods in the postwar era, but have withdrawn from the area for reasons not appearing in the record. The same is true of the large nonrespondent company Swift. The local companies operating in various portions of the territory include LaBelle Creamery, Gate City Sunshine Cooperative, Langenfeld Ice Cream Company, Mitchell Dairy, and Hot Springs Milk Company. Representatives of LaBelle, Gate City Sunshine and Hot Springs Milk testified at the hearing held in Rapid City in July 1956. Fairmont, LaBelle and Gate City are the three largest companies in the area with Fairmont having a volume of approximately 121,000 gallons, while LaBelle's gallonage is approximately 126,000 gallons and Gate City Sunshine's is approximately 100,000 gallons.

The testimony of the LaBelle witness centered about the alleged supplying of better cabinets than he thought warranted and the manufacture of private label ice cream at reduced prices. The LaBelle witness indicated that it had been customary to charge a rental on cabinets until about six or seven years previously. He made no effort to attribute the cessation of the charging of rentals to any particular competitor, testifying that he had stopped when "everyone else stopped." He also indicated that it had been customary to sell cabinets to customers until six or seven years ago, but that this practice had also declined, so that only three per cent of his company's accounts now owned their own cabinets, as compared to 20 to 25 percent in former years.

The criticism of the LaBelle witness with respect to the supplying of cabinets revolved about the supplying of larger or better cabinets than he thought justified, and permitting the storage of other frozen foods in the cabinets. No claim was made that his company had lost any accounts or had been prevented from acquiring any by reason of the supplying of cabinets by a competitor. At least two of

the three accounts which the witness mentioned as having received bigger cabinets from Fairmont than he thought proper were being served on a split basis by both LaBelle and Fairmont. Fairmont sells other frozen foods in the area, as well as ice cream, which may well account for it permitting the storage of such food in its cabinets. The witness also conceded that it is sometimes "hard" for an ice cream manufacturer to prevent a dealer from storing frozen food in the cabinet. Insofar as the size and type of cabinet is concerned, there is no showing of any abuse of discretion by Fairmont in supplying cabinets which were not appropriate to the volume and type of establishment involved. The LaBelle witness admitted that his own company had supplied cabinets to dealers where Fairmont had refused to do so.

Most of the witness' testimony was directed to the fact that his company had lost several stores of a chain, which it had previously served, when Fairmont began manufacturing ice cream for the chain under a private label. According to the witness, the Fairmont manager had told him that the private label brand was being sold at 15¢ a gallon less than the regular brand. While both brands have the same butterfat content, the private label brand has a higher overrun (i.e. more air), which may account for its allegedly lower price. The LaBelle witness indicated that his company also made a second brand, which at times sold below Fairmont's private label brand. As heretofore indicated, there is nothing in the complaint which challenges the right of a manufacturer to manufacture private label ice cream at a lower price than its regular brand.

According to the figures given by the LaBelle witness, his company's present gallonage of approximately 126,000 gallons is about 16,000 gallons below its 1952 peak of 142,000 gallons. However, about three-fourths of this decline is represented by the loss of the nearby U.S. air base account (which went to Fairmont on the basis of a lower bid) and by the loss of the Safeway account (which is now manufacturing its own ice cream). There is no reliable evidence in the record to establish that any substantial portion of the LaBelle decline is due to Fairmont's use of any of the complaint practices. There was no evidence introduced of the use of any exclusive dealing arrangements in the area. In fact, the testimony indicates that there is a wide splitting of accounts in the area, with some of the stores serving two or three different manufacturers' ice cream.

Gate City Sunshine Cooperative is a consolidation of two companies, one of which was formerly only in the milk business. Unlike the experience of LaBelle Creamery, Gate City Sunshine's sales have been

on the increase. Starting with a volume of about 65,000 gallons in 1953, the company's sales increased to 75,000 gallons in 1954, then to 87,000 gallons in 1955, and in 1956 the company's sales were running at the rate of 100,000 gallons a year.

A representative of Gate City complained that Fairmont was selling below list, but conceded that he had no personal knowledge of this. No evidence of off-list prices charged in the area was offered by counsel supporting the complaint. Another witness from the Gate City Company conceded that the dropping of prices in the market was started by Swift, rather than Fairmont, when the former came into the market area for a brief period and later withdrew. Gate City has had no apparent difficulties in meeting price competition in the area. It lowered its own prices when other competitors did, and it now serves a number of the larger stores in the area, some on a split basis with Fairmont and LaBelle.

The third company to be represented at the hearing, Hot Springs Milk Company, sells in only a portion of the territory around Hot Springs. It did not enter the ice cream business until 1949. Its gallonage in 1956 was around 10,000 gallons, which represented an increase over its gallonage in previous years. The principal complaint of the witness from the company was that Fairmont had advertised on TV and given away premiums to customers who received a certain number of coupons in the purchase of Fairmont products. This, of course, involves matters not covered by the complaint. The witness also referred to another local competitor who was allegedly "worse than Fairmont when it comes to giving stuff away."

The record fails to establish any injury to competition in the Black Hills area due to the use of the complaint practices. The record does not establish any substantial mortality among competitors. While one small company has gone out of business due to the retirement of its owner, a new company, Langenfeld, has come in from Mitchell, South Dakota to do business in the market. There is no indication in the record that respondent Fairmont has experienced any increase in sales in the area during the postwar period.

DISSENTING OPINION, DOCKET 6425

By MACINTYRE, *Commissioner*:

My consideration of this case has been and is based upon evidence in the record relating to this respondent. Scrupulously I have endeavored to keep my sights on that record relating to this respondent to the exclusion of what is involved in the records or otherwise relating to other cases. During the course of the hearing before the Commis-

Order

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sion (Transcript pages 32-33) it appeared that counsel for the respondent was injecting matters from the record relating to other respondents into his presentation of this case. To this I objected, and have been hopeful that we would not become confused thereby.

The decision of the majority to dismiss the complaint in this case is based upon its finding that the record in the case relating to practices used by the respondent in connection with its frozen dairy products "will not support a finding that these practices have produced the requisite degree of competitive injury to support an order to cease and desist."

With the conclusion of the majority I disagree, and from its action dismissing the complaint, I dissent.

ORDERS DISMISSING COMPLAINTS*

These matters having been heard by the Commission upon the appeal of counsel supporting the complaints from the hearing examiner's initial decision dismissing the complaints and the Commission having considered said appeal and the opposition thereto presented by respondents; and

It appearing that the complaints charge respondents have engaged in unfair methods of competition and unfair acts and practices in commerce in that they granted or offered certain material considerations to customers and prospective customers to induce them to purchase or continue purchasing frozen dairy products from respondents with the result and effect of lessening, hindering and eliminating competition and of creating a tendency toward monopoly in the sale and distribution of frozen dairy products; and

The Commission, upon review of all evidence adduced in support of said complaints, having concluded that the record will not support a finding that the complaints practices shown to have been engaged in by respondents have resulted in substantial injury to competition or are likely to effect a monopoly in the sale and distribution of frozen dairy products, and that, therefore, insofar as the initial decision of the hearing examiner is based upon this failure of proof, it must be affirmed and adopted as the decision of the Commission; and

¹ It further appearing that respondents Carnation Company, The Borden Company, Beatrice Foods Company (Delaware), National Dairy Products Corporation, Arden Farms Co., Foremost Dairies,

*As to all nine respondents named in the combined amended complaints.

¹ It should be noted that while respondents cited in all nine dockets are subject to the dismissal order, Pet Milk Company et al. and Fairmont Foods Company et al. are omitted from the following paragraph as explained in the initial decision.

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Complaint

Inc., H. P. Hood & Sons, Inc., directly or through their subsidiaries, have engaged in the practice of granting loans or sums of money to frozen dairy products retailers upon the condition that the recipients will deal exclusively with said respondents, or their subsidiaries, and while, as aforesaid, this record will not support a finding that these practices have produced the requisite degree of competitive injury to support an order to cease and desist, nevertheless, the Commission, under such circumstances, should safeguard the public interest by continuing close scrutiny of respondents' operations with a view toward reopening or taking such other action as may be warranted.

It is ordered, That the appeal of counsel supporting the complaints be, and it hereby is, denied.

It is further ordered, That the complaints be, and they hereby are, dismissed.

Commissioner Kern not participating and Commissioner MacIntyre dissenting in H. P. Hood & Sons, Inc., docket 6425, not participating in the other cases.
