

tification Act.

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.

IN THE MATTER OF

NATIONAL DAIRY PRODUCTS CORPORATION

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

Docket 6651. Complaint, Oct. 16, 1956—Decision, Jan. 30, 1963

Consent order requiring the largest company in the dairy products industry in the United States, which by 1950 had acquired over 400 subsidiary concerns and become a nationwide organization, to divest itself within a period of 18 months of two dairy companies it acquired in 1954 in Wilmington, N.C., and Amarillo, Tex., respectively, and until Oct. 1, 1972, to refrain from acquiring any domestic manufacturer, processor, or seller of dairy products without prior approval of the Commission.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Sec. 45) and Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18) as amended and approved December 29, 1950, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint charging as follows:

PARAGRAPH 1. Respondent National Dairy Products Corporation hereinafter referred to as "National", is a corporation organized and existing under the laws of the State of Delaware, with its principal

office and place of business located at 260 Madison Avenue, New York 17, N.Y.

PAR. 2. National is a holding company and an operating company. National and its subsidiaries, which are either owned or controlled by National, are engaged principally in the purchase, manufacture, processing and distribution of dairy products throughout the United States, Canada, and many foreign countries. National is the largest company engaged in the dairy products industry in the United States. National and its subsidiaries are engaged in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 3. A substantial portion of the growth of National and its subsidiaries has been through mergers and acquisitions. Beginning with 1924, National initiated a policy of expansion by acquiring a large number of concerns engaged in practically all branches of the dairy products industry. By 1950, prior to the time that Section 7 of the Clayton Act was amended, National had acquired over 400 concerns engaged in the purchase, manufacture, processing and distribution of fluid milk, ice cream, cheese, butter, and condensed and evaporated milk. Primarily as a result of said acquisitions, National's net sales increased from \$20,180,892 in 1924 to \$906,641,022 in 1950. National followed a pattern of acquiring dairy concerns in selected localities, strengthening its position in these localities by additional acquisitions, branching out by acquiring companies in nearby localities, consolidating its local acquisitions into broad regional or district organizations, bringing into the fold leading companies in the major regions, and, by this steady pattern of encroachment, becoming a nationwide organization with a substantial share of the purchasing, manufacturing, processing and distribution of dairy products.

PAR. 4. National and its subsidiaries are primarily engaged in the purchase, manufacture, processing and distribution of a diversified line of dairy products. National's business is conducted through various product divisions, subsidiaries and affiliated companies.

National's Milk Divisions and Milk Processing and Distribution Subsidiaries process and sell milk, concentrated fresh milk, chocolate milk, buttermilk, cream, butter, eggs, cottage cheese, special milks, and other dairy products to both wholesale and retail accounts in the East, Midwest, South and District of Columbia.

National's Ice Cream Division and Subsidiaries manufacture and sell a diversified line of frozen desserts under numerous brand names in various parts of 33 States and the District of Columbia. The ice cream subsidiaries operate 194 plants located in 32 States and the District of Columbia.

National's Butter Division distributes and sells butter in New York,

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Indiana, Tennessee, Illinois, Massachusetts, Alabama, Nebraska and Ohio. The butter subsidiaries operate 26 plants in 11 States, viz., Alabama, Illinois, Indiana, Kansas, Kentucky, Missouri, Nebraska, New York, Ohio, South Dakota and Tennessee.

Kraft Foods Company, a subsidiary, purchases, ages, imports, manufactures and processes cheese and cheese products which are sold throughout the United States and in practically all foreign countries. Kraft Foods Company also manufactures margarine, mayonnaise, salad oil, "Miracle Whip" and other salad dressings, and various other products used in the manufacture of foods and animal and poultry feeds.

Other products of National's subsidiaries include refined vegetable oils and their by-products, shell and frozen eggs, milk powder, malted milk, concentrated milk, condensed milk, ice cream mix, whey powder, caramel candy, mustard, casein, emulsifiers, stabilizing agents, and certain specialized products used in pharmaceuticals and for certain other industrial purposes.

Kraft Foods Company conducts an extensive national advertising program in connection with the sale of its products. National's trademark, "Sealtest", under which many of National's subsidiaries process and distribute dairy and other food products, is emphasized through national advertising and other promotional activities.

PAR. 5. National's net sales for all products increased from approximately \$906 million in 1950 to \$1,260 million in 1955, an increase of \$354 million, or 39%.

National's fluid milk sales increased from approximately \$272 million in 1950 to approximately \$453 million in 1955, an increase of approximately \$181 million, or 66%.

National's sales of frozen desserts increased from approximately \$135 million in 1950 to approximately \$201 million in 1955, an increase of approximately \$66 million, or 48%.

A substantial portion of the aforesaid increases in sales resulted directly from the acquisitions hereinafter described.

PAR. 6. In a series of transactions beginning in January 1951, National and certain of its subsidiaries have acquired all or part of the stocks or assets of the following named corporations engaged in the purchase, manufacture, processing or distribution of dairy products. When used herein the term "dairy products" shall include one or any number of the following products: milk, cottage cheese, cream, ice cream, cheese, butter, powdered milk, ice cream mix, canned fresh milk, frozen desserts and evaporated milk. All of the acquired corporations at the time of the said acquisitions, in the regular course of business, either purchased, manufactured, processed or distributed

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dairy products in and throughout the various States of the United States or purchased and received shipments of dairy products or equipment related to the manufacture, processing or distribution of dairy products from producers, suppliers, manufacturers or processors located throughout the United States. All of the acquired corporations, prior to and at the time of the acquisitions, were engaged in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act. Such acquisitions include the following:

1951

- (1) Cokers Pedigreed Seed Co., Hartsville, S.C.

1952

- (2) Spring Valley Butter Company, 2532 Penn St., Kansas City, Missouri.
(3) Versailles Farm Products Co., 6135 Manchester, St. Louis, Missouri.
(4) McCluer Cheese Co., Springfield, Missouri.
(5) Schlosser Bros., Inc., 705 E. Market St., Indianapolis, Indiana.
(6) Avon Dairy Inc., 630 Woodward Ave., Rochester, Michigan.
(7) Ballard Ice Cream Co., Inc., 315 No. Alabama Street, Indianapolis, Indiana.

1953

- (8) Premier Industries, Inc., Second and Madison Streets, Covington, Kentucky.
(9) United Dairy Farms of Albany, Inc., 581 Livingston Ave., Albany 5, N.Y.
(10) Beale Dairy, Inc., 20-22 Mesmer St., Buffalo, N.Y.

1954

- (11) White Ice Cream & Milk Co., Wilmington, N.C.
(12) Plains Creamery, Inc., Box 30, Amarillo, Texas.
(13) Ideal Pure Milk Co., Inc., 201 S.E. Eighth Street, Evansville, Indiana.
(14) Ak-Sar Ben Ice Cream Co., % Velvet-Rich Ice Cream Co., Irvington, Nebraska.
(15) Dairymen's League Cooperative Association, Inc., 100 Park Ave., New York, N.Y.
(16) Peoria Creamery Company, and Jacksonville Creamery Co., 521 S. Washington St., Peoria, Illinois.
(17) Smith & Cutbush, Inc., 61 Hyde Boulevard, Ballston Spa, N.Y.

1955

- (18) Garden Farm Dairy, Inc., Box 363, Denver, Colorado.
(19) Indiana Condensed Milk Co., Inc., 320 N. Meridian Street, Indianapolis, Indiana.
(20) Mooos Shops, Inc., 1 Gateway Centre, Pittsburgh, Pa.

1956

- (21) Beatrice Foods Co., Cadillac, Michigan.

PAR. 7. In a series of transactions beginning in January 1951, Na-

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tional and certain of its subsidiaries acquired all or part of the assets of 18 dairy product concerns, located in 11 states, which were individually owned and were not corporations. Such acquisitions include the following:

- (1) Dean Dairy, 834 Boston Post Road, Weston, Mass.
- (2) Shelley Dairy Co., 330 South Pine St., Lima, Ohio.
- (3) Bob E. Lewis, 1432 Charles St., Huntington, Ind.
- (4) Arthur Carey, Huntington, Ind.
- (5) Giles County Dairy Products Co., Pulaski, Tenn.
- (6) Vincent J. and Ruth Snell, 182 E. Shore Drive, Whitmore Lake, Mich.
- (7) Hirschman Dairy, Fifth and Summer Sts., Florence, N.J.
- (8) Shamrock Creamery Co., Pontiac, Mich.
- (9) Woy's Ice Cream, Everett, Pa.
- (10) Pure Food Ice Cream Co., 119 Main St., LaCrosse, Wis.
- (11) Shelbyville Pure Milk Co., N. Main St., Shelbyville, Tenn.
- (12) Finis and Sadie Hunt, Clarksville, Tenn.
- (13) Gaylord W. and Doris M. Green, 127 W. Summit St., Chelsea, Mich.
- (14) Community Dairy Co., 695 Atlantic Ave., E. Rochester, N.Y.
- (15) Imperial Dairy Products Co., Cohoes, N.Y.
- (16) Irvington Dairy c/o Velvet-Rich Ice Cream Co., Irvington, Nebr.
- (17) Jay F. Bowman, 735 East End Ave., Lancaster, Pa.
- (18) Hilldale Dairy, Dubuque, Iowa.

PAR. 8. On June 5, 1952, National acquired the stock and assets of The Humko Company, Memphis, Tennessee.

The Humko Company was incorporated under the laws of Tennessee in 1935. Humko was engaged in commerce, as "commerce" is defined in the Clayton Act and Federal Trade Commission Act.

Humko refines, processes and sells to the margarine, salad oil and salad dressing industries edible vegetable oils. It also produces and sells shortening for the use of the commercial baking industry and shortening and packaged salad oil for household use. The Humko Company's sales in 1951 totaled \$71,187,159.

PAR. 9. National's great size and financial resources, in relation to that of its competitors, together with its product and geographical diversification, may give and have given National the power, in the course and conduct of its business, to do among other things the following:

- (a) Expend substantial sums to make interest or noninterest bearing loans to customers and potential customers.
- (b) Make loans of equipment and facilities in substantial amounts to its customers and potential customers.
- (c) Sell equipment and facilities to customers and potential customers at prices that are substantially less than the market value of said equipment and facilities.

(d) Pay substantial sums in the form of rebates to customers and potential customers in advance of being earned.

(e) Make substantial payments to customers and potential customers in the form of gifts or gratuities.

(f) Expend substantial sums for performing service of value for its customers, e.g., repainting the customer's establishment.

(g) Charge favored customers and potential customers discriminatory prices.

(h) Expend substantial sums to promote its various brands through advertising and other promotions.

(i) Hire key employees of competitors eliminated through National's acquisitions.

(j) Enter into express or implied agreements or understandings with customers and potential customers which may have and do have the effect of excluding competitors.

PAR. 10. The acquisitions listed in Paragraphs 6 and 7, either individually or collectively, may have the effect of substantially lessening competition or tending to create a monopoly in the following ways, among others:

(a) Industry-wide concentration of the purchase, manufacture, processing or distribution of dairy products has been increased;

(b) Actual and potential competition between National and the acquired corporations in the purchase, manufacture, processing or distribution of dairy products may be or have been eliminated;

(c) The acquisitions by National may enhance National's competitive advantage in the purchase, manufacture, processing or distribution of dairy products to the detriment of actual or potential competition;

(d) The acquisitions provide National with additional facilities which National may utilize to extend practices identical or similar to those hereinbefore described in Paragraph 9 to the detriment of actual or potential competition;

(e) Competitive manufacturers, purchasers, processors or distributors of dairy products may be foreclosed from a substantial segment of the market in that National has eliminated the acquired corporations as potential suppliers or customers;

(f) Independent business concerns have been eliminated from the Dairy Products Industry;

(g) Actual and potential competition in the purchase, manufacture, processing or distribution of dairy products may be substantially lessened.

PAR. 11. In addition, the acquisition of the stock and assets of The Humko Company listed in Paragraph 8 herein, may have the effect of substantially lessening competition or tending to create a monopoly in the following ways, among others:

(a) Industry-wide concentration of the purchase, processing and sale of edible vegetable oils for the manufacture of margarine, salad oil and salad dressing has been increased;

(b) Actual and potential competition between National and The Humko Company in the processing and sale of shortening and salad oil has been eliminated;

(c) The acquisition of The Humko Company by National may enhance National's competitive advantage in the manufacturing, processing or distribution of margarine, salad oil and salad dressing to the detriment of actual or potential competition;

(d) Competitive manufacturers, processors or distributors of margarine, salad oil and salad dressing may be deprived of a source of supply of edible vegetable oil in that National may eliminate The Humko Company as a supplier or potential supplier;

(e) Actual and potential competition in the purchase, manufacture, processing or distribution of margarine, salad oil and salad dressing may be substantially lessened.

PAR. 12. The foregoing acquisitions alleged and set forth in Paragraphs 6 and 8 constitute a violation of Section 7 of the Clayton Act (15 U.S.C. Sec. 18).

PAR. 13. The constant and systematic elimination of actual and potential competitors and otherwise lessening of competition by the means of the acquisitions described in Paragraphs 6, 7, and 8 herein are all to the prejudice and injury of the public and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 14. The foregoing acquisitions, acts and practices, as hereinbefore alleged and set forth, constitute a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. Sec. 45).

ORDER WAIVING NOTICE AND ACCEPTING AGREEMENT CONTAINING
ORDER TO CEASE AND DESIST

This matter having come before the Commission upon the hearing examiner's certification of the question whether the requirement of the Commission's Notice of July 14, 1961, requiring the filing of notice of intent to enter into a consent agreement, should be waived; and

It appearing that the failure of the respondent to file timely notice of its intention to dispose of the proceeding through entry of a con-

sent agreement is attributable to the then uncertain state of the law and was not for the purpose of delay :

It is ordered, That the filing of notice by the parties as prescribed under the Commission's published Notice of July 14, 1961, be, and it hereby is, waived.

And it further appearing that the agreement that has now been entered into affords an adequate basis for appropriate disposition of this proceeding and should be accepted, and that the Commission itself should initially decide this matter, and forthwith issue its decision and order :

The agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered :

1. Respondent is a corporation existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 260 Madison Avenue, in the city of New York, State of New York.

2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of the respondent.

I

It is ordered, That respondent, National Dairy Products Corporation, within a period not exceeding 18 months after the service of this order upon respondent, shall divest itself absolutely, subject to the prior approval of the Commission, of :

A. The fluid milk business in the Counties of Craven, Pamlico, Carteret, Jones, Onslow, Duplin, Pender, New Hanover, Brunswick and Bladen, North Carolina, acquired by respondent as the result of its acquisition of the capital stock of White Ice Cream & Milk Company, a North Carolina corporation (hereinafter called "White"), comprising the fluid milk plant located in Wilmington, North Carolina, the branch milk distribution points described in Annex A attached hereto (p. 130), the machinery, trucks, and equipment of such fluid milk business so acquired and now owned by respondent and used in the operation of said fluid milk business as well as all trademarks and trade names so acquired, together with all additions, replacements and improvements heretofore made by respondent to such plant, branches, machinery, trucks and equipment so acquired and now owned by respondent and used in the operation of said fluid milk business (hereinafter called the "White fluid milk assets").

B. The fluid milk business in the Counties of Parmer, Castro, Swisher, Briscoe, Hall, Childress, Cottle, Collinsworth, Donley, Armstrong, Randall, Deaf Smith, Wheeler, Gray, Carson, Potter, Oldham,

Hemphill, Roberts, Hutchinson, Moore, Hartley, Dallam, Sherman, Hansford, Ochiltree, and Lipscomb, Texas, and in the Counties of Beaver, Harper, and Ellis, Oklahoma, acquired by respondent as the result of its acquisition of the capital stock of Plains Creamery, Inc., a Texas corporation (hereinafter called "Plains"), comprising the fluid milk plant located in Amarillo, Texas, the milk receiving and processing plant located at Arnett, Oklahoma, the branch milk distribution points described in Annex B attached hereto (p. 130), and the machinery, trucks and equipment of such fluid milk business so acquired and now owned by respondent and used in the operation of said fluid milk business as well as all trademarks and trade names so acquired, together with all additions, replacements and improvements heretofore made by respondent to such plants, branches, machinery, trucks and equipment so acquired and now owned by respondent and used in the operation of said fluid milk business (hereinafter called the "Plains fluid milk assets").

C. The divestiture of the White fluid milk assets and the Plains fluid milk assets provided for in paragraphs A and B above shall be accomplished by respondent so as to divest each of the businesses as a going concern, capable of competing effectively in the areas involved.

D. Respondent, in divestitures under paragraphs A and B above, shall not sell or transfer, directly or indirectly, any of the White fluid milk assets or Plains fluid milk assets to anyone who, immediately following the respective divestitures, shall be a stockholder holding more than one-half of 1% of the outstanding stock of the respondent, an officer, director, representative, employee or agent or otherwise directly or indirectly connected with or under the control of the respondent.

E. Pending divestiture, respondent shall not make any changes in the plants, machinery, buildings, equipment or other property of whatever description which shall impair their present rate of capacity for the processing and sale of fluid milk, or their market value, unless said capacity or value is restored prior to divestiture.

II

Respondent shall divest itself of the White fluid milk assets and Plains fluid milk assets in the following manner and subject to the following conditions:

A. Beginning promptly after the date of service of this order upon respondent by the Commission, respondent shall make diligent efforts in good faith to sell the White fluid milk assets and the Plains fluid milk assets and shall continue such efforts to the end that the sale thereof shall be effected within the aforesaid period of 18 months.

Respondent shall submit to the Commission summaries of conversations of authorized representatives of respondent with potential purchasers or their representatives relating to the sale of such assets, and, subject to any legally recognized privilege, copies of all written communications pertaining to negotiations, offers to buy or indications of interest in the acquisition of the whole or a part of the assets in question, within 15 days after the termination of the calendar month in which the conversations occurred or the communications were sent or received by respondent.

B. If complete divestiture shall not have been accomplished within the aforesaid period of 18 months or any extension of said period which the Commission may grant, the Commission will give respondent notice and afford it an opportunity to be heard before the Commission issues any further order or orders which the Commission may deem appropriate.

C. For the protection of the purchaser or purchasers of the White fluid milk assets and the Plains fluid milk assets, respectively, respondent shall not sell processed fluid milk for a period of five years from the effective dates of the sale of such assets in or for the purpose of resale in the counties of North Carolina listed in Article IA of this order and in or for the purpose of resale in the counties in Texas and Oklahoma listed in Article IB of this order, respectively.

D. Within sixty days after divestiture of the White fluid milk assets or the Plains fluid milk assets, respondent shall file with the Commission a report in writing setting forth in detail the manner and form in which it shall have complied with the terms of this Order with respect thereto.

E. Respondent is not required by this Order to sell, license or in any way convey any rights to any of its trademarks or trade names, including "Sealtest", not acquired from White or Plains, respectively.

III

It is further ordered, That until October 1, 1972, respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital or assets (other than products sold in the course of business) of any domestic concern, corporate or noncorporate, engaged principally or as one of its major commodity lines at the time of such acquisition in any state of the United States in the business of manufacturing, processing or selling at wholesale or on retail milk routes (a) fluid milk, (b) ice cream, ice milk, mellorine, sherbets or water ices, (c) natural or processed cheese, or (d) butter, without the prior approval of the Federal Trade Commission.

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ANNEX A

BRANCH MILK DISTRIBUTION POINTS

Owned :

Branch----- 2500 Arendell St., Morehead City, N.C.
Branch----- Court Street, Jacksonville, N.C.

ANNEX B

BRANCH MILK DISTRIBUTION POINTS

Owned :

Vacant----- 315 E. Atchison, Pampa, Texas.
Branch----- 125 S. Houston, Pampa, Texas.
Branch----- 832 North Weatherly, Borger, Texas.

Rented :

Branch----- 220 Conlon Street, Dalhart, Texas.
Branch----- Highway 70 West, Muleshoe, Texas.