
IN THE MATTER OF
BEATRICE FOODS CO.¹

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

*Docket 6653. Complaint, Oct. 16, 1956 — Decision, Apr. 26, 1965*²

Order adopting, with some exceptions and supplementary findings, the conclusions and findings of the hearing examiner that a major processor and seller of dairy products headquartered in Chicago, Ill., had violated the

¹ The name of the respondent is incorrectly stated in the complaint as Beatrice Foods Company.

² Final order to cease and desist issued Dec. 10, 1965, 6S F.T.C. 1003, modified June 7, 1967, 71 F.T.C. 797.

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antimerger provision of Sec. 7 of the Clayton Act, but deferring the entry of a divestiture order until Commission counsel and respondent submit their recommendations.

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, Section 45) and Section 7 of the Clayton Act (U.S.C., Title 15, Section 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, Beatrice Foods Company, hereinafter referred to as "Beatrice," is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 120 South La Salle Street, Chicago, Illinois.

PAR. 2. Beatrice is a holding and operating company. Beatrice and its subsidiaries, which are either owned or controlled by Beatrice, are engaged principally in the purchase, manufacture, processing and distribution of Dairy products throughout part of the United States and the Territory of Hawaii. Beatrice and its subsidiaries are engaged in commerce, as "commerce" is defined in the Clayton Act and Federal Trade Commission Act.

PAR. 3. A substantial portion of the growth of Beatrice has been through mergers and acquisitions. Beginning in 1928, Beatrice initiated a policy of expansion by acquiring concerns engaged in the processing and distribution of dairy products. By 1950, prior to the time that Section 7 of the Clayton Act was amended, Beatrice had acquired over 70 concerns engaged in the purchase, manufacture, processing and distribution of fluid milk, ice cream, butter and other dairy products. Primarily as a result of said acquisitions, Beatrice's net sales increased from \$57,389,195 in 1928 to \$205,257,498 in 1950.

PAR. 4. Beatrice and its subsidiaries' operations are conducted through various product divisions such as creamery butter, ice cream, milk, produce, cold storage and frozen food. Principal products include milk, butter, ice cream, condensed milk, buttermilk, dried milk, cheese, eggs, oleomargarine, produce, and other food products. Beatrice and its subsidiaries operate 99 manufacturing and processing plants located in 28 States, the District of Columbia and the Territory

* Paragraphs Six and Seven were amended on the record by the Hearing Examiner at the bench by adding additional corporate and noncorporate respondents (tr. pp. 1683-1684, 2052-2053, 2057-2069).

of Hawaii. Sales branches are maintained at the manufacturing plants and the company also operates 200 other selling branches in thirty-one States.

PAR. 5. Beatrice's net sales for all products increased from approximately \$205 million in 1950 to \$325 million in 1955, an increase of \$120 million or 58%.

Beatrice's fluid milk sales increased from approximately \$63 million in 1950 to approximately \$123 million in 1955, an increase of \$60 million or 95%.

Beatrice's frozen dessert sales increased from approximately \$32 million in 1950 to approximately \$58 million in 1955, an increase of \$26 million, or 81%. Frozen desserts, as used herein, includes ice cream, ice milk, sherberts, water ices, "mellorine," and other similar frozen dairy products.

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, Beatrice has 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 manufactured, purchased, processed or distributed 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) Fairfield Ice and Coal Co., Fairfield, Illinois.
- (2) A. L. Brumund Co., 121-125 W. Lake Street, Waukegan, Illinois.

1952

- (3) Standish Creamery Co., Standish, Mich.
- (4) Norwalk Pure Milk, Inc., Norwalk, Ohio.
- (5) Andalusia Dairy Company, 712 Fifth Avenue, Beaver Falls, Pa.
- (6) Weibel Dairy, Inc., 116-118 South Washington Street, Enid, Okla.
- (7) Lagomarcino-Grupe Company of Iowa, Burlington, Iowa.

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- (8) Farmers Equity Cooperative Creamery Assn., Inc., 202 E. Alger St., Sheridan, Wyo.
- (9) Dayton Ice Cream Company, 260 Proctor Street, Dayton, Ohio.

1953

- (10) Miller-Hansen Dairy, Inc., Clarinda, Iowa.
- (11) Coca-Cola Bottling Company of Clifton Forge, Inc., Clifton Forge, Va.
- (12) Buchanan Farms, Inc., Lawrenceville, Illinois.
- (13) Linton and Linton, Inc., Wilmington, Ohio.
- (14) Durham Dairy Products, Inc., 510 Memorial St., Durham, N. C.
- (15) The Gray and White Company, Adams & Franklin Sts., Tiffin, Ohio.
- (16) Creameries of America, 324 Roosevelt Bldg., Los Angeles 17, California and its subsidiaries:
 - Peacock Dairies, 22nd & Eye Sts., Bakersfield, Calif.
 - Mission Creameries, Inc., 541 N. 13th St., San Jose, Calif.
 - Valleymaid Creameries, 2901 Fletcher Drive, Los Angeles, California.
 - Crown City Dairy, 1135 E. Colorado St., Pasadena, Calif.
 - Arden-Sunfreeze Creameries, 1030 S. Main St., Salt Lake City 12, Utah.
 - Idaho Creameries, 1301 Bannock St., Boise, Idaho.
 - Valley Gold Dairies, Inc., Albuquerque, N. M.
 - Price Creameries, Inc., 600 N. Piedras St., El Paso, Texas.
 - Dairymen's Association, Ltd., Honolulu, Hawaii.

1954

- (17) Superior Milk Producers' Assn., 11709 E. Artesia Blvd., Artesia, Calif.
- (18) Mathews Dairies, Inc., Mathews, Va.
- (19) The Gateway Creamery Company, 307-19 E. 7th St., Joplin, Mo.

1955

- (20) Greenbriar Dairy Products Co., & Trans-Mountain Motors, Inc., Beckley, W. Va.
- (21) Rose Lawn Dairies of Arkansas, Inc., Ft. Smith, Ark.
- (22) Kay's of Roanoke, Inc., Roanoke, Va.
- (23) High's of Nashville, Inc., 1522 Church St., Nashville, Tenn.
- (24) Dahl-Cro-Ma, Ltd., 661 Punahou St., Hilo, Island of Hawaii, Territory of Hawaii.
- (25) Louis Sherry, Inc., 30-30 Northern Blvd., Long Island City, N. Y.
- (26) Sutter Dairy, Inc., 1623 N.W., Front St., Grand Island, Nebr.
- (27) Redbud Dairy Products, Inc., 702 N. Kickapoo St., Shawnee, Okla.
- (28) Russell Creamery Company of Brainerd, 425 Front St., Brainerd, Minn.
- (29) Brainerd Dairy, Inc., 109 Washington Street, Brainerd, Minn.
- (30) Baker-Union Cooperative Creamery, 1109 Washington Ave., Box 478, La Grande, Oreg.
- (31) Kanawha Ice Cream Co., 619 Columbia Ave., Charleston, W. Va.
- (32) Eskay Dairy Co., Inc., 1501 Fairfield Ave., Ft. Wayne, Ind.
- (33) Clarksburg Dairy Co., 208 Hewes Ave., Clarksburg, W. Va.
- (34) Nance's Creamery Inc., 115 N. Depot Street, Brazil, Indiana.
- (35) Clinton Ice Cream Co., Clinton, Iowa.
- (36) Indiana Ice & Fuel Co., 301 Circle Tower Blvd., Indianapolis, Ind.

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- (37) Princeton Creamery, Hopkinsville & Cadiz Sts., Princeton, Ky.
- (38) W. J. Bratton, Successor to Twin Valley Dairy Products, Inc., Commercial St., Emporia, Kansas.
- (39) Grocer's Dairy, Inc., 1701 N. Webster St., Dayton, Ohio.

1956

- (40) Kentucky Ice Cream Co., Inc., Richmond, Ky.
- (41) Valley Creamery Co., Inc., E. Grand Forks, Minn.
- (42) Tro-Fe Dairy Co., Inc., 704 Walnut St., Gadsden, Ala.
- (43) Tro-Fe Dairy Co., Inc., Lewisburg, Tenn.
- (44) The Lindner Ice Cream Co., Inc., 2029 Hopkins Ave., Norfolk, Ohio.

PAR. 7. In a series of transactions beginning in January 1951, Beatrice has acquired all or part of the assets of eighty-seven dairy product concerns, located in twenty-five States, which are individually owned and were not corporations. Such acquisitions include the following:

- (1) Wayne Creamery, 112 W. Third St., Wayne, Nebraska.
- (2) Link Dairy, 313 S. 13th St., Chickasha, Okla.
- (3) Benton County Dairy, 102 W. First St., Fowler, Ind.
- (4) Claggett Dairy, Sharon Valley Rd., RFD #3, Newark, Ohio.
- (5) Johnson Dairy, Main & First Sts., Mulvane, Kansas.
- (6) The Farmers Creamery, Le Mars, Iowa.
- (7) Modern Dairy, Waynetown, Ind.
- (8) Dixie Dairy, 313 N. Seminary St., Florence, Ala.
- (9) Overgaard Dairy Stores, 1845 "R" St., Lincoln, Nebr.
- (10) The Superior Dairy, 411 W. 6th St., Pueblo, Colorado.
- (11) Larry's Dairy, 514 North Main Street, Kingfisher, Okla.
- (12) Harrod's Dairy, 823 North Gulf, Holdenville, Okla.
- (13) Ernest B. & Margaret E. Naber, 616 Mulberry Ave., Muscatine, Iowa.
- (14) Meadowbrook Creamery, Emporia, Kansas.
- (15) Letner Dairy, 220 Tenth Ave., Council Bluffs, Iowa.
- (16) Springbrook Dairy, DeWitt, Iowa.
- (17) Caffey's Guernsey Dairy, 3400 W. 11th St., Pueblo, Colo.
- (18) Del Rose Ice Cream Co., Murray, Ky.
- (19) The Latta Ranch Dairy, Brookfield, Mo.
- (20) Conesville Dairy, Conesville, Ohio.
- (21) Red Oak Dairy, Red Oak, Iowa.
- (22) Bianucci Ice Cream Co., Bloomington, Illinois.
- (23) O'Neil Dairy, E. Prairie Ave., Goodland, Ind.
- (24) Richard L. Franson, R. R. #2, Goodland, Ind.
- (25) Meredith Dairy, West of City Limits, Cheyenne, Wyoming.
- (26) The Athens Creamery, Athens, Ala.
- (27) Paulus Dairy, Rensselaer, Ind.
- (28) Princeton Dairy, 327 N. Main St., Princeton, Ind.
- (29) Welcher Ice Cream Co., Seneca, Mo.
- (30) McAllister Bros. Creamery Co., Marceline, Mo.
- (31) Cambria Sales, 915 Ogle St., Ebensburg, Pa.

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- (32) Newland Dairy, Neodesha, Kansas.
- (33) Neligh Creamery, Neligh, Nebr.
- (34) Callison Dairy, 115 Washington St., Clinton, Illinois.
- (35) Sani-Pure Dairy, 701 N. Pecan St., Nowata, Okla.
- (36) P. Calistri & Sons, 324-326 Fallowfield Ave., Charleroi, Pa.
- (37) Philip's Ice Cream Co., 19 W. 23rd Ave., Gary, Ind.
- (38) Fisher's Ice Cream Shop, 119 N. 7th St., Beatrice, Nebr.
- (39) Hanson's Dairy, 501 N. Logan Ave., Danville, Illinois.
- (40) Dairyland Ice Cream Company, Twenty-Seventh & Wilgus Road, Sheboygan, Wisconsin.
- (41) Greeley Creamery, Greeley, Nebr.
- (42) Smith Dairy, Columbus, Nebr.
- (43) Seidel Creamery Company, Bay City, Mich.
- (44) Pearman Dairy, S. Plummer St., Chanute, Kansas.
- (45) Geo. C. Kruse Home Made Ice Cream, Dubuque, Iowa.
- (46) Home Dairy, Mt. Carmel, Illinois.
- (47) Pettibon Dairy Co., 387 Connecticut Ave., Rochester, Pa.
- (48) Drinkmore Dairy Co., 740 Sheffield Road, Aliquippa, Pa.
- (49) Strandsdale Farms Products, 525 Main St., Savanna, Illinois.
- (50) Johnson Ice Cream Co., Winner, S.D.
- (51) Patzner Dairy, Guttenberg, Iowa.
- (52) Royal Ice Cream Co., Maguoketa, Iowa.
- (53) Durham Road Dairy, Durham Rd., Chapel Hill, N.C.
- (54) Dunmyer Dairy, RFD, Lindsey, Ohio.
- (55) Elkhorn Farm Dairy, 1454 Elkhorn Rd., Watsonville, Calif.
- (56) Harris Dairy, 40th & Frederick, St. Joseph, Missouri.
- (57) Eastside Dairy, 101 Mental Ave., Santa Cruz, Calif.
- (58) Idlewild Dairy, Scottsbluff, Nebr.
- (59) Butler's Creamery, 1006 Broadway, Scottsbluff, Nebr.
- (60) Piedmont Dairy, Vernal, Utah.
- (61) Schuler Dairy, Savanna, Illinois.
- (62) Baywood Farm Dairy, 737 San Benito St., Hollister, Calif.
- (63) Bayard Sanitary Dairy, Bayard, Nebr.
- (64) C. C. Armstrong, Huntsville, Ala.
- (65) Lester's Ice Cream Co., Hobbs, N. Mexico.
- (66) Yellowstone Dairy, 1048 E. Yellowstone, Casper, Wyoming.
- (67) Midvale Dairy Farm, 1600 Thirty-Eighth Avenue, Moline, Illinois.
- (68) Shomont Ice Cream Co., 104 First Ave., Northwest, Cedar Rapids, Iowa, and Monticello, Iowa.
- (69) Costello's Mendota Creamery, Mendota, Illinois.
- (70) John H. Costello Co., 415 Delmar St., St. Louis, Mo.
- (71) Squire Ice Cream Co., 110 S. Blossom St., Shenandoah, Iowa.
- (72) Steele's Ice Cream Co., West Plains, Mo.
- (73) Rose Lawn Dairy, McAlester, Okla.
- (74) Blue Bonnet Ice Cream Co., Frankfort, Ky.
- (75) Delisle Distributing Co., 127 Morgan St., Manchester, N.H.
- (76) W. H. Hammond, Seventh & Kansas Sts., Great Bend, Kansas.
- (77) Greenwood County Creamery, 200 S. Main St., Eureka, Kansas.
- (78) The Harper Creamery, 824 Central Ave., Harper, Kansas.

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- (79) Welton Sullivan, 102 N. Lincoln St., Odessa, Texas.
- (80) Lucas Dairy, Grafton, W. Va.
- (81) Russell Creamery Co., Superior, Wis.; Bemidji, Minn.; Fergus Falls, Minn.
- (82) Spring Grove Dairy, Greenfield, Ohio.
- (83) Purity Ice Cream Co., Clarksville, Tenn.
- (84) Wilson Ice Cream Co., 107 Elm St., Urbana, Illinois.
- (85) Walker Ice Cream Sales, 1000 E. Burnette St., Louisville, Ky.
- (86) Morning Star Dairy, Cadiz, Ky.
- (87) McPherson Dairy of Wymore, 320 S. 9th St., Wymore, Nebr.

PAR. 8. Beatrice'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 Beatrice 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 non-interest 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 customers 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 Beatrice'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. 9. The acquisitions listed in Paragraphs Six and Seven herein, either individually or collectively, may have the effect of substantially lessening competition or tending to create a monopoly in the following ways, among others:

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

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

(c) The acquisitions by Beatrice may enhance Beatrice'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 Beatrice with additional facilities which Beatrice may utilize to extend practices identical or similar to those hereinbefore described in Paragraph Eight 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 Beatrice 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. 10. The foregoing acquisitions alleged and set forth in Paragraph Six constitute a violation of Section 7 of the Clayton Act (15 U.S.C. Sec. 18).

PAR. 11. The constant and systematic elimination of actual and potential competitors and otherwise lessening of competition by the means of the acquisitions described in Paragraphs Six and Seven 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. 12. 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).

Mr. F. P. Favarella and *Mr. Peter K. Bleakley* supporting the complaint.

Mr. Thomas A. Reynolds, Mr. Edward L. Foote and Mr. Edward J. Wendrow, of Winston, Strawn, Smith, & Patterson, and Mr. John P. Fox, of Chicago, Ill., for respondent.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

MARCH 2, 1964

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STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondent on October 16, 1956, charging it with having violated Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, by reason of the acquisition of 131 dairy product companies. Forty-four of the acquisitions are alleged, in Paragraph Six of the complaint, to involve corporations engaged in commerce. Eighty-seven of the acquisitions are alleged, in Paragraph Seven of the complaint, to involve concerns which were individually owned and were not corporations. On motion of counsel supporting the complaint, made upon the record at hearings held September 23, 1958, March 24, 1960, and September 12, 1961, respectively, Paragraphs Six and Seven of the complaint were amended so as to include 33 additional corporate acquisitions and 11 additional noncorporate acquisitions, bringing the total number of acquisitions challenged by the complaint to 175.

The corporate acquisitions, as set forth in Paragraph Six of the complaint, are alleged to constitute a violation of Section 7 of the Clayton Act. All of the acquisitions, both corporate and noncorporate, as set forth in Paragraphs Six and Seven of the complaint, are

alleged to constitute part of the "constant and systematic elimination of actual and potential competitors" in violation of Section 5 of the Federal Trade Commission Act. It is alleged in Paragraph Eight of the complaint that as a result of respondent's size, financial resources and diversification, it has the power to engage in various types of business practices, including the making of loans to customers and the granting of rebates and discriminatory prices. Such practices, as well as the acquisitions, are alleged to constitute a violation of Section 5 of the Federal Trade Commission Act.

Respondent filed a combined answer and motions to dismiss and to strike portions of the complaint on January 3, 1957. In its answer respondent admitted, in substance, the making of the acquisitions referred to in the complaint, and the fact that certain of said acquisitions involved corporations engaged in commerce, but denied that it had violated Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act. It moved to dismiss the complaint and to strike those portions thereof that charged the illegality of activities other than the acquisition of corporations engaged in commerce.

Pursuant to notice duly given, a pre-trial conference was convened in this proceeding on January 15, 1957. Following said conference a pre-trial order was issued by the undersigned on February 8, 1957, reciting the various stipulations and agreements that had been reached by the parties, including, among other things, agreements that (1) counsel supporting the complaint would not seek any order requiring respondent to cease and desist from engaging in any of the acts and practices set forth in Paragraph Eight of the complaint or any order requiring respondent to divest itself of the stock or assets of any company acquired prior to 1951, and (2) respondent's motion to dismiss the complaint or strike various allegations thereof would be held in abeyance until at least the close of the case-in-chief.

Hearings for the reception of evidence in support of the complaint were commenced on March 7, 1957, and continued at intervals until September 12, 1961. At the conclusion of the case-in-chief respondent agreed to proceed with the offering of testimony and other evidence in opposition to the complaint, and that ruling on the motions to dismiss and strike filed with its answer could be withheld until the close of all the evidence. Hearings for the reception of defense evidence were thereafter held on various dates between October 23, 1961, and May 8, 1962. Rebuttal and sur-rebuttal evidence were thereafter received at hearings held between July 31, 1962, and October 1, 1962.

A considerable portion of the evidence in support of the complaint consists of documentary evidence, obtained largely from respondent.

including basic descriptive and statistical information concerning each of the acquisitions involved in the proceeding. Complaint counsel also called 15 witnesses to testify, of whom 11 were respondent's officials, two were Commission economists, one was an official of the United States Department of Agriculture and one was a trade association official. Respondent called 74 witnesses, of whom 26 were its own officials or were former owners or employees of acquired companies, and the balance were mainly independent expert witnesses, including professors of agricultural economics and industry personnel familiar with technological trends in production and packaging. Respondent also introduced a considerable amount of statistical and economic documentary evidence. The record herein consists of 4,750 pages of testimony and approximately 630 numbered exhibits. Most of the latter consist of multi-paged documents, which are compiled in over 35 volumes and aggregate many thousands of pages.

Except for one hearing in Chicago, all hearings were held in Washington, D.C. This was made possible in large measure by the cooperation of counsel for respondent, who agreed to bring to Washington, D.C., at no expense to the Government, various of respondent's officials called as witnesses in support of the complaint, and arranged to produce in Washington, D.C. all of the witnesses in support of the defense case. As a result of the cooperation of both counsel, a substantial amount of evidence in documentary form was offered pursuant to stipulation and agreement, thus avoiding the calling of a considerable number of witnesses.

All testimony taken in this proceeding was duly recorded, and such testimony and all other evidence have been filed in the office of the Commission. All parties were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the close of all the evidence, and pursuant to leave granted by the undersigned, proposed findings of fact, conclusions of law and an order, together with supporting briefs or legal memoranda, were filed by complaint counsel on December 19, 1962, and by respondent on December 20, 1962, and replies thereto were filed by both sides on January 31, 1963. On motion of counsel supporting the complaint, and pursuant to order of the undersigned, an amended proposed order was filed on May 2, 1963. A memorandum in opposition to said amended order was filed by respondent on May 15, 1963, and a reply to such memorandum was filed by complaint counsel on May 31, 1963. The proposed findings, replies, briefs and memoranda filed by the parties aggregate over 1200 pages.

Findings

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After having reviewed the entire record in this proceeding, and the proposed findings,¹ conclusions and order, including the motion to dismiss and strike contained in respondent's proposed findings, and based on his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. RESPONDENT AND THE INDUSTRY SETTING

Identity and Business

1. Respondent, Beatrice Foods Co.,² hereinafter referred to as "Beatrice," is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 120 South LaSalle Street, Chicago, Illinois.

2. Beatrice is a holding and operating company. It and its subsidiaries (which are either owned or controlled by it) are engaged principally in the purchase, manufacture, processing and distribution of dairy products throughout various parts of the continental United States and Hawaii, as will hereafter be more specifically described. Beatrice and certain of its subsidiaries are also engaged in the manufacture, processing and distribution of other food products in various parts of the United States.

Growth

3. Beatrice is an outgrowth of the partnership of Haskell & Bosworth, wholesale produce dealers, which was founded in 1891 in Beatrice, Nebraska, and began to churn butter in 1894. The company was incorporated in the State of Nebraska in 1897 under the name Beatrice Creamery Company, and was re-incorporated under the laws of Iowa in 1905 and under the laws of Delaware in 1924, retaining the same name (CX 161). The present name, Beatrice Foods Co., was adopted on June 1, 1946 (CX 184).

4. Up to 1928 Beatrice was principally in the butter, egg and poultry business. Subsequent to that time it began to diversify its product lines in the dairy field, particularly in fluid milk and ice cream (CX 196 B). This involved, among other things, the acquisition of a number of other dairy concerns. Between 1928 and 1950 it acquired over 70 concerns engaged in the purchase, manufacture, processing and distribution of fluid milk, ice cream, butter and other

¹ 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.

² The name of the respondent is incorrectly stated in the complaint as Beatrice Foods Company.

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dairy products. Its net sales increased from \$57,389,195 in 1928 to \$205,257,498 in 1950.

5. From 1951 to 1961 Beatrice acquired 175 dairy concerns.³ Its sales of dairy products increased from \$194,732,000 in the fiscal year ending February 28, 1951, to \$311,642,000 in the fiscal year ending February 28, 1961, representing an increase of approximately \$117,000,000 in the 10-year period (CX 287 and CX 396). The sales of the acquired companies in the last full year prior to their acquisition amounted to \$147,459,207.⁴ Making due allowance for the fact that respondent may have lost some of the volume which it acquired, it seems reasonable to infer that the bulk of respondent's \$117,000,000 sales increase between 1951 and 1961 came from volume which it acquired. Of respondent's total dairy sales of \$311,642,000 in 1961, \$113,077,000, or 36%, came from the plants of concerns which it acquired between 1951 and 1961 (CX 396). Since the latter figure does not include the volume of acquired concerns which respondent transferred to its existing plants, it seems evident that over one-third of respondent's 1961 dairy sales is attributable to the acquisitions which it made between 1951 and 1961. It may be noted, in this connection, that the \$113,000,000 figure, representing the volume of sales from acquired plants still operating in 1961, is substantially identical with the amount of respondent's sales increase between 1951 and 1961, viz, \$117,000,000. Of the \$113,000,000 in sales from acquired plants as of 1961, approximately \$96,000,000 represents sales from plants of companies which complaint counsel claim were in commerce at the time they were acquired.⁵

6. In addition to dairy products, respondent is engaged in the manufacture and/or sale of other food products. In 1939 it began the distribution of frozen foods, primarily the Birds Eye brand. It also operates a number of public cold storage warehouses. In 1943 it acquired La Choy Food Products Company, a large manufacturer of

³ Respondent contends that it only acquired 168 concerns, claiming that complaint counsel have improperly counted as separate concerns, certain related companies which were simultaneously acquired.

⁴ The above figure does not include the sales of 28 of the smaller companies, for which dollar sales figures are not available in the record.

⁵ The above figure for plants claimed to be in commerce includes sales from plants of the following acquired companies: Dothan Ice Cream Co., Durham Dairy Products Co., Tro-Fe Dairies, Boswell Dairies, Associated Dairy Products, Melvern-Fussell, Clarksburg Dairy, Creameries of America, Community Creamery, Greenbrier Dairy Products, and A. L. Brumund Co. It does not include sales of Dairyland Farms and Valdair Creamery, or Westerville Creamery, which were acquired after the close of the fiscal year 1961, the last year for which there are sales figures of Beatrice's plants in evidence. The sales of these companies in 1960 were: Dairyland and Valdair \$3,300,000, and Westerville \$13,820,000.

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Chinese foods. It has since acquired a number of other manufacturers of food and related products, including D. L. Clark Candy Co., D. Richardson Co. (mints), Mario's Food Products (olives and oil), Bond Pickle Company, Squire Dingee Company (pickles and preserves), Lutz & Schramm (pickles and preserves), Brown-Miller (pickles and preserves), Shedd-Bartush (margarine), Tasty Foods, Inc. (potato chips), Gebhardt Chili Powder Co. (Mexican foods), Mitchell Syrup & Preserve Co., M. J. Halloway & Co. (candy), Rosarita Mexican Foods, and Adams Corp. (snack foods). None of these nondairy-product acquisitions is challenged by the complaint.

Total Sales Eight Largest Dairies

7. Respondent's total sales in 1959-1960 were \$443,059,000. This includes both dairy products and nondairy products. The total sales of the eight dairy companies with the largest sales (including all products sold) were \$4,578,183,000 (CX 416). Respondent's sales volume in 1959-1960 made it the third among the eight largest dairy companies. The total sales of each of these eight dairy companies, in order of rank, were as follows:

<i>Company:</i>	<i>Sales (\$000)</i>
National Dairy Products Co.	\$1,667,176
Borden Co.	956,014
Beatrice Foods Co.	443,059
Foremost Dairies Co.	436,981
Carnation Co.	417,629
Arden Farms Co.	364,996
Pet Milk Co.	195,033
Fairmont Foods Co.	97,295
Total	4,578,183

The sales of these eight companies, as a group, have increased by 91% since 1950, with respondent having the third largest percentage increase (CX 350). The changes in sales have varied among the eight companies as follows:

<i>Company:</i>	<i>Percent change in sales (1950-1960)</i>
National Dairy Products Co.	+83
Borden Co.	+51
Beatrice Foods Co.	+116
Foremost Dairies Co.	+807
Carnation Co.	+63
Arden Farms Co.	+262
Pet Milk Co.	+42
Fairmont Foods Co.	-13

Concentration

8. Bottled fluid milk and frozen desserts account for the largest percentage of the sales of most dairy companies, other than the relatively few companies specializing in particular products such as butter, cheeses or condensed milk. In 1961, out of dairy sales of \$311,642,000, respondent's sales of bottled fluid milk and cream were \$177,462,000 and its sales of frozen desserts were \$73,781,000 (CX 396). An analysis of the market shares of the leading companies, in terms of these two principal products, affords a meaningful measurement of the extent of concentration in the dairy industry. The record discloses that in 1958 (the latest year for which the record contains such data) the value of shipments by manufacturing establishments in the United States, of bottled milk and cream (including buttermilk, chocolate milk and other milk drinks), amounted to \$4,346,348,000. In the same year the value of shipments of frozen desserts (including ice cream, ices, frozen desserts containing fats other than butter fats, and other frozen dairy products) amounted to \$1,137,704,000 (CX 425-D and F) :⁶

In 1958 respondent ranked fourth among the large companies in the value of shipments of fluid milk and frozen desserts, respectively. Eight companies accounted for 31% of the value of shipments of fluid milk, and nine companies accounted for 44.4% of the value of shipments of frozen desserts. The individual companies' respective shares of shipments of each of these products were as follows (CX 425-D and F) :⁷

⁶ The figures above used are taken from the official figures of the U.S. Department of Commerce, Bureau of the Census. Respondent contends that such figures do not afford a proper basis for determining concentration in the dairy industry because they exclude shipments by small processors who do not file reports with Census, and hence the reported figures understate the "universe" figures and overstate the market shares of the large companies. Respondent estimates that the Bureau of Census figures reflect only 78% of the actual value of shipments of fluid milk. No estimate is made concerning the frozen dessert shipments, except that respondent contends they are "understated—probably appreciably." The examiner is of the opinion that, while there is probably some understatement in the total figures of value of shipments by reason of the noninclusion of the shipments of the nonreporting smaller processors, nevertheless, the official Bureau of Census figures, as the most complete set of figures which can realistically be compiled, are a helpful indicator of the general order of magnitude of concentration in the dairy industry.

⁷ The above percentages are based on the total value of shipments of these products, as appearing in the official reports of the Bureau of the Census, and the figures of the individual companies, as separately reported by them to the Commission. Respondent does not question the accuracy of the figures of the individual companies. However, as indicated in the previous footnote, respondent contends that the total or "universe" figures are understated, and hence that the individual market shares of the eight or nine companies are overstated.

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Fluid Milk:	Percent	Frozen Desserts:	Percent
Borden -----	9.2	National -----	13.1
National -----	8.9	Borden -----	10.6
Foremost -----	4.3	Foremost -----	6.4
Beatrice -----	3.4	Beatrice -----	4.9
Carnation -----	2.3	Swift -----	2.7
Arden -----	1.4	Carnation -----	2.4
Fairmont -----	0.9	Arden -----	2.1
Pet -----	0.6	Fairmont -----	1.5
		Pet -----	0.7
	31.0		
			44.4

9. The data on which the foregoing percentages are based do not provide a basis for determining whether there has been any increase in concentration, in terms of the value of shipments of the eight or nine large companies. However, there is other evidence in the record purporting to compare the extent of concentration in the industry in 1958, with that in 1954 and 1947, in terms of the value of shipments of the eight largest companies (the identity of which is not revealed). This evidence is not precisely comparable to that discussed above since it is based on the value of shipments of companies classified as being in the dairy industry, whereas the evidence previously discussed includes all shipments of dairy products, irrespective of whether the producer is classified as a dairy concern. According to this study, the percentage of the value of shipments of ice cream and ices by the eight largest companies was 48% in 1947, 45% in 1954, and 48% in 1958.⁸ On this basis the eight largest companies accounted for the same percentage of shipments in 1958 as they did in 1947, after having experienced a decline in position between 1947 and 1954. In the case of fluid milk (including all fluid milk products and not merely bottled milk), the eight largest companies accounted for 28% of the value of shipments in 1954 and 29% in 1958. There is no evidence of the position of these companies in 1947. Considering the fact that there is some understatement in the universe figures and that there is no assurance the extent of understatement was the same in 1954 and 1958, it is not possible to conclude that there has been any significant increase in concentration in the fluid milk industry merely because of the 1% differential revealed by the above figures.

⁸ The figures cited in this paragraph are taken from CX 424, which is a report prepared by the Bureau of the Census for the Subcommittee on Antitrust and Monopoly of the U.S. Senate. See Table 2 of the report, pp. 10-11 (including explanation of table) and footnotes 11 and 12, p. 74; cf. Table 4, pp. 106 and 108 (including explanation of table). It will be noted that the universe figures in Table 4 are substantially identical with those in CX 425, on which the concentration figures in the previous paragraph are based. However, since Table 4 contains no 1955 figures for bottled milk and other milk products, the examiner has used Table 2 as the basis for the above comparison.

10. The record contains further evidence of the extent of concentration in the frozen dessert end of the dairy industry, and the trend in concentration since 1950. Such evidence is in terms of the production of frozen desserts, rather than in terms of value of shipments as previously discussed. Set forth below is a table reflecting the production shares of respondent and seven other large producers of frozen desserts in 1950 and 1957 (CX 456).⁹

Company	1950	1957
	<i>Percent</i>	<i>Percent</i>
National Dairy.....	14.4	12.7
Borden.....	9.6	8.9
Foremost Dairies.....	1.5	6.2
Beatrice Foods.....	3.5	4.7
Arden Farms.....	1.9	2.4
Carnation.....	1.5	2.0
Fairmont Foods.....	1.7	1.6
Pet Milk.....	.9	.7
Total.....	35.0	39.2

While the above table reveals that the production shares of the eight companies, as a group, have increased by 4.2% between 1950 and 1957, it seems apparent that most of the increase is accounted for by the change in fortunes of one company, Foremost Dairies. Respondent's production share increased by 1.2%, but its relative position dropped from third to fourth. It may be noted, however, that respondent's production share of 4.7% in 1957 is fairly comparable to its percentage of value of shipments in 1958, previously discussed, viz, 4.9%. Similarly, the production shares of all eight companies in 1957, viz, 39.2% is fairly comparable to their share of value of shipments in 1958, as previously discussed, viz, 41.7%. Therefore, while the above study has limitations as an indicator of any trend in concentration in the frozen dessert industry between 1950 and 1957,¹⁰ it is of value as reflecting respondent's relative position and the general order of magnitude of concentration among the eight large companies.

Respondent's Area of Distribution

11. Up to 1950 respondent's principal area of fluid milk distribution consisted of an area extending from the Appalachian Mountains to

⁹ The total or "universe" figures, on which CX 456 is based, are taken from figures reported to the U.S. Department of Agriculture (R. 4613). The figures of the individual companies were submitted by them to the Commission.

¹⁰ As indicated in the study discussed in the preceding paragraph, the percent of value of shipments of ice cream and ices accounted for by the eight largest companies in the ice cream industry declined from 48% in 1947 to 45% in 1954, and then returned to 48% in 1958.

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the Continental Divide. This Midwestern area was considered by respondent as its traditional area of fluid milk distribution. It included the eight states of Ohio, Indiana, Illinois, Iowa, Missouri, Nebraska, Kansas and Oklahoma and, in addition, included portions of western Pennsylvania and eastern Colorado.¹¹ Respondent distributed ice cream and other frozen products in a somewhat similar, but slightly wider area, than that in which it distributed fluid milk. Its area of frozen product distribution up to 1950 included the traditional eight-state fluid milk area, plus West Virginia and certain counties in Pennsylvania, Virginia, Tennessee, Kentucky, South Dakota, Wisconsin, Minnesota and Arkansas.¹² Of the 175 acquisitions listed in the complaint, as amended, 63 were fluid milk facilities located in respondent's so-called traditional or pre-1951 distribution area, and 69 were ice cream concerns located in its so-called traditional ice cream area, as above described.

12. As of August 31, 1956, Beatrice and its subsidiaries operated one or more dairy plants in the District of Columbia and 29 states of the United States, including Alabama, California, Colorado, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Wisconsin, West Virginia and Wyoming. In addition, it and its subsidiaries operated sales branches in a number of these states and in eight additional states, including Arkansas, Massachusetts, New Hampshire, New Jersey, Oregon, Rhode Island, South Dakota, and Virginia (CX 135 A-H). Since August 31, 1956, respondent has acquired the plant of a company in Arizona (CX 308).

13. For purposes of supervision and control, Beatrice's plants and sales branches are grouped into various districts, each headed by a district manager. There are 15 districts, viz: (a) Eastern, (b) Northern Ohio and Michigan, (c) Indiana and Southern Ohio, (d) Southern, (e) Illinois, (f) Northern, (g) Iowa-Missouri, (h) Kansas-Nebraska and Oklahoma, (i) Texas and Arizona, (j) Colorado, (k) Utah, (l) Montana, (m) Idaho, (n) California, and (o) Hawaiian Islands (R. 359-362).

Products

14. Respondent manufactures, processes, distributes and sells a full line of dairy and related products, including butter, eggs, poultry, ice cream, ice cream mix, ice milk, sherbet, mellorine, water ices, milk,

¹¹ The area is physically delineated in RX 3.

¹² The area above described is delineated in RX 46 and 74.

cream, buttermilk, skim milk, chocolate milk, bulk surplus milk, cheese, cottage cheese, condensed milk, powdered milk, fruitade, oleo-margarine, frozen foods and specialties. Its products and sales activities are organized along department lines, including the following departments: Butter and Butter By-Products, Eggs and Poultry, Ice Cream and Mix, Fluid Milk, Other Manufactured Dairy Products, and Other Sales and Services (CX 134 A-B).

15. Respondent manufactures, processes, distributes and sells its products under a variety of brand names. Its principal brand is "Meadow Gold," which is used on butter, ice cream products, and fluid milk. This brand is used in 36 states and the District of Columbia (CX 136 C). Respondent also manufactures and distributes ice cream department products under 44 additional brand names in one or more states. These brands represent principally those of acquired companies. It also manufactures and distributes fluid milk products under 28 additional brand names in one or more states. These brands likewise represent principally those of acquired companies.

Postwar Changes in Dairy Industry

16. The dairy industry has undergone a considerable metamorphosis during the postwar period. This has included substantial changes in production and distribution technology, a substantial decline in the number of plants and processors (with an accompanying trend toward larger plants and companies and a consolidation of plants and companies), and substantial changes in its traditional types of customers and distributional patterns.

17. Prior to World War II the fluid milk industry consisted of a very large number of small producers serving separate isolated town markets. Each locality had its local processors supplying the needs of the community. Many of the processors were producer-distributors, *i.e.*, farmers who produced the raw milk and bottled it for home sale and delivery. Those companies which did not produce their own milk purchased it from local farmers on the basis of individually negotiated contracts. The raw milk was handled manually on the farms in 10-gallon cans, with no attempt to maintain the temperature so as to avoid bacteria growth. At the milk plant the 10-gallon cans were handled manually, being dumped into open tanks for storage. The pipes and other equipment used in handling and pasteurizing the milk at the plant were cleaned daily by hand. Pasteurizing was accomplished in open "vats" by simply boiling the milk, which was usually cooled by open surface coolers and then bottled in glass con-

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tainers. Home delivered milk constituted over 60% of sales, and the prices from the stores were usually the same as those of home-delivered milk. Because of the perishability of the product and because many towns had ordinances requiring that the product be processed in the town in which it was sold, the typical milk market was relatively small and local in nature. Milk companies operating manual plants and selling ungraded milk in glass-filled containers on local home-delivery routes could operate profitably on 500 gallons a day (R. 2114-2129, 2287-2288).

18. By the middle 1950's the fluid milk industry had undergone a radical transformation. Many communities and states had adopted the Grade A Model Code of the U.S. Public Health Service. Grade A milk has a prescribed bacteria count, and is processed with Triple A Standard equipment (R. 2321-2325, 2114, 2129-31). The sanitary process begins at the farm where the milk is handled more carefully and in many instances is pumped directly into stainless steel refrigerated tanks. It is delivered in refrigerated trucks and pumped through stainless steel lines at the plant into stainless steel holding vats (R. 2289). Pasteurization is accomplished with high temperature, short-time processing equipment (referred to in the industry as HTST), which insures not only perfect pasteurization but reduces the cost per gallon if a given volume is steadily available for processing. The need for daily hand-cleaning of pipes and equipment is eliminated (R. 2116, 2132-34, 2293-95). In front of each tank is a large packaging or filling machine. Today the packaging is principally into paper containers. The milk is then taken by conveyor to refrigerated storage rooms or directly to electrically refrigerated trucks. As a result of the improvement in processing and in delivery equipment, the product is less perishable and can be delivered greater distances, in some instances up to 100 or 150 miles (R. 2136). This extension of markets has been facilitated by the repeal of many of the local community ordinances which required that the processor be located within the community limits.

19. Although the unit cost of production in modern, automatic processing plants has tended to decline, the cost of raw milk has tended to increase. Milk is now purchased from large cooperatives that sell milk on behalf of thousands of individual producers. The producer-cooperatives have also benefited from the Federal Milk Market Orders, which have been vastly extended in area during the postwar period. These orders establish uniform prices for milk sold by farmers within the order area. A plant desiring to sell within a particular Federal Milk Marketing Order (FMMO) area must pay

the fixed federally established price for all milk purchased (R. 2119-2121, 2176). The extension of the FMMO areas has resulted in increasing the costs of many small producers which were formerly not subject to such orders (R. 2269-2270).

20. The growth of the large supermarkets during the postwar period has had a marked influence on the dairy industry. Such markets have replaced home delivery as the major channel of milk distribution. The merchandising of milk in supermarkets has broken the traditional price parity which had previously existed between out-of-store milk and home-delivered milk. Many supermarkets now sell their milk cheaper than a small plant can sell home-delivered milk (R. 2135-36, 2169-2170).

21. Accompanying the change in milk distribution through supermarkets has been the change in milk packaging. During the 1940's automatic paper packaging equipment was perfected to take the place of the traditional glass containers. In the early 1950's the larger automatic half-gallon packaging machine was developed, and sales of that product increased rapidly. Many supermarkets insist on paper containers, particularly those of half-gallon size (R. 2143-44, 2165, 2169-70). One of the principal manufacturers of automatic paper packaging equipment is the Ex-Cell-O Corporation. Its machines are leased on the basis of a flat fee per month, plus a per unit charge for each package processed (R. 2296, RX 152). While the size of the machines leased by it vary, a milk company must have a volume of at least 1500 gallons a day in order to be able to utilize the smallest machine economically (R. 2297, 2467). There are other companies which sell pre-formed paper cartons, but the cost of such containers is higher than those produced by automatic paper-packaging equipment (R. 2516-19).

22. The industry changes which have occurred in the postwar period, including the almost universal establishment of a requirement for Grade A milk, the rise of the supermarkets as a major retail outlet, the necessity for installing HTST equipment, paper packaging and other automatic equipment in order to meet the higher Grade A standards, reduce labor costs, and serve the supermarkets, the increase in the cost of raw milk, the pressure on selling prices resulting from competition for supermarket business, have all resulted in increased economic pressure on the smaller producers, many of whom have not been able to afford the more expensive processing equipment and have not had the volume to justify the leasing of automatic paper packaging equipment. The result has been a decline in the number of smaller producers, many of these having been acquired by the

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larger companies. As a result of the various technological changes discussed above, there has been a consolidation of processing plants even among the larger producers, in order to be able to utilize the expensive types of automatic equipment more effectively. Many of the smaller processing plants have been converted into distribution or sales branches.

23. Set forth below is a table comparing the number of fluid milk plants in the United States in 1950-1951 with those in 1961-1962 (CX 409 and 412).

Year	Number of fluid milk plants					Total
	No volume listed	Under 1 million quarts	1 to 5 million quarts	5 to 10 million quarts	Over 10 million quarts	
1950-51-----	8, 535	5, 453	1, 573	295	233	16, 089
1961-62-----	1, 858	3, 048	1, 539	365	366	7, 176
Percent change-----	-79	-44	-2	+24	+57	-55

As is indicated in the above table, the number of milk plants in the United States has declined from 16,089 in 1951 to 7,176 in 1961-1962, or a decline of 55%. However, as the above figures reveal, this decline has occurred almost entirely in two categories, viz, plants with no volume listed and plants with a volume of under 1,000,000 quarts. The "No Volume Listed" category consists principally of small plants whose volume is so small that the trade association which compiled the above data was unable to ascertain their volume.¹³ Plants with a volume under 1,000,000 quarts are those whose production is less than 800 gallons a day. The third category of plants, i.e., those with a volume of 1-5 million quarts, includes plants whose production volume is between 800 gallons and 4000 gallons a day. It seems probable that the 2% decline in the number of plants in this category involves mainly plants at the lower end of the production spectrum. It is, therefore, apparent that the decline in the number of milk plants in the United States during the 10-year period involved in the above statistics involves almost entirely plants with a volume under 1,600 gallons a day. These are the plants which, generally speaking, do not have HTST equipment, or automatic paper packaging equipment, and which do not serve supermarkets to any

¹³ Many of the plants listed under the "No Volume" category were operated by producer-distributors, i.e., farmers, who are not required to be licensed by state laws and who do not report their production statistics. For example, out of 126 plants listed in the "No Volume" category for Indiana, 89 were not licensed by the State of Indiana. (Compare licensed companies in CX 326 with companies listed in CX 409, Indiana Section.)

considerable extent. The above table also reveals that there has been an increase in the number of plants producing over 1,000,000 quarts. The number of such plants has increased from 2,101 in 1950-1951 to 2,270 in 1961-1962. This represents an increase of 169 plants or 8%.

24. The record also establishes that there has been a substantial increase in the number of larger independent companies, as well as in the number of larger plants. Thus it appears that the number of independent companies producing 1,600 or more gallons of fluid milk a day has increased from 805 in 1953-1954 to 1,098 in 1961-1962, representing an increase of 36% in the number of such companies (RX 161-G).¹⁴

Changes in Ice Cream Industry

25. Changes similar to those above described in the fluid milk industry have also occurred among producers of ice cream and other frozen desserts during the postwar period. The ice cream industry has likewise witnessed major changes in production and packaging technology, and in methods of distribution. Prior to World War II ice cream was a confection manufactured in relatively small plants and sold within a few miles of the manufacturing facility. Ice cream was sold in bulk containers to so-called "wet stops," such as drug stores, restaurants and confectionery stores. Only relatively small quantities were sold in package form, mainly to small so-called "Mom and Pop" grocery stores. Ice cream was produced in batch freezers and packed in bulk. A large part of the operation was performed by hand. Ice cream trucks had a capacity of 300 to 400 gallons, and many were refrigerated by dry ice. The trucks distributed on a local basis and into adjacent communities, not more than 50 to 75 miles from the freezing plant. In addition to small ice cream manufacturers, there were many counter-freezer establishments, which produced ice cream from purchased mix, and sold it at retail on their premises. Some of the smaller wholesale ice cream manufacturers also sold part of their production at retail for consumption on the premises (R. 3265-67, 3314-15, 3383-86).

26. The 1950's have witnessed a marked trend in the direction of automation in the manufacture and packaging of ice cream and frozen desserts. The trend was given considerable impetus by the need

¹⁴ The figures above cited are taken from a statistical analysis prepared on behalf of respondent from evidence offered by complaint counsel. The comparison is made with 1953-1954, rather than 1950-1951 (as was done by complaint counsel), because the data for 1950-1951 do not permit a separation of plants on the basis of a minimum volume of 1,600 gallons per day.

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to reduce production costs, particularly labor costs. Indicative of the extent to which labor costs had increased is that of one of respondent's Midwestern plants, in which hourly wage rates rose from 63¢ an hour to \$2.45 an hour between 1940 and 1960. If respondent's ice cream plants were operating in 1960 with the same number of employees as they did in 1938 or even 1948, they would be operating at a loss on the basis of paying the 1960 wage rates (RX 38-40, R. 3275). Because the supermarkets, with their strong bargaining power, have become the most important single type of customer in the ice cream business, it would have been difficult for respondent or other manufacturers to pass on the increased costs to their customers. Hence, the trend toward mechanization as the answer to rising production costs.

27. The process of mechanization has resulted in the semi-automation of the plants of a great many wholesale ice cream manufacturers, and some plants have become fully automatic. In a semi-automatic plant mechanization has been introduced into the separate stages of ice cream manufacturing and packaging, with some use of labor between the various stages, whereas in a fully automatic plant as few as two employees can operate an entire plant by pushing a series of buttons on a central control board. In a semi-automatic plant the ice cream mix is automatically prepared through valves and dials that control the volume of ingredients pumped into the mixing tanks. The freezing operation is performed with multiple tube, continuous freezing units, as compared with the old batch-type freezers. The new type continuous freezer has a capacity of 400 to 1,000 gallons an hour, compared to 120 to 250 gallons in the old type. The semi-frozen product is automatically packaged by machinery which forms, fills, seals and partially stacks the containers. They are then transported to hardening rooms by belt conveyors or multi-shelf carts. The large, electrically refrigerated transports or distribution trucks now in use permit deliveries to be made over distances of several hundred miles to distribution branches or to the warehouses of large supermarket customers (R. 3268-3271, 3315, 3367-69, 3383-86).

28. As in the case of the newer types of fluid milk processing and packaging equipment, the new semi-automatic and automatic ice cream equipment is expensive and, requires that a manufacturer have a certain minimum volume in order to be able to make efficient and economic use of such equipment. Indicative of this situation is that involving automatic packaging equipment. The half-gallon automatic packaging machine was developed in the early 1950's by Anderson Bros. Manufacturing Company, in response to the need to efficiently package ice cream to satisfy the demands of the supermarkets.

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In order to make efficient use of such a machine a plant must first have continuous freezing equipment with a minimum capacity of 350 to 400 gallons per hour, which is equivalent to an annual gallonage of 200,000 to 300,000 gallons. There have been very few sales of such equipment to plants with a volume of under 250,000 gallons (R. 4678-4681).

29. There has been a substantial decline in the number of ice cream plants since 1950, although the decline has not been as great as that of milk plants. Set forth below is a table comparing the number of ice cream plants in the United States in 1961-1962, with those in 1950-1951 (CX 409 and 412):

Year	Number of plants			Total
	No volume reported	Volume less than 250,000 gallons	Volume over 249,999 gallons	
1950-51.....	1, 020	2, 772	411	4, 202
1961-62.....	520	2, 176	530	3, 226
Percent change.....	-49. 02	-21. 51	+28. 95	-23. 23

As indicated in the table, the number of ice cream plants has declined from 4,202 to 3,226, or 23.23%, over a period of approximately ten years. However, as in the case of fluid milk plants, this decline has occurred principally among the smaller plants, viz, those with an annual volume under 250,000 gallons and those with no volume reported (which, for the most part, includes plants whose volume is so small that it cannot be ascertained by usual industry data collecting organizations). Such plants, generally speaking, do not have a sufficient volume to support automatic packaging equipment and, in many instances, do not have some automatic continuous freezing equipment. In the case of plants with an annual volume of 250,000 gallons and over, the number of plants has increased from 411 to 530, or an increase of 28.95%. This increase is also reflected in the number of independent companies (as distinguished from plants) manufacturing 250,000 gallons or more. The number of such companies has increased from 346 in 1950 to 388 in 1961, or an increase of 12.1% in the number of such independent companies (RX 161-D).

30. Some difference of opinion exists concerning the minimum volume which is required in order for an ice cream or milk plant to be "viable" and competitive. According to respondent, an ice cream plant must now have a minimum volume of 250,000 gallons annually and a milk plant must have a daily volume of at least 1,600 gallons

in order to be considered viable. Complaint counsel dispute this contention, citing the fact that plants with lesser volumes are able to operate profitably, and the fact that as of 1960 there were still at least 2,176 ice cream plants processing less than 250,000 gallons annually, and 3,048 milk plants processing less than 1,600 gallons daily.

The examiner considers it unnecessary to determine what is the precise dividing line, volume-wise, between viable and marginal ice cream and milk plants. However, based on the substantial and uncontradicted evidence presented by respondent, it is clear that plants having volumes substantially below those above indicated, operate under a considerable disadvantage. Such plants, generally speaking, are unable to afford the type of equipment necessary to overcome increased labor and material costs, and to compete for the high-volume, lower profit-margin supermarket business. While it may be that there are smaller plants which are still able to operate profitably, the fact remains that a very substantial number of such plants have ceased operating in the last ten years. The record is clear that their inability to support the requisite types of automatic and semi-automatic equipment was a significant factor in the demise of many of them.¹⁵

II. THE ACQUISITIONS

A. *In General*

1. During the period between 1950 and 1961 there have been 505 acquisitions of dairy concerns by eight large so-called national dairy companies, including respondent, National Dairy Products Corp., The Borden Co., Foremost Dairies Inc., Carnation Co., Arden Farms Co., Fairmont Foods Co., and Pet Milk Co. These same eight companies have made over 1,900 dairy acquisitions in the United States since 1905 (CX 426).

2. The complaint, as amended, challenges the making of 175 acquisitions by respondent. Of these, 77 are alleged (in Paragraph Six) to be corporations engaged in commerce, and 98 are alleged (in Paragraph Seven) to be individually owned noncorporate dairy concerns. Of the 77 corporate acquisitions, complaint counsel concede in their proposed findings that the evidence fails to establish that 40 of such companies were engaged in interstate commerce within the meaning of the Clayton Act, leaving a balance of 37 acquisitions involving corporations claimed to be engaged in interstate commerce. Respondent contends that the record establishes the existence of interstate

¹⁵ See, for example, R. 2516-20, 2534, 2556, 4629. Of approximately 120 milk plants which discontinued processing in Indiana between 1950 and 1960, all but about four were manual, non-automatic plants (RX 32, R. 2798 *et seq.*, 2822-23).

commerce with respect to only 19 of the corporate dairy acquisitions. With respect to the noncorporate acquisitions, complaint counsel concede that the great bulk of them involve concerns as to which the record is lacking in substantial evidence of engagement in interstate commerce at the time of the acquisition.

3. The great preponderance of the acquired concerns, both corporate and noncorporate, involve relatively small companies. Only 23 of the entire 175 companies acquired had sales of over \$1,000,000 annually, and 32 had sales of \$500,000 and over. The total sales of the 32 concerns with sales of \$500,000 and over amounted to approximately \$129,000,000, as of their last year of operation. The largest concern acquired was Creameries of America, Inc., whose sales were approximately \$49,000,000.

4. In accordance with the motions filed with its answer and the right reserved to it in the pre-trial order, respondent has moved to dismiss the complaint or to strike any reference therein as to all 98 concerns not involving corporations. Respondent has also moved to dismiss the complaint as to 48 corporate acquisitions involving corporations concerning which it contends the record fails to establish the existance of, or sufficient engagement in, interstate commerce, and as to eight concerns which it contends were not engaged in the sale of fluid milk or frozen products. These motions will be hereinafter disposed of.

5. Complaint counsel have submitted proposed findings of over 600 pages with respect to each of the 175 concerns acquired by respondent, irrespective of whether they were corporations or were engaged in interstate commerce. The examiner considers it sufficient for purposes of this decision to make detailed findings as to only the 37 acquisitions involving corporations claimed to be engaged in interstate commerce. At the conclusion of such findings, additional summary findings will be made as to the remaining acquisitions. The examiner, accordingly, turns to a consideration of the evidence in the record pertaining to each of the acquisitions involving a corporation claimed to be engaged in interstate commerce. Such acquisitions will be considered in order of the size of each company acquired, as reflected in its sales volume.

B. *Creameries of America, Inc.*

The Acquisition

1. Respondent acquired Creameries of America, Inc. (hereinafter referred to as "Creameries"), pursuant to an agreement of merger

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dated June 1, 1953 (CX 16 A-U). As a result of the agreement, Creameries was merged into Beatrice on August 1, 1953 (CX 191, p. 20). The merger involved the issuance by Beatrice, to Creameries' stockholders, of 81,250 shares of a new 4½% preferred stock and 81,250 shares of common stock, on the basis of one share of each type of stock for each eight shares of Creameries' common stock. The stock thus received by Creameries' stockholders had an aggregate value of approximately \$11,000,000. At the time of the acquisition Creameries' assets totalled \$17,753,763, compared to Beatrice's total assets of \$48,437,320 (CX 16-Z 212). Its net depreciated book value was approximately \$11,300,000 and its working capital was approximately \$4,500,000 (CX 16-Z 12).

2. Creameries' head office was located in Los Angeles, California. It was an outgrowth of a predecessor of like name organized on October 4, 1929, which functioned largely as a holding company for seven subsidiaries engaged in the dairy business. The Creameries corporation acquired by respondent was incorporated in Delaware on February 29, 1936, as a result of its consolidation with its constituent company of the same name and a number of the latter's subsidiaries. At the time of the merger Creameries was one of the three largest dairy product concerns operating exclusively in the territory west of the Rocky Mountains. Its area of operation included California, Colorado, Idaho, New Mexico, Texas, Utah, Wyoming and Hawaii. In addition to processing and distributing dairy products, including fluid milk, cream, milk powder, butter, cheese and ice cream, the company distributed frozen foods, operated dairy farms and, through its Hawaiian subsidiary, operated a brewery, ice plant and public cold storage warehouse (CX 16-Z 22). Its consolidated net sales of all products in 1952 were \$49,040,000. During the five years ending December 31, 1952, the proportion of its sales in the various product lines handled by it was as follows (CX 143, p. 6) :

Product :	Percentage
Milk and cream -----	55
Ice cream and other frozen confections ----	18
Butter -----	3
Other dairy products -----	4
Frozen foods -----	7
Other products -----	13

3. Creameries' operations were conducted on a geographic divisional basis, in the name of the original company in each territory (CX 16-Z 22, p. 2; CX 16-Z 227, pp. 15-16). The various divisions, the

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territory included in each division, the sales of such divisions in 1952 and the percentage of the total represented thereby were as follows (CX 143, p. 6) :

Division	Territory	Net sales 1952	Percent of total
Honolulu.....	Hawaiian Islands.....	\$13, 275, 000	27
Utah.....	Utah, Colorado and Wyoming.....	9, 782, 000	20
El Paso.....	Texas and New Mexico.....	9, 438, 000	19
Idaho.....	Idaho.....	4, 034, 000	8
Bakersfield.....	California.....	12, 511, 000	26
San Jose.....	California.....		
Los Angeles.....	California.....		

4. During the five-year period up to December 31, 1952, Creameries had an average annual profit before taxes of \$1,698,942, and an average net profit after taxes of \$897,743 (CX 16-Z 213). In the year ending December 31, 1952, its last full year of operations before the merger, its net profit before taxes was \$1,999,656, and its net profit after taxes was \$879,255. The breakdown of the earnings of the various divisions, before taxes, during the year 1952 was as follows (CX 16-Z 214) :

Division:	Earnings before taxes
Honolulu	\$529, 506
Utah	341, 881
El Paso.....	524, 873
Bakersfield	250, 764
San Jose.....	48, 073
Los Angeles.....	¹⁰ 82, 251
Idaho	193, 536
Honolulu brewery.....	335, 842
Rawley frozen foods.....	13, 428
Unallocated general office expense (expenses).....	34, 534

¹⁰ The above figure (loss) includes a \$32,000 writeoff on the good will of an acquired company.

5. Although, as above indicated, Creameries' operation was a profitable one at the time of its merger with respondent, the record discloses that it had experienced a significant decline in its rate of profit during the postwar period. Set forth below is a table reflecting Creameries' profit picture during the period of 1946-1952 (CX 16-Z 216).

[Dollars in thousands]

	1946	1947	1948	1949	1950	1951	1952
Sales.....	\$35, 556	\$39, 235	\$38, 811	\$38, 985	\$38, 603	\$44, 369	\$49, 040
Net profit.....	\$1, 635	\$747	\$863	\$1, 008	\$901	\$837	\$879
Percent of profit to sales.....	4. 60	1. 88	2. 22	2. 50	2. 33	1. 89	1. 79

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As the above table reveals, Creameries' sales remained fairly static during the period 1947-1950. Despite the fact that its sales during this period were more than \$3,000,000 greater than those achieved during 1946, its rate of profit was approximately half. Although its sales increased substantially in 1951 and 1952, its rate of profit continued to decline. Thus, while its sales in 1952 were over \$13,000,000 greater than in 1946, or an increase of 37%, its rate of profit on such sales declined from 4.6% to 1.79%.

6. During the postwar period Creameries expended over \$11,000,000 for plant improvements, buildings, equipment and other capital items (CX 16-Z 13; CX 16-Z 22, pp. 23 and 41). Since it was unable to finance these improvements out of current earnings, it did so in part through a stock offering of common stock in 1946, which yielded \$2,500,000, and partly by a loan of \$4,000,000 from Equitable Life Assurance Society in 1947 (R. 4641, 4666). The terms of the latter loan required that Creameries set up a sinking fund of \$250,000 a year to repay the loan (R. 4642). In 1952 Creameries found itself in need of additional funds to finance further capital expenditures. It gave consideration to financing these through a further stock issue, but ruled out this approach due to a decline in its stock from approximately \$22.00 a share in 1946 to \$11.00 in 1952, which was below the stock's book value of approximately \$17.00 a share (R. 4649, 4672-4673, RX 155-C). Consequently, Creameries turned to the insurance company which had loaned it \$4,000,000 in 1947 for additional financial aid. It was able to obtain a commitment of \$1,000,000, which was less than the amount it sought. Due to the merger with respondent, this loan commitment was never taken up (R. 4647, 4671).

7. During the period from 1946 to 1952, Creameries' cash requirements exceeded the funds available to it from its current operations by \$3,924,000 (RX 155-A). During the same period its working capital, as a percent of sales, declined from 14.1% in 1946 to 9.5% in 1952 (RX 150). Further indicative of Creameries' capital position was its current ratio (*i.e.* ratio of current assets to current liabilities), in comparison with that of respondent. While respondent's current ratio between 1949 and 1951 was between 6.49 and 5.43, Creameries' current ratio was between 3.29 and 2.34 (CX 16-Z 22, p. 11).

8. The initiative for the merger between the two companies came from Creameries, which approached Beatrice in December of 1951 through its investment broker, Kidder, Peabody & Co. of New York. There were two principal reasons for Creameries' interest in merging with a larger company. One was the fact that the founder, presi-

dent and "spark plug" of the company, who was then about 65 years of age, wished to retire because of health and there was no one within the organization who was interested in taking his place. The second was the fact that the company felt it could not grow in accordance with its potential because of its limited financial resources (R. 1141-1145).¹⁷ Creameries was interested in entering into a merger with Beatrice, in particular, because although the latter was a larger company serving greater areas than Creameries, it competed with Creameries in only a small portion of Creameries' territory. Creameries expected that the "addition of Creameries' markets to Beatrice's service area should enable Beatrice to capitalize, in these markets, on its national advertising program without increasing advertising costs * * * [and] that various other economies will accrue from combined operations of the two companies" (RX 149-A).

9. The principal reasons for respondent's interest in proceeding with the merger were (CX 16-Z 12; CX 16-Z 22, pp. 41-42; CX 16-Z 221):

(a) It would permit Beatrice's expansion into areas in which, with two exceptions, it was not then doing business. The heartland of Beatrice's existing operation was in the area between the eastern slope of the Rocky Mountains and the Appalachian Mountains, whereas Creameries operated west of the Continental Divide. Except for two areas of California, Beatrice did not compete with Creameries.

(b) With the exception of the Hawaiian Islands, the expansion would be into areas in which the growth of population and commercial activity was above average.

(c) Creameries was a leading distributor of dairy products in the areas where it did business, with the exception of California. Its operation in California was considered to "supplement and fit in well" with Beatrice's operations there.

¹⁷ As Creameries advised its stockholders when the merger agreement was entered into in June 1953: "For sometime past it has been increasingly evident to your Directors that additional capital would be required in order for Creameries to maintain, and effect normal expansion of its position in the territories served. Sales in 1952 were \$10,230,000 (26%) in excess of 1948 sales, but during this period working capital was not increased. Thus, unless the problem of raising additional capital were met by substantially reducing dividends, additional outside capital would be required. Raising capital through additional long-term debt or new preferred stock would undoubtedly be accompanied by the imposition of restrictive provisions which might well be burdensome to the holders of Creameries' common stock. Obtaining more capital through issuance of additional common stock under current conditions would dilute the stockholders' present book value since in recent years the market price of Creameries' common stock has been only around two-thirds of its book value" (RX 149-A).

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(d) As a result of Creameries' capital expenditures of around \$12,000,000 since 1946, its plants, equipment and buildings were in good condition, except for the Los Angeles area and several locations in Utah.

(e) Creameries' method of operation was very similar to that of Beatrice in that, (1) it operated on a decentralized basis and (2) it did business in the same type of communities, viz, medium-sized and small cities and towns. Its operations could therefore be integrated into Beatrice's with a minimum of change.

(f) Creameries could be acquired at a price which was considered to be advantageous. The cost to Beatrice of \$11,200,000 was less than the book value of Creameries' stock (approximately \$11,300,000), and less than the amount Creameries had invested in its business since 1946.

10. While respondent considered the acquisition to be a desirable one, it also recognized that there were certain disadvantageous aspects to it (CX 16-Z 22, pp. 42-43). For example, it had some reservations about acquiring the Hawaiian Islands portion of Creameries' operations due to the then declining population and the downward trend in its economy (CX 16-Z 22, pp. 33-34, 42-43; cf. CX 16-Z 225, p. 6). Consideration was also given to trying to induce Creameries to dispose of its brewery operation in Hawaii and its dairy farm in Bakersfield, California, so that these would not have to be taken into account in the consideration to be paid by respondent (CX 16-Z 22, pp. 16, 24). However, Creameries insisted that if the merger were to take place, all of the assets would have to be included (R. 1148-1151). Another factor which Beatrice considered to be disadvantageous was the additional concentration which would result in the dairy products portion of its business. It was estimated that the acquisition would increase its milk and ice cream sales from 48% to 52% of its dollar sales. While the geographic diversification aspect of the acquisition was considered a plus factor, the further concentration of respondent's business in milk and ice cream was considered to be undesirable. Beatrice was also dubious about the advantages to be obtained from the California portion of Creameries' operation "due to the highly competitive situation and smaller margins on both milk and ice cream in California * * *" (CX 16-Z 22, p. 42). However, it considered that the value of Creameries' California properties would be increased by the consolidation with Beatrice's own operations in the area, thus giving respondent "an opportunity to possibly improve our profits in those areas." Weighing the advantages and disadvantages,

it considered the acquisition to be to its own overall advantage because: "[T]his is an opportunity for our company to go into new areas, which are growing areas with major operations, at a price lower than we could ever develop the business in these areas. With the possible exception of Hawaii, I think they are areas where we should be in. This is particularly true of Texas, New Mexico, Utah and Idaho" (CX 16-Z 22, p. 43).

Market Conditions

a. *California*

11. As mentioned above, Creameries had three operating divisions doing business in California. They were: San Jose, Bakersfield and Los Angeles. The San Jose division did business in an area of north central California just south of San Francisco; the Bakersfield division sold in an area of south central California around Bakersfield; and the Los Angeles division operated in the Los Angeles area of southern California. The three divisions accounted for approximately 26% of Creameries' sales in 1952. Respondent was in competition only with the San Jose and Los Angeles divisions. It competed with the San Jose division only in the sale of ice cream, while in Los Angeles it competed in the full line of dairy products. The operations of each of Creameries' divisions, the extent of their competition with respondent and a discussion of general market and competitive conditions in each area where Creameries did business will be discussed separately below.

San Jose Division

12. Creameries' divisional headquarters was located in San Jose, California, where it operated both a milk and an ice cream plant. Its operations in this part of California were conducted under the name of Mission Creameries. In addition to processing plants in San Jose, it had a branch milk processing plant at Watsonville and distribution branches at Santa Cruz, Monterey, Salinas and Los Banos.¹⁸ The San Jose division marketed its ice cream under the brand names of Mission and American Hostess. Its milk and other dairy products were marketed under the name of Mission.

13. The main milk plant in San Jose was a modern plant, in good condition, and was capable of being expanded. It had HTST equip-

¹⁸ There is some reference in the record to Los Banos being a branch manufacturing plant (CX 16-Z 218). However, if there was such a plant, it was not in operation at the time of the acquisition, such branch being principally a receiving station (CX 16-Z 22, pp. 31-32; CX 16-Z 252, pp. 1-2; CX 16-Z 28).

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ment, and machinery for packaging milk in both glass and paper containers. It processed about 3,000 gallons a day (CX 16-Z 22, p. 31; CX 16-Z 26). The ice cream plant was located in an old-garage-type building, which was being leased, and was in poor condition. Its pasteurizing and processing equipment was, however, in good condition. It had an annual gallonage of about 250,000 gallons (CX 16-Z 22, p. 31; CX 16-Z 27). The branch milk plant at Watsonville was located in an old run down store-type building, which was being leased. Its daily output was about 6,000 gallons. It used HTST equipment, and had equipment for filling both glass and paper containers (CX 16-Z 22, p. 32; CX 16-Z 28). In acquiring the San Jose ice cream plant, respondent contemplated that the plant would be closed and its ice cream manufacturing operations consolidated with respondent's own plant at Los Gatos, 12 miles away. This was, in fact, done shortly after the merger took place (R. 1077-78). In the case of the Watsonville milk plant, while it was regarded as a profitable and efficient operation, respondent considered combining it with the San Jose milk plant. This, however, was not done (R. 1078).

14. The San Jose division was one of Creameries' smaller divisions. Its 1951 sales of approximately \$3,600,000, represented 8.18% of total company sales of over \$44,000,000 (CX 16-Z 114). The only division selling dairy products which accounted for a smaller percentage of Creameries' sales was the Los Angeles division, with 6.69%. In the four months ending April 30, 1953, the San Jose division's net sales were \$1,247,519 out of total company sales of \$14,897,413 (CX 16-Z 122). This, again, accounted for the smallest proportion of sales, except for the Los Angeles division. As previously mentioned, the net earnings of the San Jose division, before taxes, were \$48,073 in 1952 (CX 16-Z 214). The only dairy division with lower earnings was Los Angeles. During the four-month period ending April 30, 1953, the San Jose division had a net loss of \$7,961. All other divisions selling dairy products showed a profit, except for Los Angeles (CX 16-Z 122).

15. As in the case of the other divisions selling dairy products, the largest proportion of the sales of the San Jose division consisted of milk and ice cream, and of these, milk accounted for the greater part. In the 12-month period ending July 31, 1952, the division sold 3,060,682 gallons of milk and 266,332 gallons of ice cream (CX 16-Z 112, 113). The record does not disclose the relative profitability of such sales during this period. However, during the last 10 months of 1950 (the latest period for which such figures are available in the

record) the San Jose division had an operating profit of \$53,267 on milk and \$10,365 on ice cream, out of a total profit of \$74,462 on dairy product sales (CX 16-Z 118). In the year 1949 its operating profit on milk was \$100,351 and that on ice cream was \$63,382, out of a total profit of \$182,219 on dairy product sales.

16. Creameries' San Jose division distributed milk, ice cream and other dairy products in an area at the southern end of the San Francisco Bay area known as the "lower bay and coastal area" (R. 3860). This area consisted of the following principal communities (including the counties in which such communities were located): San Jose in Santa Clara County, Watsonville and Santa Cruz in Santa Cruz County, Monterey and Salinas in Monterey County and Los Banos in Merced County. The ice cream distributed in this area was manufactured in Creameries' plant located in San Jose. The milk distributed in Santa Clara County was processed in the San Jose plant, while that sold in the other three counties was processed at the Watsonville plant (R. 1077, CX 16-Z 28).

17. Respondent produced and distributed only ice cream and other frozen desserts in the area in which Creameries' San Jose division operated. It did not process or distribute fluid milk products. Its plant was located at Los Gatos in Santa Clara County, approximately 10 miles southwest of San Jose. Whereas the distribution area of Creameries' San Jose division was confined to the lower bay and adjacent coastal area, respondent distributed frozen products in the entire bay area, including San Francisco and Oakland (R. 3758, 3789). Respondent also distributed frozen products as far north as Sacramento (approximately 100 miles from Los Gatos), and as far west as Fresno, where it had a distribution branch (R. 3810, 3820, 3879; CX 16-Z 245). Although respondent sold frozen products in San Jose, Salinas, Monterey, Santa Cruz, and other towns where Creameries distributed, it sold to a different type of customer. Creameries' customers were mainly small retail and service establishments, such as fountains, restaurants, and "mom-and-pop" grocery stores (R. 3851, 3799). Respondent, on the other hand, specialized in serving supermarkets, its principal customer in Creameries' distribution area being a grocery chain known as the Purity Stores (R. 3758, 3869, 3872).

18. In addition to respondent, there were four other major companies which sold ice cream and other frozen dairy products in some or all of the communities where Mission Creameries did business. These were: The Borden Co., Carnation Co., Golden State Co., and

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Arden Farms Co. With the exception of Golden State, these were so-called national companies, distributing dairy products in a number of States other than California. While Golden State's operations were confined principally to California, it was a major company in the State and had a substantial number of plants and distribution branches throughout the State. In February 1954 it was acquired by Foremost Dairies, Inc., a large so-called national dairy company. In addition to these major companies, there were at least eight other companies distributing frozen dairy products in portions of Mission Creameries' distribution area. For the most part, they were small companies which distributed in only one or two communities. However, several were somewhat larger in size. In this category were: Spreckels Russell Dairy Co. of San Francisco, which distributed in both San Jose and Watsonville; Dreyers Grand Ice Cream Co. of Oakland, which distributed in San Jose; and Swift & Co., the meat packing company, which had an ice cream plant in San Francisco and distributed in San Jose.

19. Although, as previously indicated, respondent did not process and distribute milk in northern California, Mission Creameries had a number of other competitors in this product line. Of the large companies previously mentioned, Borden, Carnation and Golden State were also major competitors in the sale of fluid milk. In addition, there were at least 24 other companies distributing fluid milk in Mission Creameries' territory. For the most part these were small local companies which distributed in a single community. However, several distributed over a wider area. Among the larger local companies were Challenge Cream & Butter Association Inc. and Crystal Creamery Co.¹⁹

20. Complaint counsel and respondent are in sharp disagreement as to what constitute the geographic market areas, in terms of which to measure the probable competitive impact of respondent's acquisition of Creameries' San Jose Division, operated under the name of Mission Creameries. In their proposed findings complaint counsel appear to contend that each of the communities where respondent and Mission Creameries did business is a separate market area. The market share figures and concentration ratios cited by complaint

¹⁹ The above findings as to Creameries' competitors are based principally on CX 16-Z 252, pp. 29-45, which not only lists such competitors, but gives an approximation of their volume. For a further listing of competitors see CX 409, which contains the names of a few other small companies in communities not covered by CX 16-Z 252.

counsel are based principally on these market areas. The figures proposed by respondent are based on much broader geographic areas. Respondent's difference with complaint counsel involves not merely the area where Mission Creameries did business, but the other two areas in California where the acquired company had operating divisions. Respondent also proposes different geographic areas for the two principal product lines. For the fluid milk product line, respondent contends that there are four principal geographic areas of effective competition. Creameries' San Jose Division would fall within what respondent describes as the "Bay Area," extending from the area just north of San Francisco and Oakland, south to Monterey. For the frozen dairy products line, respondent contends that there are two broad areas of effective competition, viz, Northern California and Southern California, with the Mission Creameries' operation falling in the Northern California market area.

21. As is usually the case where the parties differ so widely as to the geographic boundaries of the market areas involved, the picture one receives of the structure of the market will differ widely depending on which version of the market one accepts. On the basis of the narrow market areas proposed by complaint counsel, both respondent and Mission Creameries had substantial market shares in most of the market areas, and there was a high degree of concentration among the major companies. On the basis of the broad market areas proposed by respondent, both the acquired and acquiring companies had relatively small shares of the markets and concentration was somewhat less pronounced. For the reasons which will hereafter be discussed, the examiner does not agree with either party's definition of the geographic markets. However, to provide a full record for purposes of appellate review, and as a basis for comparison with the findings hereafter made, the examiner will briefly discuss the market share data in the record, in terms of the different market areas proposed by the parties.

Ice Cream Market Shares in Markets Proposed by Complaint Counsel

22. Set forth below is a table which reflects the respective market shares of Mission Creameries and respondent, in the ice cream product line, in each of the communities in the lower bay and adjacent region, which complaint counsel contend are the appropriate geographic market areas in which to determine the probable competitive impact of the acquisition, insofar as it involves the Mission Creameries operation.

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*Market shares (ice cream) in markets proposed by complaint counsel, lower Bay, 1952*²⁰

Area	Total sales ²¹	Creameries'		Beatrice's	
		Sales	Market share	Sales	Market share
			Percent		Percent
San Jose.....	\$1, 193, 145	\$122, 964	10. 3	\$258, 549	21. 7
Watsonville.....	220, 969	50, 818	23. 0	32, 943	14. 9
Santa Cruz.....	193, 725	54, 171	28. 0	31, 211	16. 1
Salinas.....	277, 649	71, 527	25. 8	41, 611	15. 0
Monterey.....	193, 507	48, 884	25. 3	29, 745	15. 4
Los Banos.....	111, 721	32, 894	29. 4	8, 104	7. 3

²⁰ The figures in the above table are based on CX 16-Z 252, pp. 28-46, which was prepared by respondent and submitted to the Commission in the course of seeking to obtain approval of its acquisition of Creameries in 1953. Respondent now contends that the figures which it supplied are unreliable. The exhibit was originally received in evidence without any objection being raised on this score (R. 456). However, during the presentation of its defense, respondent offered the testimony of several of its officials (formerly in Creameries' employ), to the effect that the figures of the other companies were based on percentage estimates in relation to their own company's business (R. 3855-56, 3864, 3868). There may be some question whether respondent is not now estopped from questioning the reliability of the figures on the basis of which it asked the Commission to approve the merger. Aside from this, however, the examiner is satisfied that while they may not be precisely accurate and may contain a certain margin of error, they are sufficiently reliable to provide an appropriate basis for gauging the general order of magnitude of respondent's and Creameries' market positions, and the relative standing of their competitors. Other statistical evidence in the record, which will be hereafter referred to, tends to corroborate their general accuracy.

²¹ Although CX 16-Z 252 contains a breakdown of sales into "wholesale" and "retail" categories, the examiner has combined these figures in the above table and in the other tables based on this exhibit. Most of the companies whose sales figures are given, sell at both wholesale and retail, with wholesale sales generally accounting for the greater part of their sales. The market position of respondent, Creameries and the other major companies would not be materially different if broken down into separate retail and wholesale categories.

As the above table indicates, Creameries' market share in the above communities ranged from 10% to 29%, and respondent's share ranged from 7% to 21%. Between them they accounted for between a third to 40% of the sales in these communities.

23. The estimated market shares of the other major companies operating in these areas is reflected in the following table:

*Estimated ice cream market shares of other large companies in markets proposed by complaint counsel, lower bay, 1952*²²

[In percent]

Area	Golden State	Borden	Carnation	Arden
San Jose.....	20. 6	15. 5	15. 5	5. 2
Watsonville.....	25. 3	25. 3	2. 2	1. 0
Santa Cruz.....	28. 0	11. 2	11. 2	2. 6
Salinas.....	28. 3	25. 8	5. 1	-----
Monterey.....	27. 8	6. 2	2. 1	1. 0
Los Banos.....	29. 4	29. 4	1. 5	1. 5

²² The market shares are computed from the sales figures appearing in CX 16-Z 252. As indicated in footnote 20, the figures for companies other than respondent and Creameries are estimated. The market shares reflected above do not purport to be exact, but are rough approximations of the relative standing of these companies.

As indicated by both of the above tables, respondent's acquisition of Creameries resulted in a high degree of concentration in the ice cream product line in a number of the above communities. Thus, in San Jose the market shares of respondent and Creameries, combined with the shares of Borden, Carnation and Arden, accounted for approximately 68% of the ice cream sold in that community. If the share of Golden State (which joined the ranks of the national companies six months after the Beatrice Creameries merger) were added, the five so-called national companies would account for approximately 88% of the area's sales (assuming all companies maintained their relative market positions during the period following these acquisitions).

Ice Cream Market Shares in Market Proposed by Respondent

24. The Northern California market area proposed by respondent for the frozen dairy product line includes all of northern California north of the Tehachapi Mountain range (located approximately 25 miles south of Bakersfield). This area includes not only the operations of Creameries' San Jose Division, but also that of its Bakersfield Division, in whose territory respondent did not sell. Set forth below is a table reflecting Creameries' and respondent's respective market positions in the Northern California market, as proposed by respondent, for the frozen dairy product line.

Market shares (frozen dairy products) in northern California market proposed by respondent, 1952²³

Total production (gallons)	Creameries'		Beatrice's	
	Production (gallons)	Percent of area	Production (gallons)	Percent of area
27, 724, 000	646, 425	2. 33	1, 580, 917	5. 7

²³ The figures used in the table are taken from RX 115-C, which is based on figures obtained from the records of the State of California. Creameries' production figures include both its San Jose and Bakersfield plants. Beatrice's figures are those of its Los Gatos plant. Creameries' San Jose plant sales represent 0.65% of the market, and its Bakersfield plant sales represent 1.68% of the market.

As the above table indicates, respondent and Creameries, together, accounted for 8.03% of the frozen dairy products produced and, presumably sold, in the Northern California market proposed by respondent. No evidence was offered by respondent as to the extent of concentration in the frozen dairy product line in Northern California, although it did offer such evidence for fluid milk.

Milk Market Shares in Markets Proposed by Complaint Counsel

25. As previously mentioned, Creameries distributed fluid milk in a number of communities in the lower bay area and adjacent region

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from its plants in San Jose and Watsonville. Respondent did not process or distribute fluid milk in this part of California. Set forth below is a table reflecting Creameries' market share, in the fluid milk product line, in the various communities which complaint counsel contend are the appropriate market areas.

Creameries' market share (fluid milk) in markets proposed by complaint counsel, lower bay, 1952²⁴

Area	Total sales	Creameries' sales	Creameries' market share
			Percent ^t
San Jose.....	\$6, 887, 107	\$756, 106	11. 0
Watsonville.....	640, 130	250, 857	39. 2
Santa Cruz.....	1, 126, 250	302, 468	26. 9
Salinas.....	1, 285, 105	472, 921	36. 8
Monterey.....	1, 243, 448	403, 544	32. 5
Los Banos.....	247, 789	94, 925	38. 3

²⁴ The figures used in the above table are based on CX 16-Z 252, pp. 26-46. See footnote 20 for discussion of these figures.

As indicated in the above table, Creameries' sales in each of the above communities exceeded 25% of the market, with the exception of San Jose where its sales accounted for 11% of those made in that community. It was the top ranking company in each of these markets except for San Jose and Salinas, where it was the third and second ranking company, respectively.

26. The estimated market shares of the other large companies selling milk in the above communities is reflected in the following table:

Estimated milk market shares of other large companies in markets proposed by complaint counsel, lower bay, 1952²⁵

[In percent]

Area	Golden State	Borden	Carnation
San Jose.....	27. 4	22. 0	9. 2
Watsonville.....	14. 9	12. 1	9. 1
Santa Cruz.....	21. 2	18. 6	9. 1
Salinas.....	41. 6	6. 3	4. 8
Monterey.....	30. 7		7. 3
Los Banos.....	23. 3	10. 6	36. 6

²⁵ The above market shares are computed from CX 16-Z 252. The explanation in footnote 22 is also applicable to fluid milk shares.

As the above table indicates, the so-called national companies (Borden and Carnation, together with respondent's newly acquired

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company, Creameries) accounted for approximately 42% of San Jose area sales. If the market share of Golden State, which became part of a national company in February 1954, were added, these four companies would account for approximately 70% of San Jose area sales.

Milk Market Shares in Market Proposed by Respondent

27. As previously mentioned, respondent contends that the appropriate market area, insofar as the fluid milk part of Mission Creameries' operation is concerned, is the so-called "Bay Area." This is an area of 13 counties contiguous to San Francisco Bay. Set forth below is a table reflecting Creameries' market share in the area proposed by respondent as the appropriate market area.

*Creameries' market share (fluid milk) in market proposed by respondent, bay area, 1952*²⁶

Total area sales (gallons)	Creameries'	
	Sales (gallons)	Percent of market
98, 785, 699	²⁷ 2, 615, 768	2. 65

²⁶ The above table is based on RX 108-C. The figures there used were compiled from State data.

²⁷ The above figures do not include 113,893 gallons sold in Merced County, which is not in the bay area

As is evident from the above table, Creameries' market share in the above area, 2.65%, is considerably smaller than that in the areas claimed to be the appropriate market areas by complaint counsel, as revealed by a previous table.

28. The extent of concentration, in terms of the market area proposed by respondent, is also lower than that in the areas proposed by complaint counsel, although it is still substantial. The top four companies in the Bay Area accounted for 58.14% of the fluid milk sold in the area in 1952 (RX 109-A). Unlike its position in the areas proposed by complaint counsel, Creameries was not in the ranks of the top four companies in the Bay Area. These companies, in order of rank, were Golden State, Borden, Carnation and Challenge (RX 112).

Definition of Market Areas

29. Before seeking to resolve the differences concerning what are the appropriate market areas in which to gauge the probable competitive impact of the acquisition of Creameries' San Jose Division, reference should be made to the marketing areas recognized by the State of California, since the positions of the parties revolve to some extent about these areas. In California the price of milk is regulated

by the State at both the producer and resale levels. The State establishes minimum prices which the "distributors" (dairy companies) are required to pay to the "producers" (farmers), and minimum prices which the distributors and the retail stores may charge in the resale of fluid milk. The minimum prices are established on the basis of so-called "marketing areas," the boundaries of which are fixed by the State Director of Agriculture (after a hearing) on the basis of a finding that in a given area "the conditions affecting the production, distribution and sale of fluid milk, fluid cream or both are reasonably uniform."²⁸ Marketing areas, once established, may be later consolidated upon a finding that "conditions of production and distribution are reasonably uniform in two or more such marketing areas," unless more than 35% of the producers supplying the area object.

The marketing areas established by the State for the purpose of regulating fluid milk prices are generally coterminous with the geographic lines of the counties, and may consist of a single county or a combination of several counties. In 1952 there were 35 specific marketing areas; by 1960 the number of such areas had been reduced, by consolidation, to 27.²⁹ For statistical purposes, the State groups the county and multi-county marketing areas into broader regional groupings. There are four principal regional areas, viz, San Francisco Bay Area, Sacramento Valley, San Joaquin Valley and Southern California. These regional areas are referred to, variously, as "Major Areas" or "Major Markets."³⁰

There are no official marketing areas, as such, in the frozen product line, since the price of these products is not directly regulated. Manufacturers are required to file copies of their price lists and to adhere to such prices unless they file an amended schedule (R. 4214). They are also required to file monthly reports of their production. These reports are the basis of statistical reports by the State, in which figures of frozen dairy product production is published by "county

²⁸ Agricultural Code of State of California, Section 4270 (CX 419).

²⁹ The above findings are based on the published reports of the State of California entitled "California Dairy Industry Statistics," for 1952 and 1960, upon which the parties have relied in preparing a number of statistical exhibits, and of which official notice is herein taken by the examiner. There is testimony that there were at one time 38 areas, but this apparently involves a period prior to 1952 (R. 4080).

³⁰ In the annual California Dairy Industry statistical reports the sales figures are reported by the county or multi-county areas, which are referred to as "marketing areas." However, these marketing area statistics are grouped on a regional basis in accordance with the above-mentioned regional groupings. The monthly "Dairy Information Bulletin" published by the State contains a similar compilation of data, and refers to the regional groupings as "Major Areas" (CX 392). A report of the State legislature on fluid milk prices refers to the regional areas as "Major Areas" and as "Major Markets" (CX 461, pp. 77, 85).

and district," but these areas do not purport to be marketing area in an economic sense.³¹

30. As previously indicated, much of the argument of complaint counsel concerning the market structure of the area in which Creameries' San Jose Division operated is predicated on the assumption that the individual communities are the appropriate market areas. Counsel's position in this regard appears to have been influenced by the fact that the statistical evidence in the record concerning this area is mainly in terms of the individual communities.³² However, in their reply to respondent's proposed findings complaint counsel, while still contending that the "[m]arket areas in the dairy industry are small, local ones such as those described by respondent in CX 16-Z 252," assert (p. 13) that the relevant markets in California are "the market area[s] delineated by the State."³³ As previously noted, the area delineated by the State as milk marketing areas are not the individual communities, but are at least county-wide in scope. The individual communities in which Creameries' San Jose Division operated fall principally within two milk marketing areas recognized by the State, viz, Santa Clara County (in which San Jose is located) and Monterey-Santa Cruz Counties (in which Watsonville, Santa Cruz, Salinas and Monterey are located). The only community not falling in these two areas, concerning which complaint counsel offered evidence, is Los Banos, which is located in Merced County and is part of the Madera-Merced milk marketing area. Except for San Jose, which had a 1953-1954 population of approximately 95,000, the individual communities were relatively small in size.³⁴

31. As previously mentioned, respondent proposes two sets of market areas, one for fluid milk and one for frozen dairy products. The

³¹ California Dairy Industry Statistics, 1960, p. 68. The 1952 report contains figures for the State as a whole, but no breakdown by county and district (p. 52).

³² As previously mentioned (footnote 20), the market share figures and concentration ratios cited by complaint counsel are based mainly on CX 16-Z 252, which was prepared by respondent at the request of the Commission. Respondent was requested to submit sales data for "each town or country * * * in which Creameries of America, Inc. sold" (CX 16-Z 251). In responding to this request respondent referred to the communities as "sales areas," and stated that it was submitting the figures "by marketing areas" (CX 16-Z 252, p. 1). It is not clear whether complaint counsel contend that this constitutes an admission or acknowledgment by respondent that the individual communities are marketing areas in an economic or legal sense. However, the examiner is satisfied from the circumstances of the request, and the response, that no such admission or acknowledgment was intended by respondent.

³³ In support of the position that the State marketing areas are the appropriate markets for California, complaint counsel refer to CX 16-Z 245, which contains sales data for respondent and Creameries on a county basis. This exhibit was likewise prepared by respondent but, unlike CX 16-Z 252, contains no data for competitors, nor does it reflect Creameries' milk sales in northern California.

³⁴ The approximate 1953 populations of the other communities were: Santa Cruz—21,000; Salinas—18,000; Monterey—16,000; and Los Banos—3,000.

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market areas proposed for the fluid milk product line are based essentially on the State marketing areas. However, respondent contends that the 35 or so State marketing areas should be consolidated into four major marketing areas and one miscellaneous area (the latter consisting of certain sparsely populated counties in the northern and eastern part of the State). The marketing areas proposed by respondent actually correspond to the broad, regional groupings previously mentioned, which are recognized by the State for statistical and reporting purposes (R. 4089), viz, San Francisco Bay Area, Sacramento Valley, San Joaquin Valley, and Southern California. With respect to Creameries' San Jose Division, respondent contends that the appropriate market area is the San Francisco Bay Area, which is essentially a combination of nine marketing areas recognized by the State, including Santa Clara and Monterey-Santa Cruz, but not including Madera-Merced in which Los Banos is located (the latter area being included in the San Joaquin Valley regional area). For the frozen dairy product line respondent proposes a further consolidation of marketing areas, with only two areas in the State, viz, Northern California and Southern California. The frozen product operations of Creameries' San Jose and Bakersfield divisions would both fall within the Northern California market, as proposed by respondent.

32a. Respondent's position as to what are the proper market areas, in California, in which to measure the probable competitive impact of the Creameries acquisition, is based largely on the testimony of Dr. David A. Clarke, Jr., Professor of Agricultural Economics at the University of California and a recognized expert in his field.³⁵ It was the burden of Dr. Clarke's testimony that while the marketing areas recognized by the State may at one time have had a meaningful relationship to the distribution patterns of milk processors, this is no longer true because in establishing such areas the State is required to take into consideration not only the relationship between competing processors, but also that between producers (dairy farmers). While recognizing that the law permits a consolidation of marketing areas and that the number of such areas has been reduced from 38 to 27, it was Dr. Clarke's position that the remaining areas still do not reflect

³⁵ In addition to teaching at the University of California, Dr. Clarke is associated with the Giannini Foundation, which is a research organization connected with the School of Agricultural Economics of the University and conducts research for the State. Dr. Clarke has conducted price and market studies for the State legislature, has testified as a witness for the State at milk price hearings, has conducted milk pricing studies for the U.S. Department of Agriculture and has served on a committee established by the Secretary of Agriculture to study the Federal Milk Market Order program (R. 4065-4070).

meaningful areas of distributor competition because of the opposition of both producer and distributor organizations which desire to maintain their autonomy, and because of the law's requirement that producer as well as distributor competitive conditions be taken into account (R. 4080-4086).³⁶

According to Dr. Clarke, improvements in technology and the elimination of local health ordinances have resulted in a widening of distribution areas, so that at present the above-mentioned regional or major areas are "pretty much [the] areas within which a pattern of companies operate" (R. 4088-4089), and "are relatively homogeneous with respect to marketing conditions" of fluid milk (R. 4076). He likewise was of the opinion that the market for frozen dairy products was divisible in two, with one market "centered around the Los Angeles area," and "the remaining part of the State forming the other marketing area" (R. 4118). It is the position of respondent that since the testimony of Dr. Clarke (which was corroborated by several of its officials) stands "unimpeached and uncontradicted" by any countervailing testimony on behalf of complaint counsel, the market areas proposed by respondent should be accepted.

32b. While not questioning Dr. Clarke's credibility or his high degree of professional competence, the undersigned does not feel obliged to accept the market areas proposed by respondent, for several reasons. In the first place, it is clear from the testimony of Dr. Clarke, and that of respondent's officials who testified regarding marketing areas, that they were speaking primarily of the current situation and not that which existed in 1953, when the Creameries acquisition occurred.³⁷ In the opinion of the examiner the probable competitive impact of the Creameries acquisition must be considered, initially at least, in terms of the market as it existed when the acquisition occurred, uninfluenced by changes or distortions in market structure to which this and other acquisitions in the area may have contributed. While it may be, as respondent urges in another connection, that post-acquisition conditions are relevant under some circumstances, they are not relevant in determining market shares and concentration as of the time the acquisition occurred.

³⁶ As previously mentioned, a consolidation of marketing areas may be blocked if more than 35% of the producers supplying the area object (Sec. 4270, State Agricultural Code, CX 419).

³⁷ Dr. Clarke's negative response, with respect to whether the State marketing areas any longer had any relationship with milk distribution patterns, was in answer to the question whether such areas "have any such relationship *today*" (R. 4080). It should be noted that his testimony was given in May 1962. His testimony concerning the two marketing areas in frozen desserts was in response to the question of "how many ice cream or frozen desserts markets *are* there" (R. 4118). [Emphasis supplied.]

Secondly, the market areas delineated by Dr. Clarke are based principally on the distribution patterns of the large, national companies. The market areas proposed for frozen products are based exclusively on the distribution patterns of such companies, except for the plants which are controlled by the large grocery chains (RX 96). The market areas proposed for fluid milk are based on the distribution patterns of the five national companies, plus those of the three large California companies and the "captive creameries" (CX 95). Even on the basis of the distribution patterns of such companies, the record indicates that the areas of distribution are smaller than those proposed by respondent. Thus, in the case of the frozen dairy product line, in which respondent claims that the companies involved distribute in all of northern California, respondent's map of the area (RX 96) discloses that some of the companies have multiple distribution points in northern California, with one or more plants or distribution branches in the Bay Area, the Sacramento Valley and the San Joaquin Valley. Similarly, in the case of fluid milk product line, in which respondent claims that the entire Bay Area is one market area, respondent's map (RX 95) discloses at least two patterns of distribution, one involving plants or distribution branches in the upper Bay and another in the lower Bay.

The evidence of plant and branch locations, which will be hereafter discussed, confirms the facts which are visually indicated by respondent's diagrammatic presentation.

While it is true, as Dr. Clarke testified, that due to changes in technology, plant consolidations, elimination of local ordinances and other factors, there has been a widening of fluid milk distribution areas, the record establishes that the milk marketing areas recognized by the State still have considerable validity. This is clear from a report which Dr. Clarke himself prepared for a joint committee of the California legislature, on agricultural problems. The report considered, among other things, the extent of interarea shipments to and from the State-recognized marketing areas, as a factor in the establishment of area milk prices.³⁸ Dr. Clarke's report indicates that despite significant interarea shipments of fluid milk in 1954-1955,³⁹ the bulk of the milk sold within the various State milk marketing

³⁸ The portion of the report dealing with interarea shipments was introduced in evidence by respondent, as RX 162 A-Q. The entire report was introduced in evidence by complaint counsel, during rebuttal, as CX 461. It may be noted that the map of milk marketing areas, on which respondent relies (RX 95), was based on a map prepared by Dr. Clarke, in connection with his report (RX 163; R. 4728).

³⁹ The report is dated June 1955. However, most of the statistical data is for February 1954.

areas was processed within such areas. Thus, for the State as a whole, the report indicates that shipments of standard milk produced in one area and sold in another area amounted to only 12% of gross sales for the entire State (RX 162-K).⁴⁰ To the extent there were inter-area shipments, the bulk of such shipments (80%) were made to the adjacent marketing areas (RX 162-0). Only seven areas, out of a total of 36 areas, had out-of-area shipments above 20% of their intra-area sales (RX 162-0). Among these seven areas was Santa Clara County, with shipments out of the area amounting to 233,384 gallons, or 31.5% of a total of 741,339 gallons of milk processed and sold in the area (RX 162-F). All of the out-of-area shipments were to adjacent areas (RX 162-P). Of 166,205 gallons shipped into Santa Clara from other areas, all came from adjacent areas (RX 162-P). Such out-of-area receipts amounted to 21.9% of the milk processed and sold in the area. The Santa Cruz-Monterey marketing area had a much smaller percentage of out-of-area shipments, but received a larger percentage of shipments from other areas. Thus, it processed 329,204 gallons of standard milk and sold only 5,874 gallons, or 1.8%, out of the area, but received out-of-area shipments of 118,213 gallons (all from adjacent areas), representing 35.8% of the gallonage processed within the area. At least half of the out-of-area milk sold in Santa Cruz-Monterey came from the Santa Clara area. These figures demonstrate that the bulk of the milk sold within each marketing area is processed within the area, and that to the extent there are interarea shipments they are generally to and from adjacent areas.

In the case of the frozen dairy product line, in which the State milk marketing areas are not necessarily applicable, Dr. Clarke's position that there were only two broad marketing areas was based on the fact that all companies which did business in both northern California and southern California had a separate plant in each area (R. 4118-4119). While this may indicate that there are *at least* two marketing areas, since no company distributes throughout the State from a single plant, it does not preclude a further subdivision of these two broad areas. The record discloses that even some of the large companies had multiple plants within the above areas at or about the time of the Creameries acquisition, and that those that had only a single plant found it necessary to have a distribution branch or branches within the area in order to serve it effectively. In the case of the smaller companies, whose distribution patterns cannot be

⁴⁰ This figure includes only direct shipments of milk for resale in another area. It does not include interplant shipments between plants in different markets, where the receiving plant processes or otherwise handles the milk before it is resold.

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ignored, none of them distributed over the wide areas proposed by respondent.

33. The examiner now turns to a delineation of what he considers to be the market areas, in terms of which the market shares of the acquired and acquiring companies, the extent of concentration, and other appropriate market statistics may be determined, insofar as Creameries' San Jose Division is concerned.

(a) *Fluid Milk*. As previously mentioned, Creameries' San Jose Division operated two milk processing plants, one at San Jose in Santa Clara County, and the other at Watsonville in Santa Cruz County. The milk processed in San Jose was distributed in Santa Clara County, while that processed at Watsonville was distributed in both Santa Cruz and Monterey Counties and, to a small extent, in a portion of Merced County around Los Banos. Creameries' major competitors in the area were Golden State, Borden and Carnation, all three of which distributed throughout the three-county area in which Creameries' San Jose Division sold, viz, Santa Clara, Santa Cruz and Monterey Counties. The record is not entirely clear as to what the distribution areas of these three large companies were. However, it does appear that in 1951 Golden State had milk processing plants or distribution branches in Oakland and/or San Francisco, San Jose, Salinas and Santa Cruz (CX 409).⁴¹ Presumably the distribution branches served different portions of the Bay Area. In all probability Santa Clara County was served from San Jose, and Monterey-Santa Cruz were served from Salinas and Santa Cruz. Borden had plants at San Jose, Burlingame (San Mateo County) and Oakland, and had distribution branches at Gilroy (Santa Clara County) and in Watsonville and Monterey.⁴² Presumably these plants and branches served separate portions of the Bay Area. Carnation had a processing plant at Oakland and distribution branches at Santa Clara and San Jose. Presumably its distribution in the lower Bay Area was from its distribution branches located there. In addition to the major companies, there were at least 24 other milk companies distributing in portions of the three-county area. Approximately half of these had plants in San Jose or elsewhere in Santa Clara County. Except for Challenge Cream & Butter Association, none of the latter companies did business in any of the principal communities of

⁴¹ Even in 1962 Golden State (Foremost) had plants or branches in these communities (CX 412).

⁴² In 1962 Borden's only milk processing plant in the Bay Area was in San Francisco, but it maintained distributing branches in all of the above communities except Oakland.

Monterey-Santa Cruz Counties (CX 16-Z 252, pp. 29-43). None of the independent companies with plants in Monterey or Santa Cruz Counties sold in the San Jose Area.

Based on the record as a whole, the examiner concludes and finds that each of the milk marketing areas recognized by the State in the lower Bay Area, viz, Santa Clara County and Monterey-Santa Cruz Counties, constitutes an area of effective competition in which to measure the probable competitive impact of the Creameries acquisition, insofar as the milk operations of its San Jose Division are concerned. These two areas were separately served by Mission Creameries' two milk plants; they were separately served from different plants or branches by the major companies; and the smaller independent companies served only portions of each area, but not both areas. Each of the areas was recognized as a separate marketing area by the State of California in 1952 and, despite a reduction and consolidation of marketing areas from 36 to 27 in the State as a whole, and from 9 to 7 in the Bay Area, these two areas were still recognized as separate marketing areas in 1960. As late as 1954-1955 the greater part of the milk sold in each of the two areas was processed within the area. Although Creameries' San Jose Division made a small amount of sales in Los Banos, the examiner considers this area as falling within the Madera-Merced marketing area recognized by the State.

(b) *Frozen Dairy Products.* As previously mentioned, Creameries operated a frozen products plant in San Jose from which it distributed ice cream and other frozen dairy products in Santa Clara, Santa Cruz and Monterey Counties, and in a small portion of Merced County around Los Banos. Its major competitors in this area were Beatrice, Borden, Carnation and Golden State. There were at least nine other companies selling in portions of its territory, including Arden, Swift and approximately seven local, independent companies. Respondent distributed over a wider area than did Creameries, its distribution area extending to the upper Bay Area north of Santa Clara County, and into portions of the San Joaquin Valley. Except for the area around Los Banos, respondent's distribution in the San Joaquin Valley was from its Fresno distributing branch and not directly from its plant at Los Gatos in Santa Clara County. Of the large companies, several had multiple plants or branches in the Bay and adjacent areas. Borden had manufacturing plants in Oakland and San Jose (in the upper and lower Bay Area) and in Sacramento. It also had a plant or distribution branch at Fresno in the San

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Joaquin Valley (CX 409).⁴³ Carnation had a manufacturing plant at Oakland, and distribution branches at San Jose in the lower Bay Area, at Sacramento in the Sacramento Valley, and at Stockton and Bakersfield in the San Joaquin Valley. Golden State operated manufacturing plants at San Francisco and Santa Cruz (in the upper and lower Bay Area), and at Sacramento and the Sacramento Valley and Fresno in the San Joaquin Valley.⁴⁴ It also had distributing branches in the lower Bay Area at San Jose and in the San Joaquin Valley at Stockton. Arden had manufacturing plants at Oakland and Fresno, and distributing branches at Sacramento and Stockton. Spreckels-Russell, a San Francisco manufacturer, had a distributing branch at Burlingame on the peninsula south of San Francisco. Dreyer's which had a plant only at Oakland in 1951, had also established a manufacturing branch in Santa Clara by 1962. Dreyer's distribution into the lower Bay Area in 1952 was limited to San Jose while Spreckels-Russell sold in both San Jose and Watsonville. The other local independents sold only in portions of Santa Clara, Santa Cruz, or Monterey Counties.

It is the conclusion and finding of the examiner that the appropriate market area in which to determine the probable competitive impact of the Creameries' acquisition, insofar as it involves its San Jose Division's frozen dairy products operation is the three-county area in which Creameries principally distributed, viz, Santa Clara, Santa Cruz and Monterey Counties. The examiner does not consider all of northern California an appropriate market area since even the major companies operated on a multi-plant basis within this area. Most of them had at least a tri-partite distribution pattern, with deliveries being made from separate focal points in the Bay Area, the Sacramento Valley and the San Joaquin Valley. Within the Bay Area itself, there was a tendency for distribution to be divided between the upper and lower Bay counties. Giving due regard to Creameries' distribution pattern, and that of both the larger and smaller companies, a combination of the three above-mentioned counties in the lower Bay Area impresses the examiner as the most meaningful economic market for purposes of this proceeding.

Market Shares and Concentration

(a) *Fluid Milk*

34. It has been determined above that the appropriate geographic market areas in which to weigh the probable competitive impact of

⁴³ By 1962 Borden had an ice cream processing plant only at Sacramento in northern California, but it had one or more distributing branches in each of the three major regional areas in northern California (CX 412).

⁴⁴ By 1962, Golden State (Foremost) had converted Santa Cruz and Fresno into distributing branches.

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the acquisition of Creameries' San Jose Division, insofar as it involves the fluid milk product line, are: Santa Clara County and Monterey-Santa Cruz Counties. Creameries' sales were made principally in these three counties in the lower Bay Area. Respondent did not process or distribute milk in this area. Set forth below is a table reflecting Creameries' market shares in the two market areas in question. In the interest of completeness, the table also reflects Creameries' share of sales in the entire lower Bay Area where it operated, except for the small amount of business it did around Los Banos in Merced County.⁴⁵

*Creameries' market shares (fluid milk) in lower bay markets, 1952*⁴⁶

County area	Total sales (gallons)	Creameries'	
		Sales (Gallons)	Percent of area
Santa Clara.....	10,314,005	947,385	9.2
Monterey-Santa Cruz.....	6,626,924	1,895,539	28.6
Total both areas.....	16,940,929	2,842,924	16.8

⁴⁵ The above table is based on CX 421, which was prepared by complaint counsel from the same State data which were used by respondent in preparing RX 108-B (R. 4525). Although purporting to reflect sales, the figures actually are those of shipments made by plants in the area and, to this extent, would not include sales within the area by plants located out of the area (R. 4535). However, the reliability of the above figures, as reflecting a reasonable approximation of Creameries' market position, becomes apparent from a comparison with the figures of Creameries' sales in the principal communities in these two areas, which appear in CX 16-Z 252 prepared by respondent. (See paragraph 25, *supra*). These figures disclose that Creameries' 1952 market share in San Jose (the principal city in Santa Clara County) was 11.0%, and its combined market share in the four principal communities of Monterey-Santa Cruz Counties, was 33.2%. Its share of sales in all five cities in both areas was 19.5%.

It is not possible to determine, precisely, the extent of concentration in the two milk marketing areas discussed above, since the record contains no data as to the total sales of the other large companies in these two areas. However, as previously noted (paragraph 26 and footnote 25), the record does contain estimated sales figures for these companies in five of the principal communities in these market areas, from which a reasonable approximation of the general order of magnitude of concentration in the lower Bay Area may be obtained. As already indicated, Golden State, Borden, and Carnation accounted for approximately 58% of milk sales in San Jose. Adding Creameries' share, four companies accounted for approximately 70% of the San Jose area. Set forth below is an additional table reflecting the extent of concentration in the five-city area as a whole, including San Jose (the principal community in Santa Clara County) and Watson-

⁴⁶ Creameries sold 121,836 gallons of fluid milk in Merced County from its Watsonville plant in 1952, amounting to 6% of the plant's sales (RX 108-B).

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ville, Santa Cruz, Salinas and Monterey (four of the principal communities in Santa Cruz and Monterey Counties).

*Concentration (fluid milk) among major companies, 5-city area, lower bay, 1952*⁴⁷

Company	Sales	Market shares (percent)
Golden State.....	\$3, 141, 515	28. 1
Creameries.....	2, 185, 896	19. 5
Borden.....	1, 879, 811	16. 8
Carnation.....	986, 559	8. 8
Total.....	8, 193, 781	73. 2
Total area sales.....	11, 182, 529	

⁴⁷ As in the case of the figures in paragraph 25 *supra*, the above table is based on CX 16-Z 252.

As the above table indicates, with respondent's acquisition of Creameries and Foremost's acquisition of Golden State, four national companies accounted for somewhere around 70% of the fluid milk sold in the lower Bay Area (assuming, of course, that no substantial decline occurred in the market shares of the above companies between 1952 and 1954).

(b) *Frozen Dairy Products*

35. As the examiner has found, the appropriate market area for determining the probable competitive impact of the acquisition of Creameries' San Jose Division, insofar as it involves the frozen dairy product line, is a three-county area in the lower Bay, consisting of Santa Clara, Santa Cruz and Monterey Counties. Both Creameries and respondent competed in this area in the sale of frozen dairy products. Set forth below is a table reflecting Creameries' and respondent's respective market shares in the three-county market area.

*Market shares (ice cream), 3-county area, lower bay, 1952*⁴⁸

Total sales (gallons)	Creameries		Beatrice	
	Sales (gallons)	Percent of market	Sales (gallons)	Percent of market
1, 878, 726	250, 661	13. 3	598, 391	31. 8

⁴⁸ The above table is based on CX 16-Z 245, which was prepared by respondent and submitted to the Commission in connection with seeking approval of the Creameries acquisition. The table submitted was prepared in terms of "ice cream," rather than for all frozen dairy products. The data in CX 16-Z 245, purport to be based on reported data of the State of California and "Company financial statements."

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As previously noted, the market share cited by complaint counsel are in terms of the individual communities in the lower Bay Area. While the individual communities themselves are not appropriate market divisions, a combination of the five principal communities in the lower Bay Area does constitute a reasonable approximation of the three-county area which has been found to be the appropriate market area for the frozen product line. Set forth below, for purposes of comparison with the preceding table, is a table reflecting the market shares of Creameries and respondent in a five-city area in the lower Bay.

*Market shares (ice cream) in principal communities where creameries' San Jose division sold, 1952*⁴⁹

Community	Total sales	Creameries' sales	Beatrice's sales
San Jose.....	\$1, 193, 145	\$122, 964	\$258, 549
Watsonville.....	220, 969	50, 818	32, 943
Santa Cruz.....	193, 725	54, 171	31, 211
Salinas.....	277, 649	71, 527	41, 611
Monterey.....	193, 507	48, 884	29, 745
Total.....	2, 078, 995	348, 364	394, 059
Market share (percent).....	100	16. 7	18. 9

⁴⁹ The above table is based on CX 16-Z 252, pp. 28-43. It will be noted that while the market share figure for creameries is fairly comparable with that in the preceding table (based on CX 16-Z 245), there is a wide divergence in the market share figures for Beatrice in both tables. The record contains no explanation for this. One possible explanation is that respondent's sales in the other communities in the three-county market were proportionately larger than they were in the above five cities.

The extent of concentration in the three-county frozen dairy products market cannot be determined precisely since the record does not contain data as to the total sales of the other large companies in this area. However, from the data as to the estimated sales by all companies in the five principal communities in the area, it is possible to obtain a reasonable approximation of the extent of such concentration. Set forth below is a table reflecting the sales and market shares of the principal companies in a combined area consisting of San Jose, Watsonville, Santa Cruz, Salinas and Monterey.

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*Market shares and concentration (ice cream) among major companies, principal communities, lower bay area, 1952*⁵⁰

Company	Sales	Market share (percent)
Golden State.....	\$488, 449	23. 4
Beatrice.....	394, 059	18. 9
Creameries.....	348, 364	16. 7
Borden.....	345, 761	16. 6
Carnation.....	230, 389	11. 1
Arden.....	71, 884	3. 4
Total.....	1, 878, 906	90. 1
Total area sales.....	2, 078, 995	

⁵⁰ The above table is based on CX 16-Z 252, pp. 23-43. See paragraph 23 and footnote 22, *supra*, for discussion of these figures.

As the above table indicates, with Creameries' acquisition by respondent, four companies accounted for almost 90% of ice cream sales in the five principal cities of the lower Bay Area. Within six months after the Creameries acquisition, all four of these companies were so-called national companies as a result of Foremost's acquisition of Golden State.

Bakersfield Division

36. The divisional headquarters of Creameries' Bakersfield Division was located in Bakersfield (Kern County), where the company operated a plant which bottled milk, manufactured ice cream, ice cream mix and novelties, and produced cottage cheese. The plant was in excellent condition. It had an HTST pasteurizer, stainless steel processing equipment, and automatic bottling equipment for both glass and paper containers. The plant had a large volume and was capable of being expanded (CX 16-Z 22, p. 31, CX 16-Z 25). The operations of the Bakersfield Division were conducted under the name of Peacock Dairies, Inc. (CX 16-Z 218). Its products were marketed under the brand names of "Peacock" and "American Hostess." In addition to the manufacturing plant at Bakersfield, the Division operated a dairy farm in the area of Bakersfield and distributing branches at Taft, Delano and Ridgecrest in Kern County and at Tulare in Tulare County (CX 16-Z 218).⁵¹

⁵¹ Creameries also had a branch at Wasco in Kern County, but this was closed at the time the company was acquired by respondent (R. 1077).

37. The Bakersfield Division was the largest and most profitable division of Creameries' three divisions operating in California. Its total sales of \$4,839,065 in 1951, represented 10.9% of Creameries' over-all sales (CX 16-Z 114). Its net earnings before taxes in 1952 were \$250,764, compared to earnings of \$48,073 for the San Jose Division and an \$82,000 loss for the Los Angeles Division (CX 16-Z 214). In the four months' period ending April 30, 1953, the net sales of the Bakersfield Division were \$1,775,309, or 11.9% of total company sales of \$14,897,413 (CX 16-Z 122). During the same period its net income before taxes was \$80,416, compared to a loss of approximately \$8,000 by the San Jose Division and a loss of approximately \$7,000 by the Los Angeles Division.

38. As in the case of the other dairy divisions, the largest proportion of the sales of the Bakersfield Division consisted of fluid milk and cream products. For the 12 months ending December 31, 1952, its sales of fluid milk were 3,932,415 gallons, compared to ice cream sales of 603,777 gallons (CX 16-Z 206, pp. 1-2). Its operating profit on sales of milk during the first ten months of 1950 (the latest period for which such figures appear in the record) was \$52,059, compared to a profit of \$26,034 on sales of ice cream and an over-all operating profit of \$91,029 (CX 16-Z 117).

39. The Bakersfield Division distributed dairy products throughout most of Kern and Tulare Counties, which are located at the southern end of the San Joaquin Valley, with Tulare County being located directly north of Kern County. There were 24 dairies distributing fluid milk in various portions of Kern and Tulare Counties, of whom 16 were regarded as Creameries' "principal competitors" (CX 16-Z 252, pp. 22, 24-25; CX 16-Z 237). There were also seven "principal competitors" engaged in distributing ice cream and other frozen dairy products in Kern and Tulare Counties (CX 16-Z 252, p. 23). All of the large companies which distributed frozen dairy products also distributed fluid milk in the territory, with one exception. Among the larger distributors in the area were Carnation, Arden, Golden State, Borden, Challenge Creamery & Butter Association, Neilsen's Creamery, and Swift. The latter was the only one of these competitors which was not in both product lines. Other major competitors engaged only in the fluid milk line were Knudsen Creamery Co. and Wayne's Dairy (CX 16-Z 252, p. 24). Some of the competitors distributed in portions of the territory, while some distributed throughout the territory. Most had their plants in either Kern or Tulare Counties. However, some of the competitors distributed

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from plants in Fresno, which is located immediately north of Tulare County in the San Joaquin Valley (CX 16-Z 252, pp. 22-23). Respondent did not process dairy products in Kern or Tulare Counties. However, as already mentioned, it had a distribution branch at Fresno, from which it distributed frozen dairy products manufactured in its Los Gatos plant located in Santa Clara County. So far as appears from the record, its distribution in Fresno County did not extend south into either Tulare or Kern Counties.

40. As in the case of the San Jose Division, the parties are in disagreement concerning the relevant market areas. Complaint counsel contend that the market area in both the fluid milk and frozen dairy product lines is a combination of Kern and Tulare Counties. Respondent proposes a different market delineation for each of these product lines. For fluid milk, respondent contends that the relevant market is the entire San Joaquin Valley. This is in line with its position, discussed above, that the major regional areas are the appropriate markets in fluid milk. With respect to the frozen dairy product line, its position, as already mentioned, is that there are only two markets in the State, Northern and Southern California, with the Bakersfield Division (along with the San Jose Division) falling within the Northern California market.

41. As in the case of the San Jose operation, one receives a considerably different picture of the structure of the market, depending on which geographic delineation one accepts. Based on the market proposed by complaint counsel, Creameries was a substantial factor in both the fluid milk and the frozen dairy product lines. In the fluid milk product line its sales in Kern and Tulare Counties represented 25.8% of the total milk sales made in this area.⁵² In terms of the broader market area proposed by respondent, viz, the entire San Joaquin Valley, Creameries' milk market share would be 9.32%.⁵³ In the ice cream and frozen dairy product line, Creameries' market shares in the Kern-Tulare market area proposed by complaint counsel

⁵² The above market-share percentage is taken from CX 16-Z 252, p. 26 which, like the portions of this exhibit cited in connection with the San Jose operation, was submitted to the Commission by respondent in seeking approval of the acquisition. Unlike the portions previously cited, which were prepared by respondent, the portion dealing with the Bakersfield operation was prepared by a firm of agricultural economists at Creameries' request. The figures of total area sales, from which Creameries' market share is computed, purport to have been developed from sales and production figures published by the State (pp. 20-21 of exhibit).

⁵³ The above market-share percentage is taken from RX 108-C. The total market-sales figure in this exhibit purports to have been developed from published State data. Creameries' sales purport to have been computed from records submitted by the company. The above percentage does not include a small amount of sales made in the San Joaquin valley from Creameries' Watsonville plant. Sales from this plant represent 0.32% of total sales made in the San Joaquin Valley market area proposed by respondent.

were: 22.9%, in the narrow ice cream product line; and 29.3% in the somewhat broader frozen dairy product line (including ice milk and sherbet, as well as ice cream).⁵⁴ Since the market area proposed by respondent, viz, all of northern California, includes respondent's Los Gatos plant and Creameries' San Jose plant, as well as Creameries' Bakersfield plant, both companies would be considered to be competitors in this broad area. As already mentioned in connection with the San Jose Division's operations, their respective frozen dairy product market shares in this broad area were: Creameries, 2.33%; and respondent, 5.7%.⁵⁵

The Relevant Market Areas

42. The market area in fluid milk proposed by complaint counsel is, essentially, a combination of two milk marketing areas recognized by the State, viz, Kern County and Tulare County. There is no explanation by complaint counsel as to why they consider the individual communities or the separate State milk marketing areas to be the appropriate market units for determining market shares and concentration in the San Jose area, whereas in the Bakersfield area they propose a combination of two milk market areas as the appropriate unit. The only apparent reason for a different approach in the case of the Bakersfield operation is the fact that the statistical evidence pertaining to this area (which was prepared by respondent for the Commission) is in terms of the bi-county area.

43. The market area in fluid milk proposed by respondent reflects its previously mentioned position that the appropriate markets are the regional groupings of the State milk marketing areas. The operations of Creameries' Bakersfield Division fall within the regional grouping of marketing areas referred to in State published reports as the San Joaquin Valley Area. This is a combination of seven marketing areas recognized by the State, of which Kern and Tulare are two separate areas. Respondent's position in this regard is based principally on Dr. Clarke's testimony, which has been previously discussed. As the examiner has already noted, despite substantial shipments between State marketing areas, the bulk of the milk sold in the various marketing areas consists of milk which has been processed in such areas. This is as true of the two areas here under consideration as it is of the areas previously discussed. Thus, during the

⁵⁴ The above market-share percentages are taken from CX 16-Z 252, p. 26. As explained in footnote 52, the total universe figures purport to have been developed from published State data.

⁵⁵ See paragraph 24 *supra*. As indicated in footnote 23, the market-share percentages are taken from RX 115-C.

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period covered by Dr. Clarke's report,⁵⁶ direct shipments of processed standard milk from Kern County amounted to only 7.0% of that processed and sold within the area, and shipments of milk received from outside the area amounted to 25.8% of that processed and sold within the area (RX 162-H and P). Direct shipments of standard milk from Tulare County were somewhat higher, amounting to 32.5%, while shipments into that area of standard milk processed outside were almost the same as in Kern County, viz, 26.4%. Approximately 75% of the milk shipped into Tulare County from other areas came from the adjoining counties of Kern and Fresno, while approximately 68% of that shipped into Kern County from the outside came from adjacent Tulare County and nearby Fresno County (RX 162-M and P).

With respect to Dr. Clarke's position concerning the frozen products market, that there are only two market areas in California, the examiner has previously noted that even the larger companies had multiple plants or branches in northern California in 1952. Thus, respondent had a processing plant in the lower Bay Area, but served the San Joaquin Valley from its Fresno branch. Borden had plants or distributing branches in both the Bay Area and the San Joaquin Valley Area, as well as in the Sacramento Valley. The same was true of Arden, Carnation and Golden State. While some of these companies may now have only one plant in northern California, they operate one or more distributing branches in various portions of the northern part of the State in order to effectively serve each area.

44. As previously mentioned, Creameries had its plant in Bakersfield and served both Kern and Tulare Counties. It served Tulare County from a distributing branch in that county. It had 16 principal competitors in fluid milk, of which most had plants or distributing branches in Kern or Tulare Counties, although several had their place of business in Fresno County (CX 16-Z 252, p. 22). It is the conclusion and finding of the examiner that a combination of Kern and Tulare Counties may be considered an appropriate geographic market area for purposes of determining the probable competitive impact of the Creameries' acquisition, in the fluid milk product line. It may be that each of these counties could be considered to be a separate market area, as they were for purposes of establishing minimum milk prices under State regulation.⁵⁷ However, since there is no reason to believe

⁵⁶ See page 520, *supra*, and footnote 38.

⁵⁷ Kern and Tulare Counties were separate milk marketing areas when the Creameries acquisition took place, and are still separate areas. However, Tulare was combined with adjoining Kings County in September 1960, to form the Kings-Tulare milk marketing area.

that Creameries' market position in the individual counties is substantially below that in the two counties as a whole, and since the statistical evidence in the record is in terms of the bi-county area, the examiner considers it proper to consider the impact of the acquisition in terms of the broader area.

45. In the frozen dairy product line the evidence likewise discloses that Creameries distributed in both Kern and Tulare Counties. In this area it had seven principal competitors (CX 16-Z 252, p. 23). Of these, four had plants or distributing branches in Fresno, which is the county seat of Fresno County.⁵⁸ There is reason to believe that the companies having a plant or branch in Fresno distributed in Tulare County immediately to the south. The latter county appears to be an overlap county, which is served with frozen dairy products from Kern County to the south and from Fresno County to the north. In view of the fact that respondent was encroaching on Creameries' territory from Fresno (although it had not yet entered Tulare County), and a number of companies were serving the area from Fresno, the examiner considers it appropriate to combine the tri-county area of Fresno, Tulare and Kern Counties for purposes of weighing the probable competitive impact of the acquisition in the frozen dairy product line.

Market Shares and Concentration

(a) *Fluid Milk*

46. It has been determined that a combination of Kern and Tulare Counties, two counties in the lower end of the San Joaquin Valley, is the appropriate market area in which to weigh the probable competitive impact of the acquisition of Creameries' Bakersfield Division, insofar as it involves the fluid milk product line. Creameries distributed fluid milk in this area, but respondent did not. Set forth below is a table reflecting Creameries' market share in the market area found to be appropriate.

⁵⁸ Although only Borden, Challenge and Golden State are referred to in CX 16-Z 252, p. 23, as having a Fresno address, Arden Farms likewise had a plant in Fresno (CX 409).

*Creameries' market share (fluid milk) in Lower San Joaquin Valley, 1952*⁵⁹

Area	Total area sales (gallons)	Creameries	
		Sales (gallons)	Market share (percent)
Kern and Tulare Counties.....	13, 325, 593	3, 435, 087	25. 8

⁵⁹ Based on CX 16-Z 252, p. 26.

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(b) *Frozen Dairy Products*

47. It has been determined that a combination of Kern, Tulare and Fresno Counties in the lower end of the San Joaquin Valley may be considered the appropriate geographic market for purposes of determining the probable competitive impact of the acquisition, insofar as it involves the frozen dairy product line. Since Creameries sold only in Kern and Tulare Counties, and respondent only in Fresno County, the table set forth below reflects their position in each of the areas where they distributed, as well as in the tri-county area as a whole.

*Respondent's and Creameries' market shares (ice cream) in Lower San Joaquin Valley, 1952*⁶⁰

Area	Total sales (gallons)	Creameries		Beatrice	
		Sales (gallons)	Percent area	Sales (gallons)	Percent area
Kern and Tulare Counties	1, 532, 420	350, 741	22. 9	-----	-----
Fresno County	853, 931	-----	-----	284, 139	33. 3
Market total	2, 386, 351	350, 741	14. 6	284, 139	11. 9

⁶⁰ The figures for Kern and Tulare Counties are taken from CX 16-Z 252, p. 26. The figures for Fresno County are taken from CX 16-Z 245. The former exhibit contains data for both ice cream and other frozen dairy products, viz, ice milk and sherbet. However, since CX 16-Z 245 is limited to ice cream, the comparison above made is so limited. Creameries' market share in these two counties in all frozen dairy products was 29.3%.

48. The record does not reveal the extent of concentration in either the fluid milk or the frozen dairy product lines, in terms of the market areas above found to be the areas of effective competition. The evidence offered by complaint counsel discloses that a number of the large companies, including Carnation, Borden, Arden and Golden State, were among Creameries' "principal competitors" in the Kern-Tulare marketing area (CX 16-Z 252, pp. 22-23), but does not reveal the share of the market accounted for by these companies. However, the evidence offered by respondent does disclose the extent of concentration in the broader market area proposed by it, with respect to the fluid milk product line. In the San Joaquin Valley area as a whole, which includes seven State milk marketing areas (among which are Kern and Tulare), four companies accounted for 44.35% of the sales of fluid milk in the area in 1952 (RX 109-A). These four companies, in order of rank, were: Golden State, Borden, Creameries and Carnation (RX 112).

Los Angeles Division

49. The headquarters of Creameries' Los Angeles Division was located in Los Angeles, where Creameries also operated an ice cream plant. The Division, in addition, had a milk processing plant at Pasadena (CX 16-Z 218). The milk plant was operated under the name Crown City Dairy, and the ice cream plant operated as Valley Maid Creameries (CX 16-Z 23, 24). The Los Angeles Division distributed its ice cream under the brand names Valley Maid and American Hostess. It distributed its milk, buttermilk, cottage cheese and butter and eggs under the brand name Valley Maid-Crown City (CX 16-Z 218).

50. At the time of the acquisition, the Valley Maid ice cream plant in Los Angeles was located in a well-constructed building and was in good condition. It manufactured bulk and package ice cream and ice cream novelties. It had a freezing capacity of 600 gallons per day. The processing equipment was relatively new and well maintained. The volume of the plant was capable of being expanded by the addition of hardening room space (CX 16-Z 23). The Crown City milk plant in Pasadena was located in an old building and was in poor condition. It processed about 7,500 gallons a day and had HTST pasteurizing equipment and automatic paper and glass filling equipment. However, most of this equipment was in only fair condition, and the refrigeration equipment was in poor condition (CX 16-Z 24). Respondent operated a combination milk and ice cream plant in Pasadena, the plant being known as the Fosselman plant (R. 3758, 3786). Shortly after the merger, respondent transferred its milk processing from the Fosselman plant to Creameries' Crown City plant in Pasadena (R. 3786). It continued to operate Creameries' Valley Maid ice cream plant in Los Angeles until late 1954 or early 1955, when it moved all of its ice cream production to its own Fosselman plant in Pasadena and sold the Valley Maid plant (R. 3843, 3792).

51. The Los Angeles Division was Creameries' smallest and least profitable division in California. Its net sales in 1951 were \$2,959,186, compared to net sales of \$3,629,182 by the San Jose Division and \$4,829,065 by the Bakersfield Division. The sales of the Los Angeles Division in that year represented 6.67% of the company's total sales (CX 16-Z 114). In 1952 the Los Angeles Division had a loss of \$82,251, compared to net earnings, before taxes, of \$250,764 for the Bakersfield Division, and \$48,073 for the San Jose Division (CX 16-Z 214). In the first four months of 1953, the Los Angeles Division

had net sales of \$1,121,401 out of total company sales of \$14,897,453 (CX 16-Z 122). It had a loss on such sales of \$13,196.

52. As in the case of the other divisions selling dairy products, the largest proportion of the sales of the Los Angeles Division consisted of fluid milk and cream products. For the 12 months ending December 31, 1952, the milk sales of the Los Angeles Division amounted to 2,157,971 gallons, compared to ice cream sales amounting to 703,915 gallons (CX 16-Z 206). During the first 10 months of 1950, the Division had a net loss of \$107,247 on its ice cream sales, compared to a loss of \$17,821 on its milk sales (CX 16-Z 118).

53. Respondent and Creameries distributed dairy products from their respective Los Angeles and Pasadena plants, predominantly in the Greater Los Angeles Area, although respondent has distributed frozen dairy products as far south as San Diego through an arrangement with a dairy company affiliated with a group of grocery chain stores (R. 3805, 3810, 3794). Although selling within the same general area in southern California, respondent and Creameries catered to somewhat different types of customers. Insofar as it distributed at wholesale, Creameries sold largely to restaurants, "Mom and Pop" grocery stores and other small retail establishments (R. 3838). Creameries had little supermarket business (R. 3847). Respondent, on the other hand, had a substantial amount of supermarket business. A large proportion of its ice cream production was distributed through another company, Jersey Maid Milk Products Co., which was owned by a number of supermarkets and for which respondent manufactured ice cream under a special arrangement pursuant to which it received a fee for the use of its facilities (R. 3793).

54. In 1952 there were 135 companies distributing fluid milk in the Los Angeles market area, as defined by the State of California. Of these, 17 companies were considered to be respondent's and Creameries' "principal competitors" (CX 16-Z 252, pp. 10-13). The six companies with the largest volume in the area were: Arden Farms, Golden State, Carnation, Knudsen Creamery, Adohr Milk Farms and Challenge Cream & Butter Association. In addition to the 17 principal competitors, there were four so-called "captive creameries" affiliated with retail grocery chains. There were approximately 200 distributors of frozen dairy products in the area, of which 14 were considered to be Creameries' "principal competitors" in that line of commerce. The largest of these were: Arden Farms, Golden State, Carnation, Challenge, Beverly Dairies, Minick Ice Cream, Balian Ice Cream and Swift. In addition to these companies there were nine specialty companies distributing frozen dairy products through their

own or affiliated stores, or selling directly to the consumer, such as Good Humor (CX 16-Z 252, pp. 14-16).

55. As in the case of the northern California area, complaint counsel and respondent are in disagreement concerning the area of effective competition in which to weigh the probable competitive impact of the acquisition, insofar as it involves the operations of Creameries' Los Angeles Division. Complaint counsel contend that the area of effective competition is the Los Angeles marketing area, as defined by the State of California for purposes of establishing minimum prices on fluid milk. This market consists essentially of Los Angeles County, including the city of Los Angeles. Complaint counsel propose the same geographic market area for both fluid milk and frozen dairy products. Respondent likewise proposes an "almost identical" area of effective competition for both products, but contends that the area is all of southern California. Essentially, this includes not only Los Angeles County, but seven or eight counties contiguous to and south of Los Angeles, including San Diego County.⁶¹ As in the case of the northern California areas previously discussed, respondent relies principally on the testimony of Dr. Clarke, in support of its position that all of southern California is one marketing area.

56. It is the opinion of the examiner that the entire southern California area does not constitute a single area of effective competition, in either the fluid milk or frozen dairy product line. The heart of the market insofar as Creameries' and respondent's southern California operations are concerned is, as Dr. Clarke's testimony suggests, the geographic area which is "centered around the Los Angeles area" (R. 4118). Dr. Clarke's report, prepared for the State legislature, indicates that only 8.7% of the standard fluid milk processed in the Los Angeles marketing area was shipped out of the area for sale elsewhere (RX 162-G). Of the counties which might be expected to be on the receiving end of milk processed in the Los Angeles area, Dr. Clarke's report indicates that San Diego County's receipts of processed milk amounted to only 13.2% of the milk processed and sold within the area (RX 162-P). The three marketing areas adjacent to Los Angeles received greater amounts of out-of-area milk, with Ventura receiving more milk from out of the area than it processed within the area, and San Bernardino-Riverside and Orange receiving

⁶¹ Although respondent contends that the geographic limits of the area are almost the same for both milk and ice cream, it may be noted that the area proposed for milk is somewhat broader than that proposed for ice cream, in that it includes all of San Bernardino County (east and north of Los Angeles), and all of San Luis Obispo County (northwest of Los Angeles), whereas the area proposed for ice cream includes only the southern half of San Bernardino County and does not include San Luis Obispo County (RX 95 and 96).

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38% and 43%, respectively, from out of the area. This would indicate substantial interarea shipments in the counties contiguous to Los Angeles, but relatively small shipments to the more remote counties.

57. It is the conclusion and finding of the examiner that Los Angeles County is the appropriate geographic market area in which to gauge the competitive impact of the acquisition of Creameries' Los Angeles Division. This is the area in which Creameries made all of its sales, and in which respondent made all of its milk sales and that part of its ice cream sales which was not distributed through the captive creamery, Jersey Maid (R. 3805, 3810, 3794). The smaller companies competing with Creameries and respondent had limited distribution in Los Angeles County or portions thereof (CX 16-Z 252, p. 12). While some of the larger companies may have distributed beyond the confines of Los Angeles County, their distribution to more remote areas was generally from separate plants or distributing branches in those areas. Thus in 1951 Arden, Carnation, Challenge and Knudsen had separate plants or distributing branches in San Diego; Arden, Carnation, Golden State and Challenge had branches in San Bernardino or Riverside; and Arden, Challenge and Golden State had a plant or distributing branch in Ventura or Santa Barbara (CX 409).⁶² There were also separate groupings of smaller companies operating single plants in each of the above separate areas. It may be that a slightly broader area of effective competition could be marked out, so as to encompass some of the communities or portions of the counties adjacent to Los Angeles County. However, in the opinion of the examiner, a delineation on this basis would not materially affect a determination of the issues in this case since Los Angeles County accounted for the overwhelming bulk of the milk and ice cream distributed in southern California. For example, in 1952 sales of milk in Los Angeles County accounted for approximately 70% of the milk sold in southern California.⁶³ In the same year, plants in Los Angeles County accounted for approximately 75% of all frozen dairy products produced in southern California.⁶⁴

Market Shares

58. Set forth below are two tables reflecting the respective market shares of respondent and Creameries within the area of effective competition. Although that area has been found to be the Los Angeles

⁶² Even in 1962 most of these companies had multiple processing plants and distributing branches in southern California (CX 412, including Multiple Unit Section).

⁶³ There were 236,669,790 gallons of fluid milk products (including cream and skim products), sold in southern California in 1952 (RX 108-A), of which 163,052,235 gallons were sold in Los Angeles County (CX 421).

⁶⁴ There were 33,309,000 gallons produced in southern California plants (RX 115-A), of which 25,056,700 gallons were sold in Los Angeles (CX 16-Z 252, p. 17).

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marketing area, the tables also contain market share data in terms of the broader market proposed by respondent in order to provide a basis for gauging the order of magnitude of any difference in market shares which would result from the use of the geographic market proposed by respondent. The first table contains a comparison in terms of the fluid milk product line, and the second in terms of the frozen dairy product line.

Comparison of market shares in fluid milk, southern California areas, 1952

Area	Total production (gallons)	Beatrice		Creameries	
		Production (gallons)	Percent of market	Production (gallons)	Percent of market
Los Angeles County ⁶⁵ -----	144, 272, 076	1, 522, 666	1. 05	1, 650, 690	1. 1
Southern California ⁶⁶ -----	213, 083, 739	1, 522, 847	. 71	1, 651, 381	. 77

⁶⁵ The figures used for the Los Angeles marketing area are based on CX 16-Z 252, pp. 17-18, which is the exhibit principally relied upon by complaint counsel as reflecting market-share data. Complaint counsel also offered in evidence CX 16-Z 245, according to which respondent's market share for Los Angeles was 1.4% and Creameries' was 1.7%. The figures in the latter exhibit are expressed in terms of pounds, rather than gallons. The examiner has used the figures in CX 16-Z 252, rather than those in CX 16-Z 245, because the total market figure appearing in the former exhibit is substantially identical with that appearing in the reported statistics of the State of California for the dairy industry in 1952. CX 421, which was also introduced in evidence by complaint counsel, indicates that Creameries' market share of all fluid sales (including skim and cream) was 1.2% and that respondent's was 1.0%.

⁶⁶ The figures used above are based on RX 108-A. There is a slight discrepancy between the production figures of Beatrice and Creameries in RX 108-A from the figures appearing in CX 16-Z 252. There is no explanation for this discrepancy, in the record. However, the differential is so slight that it does not affect the market share percentages. RX 108-A contains two tables, one for fluid milk alone and the other for fluid milk including cream and skim products. The above table is based on that portion of RX 108-A which contains figures for fluid milk alone, in order to make it comparable to the figures in CX 16-Z 252, which are based on fluid milk alone. It should be noted, however, that if the allied fluid products were included, this would not materially affect the market share statistics revealed above. The only difference appearing in the two tables is that the inclusion of all fluid products would increase Creameries' share from 0.77%, as reflected in the above table, to 0.81%.

Before discussing the table reflecting market shares in frozen products, it should be noted that respondent has raised an issue as to whether part of the production of frozen dairy products in its plant should be taken into consideration in determining its market share. As previously noted, part of the production of respondent's plant in Pasadena was devoted to the production of frozen dairy products for Jersey Maid Milk Products Company. The latter is a "captive creamery," which processes fluid milk for a group of grocery chain stores with which it is affiliated, but apparently does not produce its own ice cream (CX 16-Z 252, pp. 11-12; R. 3793). Respondent produced ice cream and other frozen dairy products for Jersey Maid in its own plant under an arrangement whereby Jersey Maid supplied the

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cartons and some of the ingredients and did its own delivery in its own trucks, paying respondent a fee for the use of the latter's facilities (R. 3793). It is unnecessary to determine at this point whether the volume produced for Jersey Maid should be considered as part of respondent's market share. However, the table set forth below contains a breakdown reflecting that portion of respondent's production which is attributable to the arrangement with Jersey Maid.

Comparison of market shares in frozen dairy products, southern California areas, 1952

Area	Total production (gallons)	Beatrice		Creameries	
		Production (gallons)	Percent of market	Production (gallons)	Percent of market
Los Angeles County ⁶⁷	25, 056, 700	*1, 172, 502	*4. 68	698, 952	2. 8
		†334, 959	†1. 33		
Southern California ⁶⁸	33, 309, 000	*1, 177, 593	*3. 53	696, 913	2. 09
		†340, 050	†1. 02		

⁶⁷ The figures for Los Angeles County are taken from CX 16-Z 252, pp. 17-18, which is the exhibit principally relied upon by complaint counsel. CX 16-Z 245 also contains market share data, but is limited to ice cream and does not contain data for other frozen dairy products including ice milk and sherbet. Since the market share figures offered by respondent include all frozen dairy products, the examiner has used CX 16-Z 252, instead of CX 16-Z 245, in the above table in order that the data of both parties may be comparable. It may be noted, however, that if the market share data were limited to ice cream there would be no significant deviation from the above market share figures.

⁶⁸ The figures for the Southern California area taken from RX 115-A. It should be noted that the production figures for respondent and Creameries differ somewhat from those in CX 16-Z 252. However, this difference is so slight that it does not significantly affect the market share percentages.

*Includes Jersey Maid.

†Excludes Jersey Maid.

Concentration

59. As previously mentioned, the major companies distributing fluid milk in the Los Angeles area were Arden, Golden State, Carnation, Knudsen, Adohr, and Challenge. The record does not disclose the individual market shares of these six companies. However, it does appear that in 1952 these companies, as a group, accounted for about 60% of the fluid milk sold through wholesale channels, *i.e.*, milk sold through retail stores for resale to the public (CX 16-Z 252, p. 12). Four of these companies, *viz*, Arden, Golden State, Carnation and Adohr, accounted for about 60% of the fluid milk, cream, and fluid by-products sold through retail channels, *i.e.*, milk delivered directly to consumers in their homes. Arden, Golden State, Knudsen and Carnation were also the leading distributors of fluid milk in the southern California area as a whole (RX 112). In 1952 they accounted for 46.86% of the fluid milk sold in the entire southern California area (RX 109-A). In addition to the previously-named major companies, there were four so-called "captive creameries," distributing

milk to their affiliated stores and markets. These were Safeway Stores, Jersey Maid Milk Products Co., Ralph's Grocery Co. and Golden Creme Farms. These four companies distributed approximately 17½% of all milk sold at wholesale in the Los Angeles marketing area (CX 16-Z 252, p. 16).

60. The four largest distributors of ice cream and other frozen dairy products in the Los Angeles market area in 1952 were Arden, Golden State, Carnation and Challenge. The individual market shares of these companies do not appear from the record. However, as a group, they accounted for approximately 32% of all frozen dairy products sold in the Los Angeles County marketing area. Another group of "strong competitors" in the frozen dairy product line were Beverly Dairies, Minick Ice Cream Co., Balian Ice Cream Co. and Swift & Co., each of which distributed from 2 to 3% of the total volume of frozen dairy products in the area. The remaining six companies (out of the 14 companies characterized as comprising the "principal competitors" in the market) accounted for from 1% to less than ½% each, of the total sales of dairy products in the market (CX 16-Z 252, pp. 14, 16).

Other Acquisitions in California

61. Since 1950 approximately 25 dairy companies have been acquired in California by the so-called national dairy companies (CX 426-Z 75-80). The largest of these acquisitions was Foremost's acquisition of Golden State, which has been previously mentioned. The remainder of the acquisitions (other than that of Creameries) involved, for the most part, small companies, although some of the latter were substantial factors in the local areas in which they distributed. Respondent accounted for four of the acquisitions made by national companies since 1950, in addition to the Creameries acquisition. Two of the companies, viz, East Side Dairy of Santa Cruz, and Elkhorn Dairy of Watsonville, which were acquired in 1954, distributed milk in areas in which respondent had entered the fluid milk business through its acquisition of Creameries. East Side Dairy accounted for approximately 5% of the milk sold in Santa Cruz and its suburbs; and Elkhorn Dairy accounted for approximately 25% of the milk sold in Watsonville and its suburbs (CX 16-Z 252, pp. 36 and 33). Elkhorn had the second largest share of the market in the Watsonville area and it, together with Creameries (which had approximately 39% of the area's sales) accounted for approximately 64% of Watsonville area milk sales.

62. Borden made four acquisitions in the areas in which Creameries operated. Two of these were made prior to respondent's acquisition of Creameries. These were Meadow Brook Dairy in Santa Cruz and Blanco Dairy in Watsonville, both of which were acquired in

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1951. In 1952 Borden's Meadow Brook operation accounted for approximately 18% of the milk sales and 11% of the ice cream sales in Santa Cruz; and Borden's Blanco operation accounted for approximately 12% of the milk sales and 25% of the ice cream sales in Watsonville. In 1954 Borden acquired Pep Creameries of Watsonville and Carmel Dairy of Carmel, two of the few remaining independent ice cream manufacturers in the lower Bay Area. In 1952 Carmel accounted for approximately 12% of ice cream sales and 27% of milk sales in Monterey; and Pep accounted for approximately 4% of the ice cream sold in Watsonville and 3% of ice cream sold in Santa Cruz.

Decline in Number of Dairy Plants

63. The record reveals that there has been a substantial decline in the number of milk processing plants in California during the decade from 1950 to 1960. Set forth below is a table comparing the number of milk plants in California in 1950-1951 with the number in 1961-1962.

*Comparison in number of milk plants, California, 1950-51 and 1961-62*⁶⁹

Year	Number of plants					Total
	No volume listed	Under 1 million quarts	1-5 million quarts	5-10 million quarts	Over 10 million quarts	
1950-51-----	369	231	93	23	23	739
1961-62-----	135	148	116	31	30	460
Percent change-----	-63	-36	+25	+35	+30	-38

⁶⁹ The above table is based on CX 409 and 412. A similar comparison has been heretofore made for the United States as a whole (p. 496).

As the above table indicates, there has been a reduction of 279 milk plants in the State of California in a period of approximately ten years. However, as the above figures reveal, this decline has occurred entirely in two size categories, viz, plants with no volume listed (which have declined by 234), and those with a volume under 1 million quarts (which have declined by 83). As previously mentioned (p. 496), those plants with no volume listed are generally plants of very small size. Plants with a volume under a million gallons produce less than 800 gallons a day. In plants with a production over 800 gallons a day, the number of plants has actually increased by 38 since 1950-1951.

64. There has been a similar reduction in the number of plants manufacturing ice cream, as that above described with respect to milk. Set forth below is a table comparing the number of ice cream

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manufacturing plants in California in 1950-1951 with those in 1961-1962.

*Comparison in number of ice cream plants, California, 1950-51 and 1961-62*⁷⁰

Year	Number of plants			Total
	No volume reported	Volume less than 250,000 gallons	Volume over 249,999 gallons	
1950-51.....	43	111	15	169
1961-62.....	27	72	42	141
Percent change.....	-37	-35	+180	-17

⁷⁰ The above table is based on CX 409 and 412. A similar comparison has heretofore been made for the United States as a whole (p. 499).

As the above table reveals, the number of ice cream manufacturing plants in California has declined by 28 between 1950-51 and 1961-62. However, this decline has been entirely in the category of plants with no volume listed (which have declined by 16) and those with a volume under 250,000 gallons (which have declined by 39). As previously mentioned, those with no volume listed are generally the smaller plants (p. 499). The decline in the number of small plants has been partially compensated for by a substantial increase in the number of plants with a volume of 250,000 gallons and over, the number which has increased by 27 during the last decade.

65. As previously discussed (p. 499), it is respondent's position that the plants which have disappeared are generally the non-viable plants, *i.e.*, milk plants processing less than 1,600 gallons daily and ice cream plants producing less than 250,000 gallons annually. Such plants, generally speaking, lack modern automatic and semi-automatic processing and packaging equipment. Supplementing the evidence offered by complaint counsel with respect to the decline in the number of milk and ice cream plants between 1950 and 1961, respondent offered in evidence a comparison in terms of the number of viable companies, *i.e.*, those operating milk plants with a minimum volume of 1,600 gallons daily and those operating ice cream plants with a minimum volume of 250,000 gallons annually. This study reveals that the number of so-called viable milk companies in California has increased from 52 in 1953 to 67 in 1961 (RX 161-G), and that the number of viable ice cream plants has remained steady at 32 during the period from 1950 to 1961 (RX 161-B).

Recent Trends in Market Shares and Concentration in California

66. Complaint counsel and respondent both offered evidence as to the trend in respondent's market share and the extent of concentra-

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tion among the larger companies since the time of the Creameries acquisition. Some of the evidence relates to the individual markets claimed to be the areas of effective competition and some relates to the State of California as a whole. As might be expected, complaint counsel stress the evidence purporting to show an increase in respondent's market share and in concentration among the large companies, while respondent places emphasis on the evidence which purports to show a contrary trend. The examiner has undertaken below to analyze the trends in market shares and concentration, as revealed by the record.

Frozen Dairy Products

67. Complaint counsel place emphasis on the increase in respondent's position, and that of the national companies as a group, in the frozen dairy product line in the State of California as a whole. Set forth below is a table reflecting respondent's share, and that of all the so-called national companies doing business in California, in the production of frozen desserts in the State between 1950 and 1957. The table reflects sales of all frozen desserts, including those made of vegetable fat, as well as traditional frozen dairy products made of butterfat.

Production shares (frozen desserts), of respondent and all national companies, in California, 1950-57⁷¹

Year	Total production (gallons)	Beatrice		National companies	
		Production (gallons)	Percent of total	Production (gallons)	Percent of total
	<i>Thousands</i>	<i>Thousands</i>		<i>Thousands</i>	
1950-----	49,963	2,086	4.2	17,548	35.1
1951-----	52,917	2,262	4.3	19,454	36.8
1952-----	58,499	2,816	4.8	21,860	37.4
1953-----	64,232	3,886	6.0	23,516	36.6
1954-----	66,499	4,789	7.2	35,710	53.7
1955-----	70,301	5,347	7.6	40,059	57.0
1956-----	75,270	5,559	7.4	43,459	57.7
1957-----	80,378	5,938	7.4	44,095	54.9

⁷¹ The above table is based on CX 456-O. The figures for national companies included in the table are those of Borden, Arden, Carnation and respondent between 1950 and 1953. Beginning with 1954, the production of Foremost's Golden State operations is included in the table.

While the above table does indicate a 3.2% increase in respondent's production share in California between 1950 and 1957, the largest part of the increase, viz, 2.4%, occurred between 1952 and 1954. This is obviously attributable to the Creameries acquisition, which occurred during the middle of 1953. With respect to the 19.8% increase in the production share of the so-called national companies between 1950

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and 1957, the largest part of this increase, viz, 17.1%, occurred between 1953 and 1954. This coincides with Foremost's acquisition of Golden State, which took place in February 1954. Although not reflected in the above table, Foremost had the largest share of California production between 1954 and 1957, its share ranging from 16.5% to 19.0%. The range in the production shares of the other companies, in order of rank, was: Arden 13.3-14.9%; Carnation 9.4-10.5%; and Borden 5.6-7.8%. Beginning in 1954 respondent became the fourth ranking company in California, when its share reached 7.2% and Borden's declined to 6.8%.

68. The latest year for which the record contains concentration data for frozen desserts is 1958. While the evidence is in terms of value of shipments, rather than in terms of production, the figures are fairly comparable to those revealed in the above table. Thus, respondent's share of frozen dessert shipments in California in 1958 was 6.8%, compared to its production share of 7.4% in 1957. The shipments of the six national companies, including respondent, Foremost, Arden, Carnation, Borden and Swift, amounted to 60.3% of the total shipments of frozen desserts in California in 1958.⁷² Eliminating Swift with 2.2%, since its figures were not included in the preceding table, the 1958 share of shipments by the national companies was 2.2% greater than the aggregate production shares of the same companies in 1957.

69. Although, as previously indicated, the evidence as to concentration does not extend beyond the year 1958, the record does contain evidence as to respondent's own industry position in California through 1960. Set forth below is a table reflecting respondent's share of sales of frozen desserts produced in California between 1952 and 1960.

Respondent's market share (frozen desserts), California, 1952-60⁷³

Year	Total California production	Beatrice		Creameries	
		Sales	Percent of production	Sales	Percent of production
	<i>Thousands</i>	<i>Thousands</i>		<i>Thousands</i>	
1952-----	61,033	2,759	4.5	1,343	2.2
1957-----	80,329	6,028	7.5	-----	-----
1960-----	91,121	8,588	9.4	-----	-----

⁷² The figures in this paragraph are based on CX 425-C and D. The universe figures appearing in the exhibit are taken from the U.S. Census reports. The figures for the individual companies are based on data supplied by these companies to the Commission.

⁷³ The above table is based on RX 115-A and B, and combines the frozen dessert figures for northern California and southern California, which are separately reflected in the exhibit.

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As indicated in the above table, respondent's market share in the State as a whole more than doubled between 1952 and 1960. Respondent contends that this does not reflect its true position in the frozen dairy product line of commerce since it includes sales from its southern California plant under the special arrangement with Jersey Maid previously discussed, and also includes sales of frozen vegetable-fat desserts (principally from its northern California plant), which were not manufactured in quantity until after 1957. Respondent's sales through Jersey Maid more than quadrupled between 1952 and 1960, from 836,000 gallons to 3,654,000 gallons, representing 43% of respondent's sales in 1960 compared to 30% in 1952. Its sales of frozen desserts of vegetable-fat content, which were non-existent in 1952, reached 2,126,000 gallons in 1960 and represented 25% of respondent's sales in California.

Fluid Milk

70. The evidence offered by complaint counsel purporting to show concentration in the fluid milk line in California is limited to the year 1958. While not affording any basis for comparison with the period prior to the Creameries acquisition, it does disclose that in 1958 five national companies accounted for 45.3% of the value of shipments of bottled milk products in California.⁷⁴ Respondent's share was the smallest of the national companies, being 2.5%. The shares of the other companies, in order of rank, were: Foremost 13.8%; Arden 12.0%; Carnation 9.1%; and Borden 7.9%.

71. While, as above stated, the statistical evidence offered by complaint counsel does not disclose the extent of concentration in California in the fluid milk line at the time of the Creameries acquisition, evidence offered by respondent does disclose this fact, as well as developments through 1960. Thus it appears that in 1952 the four companies with the largest sales volume accounted for 49.94% of fluid milk sales in California. By 1957 the market share of the four largest companies had declined to 46.0%, and by 1960 to 41.93%, representing a decline of 9% in eight years (RX 109-A). The record does not reveal the identity of the four companies accounting for the largest sales volume in the State, although it is clear from the record that neither respondent nor its predecessor, Creameries, was in this category.

72. The record does not disclose the trend in concentration in terms of the market areas found to be the areas of effective competi-

⁷⁴ The figures here used are based on CX 425-E and F. This exhibit is based on shipments of bottled milk and cream, plus other related bottled products such as buttermilk and chocolate drink.

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tion in fluid milk. It does, however, reveal such trend in terms of the broader, regional markets which respondent contends are the appropriate market areas. While these areas are somewhat broader than those found by the examiner to be the areas of effective competition, there is no reason to believe that the trend would be significantly different in the latter areas. Set forth below is a table reflecting the combined market share of the four companies with the largest sales volume in each of the four regional milk markets in California between 1952 and 1960 (RX 109-A).

Market shares (fluid milk) 4 largest companies, in four major California areas, 1952-60

[In percent]

Area	1952	1957	1960
San Francisco Bay Area.....	58. 14	54. 27	49. 37
Sacramento Valley.....	73. 27	65. 94	61. 20
San Joaquin Valley.....	44. 35	37. 73	33. 40
Southern California.....	48. 86	43. 12	39. 15

As indicated by the above table, the market share of the four companies with the greatest share of the market has declined in each of the major market areas of the State. Neither respondent nor Creameries has been in the ranks of the "big four," except in 1952 when Creameries was No. 3 in the San Joaquin Valley Area, and in 1957 when respondent (which had acquired Creameries in 1953) was No. 4 in that area. In the San Francisco Bay Area the ranks of the four largest companies in 1960 included the local California company, Challenge Creamery, as the No. 4 company after Foremost, Borden and Carnation. In the San Joaquin Valley Area, Knudsen Dairy and Challenge were the No. 3 and No. 4 companies in 1960, after Foremost and Borden. In the Southern California Area, Knudsen was No. 3 after Arden and Foremost, and was followed by Carnation. In the Sacramento Valley Area, the first company in sales in 1960 was Crystal Creamery, followed by Foremost, Borden and McColl's (RX 112).

73. During the period between 1950 and 1960 there was a substantial increase in the market position of the larger independent dairies, *i.e.*, those which produce at least 3,000 gallons per day and are not connected with any national dairy company. Set forth below is a table comparing the market shares of such companies between 1950

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and 1960, in terms of the major market areas proposed by respondent (RX 109-B).

Market shares of nonnational dairies processing 3,000 gallons per day, 3 major California areas, 1950-60

[In percent]

Area	1950	1952	1957	1960
San Francisco Bay Area.....	17. 32	25. 82	36. 15	34. 45
Sacramento Valley, San Joaquin Valley ⁷⁵	8. 81	18. 75	37. 49	47. 85
Southern California.....	39. 88	40. 22	48. 52	51. 59

⁷⁵ Data for the two indicated areas were combined in RX 109-B because there were too few plants in the Sacramento Valley in 1950, 1957, and 1960 for the State to separately supply the data.

The above table includes the production of so-called "captive creameries," i.e., those affiliated with a retail food chain, as well as non-affiliated dairies. To this extent the market-share figures are somewhat distorted, insofar as they purport to reflect the trend in the market position of independent dairies. The record discloses that in 1950 captive creameries produced 16,883,000 gallons compared to 76,945,470 gallons by nonaffiliated independents, and in 1960 the captives produced 45,416,000 gallons, compared to 185,392,172 gallons by the nonaffiliated independents (RX 110-A). The record does not contain data as to the standing of the nonaffiliated independents, in terms of the above major market areas. However, the record does disclose the trend in their position in the State of California as a whole (RX 110-A). Set forth below is a table reflecting such data.

Market share of independent (noncaptive) dairies processing 3,000 gallons per day, California, 1950-60

[In percent]

1950	1952	1957	1960
23. 3	26. 1	34. 8	37. 1

While the table reflects an increase in the market share of the non-captive independents between 1950 and 1960, it is not nearly as pronounced as the increase revealed by the preceding table which includes the captives in the ranks of the independents.

74. Except for the increase resulting from the business which it acquired from Creameries, there has been no improvement in respondent's share of the California milk market between 1950 and

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1960. In 1950 its share of fluid milk sales in California (including cream and skim products) was .5%, and Creameries' share was 2.0%. In 1952, the year before the acquisition, respondent's share had declined slightly to .4%, and Creameries' remained static at 2.0%. In 1957 respondent's share was 2.4%, which corresponds exactly to the combined shares which it and Creameries had before the acquisition. By 1960 respondent's milk market share in California had declined to 2.0%.⁷⁶

75. The situation which is revealed above, for the State as a whole, is pretty much duplicated in the various markets which have been found to be the areas of effective competition in the fluid milk line of commerce. Set forth below is a table comparing respondent's position in these markets before and after the Creameries acquisition (CX 421).

Market shares (fluid milk) in California market areas, 1952 and 1957

[In percent]

Market area	1952		1957, Beatrice
	Beatrice	Creameries	
Santa Clara.....		9. 2	7. 2
Monterey-Santa Cruz.....		28. 6	24. 2
Kern-Tulare.....		24. 8	21. 1
Los Angeles.....	1. 0	1. 2	2. 3

As indicated in the above table, respondent lost market share in the two markets in the lower Bay area and in the one market in the lower San Joaquin Valley, in which it had acquired Creameries' milk business. In the Los Angeles area its share in 1957 was substantially that which it and Creameries, together, had in 1952.

76. The record does not disclose respondent's relative rank in terms of the markets found to be the areas of effective competition in the fluid milk line of commerce. However, the evidence relating to the somewhat broader regional markets proposed by respondent suggests that its relative position has either declined or remained static despite the Creameries acquisition. Thus, in the San Joaquin Valley area in which Creameries had been the third ranking milk company in 1952, respondent declined to the fifth ranking company by 1960. In the San Francisco Bay area, in which Creameries had been the

⁷⁶ The figures cited above are computed from RX 108-A and B. The figures for the various California areas, as appearing in the exhibit, have been combined for the State as a whole.

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seventh ranking company in 1952, respondent retained that rank in 1960. In southern California, where respondent was the twelfth ranking company in 1952, it had declined to 21 by 1960 (RX 111 and 112; R. 4100).

b. *Intermountain Area and West Texas*

77. Creameries had three separate Divisions which operated in the area between the Pacific Coast and the western slope of the Rocky Mountains. These were the Utah Division, the Idaho Division, and the El Paso Division. Each of these Divisions manufactured a full line of dairy products, including milk and ice cream. The Utah Division had its headquarters in Salt Lake City and distributed dairy products in Utah, western Colorado, and southwestern Wyoming. The Idaho Division had its headquarters in Boise and distributed principally in the State of Idaho. The El Paso Division had its headquarters in El Paso, Texas, and distributed in western Texas and southeastern New Mexico. In addition to processing and manufacturing plants at Salt Lake City, Boise and El Paso, each Division had additional branch plants and distribution branches located at convenient points within its territory. The El Paso Division also operated a dairy farm in New Mexico.

78. The Utah Division operated under the name Arden-Sunfreze Creameries; the Idaho Division operated as Idaho Creameries; and the El Paso Division operated as Price's Creameries, Inc. The Utah Division sold its ice cream under the brand names Arden-Sunfreze and American Hostess, and its milk products under the name Arden. The Idaho Division used the brand names Sunfreze, Maid O'Clover and American Hostess for its ice cream, and Arden for its milk. The El Paso Division used the brand names Price's Velvet and American Hostess for its ice cream, and Price's for its milk products (CX 16-Z 217-218). These three Divisions accounted for the following percentages of Creameries' net sales in 1952: Utah, 20%; Idaho, 8%; and El Paso, 19% (CX 143, p. 6). The El Paso Division was the most profitable of the three Divisions in 1952, with earnings before taxes of \$524,506. The earnings of the Utah Division were \$341,381 and those of the Idaho Division were \$193,536 (CX 16-Z 214).

79. The main plant and divisional headquarters of the Utah Division was at Salt Lake City, Utah. It had branch plants at Ogden, Provo, Cedar City and American Fork, all in Utah; and at Grand Junction and Delta in Colorado. It also operated distributing branches at Cortez, Colorado and Rock Springs, Wyoming (CX 16-Z 218). The principal communities in which it distributed were Salt

Lake City, Ogden, Provo, Cedar City, in Utah; Evanston, Kemmerer, Rock Springs, Rawlins and Casper in Wyoming; and Delta, Grand Junction and Cortez in Colorado (CX 16-Z 252, pp. 62-85). It distributed fluid milk, ice cream, and other milk products in all of these communities. In 1952 the Utah Division sold a total of 6,442,755 gallons of milk and 948,636 gallons of ice cream (CX 16-Z 206). In 1949 its operating profit on sales of milk and ice cream was \$64,832 and \$164,916, respectively (CX 16-Z 117).

80. The Utah Division processed and bottled milk at four plants in Utah and one in Colorado. The main plant in Salt Lake City was located in a new building and was in excellent condition. It had a volume of 8,000 gallons daily. Its equipment was generally very good. It had HTST pasteurization equipment and bottling equipment for both paper and glass containers (CX 16-Z 22, p. 30; CX 16-Z 49). A second bottling plant was located at Ogden, approximately 35 miles north of Salt Lake City. The plant was in good condition. It had HTST pasteurization equipment capable of processing 7,000 pounds of milk per hour, and had both paper and glass packaging equipment (CX 16-Z 56). A third milk plant in Utah was located at Provo, 50 miles south of Salt Lake City. The plant was located in leased premises, on which the lease was about to expire, and was poorly arranged. Creameries contemplated moving the automatic bottling equipment, which was in good condition, to its Salt Lake City plant and bottling milk for the Provo area at Salt Lake City (CX 16-Z 59). The fourth Utah bottling plant was located at Cedar City, in southwestern Utah 260 miles from Salt Lake City. The plant was in good condition and bottled 14,000 to 20,000 pounds of milk daily. It had an HTST pasteurizer and paper packaging equipment (CX 16-Z 62). The bottling plant in Colorado was located at Delta, in western Colorado. The plant was in good condition and bottled 40,000 pounds of milk daily. It had an HTST pasteurizer and automatic packaging equipment for quart-size paper containers (CX 16-Z 66).

81. The Utah Division manufactured ice cream at four plants in Utah and one in Colorado (CX 16-Z 22, p. 30). The main plant was in Salt Lake City, in a building separate from the milk bottling plant. It was in good condition, but was located in a congested area and was not capable of any substantial increase in volume. It manufactured both packaged ice cream and novelties, its production in 1952 being 500,000 gallons (CX 16-Z 51). The second Utah ice cream plant was located in Ogden, in a building separate from the milk bottling plant in that city. The plant was in good condition and pro-

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duced 150,000 gallons of ice cream in 1952. It had a continuous freezer for ice cream and a batch freezer for sherbets and ices. It was capable of handling additional volume without any change (CX 16-Z 54). The third Utah ice cream plant was located at Provo, in the same plant which bottled milk. The plant manufactured 150,000 gallons of ice cream in 1952. The plant was in poor condition, and Creameries contemplated moving its ice cream manufacturing equipment to Orem (about six miles to the north). It was not considered practical to move the ice cream equipment to Salt Lake City, as was contemplated for the milk processing equipment, because of the impracticality of handling any substantial additional volume at the Salt Lake City ice cream plant (CX 16-Z 58). The fourth Utah ice cream plant was located at Cedar City, in the same premises as the milk bottling plant. The plant was in good condition and produced both ice cream and novelties (CX 16-Z 62). The Colorado ice cream plant was located at Grand Junction in western Colorado. The plant and equipment were in generally good condition. It produced 1,600 gallons of ice cream and 1,400 dozen novelties a day (CX 16-Z 64).

82. The Idaho Division had its divisional headquarters and main plant at Boise, Idaho. It also had a branch plant at Pocatello, and distributing branches at Twin Falls and Idaho Falls, all in Idaho (CX 16-Z 31). The plant at Boise was in a new building and was in excellent condition. It was used both for the processing of milk and the manufacturing of ice cream. It had HTST equipment for pasteurizing milk and automatic equipment for paper packaging. The plant's milk volume was 17,000 pounds daily. The ice cream department was well equipped, and had a capacity of 3,000 to 4,000 gallons daily. The plant had a capacity for handling several times its current volume (CX 16-Z 70). There were separate milk and ice cream plants in Pocatello, both in good condition. The milk plant had HTST equipment and automatic paper packaging equipment. It had a volume of 1,400 gallons daily (CX 16-Z 80). The ice cream plant had a semi-continuous freezing unit, and produced ice cream novelties as well as packaged ice cream. It produced 500,000 gallons a year and was capable of turning out three times that amount with an additional freezer (CX 16-Z 82). The branch at Idaho Falls distributed both ice cream and milk processed at Pocatello. It was in excellent condition. The territory of this branch included Yellowstone National Park and other points in Wyoming (CX 16-Z 78 and 82). The Twin Falls distributing branch distributed milk and ice cream processed at Boise. It was in excellent condition (CX 16-Z 79).

83. The Idaho Division sold 840,872 gallons of milk and 912,327 gallons of ice cream in 1952 (CX 16-Z 206). Its operating profits on milk and ice cream sales were approximately \$110,000 and \$92,000, respectively, in 1949, the last full year for which figures are available (CX 16-Z 118). The Division as a whole showed a profit of \$193,536 before taxes in 1952, making it the least profitable dairy Division outside of San Jose and Los Angeles in California (CX 16-Z 214).

84. The El Paso Division had its divisional headquarters, and a milk and ice cream plant, at El Paso, Texas. It also had branch plants at Roswell, Portales, Las Cruces and Carlsbad, New Mexico; and distributing branches at Hobbs, Deming and Artesia, New Mexico; and Alpine, Texas (CX 16-Z 217). The plant at El Paso was in excellent condition. It bottled milk and manufactured ice cream. The milk department processed and bottled 8,500-9,000 gallons of milk daily. It had HTST equipment and automatic paper and glass bottling equipment. The ice cream department had a capacity of 450 gallons an hour for ice cream and 150 gallons per hour for novelties (CX 16-Z 29). The plant at Carlsbad, New Mexico, bottled milk in glass only. It had a volume of about 1,800 gallons daily and was in fairly good condition. There was also an ice cream storage room at the plant (CX 16-Z 33). The plant at Las Cruces bottled milk in paper only. It had a small volume and was in only fair condition (CX 16-Z 25). The plant at Roswell bottled milk in paper only. It had a volume of 6,000-7,000 gallons a day, and was in excellent condition (CX 16-Z 40). The Portales plant manufactured ice cream, in addition to condensed milk and cottage cheese. It had a volume of 1,200 gallons a day, and was in good condition (CX 16-Z 37). The distributing branch at Hobbs distributed both milk and ice cream, the milk originating in Roswell and the ice cream at Portales (CX 16-Z 22, p. 32). The branch at Artesia, New Mexico, distributed both milk and ice cream, the ice cream being supplied from Portales and the milk from Carlsbad (CX 16-Z 33 and 37). The branch at Alpine, Texas, distributed both milk and ice cream (CX 16-Z 46).

85. The El Paso Division sold 1,000,000 gallons of ice cream and 5,600,000 gallons of milk in 1952 (CX 16-Z 206). Its operating profits on ice cream and milk sales in 1949 were \$136,000 and \$189,000, respectively (CX 16-Z 117). The Division as a whole showed a profit, before taxes, of \$524,873 in 1952, making it the most profitable dairy division of the company in the continental United States (CX 16-Z 214).⁷⁷

⁷⁷ The Honolulu Division showed a profit of \$5,000 more than the El Paso Division.

*Market Shares and Concentration**Utah Division*

86. As previously mentioned, the Utah Division distributed milk, ice cream and other dairy products in Utah, western Colorado and southwestern Wyoming. Respondent did not sell in any portion of this territory. Its closest plant was at Denver, Colorado, on the eastern slope of the Rocky Mountains. The principal communities in which Creameries' Utah Division sold were: Salt Lake City, Ogden, Provo, and Cedar City, Utah; Grand Junction, Delta and Cortez, Colorado; Evanston, Kemmerer, Rock Springs, Rawlins, and Casper, Wyoming. All were located west of the Continental Divide.

87. As in the case of Creameries' California Divisions, the parties are in sharp disagreement concerning the geographic confines of the market areas in which to measure the probable competitive impact of respondent's acquisition of Creameries' Divisions in the Intermountain Area. This difference extends not merely to the Utah and Idaho Divisions, but includes the El Paso Division in the Southwest as well. The position of complaint counsel, essentially, is that each of the areas served by one of Creameries' plants or distributing branches, constitutes an appropriate market area for determining market share percentages and concentration. The market share data offered by complaint counsel are based principally on the groupings of communities or counties served by the various plants or branches of Creameries in the Intermountain Area.⁷⁸ Respondent contends that the appropriate market area is a "Six-State Area" consisting of Idaho, Utah, Nevada, New Mexico, Arizona and Texas (RPF, p. 123). However, as graphically portrayed by respondent, the area actually consists of portions of nine States including, in addition to the above six States, western Wyoming, a portion of eastern Oregon and western Colorado (RX 94).

88. It is the opinion and finding of the examiner that, generally speaking, the areas proposed by complaint counsel are the appropriate market areas for purposes of weighing the competitive impact of the Creameries acquisition, insofar as it involves the Intermountain and Texas Divisions of the company. These are the areas which were served by each of Creameries' plants or branches. Generally speaking, the areas in which Creameries had its plants and branches conformed to the natural requirements of geography and population distribution. The principal groupings of its competitors

⁷⁸ These data are contained in CX 16-Z 252 which, as previously mentioned, was prepared by respondent and submitted to the Commission in seeking approval of the Creameries acquisition.

were in terms of these geographic areas. There were substantially different groups of competitors serving each of the areas. To the extent that a few of the larger competitors served more than one area, they generally did so from a distributing branch within, or close to such other area.

89. Respondent's position that the Six-State Area is one area of effective competition is based on the current situation, rather than on the market as it existed at the time of the Creameries acquisition.⁷⁹ As the examiner has previously indicated, the acquisition must be initially judged in terms of the market situation which existed when the acquisition took place. However, the examiner is satisfied that even today the area of effective competition does not even remotely approach the broad expanse of the six or the nine-State area proposed by respondent. Respondent's current distribution pattern is essentially the same as was Creameries' in 1953 (R. 3803-3804). While there is testimony that one of the large cooperatives in the Utah area now distributes as far south as Albuquerque, New Mexico, such distribution consists of bulk milk which is sold to another dairy company in Albuquerque (R. 3774). The distribution area of the competitor in question remains essentially northern Utah and the adjacent areas of southeastern Idaho and southwestern Wyoming (R. 3804).

While contending that the entire Six-State Area is one area of effective competition, respondent concedes that the "companies located within the area do not all compete with one another and there are no doubt sub-markets within the Six-State Area" (RPF, p. 123). Not only do *all* of the companies in the area not compete with one another, as respondent concedes, but *most* of them do not. Competition is principally between different groups of companies located in or near the areas proposed by complaint counsel as the areas of effective competition. The areas which respondent concedes may be considered "sub-markets" are the actual areas of effective competition, conforming to the actual groupings of competitors. The fact that respondent does business throughout the entire Intermountain Area and is, therefore, in competition with all of the companies in the Six-State Area, does not, as it contends, transform this broad aggregation of separate markets into one single market area. Nor does the fact that this broad area is removed from the competitive influences

⁷⁹ Brown W. Cannon, the head of respondent's western region, upon whose testimony respondent principally relies, testified that the map delineating the Six-State Area (RX 94) was prepared to reflect the market divisions "[a]s of now" (R. 3766). Mr. Brown testified on May 2, 1962.

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of companies which do business east of the Continental Divide, on the one hand, and from those companies which operate on the Pacific Coast, on the other hand, transform the area into one single market, as respondent argues. If respondent's reasoning were carried to its logical conclusion, all of California would be transformed into one market area since it is removed from the influence of competitive factors pertaining to the companies which operate in the Intermountain Area and in the Pacific Northwest. As previously noted, even respondent does not contend that all of California is one market area.

90. The areas of effective competition, insofar as the Utah Division of Creameries is concerned, are as follows:

(a) The metropolitan area of Salt Lake City and the surrounding communities, including Bountiful and Murray, may be considered a single market area. This area had a population of over 200,000, as of 1950. There were approximately 35 companies distributing milk and/or ice cream within the area (CX 16-Z 252, pp. 63-67; CX 16-Z 230-231). All of these companies had their plants located within the area, except for two ice cream companies which distributed from plants in Ogden located approximately 35 miles north of Salt Lake City. The latter two companies accounted for approximately 3.5% and 1.7%, respectively, of ice cream sales in the Salt Lake City market. Creameries had a milk plant and an ice cream plant in this area, and its distribution from these plants was principally in the Salt Lake City metropolitan area.⁸⁰

(b) The city of Ogden and its environs may be considered another area of effective competition in northern Utah. This area had a population of approximately 80,000 in 1950. Creameries served this area from milk and ice cream plants located in the city of Ogden. There were approximately 15 companies distributing milk and/or ice cream in Ogden and the surrounding communities. All of these companies were located within the area of distribution, except for two Salt Lake City companies affiliated with a national company, which distributed milk and ice cream into the area from plants in Salt Lake City, and a milk company which distributed into the area from the Logan area to the north. These companies accounted for approximately 5.3% of ice cream sales, and 11.1% of milk sales in the Ogden area.

(c) Southwestern Wyoming may be considered as another market area. This includes the counties of Uinta, Lincoln, Sweetwater, Car-

⁸⁰ According to the testimony of Brown Cannon, respondent's western regional manager, respondent's milk and ice cream routes operating from the Salt Lake City plants "don't go out of the greater metropolitan area * * * because we have a distributing branch at Provo, which is south of there, and we take care of the outlying area from Provo" (R. 3804).

bon, and Natrona, of which the principal communities are Evanston, Kemmerer, Rock Springs, Rawlins and Casper. The area is sparsely populated, and the entire population of the five-county area was approximately 85,000 people in 1950. The area was served from Creameries' distributing branch in Rock Springs, which was supplied from Ogden. There were 10 companies serving the area with milk and/or ice cream. All were located within the area except for two ice cream companies which served the area from Ogden. While it may be that this area could be considered part of the Ogden market area, insofar as the ice cream product line is concerned, this would make no significant difference in Creameries' market share.

(d) Provo, Utah, and the surrounding communities, including Orem and American Fork, may be considered an appropriate market area. The area had a 1950 population of approximately 80,000. This is the area served by Creameries' plant in Provo. It was also served by approximately 19 other milk and/or ice cream companies. Most of the companies were located in or around Provo. However, there were a few ice cream companies serving the Provo area from plants located in Salt Lake City or Ogden to the north, and from Richfield to the south. While it may be that the Provo area could be considered as a southern extension of the Salt Lake City market, it appears more appropriate to consider it as a separate market area. However, it would make no practical difference as far as Creameries' market position is concerned, if all of northern Utah were considered a single market area.

(e) Cedar City, Utah, and the surrounding area in southwestern Utah may be considered an appropriate market area. Creameries' Cedar City plant served a large territory in southwestern Utah, which is a resort area (CX 16-Z 62). The area was served by nine other dairy companies, of which four were located in Las Vegas in southeastern Nevada, approximately 185 miles from Cedar City. It may be that southwestern Utah and southeastern Nevada could be considered part of one market area. However, there is no statistical evidence in the record covering the latter area. Since the statistical evidence is limited to the area round Cedar City, it is not inappropriate to consider Creameries' market position in terms of the area principally served by it.

(f) Grand Junction and Delta, Colorado, and the surrounding territory in western Colorado, may be considered an appropriate market area. Creameries served this area with ice cream from its plant in Grand Junction, and with milk from its plant in Delta. There were approximately 11 dairy companies serving Grand Junc-

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tion with milk and/or ice cream. Of these, five also distributed in Delta. The latter community was also served by two additional dairies that did not operate in Grand Junction. All but three of the companies serving the area were located in either Grand Junction, Delta or another of the nearby communities in western Colorado.⁸¹ Complaint counsel apparently regard each of the two principal communities as a separate market area. However, in the opinion of the examiner, it is more appropriate to consider them a single market area.

(g) The area around Cortez and Durango in southwestern Colorado may be considered an appropriate market area. The statistical evidence in the record relates only to Cortez, in which Creameries had a distributing branch. The branch was presumably supplied from Creameries' plants at Grand Junction and Delta. There were five dairy companies distributing milk and/or ice cream in the Cortez area, of which four were located in either Cortez or Durango.

91. Set forth below is a table reflecting Creameries' market shares in the principal markets in which its Utah Division operated.

*Creameries' market shares (milk and ice cream), Utah division, 1952*⁸²

Area	Total milk sales	Creameries'		Total ice cream sales	Creameries'	
		Sales	Percent of area		Sales	Percent of area
Salt Lake City.....	\$12,347,218	\$1,897,218	15.4	\$3,569,202	\$594,202	16.6
Ogden.....	4,499,311	846,311	19.0	1,452,000	260,000	17.9
Provo.....	3,906,206	496,206	12.7	934,894	234,894	25.1
Cedar City.....	2,519,078	584,078	23.2	855,381	155,381	18.2
Southwest Wyoming.....	2,625,000	535,000	20.4	490,000	25,000	5.1
Delta-Grand Junction.....	1,652,525	857,525	51.3	598,235	238,235	39.8
Cortez.....	457,172	117,172	24.1	178,478	48,478	27.2
Division total.....	28,036,600	5,333,000	19.0	8,078,190	1,556,190	19.2

⁸² The above table is based on CX 16-Z 252, pp. 62-85. As previously indicated in footnote 20, this exhibit was prepared by respondent. There is no indication in the record that the sales figures of the other companies, on which the universe figures depend, are based on estimated sales as in the case of the California markets. The examiner assumes, however, that respondent's position with respect to the other areas is the same as that pertaining to California. As previously indicated, the examiner accepts the figures of the other companies' sales, as providing a basis for obtaining a rough approximation of market shares.

As the above table reveals, Creameries was a substantial factor in both product lines in each of the market areas where its Utah Division sold, except for the ice cream product line in Southwestern Wyoming. As the table also reveals, its market share for the Division

⁸¹ There were two companies serving the area with ice cream from Denver, and one serving it with milk from western Utah (CX 16-Z 252, pp. 81, 83).

as a whole (the broadest possible basis for a definition of the geographic market) would not vary significantly from that in the individual markets, except for the Delta-Grand Junction market. Another possible market division, which has previously been suggested, would be one which combined all of northern Utah and southwestern Wyoming into one market area. A computation of Creameries' market share on this basis reveals that its market share in the fluid milk product line would be 16.2%, and that in the ice cream product line would be 17.3%.

92. With one exception, Creameries ranked among the first three companies in market position, in both product lines, in each of the markets which have been found to be the areas of effective competition. In the fluid milk product line it was the second or third ranking company in each market with the exception of Delta-Grand Junction, where it ranked first. In the ice cream product line it ranked first or second in each market with the exception of Southwestern Wyoming, where it ranked last.

93. Unlike California, there were few so-called national companies operating in the territory of Creameries' Utah Division. In fact there were only two such companies, and they distributed in only portions of the territory. One of these was Pet Milk Company, which had two subsidiaries operating in northern Utah. These were Cloverleaf Dairy, which processed and distributed fluid milk, and Colville Ice Cream Company, which manufactured and distributed ice cream. The other national company was Swift & Company, which distributed ice cream in the Delta-Grand Junction area. The Pet subsidiaries were substantial factors in the Salt Lake City and Provo markets, but were relatively minor factors in the Ogden market. In Salt Lake City, Cloverleaf was first in fluid milk sales, with approximately 27% of the market, and Colville was second in ice cream sales, with approximately 12% of the market. In Provo, Cloverleaf was in first place in fluid milk sales, with approximately 51% of the market, and Colville was in third place in ice cream sales, with approximately 10% of the market. Neither company was among the top three ranking companies in the Ogden market. Swift, which was a competitor only in the Delta-Grand Junction area, was not among the top three companies.

94. Set forth below is a table reflecting the combined market shares of the top three companies, in the milk and ice cream product lines, in each of the markets in which Creameries' Utah Division operated. As previously mentioned, Creameries ranked among the top three companies in each of these markets, with the exception of the ice cream product line in the Southwestern Wyoming market.

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*Market shares of top 3 companies in Utah, southwest Wyoming, and west Colorado areas, 1952*⁸³

[In percent]

Area	Fluid milk	Ice cream
Salt Lake City.....	67. 6	39. 8
Ogden.....	77. 9	58. 3
Provo.....	89. 5	49. 2
Cedar City.....	74. 8	82. 5
Southwest Wyoming.....	67. 3	61. 2
Delta-Grand Junction.....	79. 0	88. 1
Cortez.....	85. 7	94. 4

⁸³ The above table is based on CX 16-Z 252. As previously indicated, the market share data for the various companies involved are based on estimated figures and do not purport to be precisely accurate.

While the above figures reveal a high degree of concentration in both the milk and ice cream product lines in a number of the above markets, it should be noted that except for Salt Lake City and Provo, the companies involved were all local companies. Pet's subsidiaries and Creameries accounted for 42% of the milk sold and 39% of the ice cream sold in the Salt Lake City market. The two groups of companies accounted for 63% of milk sales and 35% of ice cream sales in the Provo market. It should be noted, however, that in 1962 Pet sold its interest in its Utah subsidiaries to a local milk producers' cooperative (R. 4656). Aside from the fact that a national company was involved in two of the areas, the examiner does not consider it significant that there was a high degree of concentration in the above markets (a factor stressed by complaint counsel). Except for Salt Lake City, there were a relatively small number of companies engaged in distributing milk and/or ice cream in these markets, so that it is not surprising to find that the top three or four companies accounted for a high percentage of the sales in the area. For example, in Cortez, where concentration is the highest, there were only five companies selling milk and four selling ice cream (CX 16-Z 252, p. 85).

Idaho Division

95. As previously mentioned, Creameries' Idaho Division distributed milk, ice cream and other dairy products principally in the State of Idaho. However, it also distributed in northwestern Wyoming in the area of Yellowstone National Park, particularly in the summer months (CX 16-Z 78; R. 3802). The Idaho Division operated milk and ice cream plants in Boise and Pocatello, and maintained

distributing branches at Twin Falls and Idaho Falls (CX 16-Z 70-80; CX 16-Z 218). As has been mentioned in connection with the Utah Division, complaint counsel contended that the areas served by the various plants and branches are the appropriate geographic market areas, while respondent contends that the entire Intermountain Area, including Texas, is the appropriate market area. The areas which the examiner considers to be the appropriate areas for purposes of measuring market shares, concentration and competitive impact are as follows:

(a) Ada, Owyhee, Elmore, Canyon, Gem, Payette, Boise, Washington, Valley and Adams Counties are an appropriate market area. These counties, in southwestern Idaho, are the areas served by Creameries' milk and ice cream plant in Boise. There were approximately 20 dairy companies distributing milk and/or ice cream in this area. Substantially all of them were located in Boise or in one of the nearby communities (CX 16-Z 252, pp. 48-51).

(b) Bannock, Power, Oneida, Franklin, Bear Lake, and Caribou Counties are an appropriate market area. These counties in southeastern Idaho are the areas served by Creameries' milk and ice cream plants in Pocatello. There were approximately 12 milk and/or ice cream companies serving this area. Substantially all of the companies serving the area with milk were located within this portion of Idaho. However, several companies served the area with ice cream from Ogden and Salt Lake City in the northern portion of Utah (CX 16-Z 252, pp. 53-55).

(c) Twin Falls, Cassia, Jerome, Minidoka, Lincoln, Gooding, Camas, and Blaine Counties are an appropriate market area. These counties in southern Idaho are the areas served by Creameries' distributing branch in Twin Falls. The branch sold ice cream, but not fluid milk. The ice cream was supplied from the company's Boise plant (CX 16-Z 79). There were approximately six companies selling ice cream in the area served by Creameries' Twin Falls branch, all but one of which were located in the area. The one exception was Pet's Colville subsidiary, which sold into the area from Salt Lake City (CX 16-Z 252, pp. 56-58).

(d) Bingham, Bonneville, Jefferson, Madison, Teton, Fremont, Clark, Butte, Custer, and Lemhi Counties are an appropriate market area. These counties in southeastern Idaho are the areas served by Creameries' Idaho Falls distributing branch. This branch sold both milk and ice cream, which were supplied from Creameries' Pocatello plant, approximately 50 miles to the south (CX 16-Z 78). There were approximately eight other companies selling milk and/or ice

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cream in the area, all of which operated plants or branches within the area (CX 16-Z 252, pp. 60-61).

96. Set forth below is a table reflecting Creameries' market shares in the above market areas (CX 16-Z 252, pp. 47-61). The markets are designated by the name of the city in which Creameries' plant or branch was located.

Creameries' market shares (milk and ice cream), Idaho division, 1952

Area	Total milk sales	Creameries'		Total ice cream sales	Creameries'	
		Sales	Percent of area		Sales	Percent of area
Boise.....	\$3,832,268	\$441,718	11.5	\$2,792,410	\$555,130	19.9
Pocatello.....	2,146,211	148,401	6.9	633,557	276,477	43.6
Twin Falls.....	2,075,000	None		639,879	265,514	41.5
Idaho Falls.....	2,384,945	108,670	4.6	674,178	348,698	51.7
Division total.....	10,438,424	698,789	6.7	4,740,024	1,445,819	30.5

As the above table reveals, Creameries was a substantial factor in the ice cream product line in the Idaho markets. In the Boise market it was the second ranking company after a local company which accounted for approximately 45% of the ice cream sales in the area. In the other three markets it was the top ranking company in ice cream sales. As the table also reveals, Creameries was not a significant factor in the milk product line, except in Boise, where it was the third ranking company after two local companies. The only so-called national company selling milk or ice cream in the territory covered by Creameries' Idaho Division was Pet's subsidiary, Colville Ice Cream Company. Colville sold in the Pocatello area where it was the fourth ranking company, with approximately 12% of ice cream sales, and in the Twin Falls area where it was the third ranking company, with approximately 15% of ice cream sales.

El Paso Division

97. The El Paso Division, which operated under the name of Price's Creameries, Inc., distributed milk, ice cream and other dairy products in West Texas and southeastern and southern New Mexico. In Texas it operated a milk and ice cream plant at El Paso and a distributing branch at Alpine. In New Mexico it operated plants at Roswell, Portales, Las Cruces, and Carlsbad, and distributing branches at Hobbs, Deming and Artesia. Set forth below are the geographic areas which the examiner considers to be the areas of effective competition,

insofar as the El Paso Division is concerned. Essentially, these are the areas served by each of Creameries' plants or branches.

(a) El Paso, Culberson and Hudspeth Counties, in the extreme western portion of Texas, are an appropriate market area. These counties were served with milk and ice cream by Creameries' plant in El Paso. The area was served by approximately 15 milk and/or ice cream companies, all of which were located within the area (CX 16-Z 252, pp. 87-89).

(b) Pecos, Brewster, Presidio, and Jeff Davis Counties, to the east and south of the El Paso area, are an appropriate market area. This is the area served with milk and ice cream by Creameries' distributing branch at Alpine, which received its products from El Paso. The area was served by six companies, all of which had a plant or distributing branch within the area (CX 16-Z 252, p. 91). This area might also be considered as an extension of the El Paso marketing area, but it would make no practical difference as far as the issues in this proceeding are concerned.

(c) Dona Ana, western Otero, and Sierra Counties are an appropriate marketing area. This area in southern New Mexico is the area served by Creameries' plant at Las Cruces in Dona Ana County (CX 16-Z 35). The Las Cruces plant processed milk, but not ice cream. It received its ice cream from Creameries' El Paso plant. The area was served by approximately nine dairy companies selling milk and/or ice cream. Of the five companies selling milk, four were located in or close to the area and one distributed into the area from a plant in Albuquerque. Of the eight companies distributing ice cream in the area, the four with the largest volume did so from plants or branches within the area (CX 16-Z 252, pp. 93-94).⁸⁴ Several of the companies distributed ice cream into the area from El Paso. An alternative market division would be to consider this three-county area as part of the El Paso market, insofar as the ice cream product line is concerned. However, a division on this basis would not have a significant effect on Creameries' market share percentages in the area.

(d) Hidalgo, Luna and Grant Counties may be considered an appropriate marketing area. This area in southwestern New Mexico is the area served by Creameries' distributing branch at Deming in Luna County. The Deming branch was supplied with milk from Creameries' plant at Las Cruces, and with ice cream from the plant

⁸⁴ Although The Borden Company, one of the companies distributing ice cream in the area, is referred to as having an El Paso address, it apparently had a distributing branch at Las Cruces (CX 409).

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at El Paso. There were only three companies serving the above area, all having a plant or distributing branch within the area (CX 16-Z 252, p. 96). An alternative market division would be to consider this area part of the same area as that served by the Las Cruces plant. However, a market division on this basis would not significantly affect the issues in this proceeding.

(e) Chaves, Lincoln, and northeastern Otero Counties are an appropriate market area. This area in south central New Mexico is the area served by Creameries' milk plant at Roswell in Chaves County. The plant received its ice cream from Portales. There were approximately five dairy companies supplying the area with milk and/or ice cream. All of them had a plant or distributing branch within the area (CX 16-Z 252, p. 98). This area could also be considered as part of the same market as that served by the Portales plant. However, a market division on this basis would not significantly affect the issues in this proceeding.

(f) Curry and Roosevelt Counties are an appropriate market area. These two counties in eastern New Mexico are the area served by Creameries' ice cream plant at Portales in Roosevelt County. The plant received its milk from Roswell. There were seven dairy companies supplying the area with milk and/or ice cream, of which five had a plant or branch located within the area, while two served the area from western Texas (CX 16-Z 252, p. 100).

(g) Southern Eddy County in southeastern New Mexico and Reeves County in Texas are an appropriate marketing area. This is the area served by Creameries' milk plant at Carlsbad in Eddy County. The area was served by six dairy companies with milk and/or ice cream. All were located within the area (CX 16-Z 252, p. 102).

(h) Northern Eddy County and eastern Otero County are an appropriate market area. This is the area in southeastern New Mexico served by Creameries' distributing branch at Artesia in northern Eddy County. The branch was supplied with milk from Carlsbad and with ice cream from Portales. There were three companies supplying the area with milk and/or ice cream. All of them did so from a plant or branch within the area (CX 16-Z 252, p. 104).

(i) Lea County in southeastern New Mexico and Gaines, Yoakum, Andrews and Winkler Counties in western Texas are an appropriate market area. This is the area served by Creameries' distributing branch at Hobbs in Lea County. This branch received its milk from Carlsbad in adjacent Eddy County, and its ice cream from Portales in adjacent Roosevelt County. There were approximately 12 dairy companies serving the area with milk and/or ice cream (CX 16-Z

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252, pp. 106-107). The majority served the area from plants and/or branches located within or near the area. Four or five served the area from more distant points in Texas. However, the majority of the milk and ice cream distributed within the area was supplied by companies having a plant or branch located within the area or in one of the adjacent counties.

98. Set forth below is a table reflecting Creameries' market shares in each of the above markets served by its El Paso Division, in both the fluid milk and ice cream product lines (CX 16-Z 252, pp. 86-107). For convenience, the areas are designated by the name of the city in which Creameries' plant or branch serving the area was located.

Creameries' market shares (milk and ice cream) El Paso division, 1952

Area	Total milk sales	Creameries'		Total ice cream sales	Creameries'	
		Sales	Percent of area		Sales	Percent of area
El Paso, Tex.....	\$6,038,148	\$2,474,548	41.0	\$1,549,203	\$820,203	52.9
Alpine.....	225,828	148,128	65.6	90,758	56,758	62.5
Las Cruces, N. Mex.....	749,411	429,611	57.3	265,307	187,607	70.7
Deming.....	400,330	111,180	27.7	167,098	115,238	69.0
Roswell.....	1,298,075	741,075	57.1	513,037	233,037	45.4
Portales.....	913,529	227,679	24.9	365,759	92,259	25.2
Carlsbad.....	1,429,462	645,462	45.2	398,500	180,055	45.2
Artesia.....	553,105	238,105	43.0	145,959	95,959	65.7
Hobbs.....	1,894,550	783,000	41.3	565,540	145,540	25.7
Division total.....	13,502,438	5,798,788	42.9	4,061,161	1,926,656	47.4

As the above table reveals, Creameries was a very substantial factor in both the milk and ice cream product lines, in almost every one of the market areas in which it operated. Even if geographic market lines were ignored, it was a very substantial factor throughout the territory where the El Paso Division sold. Under any conceivable consolidation or redefinition of markets in the areas where it sold in Texas and New Mexico, it was a substantial factor in both product lines. Creameries was the top ranking company in both product lines in each of the geographic market areas discussed above, except in Deming, where it was first in ice cream but second in milk, and in Portales where it was second in both milk and ice cream.

99. There were three other so-called national companies operating in various portions of the territory in which Creameries' El Paso Division sold. These were Borden, Swift, and Foremost. Swift operated in only three of the above areas and was a relatively minor factor, accounting for approximately 4% or less of ice cream sales in

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such areas, except in the area served by Creameries' Hobbs branch where Swift was the third ranking company with approximately 17% of ice cream sales. Borden served seven of the above market areas with ice cream, and served four of them with milk. In the milk product line, it was the fourth ranking company in both El Paso and Portales (with approximately 10% and 12%, respectively, of these markets), and was the second ranking company in Hobbs (with approximately 11% of milk sales in that area). It was a more important factor in the ice cream product line, being among the top three companies in five of the above markets. It was the second ranking company in the El Paso, Alpine and Carlsbad areas, with approximately 21%, 37% and 36%, respectively, of these markets. In the El Paso area, Borden and Creameries together accounted for approximately 73% of ice cream sales; in the Alpine area they accounted for substantially all of the ice cream sold in the area; and in the Carlsbad and Las Cruces areas they accounted for approximately 80% of ice cream sales. Borden's ice cream sales accounted for approximately 16% of the sales in the territory in which Creameries' El Paso Division operated, although Borden did not distribute in the entire area. Foremost Dairies and a company which it acquired in 1952, Tennessee Dairies, distributed milk in various portions of Creameries' territory in southeastern New Mexico and western Texas. Foremost was the third ranking company in milk sales in the Hobbs area, with approximately 10% of the area's sales. Tennessee Dairies was among the top four milk companies in the Alpine and Hobbs areas, with approximately 7% and 9%, respectively, of the milk sold in these markets, and was the fifth ranking milk company in the El Paso area with approximately 7% of the sales in that area. Foremost and Tennessee accounted for approximately 7% of the milk sales in the entire territory in which Creameries' El Paso Division sold.

Recent Trend in Market Shares

100. The record contains no evidence of market share trends, in terms of the geographic areas which the examiner has found to be the appropriate market areas in the Intermountain region. The evidence offered by complaint counsel was limited mainly to Creameries' market shares in these markets at the time of the acquisition. However, respondent offered statistical evidence of such trends in terms of the broad six-state area proposed by it, viz, the States of Texas, New Mexico, Arizona, Nevada, Utah and Idaho. While, as previously indicated, the examiner does not consider the six-state area to be the appropriate market area within which to measure the competitive:

impact of the acquisition of Creameries' three divisions in the Inter-mountain area, the figures offered by respondent are useful as providing some indication of the trend in its position since the acquisition. According to these figures, Creameries accounted for 4.5% of fluid milk and cream marketed in the six-state area in 1952 (RX 126), and 6.2% of frozen desserts marketed in the area in 1950 (RX 145). In 1960 respondent's sales from the plants acquired from Creameries accounted for 4.95% of milk and cream and 6.01% of frozen desserts marketed within the area. The latter figures do not, however, include respondent's sales from the plants of two other large dairies which it acquired in Texas and Arizona, viz, Boswell Dairies of Fort Worth acquired in 1958, and Associated Dairy of Arizona acquired in 1956.⁸⁵ If the sales of these two plants (which lie within the six-state area) are included, respondent's market shares in the six-state area in 1960 would be 7.76% in fluid milk and cream (RX 125), and 7.46% in frozen desserts (RX 145).

101. Complaint counsel, while contending that the six-state area is not an appropriate market area, nevertheless, argue that if respondent's market shares in the larger area are to be considered, they should be considered in terms of those portions of the territory which respondent's plants actually served, rather than in terms of the entire six-state area. The statistical evidence introduced by complaint counsel on rebuttal, which is limited to the counties actually served by respondent's plants acquired from Creameries, Boswell, and Associated in the six-state area, discloses that respondent's 1960 market share in fluid milk was 21.8%, rather than 7.76% as proposed by respondent (CX 432-I). In the frozen dessert product line, its market share in 1960 was 23.0%, as compared to 7.46% proposed by respondent (CX 432-G).

Other Acquisitions

102. In addition to respondent's acquisition of Creameries' Utah, Idaho and El Paso Divisions, there have been a number of other acquisitions within this area by so-called national companies. In 1954 respondent acquired Lester Ice Cream Co. of Hobbs, New Mexico, and Yellowstone Dairy of Casper, Wyoming. Lester served portions of the area in which Creameries' Hobbs branch distributed, and accounted for approximately 6% of fluid milk sales and 18% of ice cream sales in the area (CX 16-Z 252, p. 106). Its share of the market, together with Creameries', gave respondent approximately 47% of the fluid milk business and 44% of the ice cream business in

⁸⁵ The fact pertaining to these two acquisitions are hereinafter discussed.

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the area. Yellowstone Dairy was a substantial factor in the southwestern Wyoming area served by Creameries' distributing branch at Rock Springs. In 1952 it was the first ranking ice cream company and the third ranking milk company in the area, accounting for approximately 20% of ice cream sales and 18% of fluid milk sales. It, together with Creameries, which was the second ranking milk company, accounted for approximately 38% of milk sales. Other acquisitions in the Intermountain Area include National Dairy's acquisition of Plains Creamery, which served portions of the area served by Creameries' Hobbs branch; Borden's acquisition of Frymuth Dairy, which served the El Paso and Las Cruces areas; and Foremost's acquisition of Banner Creamery, which served areas in Texas and New Mexico (CX 426-Z 69, 27).

Counterbalancing this trend, respondent cites the departure from the market of Pet Milk Company, a so-called national company. As previously mentioned, in recent years Pet sold out its business in the Utah-Idaho area to a local cooperative, Federated Milk Producers Association (R. 4656). This leaves respondent as the only so-called national company selling in the Utah-Idaho area.

c. *Honolulu Division*

103. Creameries' Honolulu Division operated under the name Dairymen's Association, Ltd. The divisional headquarters was in Honolulu on the island of Oahu, where the company operated milk and ice cream plants. It also had distributing branches at Schofield Barracks and Kaneohe on the island of Oahu. It had another processing plant at Hilo on the island of Hawaii, and a distributing branch in the Kona district of that island. The Division also operated a dairy farm at Honolulu. Dairymen's distributed its products under the names Dairymen's Velvet and American Hostess ice cream and Dairymen's milk (CX 16-Z 217).

104. As previously mentioned, the Honolulu Division accounted for 27% of Creameries' net sales in 1952 (CX 143, pp. 6-7). It was also the most profitable of Creameries' operating divisions. In 1952 its earnings before taxes were \$529,506 (CX 16-Z 214). In 1952 the Division sold 5,633,928 gallons of milk and 902,819 gallons of ice cream (CX 16-Z 206). Its profit on sales of milk in 1949 (the latest full year for which such figures are available on a product basis) was \$333,545, and its profit on sales of ice cream was \$273,130 (CX 16-Z 117).

105. Complaint counsel contend that the island State of Hawaii is the appropriate geographic market area in which to weigh the com-

petitive impact of Creameries' acquisition, insofar as the latter's Honolulu Division is concerned. Unlike the other areas in which Creameries operated, respondent raises no issue concerning the geographic scope of this market area. Prior to the acquisition respondent did not operate in Hawaii. Creameries was by far the most important, if not the dominant, factor in the dairy business in the Hawaiian market. Practically all of the milk business in the then Territory of Hawaii was concentrated on the island of Oahu, with Creameries' Dairymen's subsidiary accounting for approximately 60% of all milk distributed on that island (CX 16-Z 3). Through its own dairy farm it was able to supply approximately 11% of the fluid milk requirement of its Honolulu plant (CX 16-Z 6). In addition, it had access to the milk produced by an important association of dairy farmers, for which it acted as exclusive processing and sales agent (CX 16-Z 275-277). There were only three other milk processors and distributors of any consequence in the Hawaiian Islands (CX 16-Z 3). These companies accounted for approximately 30% of the milk produced on Oahu. The smallest of these, Campos Dairy, which accounted for approximately 6% of the market, was owned by Foremost Dairies. In October 1953, Foremost also acquired the largest of Dairymen's competitors, viz, Moanalua Dairy Ltd. and its subsidiary Rico Ice Cream & Milk Co., which accounted for approximately 20% of the milk produced on Oahu. Thus, by the end of 1953 respondent and Foremost, together, accounted for about 85% of fluid milk produced and distributed on Oahu.

106. Creameries' Hawaiian subsidiary had over 50% of the ice cream business on the island of Oahu. There were only six other competitors of any size selling ice cream on Oahu (CX 16-Z). The largest two of these, Moanalua Dairy and its subsidiary Rico Ice Cream Co., accounted for about 25% of the ice cream produced on the island. As previously mentioned, these two companies were acquired by Foremost in October 1953. Thus, by the end of 1953 respondent and Foremost accounted for around 75% of the ice cream produced and distributed on Oahu. The only other ice cream business of any size in the then Territory of Hawaii was at Hilo and on the Kona Coast, both on the island of Hawaii (CX 16-Z). Creameries' sales on that island were between 100,000 to 120,000 gallons annually. Its only competitor on the island, Dahl-Cro-Ma, Ltd., trading as Blue Bonnet Ice Cream Co., had an annual volume of between 50,000 to 60,000 gallons (CX 16-Z 9). Thus, Creameries had about two-thirds of the business on the island of Hawaii and Blue Bonnet had about one-third. In December 1954 respondent acquired Blue

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Bonnet, giving it control of practically all the ice cream business on the island of Hawaii.

C. Boswell Dairies

The Acquisition

1. Beatrice acquired all of the outstanding capital stock (amounting to 5,040 shares) of Boswell Dairies, a Texas corporation, on March 1, 1958, pursuant to an agreement dated January 31, 1958. Respondent acquired Boswell's stock in exchange for 70,000 shares of Beatrice's common stock, capitalized at \$29.00 a share, or a total consideration of \$2,030,000, which was the equivalent of the book value of Boswell's capital stock as of the date of acquisition. The agreement provided that Boswell would continue as an operating subsidiary of respondent, and that its stock would be carried on respondent's books as an investment at the cost thereof (CX 309-C, p. 1).

2. Boswell was organized as a Texas corporation in 1928 to take over the dairy business originated by the Boswell family. It was principally engaged in the sale of milk and ice cream, but also distributed cottage cheese, butter, cream and ice cream mix. Its plant was located in Fort Worth, Texas. It operated both a milk processing plant and an ice cream manufacturing plant in adjacent buildings in Fort Worth. It sold milk products both at wholesale and retail home delivery, and sold frozen products predominantly at wholesale. It had 78 retail milk routes, 32 wholesale milk routes, 17 combination wholesale milk and ice cream routes and 6 ice cream routes. It owned an insulated and mechanically refrigerated truck fleet and related automotive equipment (CX 309-C, p. 7).

3. Boswell's net sales in 1957 were \$7,106,909. Its net income was \$396,694 before taxes and \$191,694 after taxes. It had an earned surplus, as of the end of 1957, of \$1,440,923. Its total assets, as of December 31, 1957, were \$2,691,977. Its total current assets were \$801,351, compared to current liabilities of \$614,233 (CX 309-C, pp. 8-9). Respondent concedes that Boswell was a "viable, well-operated independent company" (Findings, p. 160).

4. Boswell purchased substantially all of its supply of raw milk from members of the North Texas Producers Association. All of the milk suppliers to Boswell were located within the State of Texas (CX 309-F, p. 1). During the 12-month period prior to its acquisition, Boswell purchased butter and cottage cheese curd from a company in Springfield, Missouri. Such products were purchased on a delivered basis and were transported to Boswell's plant in Fort

Worth in the seller's own trucks. After delivery, the cottage cheese curd was further processed and packaged in Boswell's plant (CX 309-D). The record does not disclose the volume or degree of regularity of purchases of butter and cottage cheese curd from Springfield, Missouri.

Market Conditions

5. Boswell's main distribution area was in the city of Fort Worth and surrounding Tarrant County. However, it also sold in 17 other nearby counties, the most distant delivery point being Cisco, which is approximately 100 miles west of Fort Worth. Boswell sold in Dallas County to the east of Fort Worth, but not in the city of Dallas itself (CX 309-C, p. 7; CX 309-E, p. 1). Respondent did not sell any dairy products in Boswell's territory. Its closest plants were at Oklahoma City, 200 miles to the north, and at El Paso, 600 miles to the west. There were at least 32 other dairy companies selling in some or all of the areas served by Boswell. This included four so-called national companies, viz, Borden, Carnation, Foremost and Swift. These companies distributed a full line of dairy products, except for Swift which distributed only frozen dairy products (CX 309-E, pp. 1-2). Also competing with Boswell in the area were a number of independent Texas companies of relatively substantial size, including Cabells, Inc., Lamar Creamery Co., Inc., Metzger Dairies, Oak Farms Dairies, Ltd., Schepps Milk Co., and Vandervoort's Inc. (RX 147-B, C).⁸⁶

6. There is some question as to what should be considered to be the proper geographic market area in terms of which to determine the probable competitive impact of the Boswell acquisition. Although Boswell's "main distribution" area was in the city of Fort Worth and surrounding Tarrant County (CX 309-C, p. 7), complaint counsel introduced no market share data with respect to this area, and make no contention that this is the area of effective competition. Rather, complaint counsel assert that the relevant market in which to consider the Boswell acquisition is "generally that covered by the North Texas Federal Milk Market Order" (Reply, p. 14). It should be noted, however, that the Federal Milk Market Order (FMMO) covered 16 counties in North Texas, in only six of which Boswell did busi-

⁸⁶ Complaint counsel assert that Cabells and Oak Farms "are not independents but are subsidiaries of Southland Corporation of Dallas, Texas." There is nothing in the record to establish that Southland is a national dairy company. The mere fact that a company has multiple plants does not make it a national company, or mean that it is not an independent dairy.

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ness.⁸⁷ Likewise, of the 18 counties in which Boswell did business, only six were covered by the North Texas FMMO. Despite this discrepancy, the Boswell acquisition must be considered mainly in terms of the North Texas FMMO area since it is the only area for which the record contains reliable statistical data. Such data (which were introduced by respondent) relate only to the fluid milk line of commerce, there being no market share data in the record pertaining to the ice cream product line.

7. In 1957, the year before it was acquired by respondent, Boswell accounted for 10.63% of the fluid milk sold in the North Texas FMMO area. This represented a decline from the year 1956, when its market share was 11.23%. Following its acquisition by Beatrice in early 1958, Boswell's market share continued to decline slightly and reached 10.27% in 1960 (RX 136-137). While, as previously mentioned, there were three so-called national companies distributing milk in Boswell's territory, the statistical evidence as to concentration relates to the market shares of only two of these companies, plus that of Boswell. Such evidence (which was introduced by respondent) discloses that in 1952 Borden, Foremost and Boswell, together, accounted for 47.7% of the fluid milk sold in the North Texas FMMO area. By 1960, the combined share of these three companies (Boswell having since been acquired by respondent) had declined to 41.5%. It further appears that in 1952 the combined market share of the six large independent milk companies previously named was 38.6% of the fluid milk sold in the North Texas FMMO area, and that by 1960 the share of these six companies had increased to 44.4%. The market share of all other companies doing business in the North Texas FMMO area (exclusive of the nine companies above mentioned) was 13.7% in 1952 and 14.1% in 1960 (RX 147-A and B).

8. While complaint counsel apparently concede that the North Texas FMMO area is the appropriate market area (Reply, p. 14), and rely on the statistical evidence introduced by respondent as establishing that Borden, Foremost and respondent accounted for 41.5% of the milk sold in this area in 1960 (Findings, p. 186), they nevertheless contend that respondent's market share in the area served by it was between 18 to 20%, rather than 10.27% (as the statistical evidence pertaining to the North Texas FMMO area in-

⁸⁷ A map of milk marketing areas under Federal Orders as of November 1, 1961, is in evidence as CX 428. The map does not specify the counties which are actually included in each Order area. Such specification does, however, appear in an official publication of the U.S. Department of Agriculture, entitled "Milk Marketing Areas Under Federal Orders." Official notice is taken herein of the specification of counties included in Federal Milk Market Order areas as appearing in this publication, which was issued June 1963 and bears the number AMS-504.

dicates). Except for respondent's own sales, the figures relied upon by complaint counsel are not based on actual sales figures, as are those introduced by respondent, but on "estimated" sales derived from the "estimated" population and alternative per capita consumption rates in the area served by Boswell (CX 455). Such market share computation for 1960 likewise does not take into account the estimated population and sales in an area of ten counties into which respondent expanded after the Boswell acquisition (CX 442-X). At best, the data relied upon by complaint counsel provide a very rough estimate of respondent's post-acquisition market share in Boswell's territory, and cannot be compared with any earlier year to determine whether respondent's market share increased or decreased following the acquisition.

Other Acquisitions

9. In addition to acquiring Boswell and the El Paso Division of Creameries, respondent acquired one other dairy company in Texas, viz, Palestine Creamery Co. of Palestine, Texas.⁸⁸ Palestine Creamery was acquired in March 1960, and sold both milk and ice cream. In 1959 its sales of fluid milk products were approximately \$142,000 and its ice cream sales were \$140,000 (CX 372-K). Palestine was a partnership, not a corporation, and complaint counsel concede that the record fails to establish it was engaged in interstate commerce. Respondent's subsidiary, Boswell, did not compete with Palestine in the sale of fluid milk, but did sell ice cream in a portion of Palestine's territory (CX 372-O).

10. Seven large national companies, viz, Arden, Beatrice, Borden, Carnation, Foremost, Fairmont, and National have acquired approximately 85 dairy concerns in Texas since 1929, of which 28 were acquired since 1950 and 11 were within Boswell's territory (CX 426-Z 69 to 72).⁸⁹ The number of milk plants in Texas has declined from 518 in 1950 to 194 in 1960 (CX 409 and 412). Of the 324 plants which ceased operating after 1950, 310 had a volume under 800 gallons a day or were generally small plants in the "no volume listed" category. (See p. 496, *supra*.) The number of ice cream plants in Texas declined from 207 in 1950 to 111 in 1960 (CX 409 and 412). Of the 96 plants which ceased operating since 1950, 95 had an annual

⁸⁸ Complaint counsel contend that respondent also acquired another company in the dairy field, Quality Frozen Foods Co. of Odessa, Texas, which it is claimed was a "distributor of frozen desserts." The record discloses that Quality sold "frozen foods only" and "absolutely no dairy products" (CX 123-D).

⁸⁹ Complaint counsel contend that there were a larger number of acquisitions made by the national companies. Counsel have erroneously counted as separate companies, the multiple plants of a single company.

volume of under 250,000 gallons or were generally small plants in the "no volume reported" category. (See p. 499, *supra*.)

State "Market" Shares

11. In 1954, the year after its acquisition of Creameries' El Paso Division, respondent's share of the production of frozen desserts in the State of Texas was 2.3%. In 1957, the last year for which such data appears in the record, its share of production of frozen desserts in Texas was 2.1%. The three national companies with the largest shares of production of frozen desserts in Texas in 1957 were: Borden with 12.8%, Foremost with 9.5%, and Carnation with 7.3%. The combined share of frozen dessert production in 1957 of respondent, Borden, Foremost, Carnation, Arden and Fairmont was 34.2% (CX 456-L).⁹⁰

12. In 1958, the year in which it acquired Boswell, respondent accounted for 4.1% of the value of shipments of bottled fluid milk in Texas. The three national companies with the largest shares of milk shipments in Texas were: Borden with 27.2%, Foremost with 11.3%, and Carnation with 7.9%. The combined share of milk shipments of respondent, Borden, Foremost, Carnation and National was 50.8% (CX 425-F). In the frozen dessert product line respondent accounted for 3.6% of the value of shipments of frozen desserts in Texas in 1958. The three national companies with the largest shares of frozen dessert shipments were: Borden with 14.4%, Foremost with 7.1% and Carnation with 5.9%. The combined share of the value of shipments of respondent, Borden, Foremost, Carnation and Swift was 36.3% (CX 425-D).⁹¹

D. *Associated Dairy Products Company*

The Acquisition

1. Respondent acquired all of the assets and business of Associated Dairy Products Company, a Delaware corporation, on October 1, 1956, pursuant to an agreement dated September 11, 1956. The consideration paid for Associated's assets and business was the transfer to it of 15,948 shares of respondent's stock (to be rateably distributed

⁹⁰ The above percentages should not be taken as precise indications of any company's State "market" position, since they include frozen desserts produced in Texas and shipped to other states. For example, respondent made substantial shipments to New Mexico from its El Paso plant.

⁹¹ As indicated at footnote 6, p. 489, *supra*, respondent contends that market shares based on value of shipments are overstated since the universe figures do not include shipments of small processors. Likewise, the shipment figures include shipments from Texas plants to other states, and are therefore not a precise indicator of any company's market position in Texas.

among Associated's stockholders), and the assumption by respondent of Associated's liabilities remaining as of December 31, 1956. At the time of the transfer, respondent's common stock was valued at \$45.00 a share, or a total of \$717,660 for the 15,948 shares paid to Associated. The value of the stock consideration was approximately \$100,000 more than the book value of Associated's net assets (CX 308 A, B and F).

2. Associated was engaged in the processing and distribution of dairy products, principally fluid milk, at wholesale, in the State of Arizona. Its executive offices and processing plant were located in Glendale, Arizona, approximately seven miles from Phoenix. It also maintained branch offices at Bisbee, Coolidge, Miami, Tucson and Superior, all in Arizona. The plant at Glendale processed Grade A fluid milk, and manufactured milk products, including butter, cheese, ice cream mix, condensed skim milk, powdered skim milk and casein. The company operated 60 trucks for the delivery of its products. At the time of the acquisition it had approximately 150 employees (CX 309-F, p. 9).

3. Associated's net sales in the year ending December 31, 1955, were \$3,947,526. In the preceding year, its net sales were \$4,211,644. Its net income, before taxes, was \$135,351 in 1955 and \$145,523 in 1954. Its net income after taxes was \$68,385 in 1955 and \$74,402 in 1954 (CX 308-H, p. 7). For the six months ending June 30, 1956, its net sales were \$2,038,134. During the same period, its net income before taxes was \$106,624 and its net income after taxes was \$50,179 (CX 308-F, p. 10).

4. All of Associated's sales were made within the State of Arizona (CX 308-H, p. 1). Its purchases of raw milk were made entirely from a producers' association, all of whose members were located in the vicinity of Phoenix, Arizona (CX 308-I, p. 1). During the 12-month period preceding its acquisition, Associated purchased bulk butter and plastic cream from a company in Los Angeles. The record discloses that "some or all of said products may have originated in states other than Arizona but all of said purchases were made on the basis of delivered (sic) to Associated's plant at Glendale" in trucks owned or operated by the seller. Associated processed and packaged such butter and used the plastic cream as an ingredient in the manufacture of ice cream mix (CX 308-G). The record does not disclose the volume of purchases of bulk butter and plastic cream, or the degree of regularity of such purchases, or the amount thereof which actually originated outside the State of Arizona.

Market Conditions

5. Associated distributed the dairy products produced by it, at wholesale, in parts of the following Arizona counties: Maricopa, Pima, Pinal, Gila, Santa Cruz and Cochise. It also made distribution through independent distributors in the additional counties of Coconino, Yavapai and Navajo. None of respondent's plants or those of any of its subsidiaries sold any milk products in the area served by Associated. Respondent's closest plant was in El Paso, approximately 415 miles to the east. However, there were at least 26 dairy companies which sold milk products in some or all of the areas served by Associated. Eleven of these companies sold only at retail (home delivery), while the rest sold at wholesale or at wholesale and retail. Included among Associated's competitors were the following so-called national companies: Carnation, Borden and Arden (CX 308-H, pp. 1 and 2).

6. Complaint counsel contend that the area of effective competition with respect to the Associated acquisition is "generally that area covered by the Central Arizona Federal Milk Order * * *, but since Associated distributed throughout the populated portion of the state * * *, Arizona is a relevant market" (Reply, p. 14). Included within the Central Arizona Federal Milk Marketing Order (FMMO) were the counties of Maricopa, Pima, Pinal and Cochise, which were also part of Associated's territory. This was the most populous area in the State, and includes the cities of Phoenix and Tucson.⁹² The Order area also included several counties which were not part of Associated's territory. However, these were relatively sparsely populated areas.⁹³ The Central Arizona FMMO area may, therefore, be considered to be an appropriate market area since it was substantially coterminous with a sizeable portion of Associated's territory. However, since Associated and its distributors sold in five other counties in central and north central Arizona not covered by the FMMO, and since these counties together with those in the Order area comprise the bulk of the population in Arizona, the State as a whole may also be considered to be an appropriate market area.⁹⁴

7. Complaint counsel introduced no pre-acquisition market share data for Associated in either the Central Arizona FMMO area or the State of Arizona as a whole. The only statistical evidence intro-

⁹² These four counties had a population of 1,046,882, out of a total State population in 1960 of 1,302,161 (CX 429).

⁹³ The Order area included the additional counties of Yuma, Graham and Greenlee, with a combined population of 71,785 in 1960.

⁹⁴ Associated's distribution area had a 1960 population of 1,192,198 out of a total State population of 1,302,161.

duced by them involves post-acquisition market data for the State as a whole, pertaining to respondent and the other so-called national companies. The market data introduced by respondent also is in terms of the State as a whole, but includes Associated's pre-acquisition market share as well as respondent's share following the acquisition. The latter data, which the examiner accepts as reasonably reliable, disclose that Associated's 1955 market share of fluid milk and cream sales in Arizona was 11.22% and that respondent's 1960 market share in the same area was 8.39% (RX 123).⁹⁵

8. Following respondent's acquisition of Associated, there were four so-called national companies selling milk in Arizona, viz, respondent, Carnation, Borden and Arden. In 1958 the shipments of these four companies represented 71.5% of the value of shipments of bottle fluid milk and cream in Arizona. The individual percentages of these companies were: Carnation 38.5%, Borden 20.1%, respondent 9.0%, and Arden 3.9% (CX 425-F). Neither respondent nor its predecessor, Associated, distributed frozen desserts in Arizona. However, there were four national companies which did so, viz, Carnation, Arden, Swift and Borden. In 1958 the shipments of these four companies represented 88.3% of the value of shipments of frozen desserts in Arizona (CX 425-D).

9. Associated was the only acquisition made by respondent in Arizona. However, there have been approximately 15 other dairy acquisitions in Arizona by the so-called national companies since 1929. Of these, five were made since 1950 (CX 426-T). Associated was the largest of the companies acquired in Arizona. Between 1950 and 1960 the number of plants distributing fluid milk in Arizona declined from 78 to 25 (CX 409 and CX 412). Of the 53 plants which ceased operating, all had a volume under 800 gallons daily, or were in the "no volume listed" category. (See p. 496, *supra*.) The number of independent fluid milk companies processing 1,600 gallons a day or over has declined from seven to six between 1953 and 1961 (RX 161-E). Between 1950 and 1960, the number of plants distributing ice cream in Arizona has declined from 23 to 16 (CX 409 and 412). Of the seven plants which have ceased operating since 1950, six had a

⁹⁵ The statistical data introduced by respondent were prepared by Dr. David A. Clarke of the University of California (R. 4135). The universe figures were derived from U.S. Department of Agriculture figures (RX 122). Associated's and respondent's sales are based on actual sales figures. While the universe figures are computed figures, their substantial accuracy is confirmed by their close comparability with the official figures of sales in the Central Arizona FMMO area. The 1960 market share figure also compares closely with the market share figure of 8.25% contained in the statistical data introduced by complaint counsel, which is computed from per capita consumption and population figures in Associated's distribution area (CX 452).

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volume under 250,000 gallons annually or were in the "no volume reported" category (See p. 499, *supra*).

E. Greenbrier Dairy Products Company

The Acquisition

1. Respondent acquired the business and assets of Greenbrier Dairy Products Company, a West Virginia corporation, on January 1, 1955, pursuant to an agreement dated December 21, 1954. The consideration paid for the transfer was approximately \$600,000 (CX 20-S, T). As part of the same transaction, Trans-Mountain Motors, Inc., an affiliate of Greenbrier, sold to Commercial Vehicle Rental Co., an Illinois corporation, certain trucks, machinery, cabinets and equipment for a total consideration of \$640,755, which was guaranteed by respondent (CX 20-U). The latter equipment was later leased to respondent by Commercial Vehicle Rental (R. 1163).

2. Greenbrier was engaged in processing and distributing, at wholesale, a full line of milk and ice cream products. Its milk processing and ice cream manufacturing was done at a plant in Beckley, West Virginia. It had a plant for receiving raw milk at Lewisburg, and operated distributing branches at Logan, Charleston and Lewisburg (CX 20-Z 67, 99, pp. 2-4). Its affiliate, Trans-Mountain Motors, which was owned by the same family interests that owned Greenbrier, was engaged in the leasing of trucks and tank trailers to Greenbrier (CX 20-Z 99, Sched. 14). Greenbrier's net sales were \$3,483,895 in the year ending December 31, 1953, and \$3,776,272 in the preceding year. For the nine-month period ending September 30, 1954, its net sales were \$2,319,739. Its net income before taxes was \$58,210 in 1953, and \$69,672 in 1952. For the nine months ending September 30, 1954, its net income before taxes was \$3,380. Its net income after taxes was \$22,710 in 1953, and \$31,672 in 1952 (CX 20-Z 50, 51). Greenbrier's total assets were \$777,341 as of September 30, 1954, and Trans-Mountain's were \$203,086 (CX 20-Z 47, 48). Milk and ice cream constituted the principal products sold by Greenbrier, with milk accounting for the major part of its sales. In 1953, out of total gross sales of \$3,530,902, its sales of milk were \$2,820,028 and its sales of ice cream were \$584,677, with sales of miscellaneous products amounting to \$121,195 (CX 20-Z 99, p. 2).

3. Greenbrier's sales of dairy products were made entirely within the State of West Virginia (CX 20-Z 67). Its supply of raw milk was obtained from a four-county area in West Virginia and received at its Lewisburg plant (CX 20-Z 99, p. 2). During 1954 Greenbrier purchased certain dairy products or ingredients thereof from four

out-of-state suppliers, as follows: It purchased from a supplier in Staunton, Virginia, 200 gallons of cream at a cost of \$543 and 279,500 pounds of milk powder at a cost of \$58,344. The cream was used in manufacturing ice cream and other dairy products. It purchased from a supplier in Philadelphia, Pennsylvania, 72,000 pounds of milk powder at a cost of \$11,017. The milk powder was used in the manufacturing of ice cream and other dairy products. It purchased from a supplier in Marietta, Ohio, 10,300 gallons of cream at a cost of \$25,182. The cream was used for the manufacture of ice cream. In all of the foregoing instances, the products purchased by Greenbrier were delivered by the out-of-state supplier to Greenbrier's plant at Beckley. It also purchased from a supplier in Blue Ash, Ohio, 169,635 pounds of bulk dry cheese curd at a cost of \$20,104. The cheese curd was processed into cottage cheese and packaged at Greenbrier's Beckley plant. The cheese curd was purchased f.o.b. the supplier's plant (CX 20-Z 112, CX 133-B), but the record does not indicate the method of its delivery.

Market Conditions

4. Greenbrier's principal distribution area included Beckley, Charleston, Logan, Lewisburg, and the surrounding territory in central and southern West Virginia. During the middle of 1954 it also began to distribute in the Clarksburg area, in the northern part of West Virginia (CX 20-Z 99, p. 4; CX 20-Z 101). Respondent did not compete with Greenbrier except in the towns of White Sulphur Springs and Lewisburg in southeastern West Virginia, where respondent sold a "small amount" of frozen products from its plant in Washington, D.C. and Greenbrier distributed frozen products from its Lewisburg branch (CX 20-Z 67). There was no competition between the companies in the fluid milk product line. There were approximately 15 other companies competing with Greenbrier in central and southern West Virginia (CX 20-Z 105; CX 20-Z 99, pp. 3-4). With one exception (Fairmont Foods' Imperial Division), none of these companies sold in competition with Greenbrier in the Clarksburg area and none of the companies in the latter area distributed in southern West Virginia.

5. Complaint counsel contend that the relevant market area in which to weigh the impact of the acquisition is "the distribution area of Greenbrier including most of the southern half of West Virginia * * *, but also including the Clarksburg area." Counsel further contend that the distribution area of each of Greenbrier's branches "is also a relevant sub-market" (Reply, p. 14). It is respondent's con-

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tention that the area of effective competition is the entire area of West Virginia south of Charleston, which respondent designates as the "Charleston-Beckley-Bluefield marketing area" (Findings, p. 154). This, in general, is the area in which Greenbrier distributed except that it includes Bluefield in the extreme southern portion of West Virginia, in which Greenbrier did not sell. Respondent's position that the entire Charleston-Beckley-Bluefield area is one marketing area is based on the fact that it is a homogeneous area which is removed from the influences of the other principal markets in West Virginia, each of which is covered by a Federal Milk Marketing Order. Thus, the extreme northern part of West Virginia around Wheeling is part of the Wheeling FMMO, which also includes a portion of Ohio; the area around Clarksburg was established as the Clarksburg FMMO area shortly after respondent acquired Greenbrier; and the area around Huntington and Parkersburg in the western part of West Virginia is included in the Tri-State FMMO.

6. In the opinion of the examiner, the individual communities which complaint counsel designate as the sub-markets are, for the most part, too small to be considered as separate market areas. A number of the companies operating in these areas distributed in more than one of the individual communities. Thus, the four principal companies selling in Charleston, viz, Greenbrier, Valley Bell, Blossom and Imperial (Fairmont Foods) also distributed in Lewisburg and Beckley. Greenbrier and Imperial also distributed in Logan. Except for Charleston, with a population of 73,500, and Beckley with a population of 19,000, the other areas are too minute to be considered economic market areas. Lewisburg, for example, had a population of 2,200 and Logan had a population of 5,000. On the other hand, the examiner considers the area proposed by respondent as too large to be deemed an appropriate market area. While Charleston or a combination of Charleston and Beckley may be considered as appropriate market areas, Bluefield does not appear to appropriately fall within the same market area as these two cities. Except for Foremost Dairies, whose Southern Maid subsidiary sold in both Beckley and Bluefield, there is no evidence that any of the other companies operating the Bluefield area sold in Beckley or Charleston, or that Charleston or Beckley companies sold in Bluefield. In line with respondent's argument that the Charleston-Beckley-Bluefield area is removed from the influences of the FMMO's which are applicable in West Virginia, it may be noted that an FMMO was established for the Bluefield area in 1956, thus indicating that it is not part of the same economic milieu

as Charleston and Beckley.⁹⁶ It is, accordingly, concluded that the area around Charleston, or Charleston and Beckley including Logan, may be considered as appropriate market areas for weighing the competitive impact of the Greenbrier acquisition.

7. The only market-share data in the record are in terms of either the individual communities which complaint counsel assert are appropriate sub-markets, or the entire Charleston-Beckley-Bluefield area which respondent contends is the proper market area. In the Charleston area, Greenbrier was either the third or fourth ranking company, with approximately 15% of fluid milk sales. The first and second ranking companies were Valley Bell Dairy and Blossom Dairy. Fairmont's Imperial Division ranked as either third or fourth along with Greenbrier. In Beckley, Greenbrier was the first ranking company, with an estimated 60% of the fluid milk market. Valley Bell and Blossom were the second and third ranking companies. In Logan, Greenbrier was likewise the first ranking company, with approximately 60% of the market. Fairmont's Imperial Division was second and Guyan Creamery was third. In Lewisburg, Greenbrier was the first ranking company, with approximately 65% of fluid milk sales. Reconverte Ice & Produce Co. was second and Valley Bell and Blossom were third and fourth. In none of the above areas do the market shares of Greenbrier's competitors appear from the record. There is likewise no indication in the record of Greenbrier's market share in the ice cream product line, except that no estimate could be made because its ice cream sales were "so small" (CX 20-Z 105). The record does not disclose Greenbrier's or respondent's market position in ice cream in the Lewisburg-White Sulphur Springs area, the only area in which they competed. In the Charleston-Beckley-Bluefield area, proposed by respondent as the appropriate market, Greenbrier accounted for 16.0% of fluid milk sales in 1954. In 1960, after the acquisition, respondent's share in this area had declined to 14.4% (RX 144-A).

8. There is no market share data in the record in terms of the Charleston-Beckley area, which more nearly conforms to what the examiner considers as the appropriate market area in this instance. However, in view of the fact that Greenbrier's share in the broader Charleston-Beckley-Bluefield market proposed by respondent was

⁹⁶ It may be noted that in the *Foremost Dairies* case, Docket No. 6495, April 30, 1962 [60 F.T.C. 944, 1067], in which the examiner had held the Bluefield area to be an appropriate market area, the Commission ruled that "the relevant market area should also include the Appalachian area." The Bluefield FMMO area was merged into the Appalachian FMMO area in 1961. This area does not include Charleston, Beckley or Logan.

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16% in 1954, it seems evident that it must have had a substantially larger share in the smaller Charleston-Beckley (including Logan) market, particularly when it is noted that in Beckley and Logan Greenbrier was the first ranking company with 60% of the sales in these communities. The record does not disclose Greenbrier's market share in the Clarksburg area, except that its order of magnitude was around 2% or possibly less than 1%.⁹⁷

9. As indicated above, respondent's milk market share in the entire Charleston-Beckley-Bluefield area declined from 16.0% to 14.4% during the period from 1954 to 1960. While the area covered by these statistics is somewhat broader than that which the examiner regards as the appropriate geographic market area, there is no reason to believe that respondent's relative position in the smaller market would be significantly different in 1960 than that in the three-city area. Using the Charleston-Beckley-Bluefield area as a basis for comparison, it may be noted that the combined market share of respondent's Greenbrier Division, Fairmont's Imperial Division and Foremost's Welch Milk Co., was 30.5% in 1960. This compares with 30.7% for these plants in 1951. The plants of the four large independent companies (Valley Bell, Blossom, Leatherwood and Tebay), processing an average of 8,539 gallons a day, accounted for 48.2% of the Charleston-Beckley-Bluefield market in 1951 and 50.1% in 1961.⁹⁸ The plants of nine independent companies processing an average of 1,463 gallons a day accounted for 21.1% of the area in 1951 and 19.4% in 1960 (RX 156-A).

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10. In addition to its acquisition of Greenbrier, respondent acquired two other companies in the southern West Virginia area. On May 1, 1955, respondent acquired Kanawha Ice Cream Co., a West Virginia corporation, for a consideration of \$83,500 (CX 31 A-D). Kanawha sold only ice cream and its distribution area was limited to Charleston and its environs. Respondent sold no frozen products in the area in which Kanawha distributed, although it did sell milk through its Greenbrier Division (CX 31-R). The record does not disclose what Kanawha's market share was in the Charleston area. Complaint counsel concede that the record fails to establish Kanawha's engage-

⁹⁷ An official of Clarksburg Dairy, which respondent acquired in August 1955, estimated Greenbrier's market share in the Clarksburg area (after its acquisition by respondent) to be about 2% (CX 33-Z 4). However, an official of respondent testified that when the Clarksburg FMMO went into effect in November 1955, Greenbrier withdrew from the Clarksburg market, at which time it had less than 1% of the area's milk sales (R. 1183).

⁹⁸ Between 1951 and 1960 two of the large independents, Blossom and Tebay, were acquired by Broughton's Farm Dairy, a large Ohio company.

ment in interstate commerce. The other company acquired by respondent was Fayette Bottling & Ice Co., of Montgomery (26 miles southeast of Charleston). Respondent acquired the ice cream portion of Fayette's business on September 11, 1958, for a consideration of \$113,250 (CX 353-L-M). Fayette had shown a loss on its operations from 1953 to 1957, and was advised by the Commission that if the sale of its assets to respondent was effected no action would be taken to challenge the sale (CX 353-C). Complaint counsel concede that the record fails to establish Fayette's engagement in commerce.

F. Clarksburg Dairy Company

The Acquisition

1. Respondent acquired all of the outstanding capital stock of Clarksburg Dairy Company, a West Virginia corporation, on August 1, 1955, pursuant to an agreement entered into with Clarksburg's stockholders on July 8, 1955. In exchange for their stock, Clarksburg's stockholders received 12,750 shares of respondent's common stock, which was then selling on the New York Stock Exchange for approximately \$50.00 a share, or a total consideration of approximately \$635,000. The transfer also included the business and assets of Clarksburg's wholly-owned subsidiary, Home Dairy of West Virginia, Inc., a West Virginia Corporation (CX 33 A-M).

2. Clarksburg Dairy and its wholly owned subsidiary, Home Dairy, were engaged in the processing and distributing of milk and cream, cottage cheese, butter and ice cream mix (CX 33-Z 1). Clarksburg Dairy's principal processing plant was located at Clarksburg. It also operated a plant at Elkins, where it processed milk in gallon jugs. Home Dairy's office was located in Fairmont, where it had a distributing branch. It also had a distributing branch at Buckhannon, which had formerly been used as a processing plant (CX 33-Z 12, pp. 3 and 4). Clarksburg Dairy and Home Dairy operated approximately 35 combination wholesale and retail routes out of Clarksburg, Fairmont, Buckhannon and Elkins (CX 33-Z 8, p. 20).

3. For the year ending December 31, 1954, the combined sales of Clarksburg and its subsidiary were \$1,636,409. Sales of the Clarksburg plant represented approximately 60%, or \$973,764, of this combined figure. The net profit before taxes on the combined operation was \$90,252 in 1954, of which \$38,365 represented sales from Clarksburg, and \$51,950 represented sales from Fairmont (CX 33-Z 8, p. 9). Fluid milk products represented the largest volume item of the Clarksburg plant, with sales in 1954 amounting to 952,645 gallons (CX 33-Z 8, p. 16). Out of total sales \$1,636,409 in 1954, sales

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at wholesale amounted to \$1,032,460 (CX 33-Z 8, p. 10). The total assets of Clarksburg Dairy and its subsidiary, as of July 31, 1955, were \$1,076,343. Its current assets were \$680,128, and its current liabilities were \$154,405 (CX 33-Z 12, p. 7).

4. Clarksburg Dairy's sales and those of its subsidiary were made entirely within the State of West Virginia (CX 33-Z 1). So far as appears from the record, Clarksburg had only two out-of-state suppliers (CX 133-B; CX 33-Z 16). It purchased its butter requirements from respondent's Cincinnati plant. Such purchases were made f.o.b. Cincinnati and Clarksburg's purchases never exceeded three or four cases (32 lbs. each) per week. It also purchased an aerated cream in cans from a supplier in Ohio. The volume of such purchases was "very small" and was delivered in the seller's truck.

Market Conditions

5. The distribution area of Clarksburg Dairy and its subsidiary consisted of an area in northern West Virginia which included the towns of Clarksburg, Fairmont, Grafton, Weston, Elkins and Buckhannon, and adjacent territories (CX 33-Z 1 and Z 8, p. 10). A small portion of the sales of respondent's Greenbrier Division were made in some of the areas served by Clarksburg Dairy (CX 33-Z 1). The Greenbrier Division sold in Clarksburg and also in the area around Morgantown, which Clarksburg did not serve (CX 33-Z 4). There were 13 other dairy companies serving some or all of Clarksburg Dairy's distributing area, plus a number of small producer-distributors (CX 33-Z 4). The only so-called national company selling in Clarksburg's distribution area, other than respondent's Greenbrier Division, was Fairmont Food's Imperial Division.

6. It is not clear what complaint counsel consider to be the relevant market area in which to weigh the probable competitive impact of the Clarksburg acquisition. However, since the market share data cited by them are in terms of the entire distribution area of Clarksburg Dairy and Home Dairy, it may be assumed that they consider this to be the appropriate geographic area. In general, this is an area in northern West Virginia, which is within a radius of approximately 50 miles from Clarksburg. It includes the principal communities in six counties in northern West Virginia. This area conforms substantially to the boundaries of the Clarksburg FMMO area, which was established in November 1955, three months after the Clarksburg acquisition. The only populous area covered by the Clarksburg FMMO which Clarksburg Dairy did not serve was Morgantown.⁹⁹ Only one dairy from Morgantown (Chico Dairy) sold in

⁹⁹ The population of Morgantown was approximately 25,000, compared to a population of approximately 100,000 for the six principal communities served by Clarksburg Dairy.

Clarksburg Dairy's territory, accounting for approximately $\frac{1}{2}\%$ of the area's sales (CX 33-Z 4). Respondent contends that the relevant market area is that embraced within three FMMO areas, viz, Clarksburg, Wheeling and the Athens District of the Tri-State area (which includes the area around Parkersburg). This position is based on the fact that there were distributors from the other two areas which sold in the Clarksburg area (R. 4047). However, the record establishes that only one distributor from outside the Clarksburg FMMO area sold within the area in more than *de minimis* quantities.¹⁰⁰ It is the conclusion and finding of the examiner that Clarksburg Dairy's distribution area, which was slightly smaller than the Clarksburg FMMO area, is the relevant geographic market area.

7. The market share data offered by complaint counsel, based on market estimates made by a Clarksburg Dairy official shortly prior to the acquisition, disclose that Clarksburg Dairy and Home Dairy accounted for approximately 35% of the sales in the area served by them (CX 33-Z 4).¹⁰¹ The company with the second largest share of the market was Fairmont's Imperial Division, with an estimated 25% of the market. The next three ranking companies accounted for between 5% and $6\frac{1}{2}\%$ each of the area's sales. All of the other distributors had 3% or less of the market, with respondent's Greenbrier Division having an estimated 2%.¹⁰² While Clarksburg Dairy's market share percentage is an estimated figure, not based on any actual statistical data, the accuracy of its general order of magnitude is confirmed by the market share data introduced by respondent which are based on actual sales data for the FMMO areas. These data disclose that in 1956, the year after respondent acquired Clarksburg Dairy, its sales in the Clarksburg FMMO area represented 29.5% of that area's sales (RX 103).¹⁰³ By 1960, respondent's sales from Clarksburg Dairy's plants had declined to 28.6% of the Clarksburg FMMO area. However, it should be noted that in 1959 respondent had acquired the business of Sanitary Milk & Ice Cream Co. of Mor-

¹⁰⁰ Garvin's Jersey Farms of Wheeling accounted for approximately $6\frac{1}{2}\%$ of the sales in Clarksburg Dairy's territory (CX 33-Z 4). This is one of the two out-of-area companies specifically referred to by respondent's expert witness as selling within the area (R. 4047). There is no evidence that the other company, Broughton's Farm Dairy of Marietta, Ohio (R. 4049) sold in the Clarksburg area in 1955.

¹⁰¹ It is not clear whether this includes all milk products or is based on sales of fluid milk only.

¹⁰² The estimate made of respondent's sales contains the notation that the major portion of its sales were made from a distribution station in Morgantown, which area Clarksburg Dairy did not serve (CX 33-Z 4).

¹⁰³ The figures introduced by respondent disclose that its sales from Clarksburg Dairy's plants represented 6.6% of the three FMMO areas. The above percentage is computed by comparing Clarksburg Dairy's sales with the sales in the Clarksburg FMMO area only.

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gantown (which will be hereinafter discussed). If the sales from Sanitary's plant in Morgantown are included, respondent's sales in the Clarksburg FMMO area (including both the Clarksburg and Morgantown plants) represented 46.8% of that area's fluid milk sales in 1960.

Other Acquisitions

8. In addition to its acquisition of Clarksburg Dairy, respondent made one other substantial acquisition in northern West Virginia.¹⁰⁴ This was Sanitary Milk & Ice Cream Co., a West Virginia corporation, whose business and assets respondent acquired on April 1, 1959 (CX 356-G). The total consideration paid was \$345,949. Sanitary processed milk and cream and manufactured ice cream. In the year 1958 it sold 2,212,896 gallons of milk and 173,362 gallons of ice cream, with its total sales being \$1,500,875 (CX 356-G 8). Respondent concedes that Sanitary "was a viable company" (Findings, p. 180). Sanitary's products were distributed primarily in the city of Morgantown and Monongalia County, but it had some scattered distribution in several other West Virginia Counties (CX 356-C). One of its milk routes made a small portion of its sales in Marion County where respondent sold, and another milk route was in Preston County where respondent operated a milk route. In the ice cream product line, there was some minor competition between Sanitary and respondent in Monongalia and Taylor Counties, where respondent had a maximum of 10 customers (CX 356-D). Complaint counsel concede that the record fails to establish that Sanitary was engaged in interstate commerce.

9. Since 1929 the so-called national companies have acquired approximately 18 companies engaged in the sale of fluid milk or ice cream in the State of West Virginia. Of these, 10 were acquired since 1950 (CX 426-M). Between 1951 and 1961 the number of milk plants in West Virginia has declined from 149 to 66 (CX 409 and 412). Eighty-two of the plants which have ceased operating had a volume under 800 gallons a day or were in the "no volume listed" category. (See p. 496, *supra*.) The number of independent companies in West Virginia processing a minimum of 1,600 gallons a day has remained the same from 1953 to 1961, viz, nine (RX 161-F). The number of ice cream manufacturing plants in West Virginia has declined from 35 to 23 between 1951 and 1961 (CX 409 and 412). Of the 12 plants

¹⁰⁴ Respondent also acquired Lucas Dairy of Grafton, a small milk company with annual sales of about \$65,000 (CX 124-J), for whose business and assets respondent paid \$5,500 (CX 124-A-B). Lucas was not a corporation. Complaint counsel concede that the record fails to establish that it was engaged in interstate commerce.

which have ceased operating, 11 had a volume under 250,000 gallons annually or were in the "no volume reported" category. (See p. 499, *supra*.) The number of independent companies manufacturing a minimum of 250,000 gallons per year has declined from two in 1951 to none in 1961 (RX 161-A).

State "Market" Shares

10. In 1958 (after its acquisition of Greenbrier and Clarksburg Dairy, but before its acquisition of Sanitary) respondent accounted for 11.8% of the value of shipments of bottled fluid milk and cream in West Virginia.¹⁰⁵ The shares of the other three national companies doing business in West Virginia, viz, Borden, Fairmont and Foremost, were 10.0%, 8.2%, and 4.4%, respectively, making a total of 34.4% for the national companies (CX 425-F). In the frozen dessert product line, respondent's 1958 share of the value of shipments of such products (which includes the business which it acquired from Greenbrier and Kanawha Ice Cream Co.) was 7.3%. Four national companies accounted for 81.6% of the value of shipments, with Fairmont having 34.5%, National Dairy 27.0%, and Borden 12.8% (CX 425-E). In 1957 these four companies, plus Foremost, accounted for 75.1% of the production of frozen desserts in West Virginia (CX 456-J). Respondent's share of production in that year was 5.7%, compared to .4% in 1954, the first year when it produced any frozen products in the State.

G. Tro-Fe Dairy Company, Inc.

The Acquisition

1. Respondent acquired Tro-Fe Dairy Company, Inc., on June 1, 1956, pursuant to agreements entered into March 31, 1956 (CX 42 and 43). Tro-Fe consisted of two separate corporations, an Alabama corporation and a Tennessee corporation. Respondent purchased the assets of the Alabama corporation for \$134,000, in payment for its equipment, plus additional amounts for inventory (at cost), pre-paid items (at value) and receivables (at approximate book value). The total amount of the consideration actually paid cannot be determined from the record. The transaction also involved the leasing of real estate, machinery and equipment from the Alabama corporation for a period of 20-25 years at a monthly rental of about \$5,457. From the Tennessee corporation respondent purchased its inventory (at

¹⁰⁵ The reliability of this figure (which is based on official Government figures), as a general indicator of respondent's market position in the State, may be gauged by comparing it with the estimated market shares computed by complaint counsel, based on alternative rates of per capita consumption. Such estimated shares ranged from 8.66% to 13.01% in 1960 (CX 449-A).

cost) and receivables (at approximate book value). It also leased that corporation's building and plant machinery for a period of two years at an annual rental of \$4,000. The total consideration actually paid for the Tennessee corporation cannot be ascertained from the record.

2. The Alabama corporation operated a plant at Gadsden, Alabama, where it was engaged in processing and distributing milk, cream, cottage cheese, ice cream mix and butter (CX 42-Z 4). The Tennessee corporation operated a plant at Lewisburg, Tennessee, where it acted as a "captive" receiving station for the Alabama corporation, of fluid milk received from producers in Tennessee (CX 43-N). Payment to the producers for milk received by the Tennessee corporation was made by the Alabama corporation. Surplus raw milk not used by the Alabama corporation was sold by the Tennessee corporation to other producers in Tennessee and Alabama (CX 42-Z 9). In the fiscal year ending June 30, 1955, the net sales of the Alabama corporation amounted to \$2,953,067. Of this amount, approximately 73%, or \$2,176,000 consisted of sales of fluid milk (CX 42-Z 3, pp. 2-3). The corporation realized a net profit of \$96,698 on its total sales. The total assets of the Alabama corporation, as of June 30, 1955, were \$760,342 (CX 42-Z 3, p. 1). It operated 55 trucks and had approximately 15 wholesale routes and 40 retail routes (R. 983). Respondent concedes that Tro-Fe was "a viable company." The Tennessee corporation handled between 1,300,000 and 1,600,000 pounds of milk per month during 1954 and 1955, of which it shipped between 1,200,000 to 1,500,000 pounds to the Alabama corporation (CX 42-Z 9). Its total assets as of March 31, 1955, were \$95,928 (CX 42-Z 8).

3. The sales of the Alabama corporation were made in an area of approximately 30 miles around Gadsden, Alabama (CX 42-Z 4). Whether the company made any sales in Georgia does not appear from the record. However, as indicated by the above figures, it received substantial shipments of raw fluid milk from Tennessee. Likewise, the Tennessee corporation made substantial shipments of raw fluid milk to Alabama. Respondent concedes that Tro-Fe Dairy was engaged in commerce (Findings, p. 140).

Market Conditions

4. As previously stated, Tro-Fe distributed its milk products in the city of Gadsden and the adjacent territory in northeastern Alabama, within a radius of approximately 30 miles from Gadsden. Respondent's closest plant was at Huntsville, Alabama, approximately 75 miles northwest of Gadsden. The only area where the two companies were in competition was in the towns of Guntersville and

Scottsboro in northeastern Alabama (CX 42-Z 4). Including respondent, there were 14 companies competing with Tro-Fe in some or all of its territories. In addition to respondent, there were two other so-called national companies selling milk products in Tro-Fe's territory, viz, Foremost Dairies and National Dairy's Southern Dairies Division (CX 42-Z 5).

5. As in the case of a number of the other acquisitions, a sharp disagreement exists concerning the metes and bounds of the geographic market area in which to weigh the competitive impact of the Tro-Fe acquisition. However, in contrast to most of the other areas, it is complaint counsel which in this instance urges the widest possible geographic market area, while respondent proposes a narrower market. Complaint counsel contend that the area of effective competition is the entire State of Alabama, based on the fact that Alabama is a "totally controlled State" (Reply, p. 14). Respondent, on the other hand, contends that the State is divisible into four regional market areas, viz: (1) The Anniston-Gadsden market, which includes all of the area north of the Talladega National Forest in the northeastern part of the State; (2) the city of Birmingham and the entire northern and northwestern part of the State, including the Tri-City area (Florence, Sheffield and Tuscumbia), and Huntsville (but not the northeastern area which is part of the Anniston-Gadsden market); (3) the city of Montgomery and the rest of southeastern Alabama, including Opelika, Dothan and Andalusia; and (4) the western and southwestern part of the State, including the cities of Tuscaloosa and Mobile. Respondent concedes that the latter area "may be divided into two separate markets primarily centered around Mobile and Tuscaloosa" (Findings, p. 142). Respondent's position that each of these four or five areas is a separate market is based on the fact that there are no interarea shipments of processed milk between and among the areas, and that they are recognized by the State as separate markets.

6. The examiner does not concur in the basic position of either of the parties. The mere fact that Alabama is a "controlled State," i.e., that milk plants processing in the State must obtain a license from the Alabama Milk Control Board in order to operate, and that the price of milk at the producer and resale levels is controlled by the Board (RX 157-A), does not necessarily require the conclusion that the entire State is a single area of effective competition. California is likewise a controlled State, yet complaint counsel there contended that the local markets were the areas of effective competition. Respondent's position is likewise untenable. The State recognizes the

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four areas proposed by respondent as "distinct markets" only "in the sense that the dairies processing in any one of these markets do not distribute into any of the other markets" (RX 157-E). While, as in the case of the California markets proposed by respondent, this may establish the outer limits of broad regional economic areas, it does not preclude a further division of these areas, in terms of the areas in which different groups of companies actually compete. At best, the regional areas are the areas "in which the larger processors distribute their milk" (R. 2350), and it is by no means clear that even these companies distributed throughout the regional markets at the time of the Tro-Fe acquisition, or even today.

7. The examiner finds it unnecessary and inappropriate to make specific findings as to the precise boundaries of all of the geographic markets in Alabama since this proceeding only challenges certain specific acquisitions in the State, as to only three of which the basic jurisdictional facts have been established. Consideration will at this point be limited to defining the geographic area applicable to the Tro-Fe acquisition. Insofar as that acquisition is concerned, it should be noted that the area proposed by respondent comes closer to conforming to the actual area of effective competition than any of the other regional markets proposed by it. The principal communities in the area are: Anniston, Gadsden, Talladega and Sylacauga, with the former two communities accounting for the bulk of the population. Tro-Fe did business principally in Gadsden and Anniston. While it sold as far north as Guntersville and Scottsboro, these were fringe areas. There is no evidence that it sold as far south as Talladega and Sylacauga. There is no evidence that companies in the Talladega and Sylacauga areas sold in competition with Tro-Fe.¹⁰⁶ Based on the record as a whole, it is the conclusion and finding of the examiner that the area of effective competition, insofar as the acquisition of Tro-Fe Dairy is concerned, includes the communities of Gadsden and Anniston and the surrounding towns.

8. As a practical matter, it is of little consequence whether the area of effective competition be regarded as the immediate Gadsden-Anniston area or the entire northeastern region of Alabama since the record contains no evidence of market shares or concentration on either basis. The only statistical evidence introduced by complaint counsel pertains to the State as a whole. While respondent contended that northeastern Alabama was an appropriate market area, it introduced no statistical evidence with respect to such area. The statistical

¹⁰⁶ None of the companies doing business in Talladega and Sylacauga (CX 409, 412; RX 157-B), are listed among Tro-Fe's competitors (CX 42-Z 5).

evidence introduced by complaint counsel for the State of Alabama does not disclose Tro-Fe's pre-acquisition market share, but only respondent's share of fluid milk shipments in 1958, following the acquisition. Such evidence discloses that respondent accounted for 14.6% of fluid milk shipments in the State of Alabama in 1958 (CX 425-F). The only evidence in the record as to Tro-Fe's pre-acquisition market share is the testimony of an official of respondent, who expressed the opinion that Tro-Fe was "one of the largest operators" in its area, and estimated that its market share was "less than 25[%]" (R. 984). However, this testimony is too indefinite and speculative to base any definitive finding thereon as to Tro-Fe's market position in the Gadsden-Anniston area.¹⁰⁷ While, as previously mentioned, respondent and Tro-Fe competed on the fringes of each other's territory, there is no indication as to the extent of either company's sales in the overlap area, or even that such sales were substantial. Likewise, while the record indicates that respondent's milk sales in the over-all area served by its Huntsville plant were substantial, viz, \$2,712,301 (CX 42-Z 13), there is no evidence as to what its relative position was in the area from which it expanded into Gadsden.

Other Acquisitions

9. Respondent originally entered the State of Alabama in 1944 with its acquisition of Decatur Ice Cream & Creamery at Decatur, and Huntsville Ice Cream & Creamery at Huntsville, both in the northern Alabama area (CX 305, p. 1). As of 1951, respondent's only processing plant was located at Huntsville. Between 1951 and 1961 it acquired nine other dairy companies in Alabama, including Tro-Fe Dairy. Five of the acquisitions were in the north Alabama area; one (Tro-Fe) was in the northeast Alabama area; one was in the Tuscaloosa (west Alabama) area; and two were in the southeast Alabama area. The latter two companies will be hereinafter separately discussed since they are the only two companies (other than Tro-Fe), as to which complaint counsel claim to have established the

¹⁰⁷ Complaint counsel cite this witness' testimony as establishing that Tro-Fe had "somewhere around 25% of the sales in its area" (Findings, p. 508). The witness did not so testify. The best answer that he could give as to Tro-Fe's market share, in response to the prodding of complaint counsel, was that it was "difficult to answer" what Tro-Fe's market share was but that "I would say less than 25[%]". The witness' testimony is also ambiguous as to what area he was talking about, viz, whether he was referring to the immediate Gadsden area or the entire Gadsden-Anniston area. For example, while he opined that Tro-Fe was a larger operator in the Gadsden area, he stated that its competitor in the Anniston area, Turner Dairy, "is much larger than Tro-Fe" and that "in the Anniston area they [Turner] would have sold far more, and as a whole they would have sold more" (R. 985).

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necessary jurisdictional facts. Reference will be briefly made at this point to the six dairies which are not hereinafter considered in detail.

10. Of the five companies acquired in north Alabama, none were corporations, and most were very small companies. Dixie Dairy of Florence was acquired in April 1951 for \$20,000 (CX 52-G). Athens Creamery of Athens was acquired in January 1952, for approximately \$12,000 (CX 70-A). White Way Pure Milk Co. of Huntsville, a distributor for another dairy company, was acquired in December 1954 for approximately \$10,000, plus payment for its accounts receivable (CX 108-A-B). Klein Dairy of Cullman was acquired in May 1960 for approximately \$45,000 (CX 375-A-D). Klein was somewhat larger than the other four companies, but was in failing condition, and the acquisition was made with the qualified approval of the Commission (CX 375-P). Brakefield Dairy of Jasper was acquired in July 1960 for approximately \$10,000, following damage to its business by a fire for which it was not insured (CX 380-E). Complaint counsel concede that they have failed to establish the existence of interstate commerce with respect to any of the above acquisitions.

11. Respondent acquired the business and certain of the assets of Delview Dairy, Inc., an Alabama corporation, on March 1, 1961, for \$75,000 (CX 390-A). Respondent also leased Delview's real estate and certain of its machinery and equipment for a period of ten years at a total rental of \$962,000 (CX 390-P, Z 2). Delview processed and distributed milk, cream, cottage cheese and ice cream in Tuscaloosa and certain surrounding counties in western Alabama (CX 390-Z 12). Its net sales in 1960 were \$1,960,990, and its net income after taxes was \$32,081 (CX 390-Z 14, 17). There is no indication in the record as to Delview's relative position in the area in which it operated. Respondent did not sell any dairy products in Delview's territory prior to the acquisition (CX 390-Z 13). Complaint counsel concede that they have failed to establish Delview's engagement in commerce (Findings, p. 514).

12. Since 1929 the so-called national companies have acquired 23 companies distributing milk and/or ice cream in the State of Alabama. Of these, 13 were acquired since 1950 (CX 426). During the period from 1951 to 1961, the number of milk processing plants in Alabama declined from 192 to 68 (CX 409, 412). All but two of the plants which ceased operating had a volume under 800 gallons or were in the "no volume listed" category. (See, p. 496, *supra*.) The number of independent companies processing a minimum of 1,600 gallons of fluid milk daily remained constant between 1953 and 1961,

viz, six (RX 161-F). The number of ice cream plants in the State declined from 54 to 37 between 1951 and 1961 (CX 409, 412). All of the plants which ceased operating had a volume under 250,000 gallons annually or were in the "no volume reported" category. (See p. 499, *supra*.) The number of independent companies manufacturing a minimum of 250,000 gallons annually has declined from 11 to 7 between 1951 and 1961 (RX 161-A).

State "Market" Shares

13. In 1958 four national companies accounted for 33.4% of the value of shipments of fluid milk in Alabama (CX 425-F). Respondent had the largest share among these companies, with 14.6%. This was prior to its acquisition of Dairyland Farms (which will be hereinafter separately discussed) and Delview Dairy, both of which were acquired in 1961. The other three national companies, viz, Foremost, National and Pet accounted for 10.5%, 5.8% and 2.5%, respectively, of the value of shipments of fluid milk. In 1958 four national companies, viz, Foremost, Borden, National and Swift, accounted for 48.4% of the value of shipments of frozen desserts in Alabama (CX 425-D). Respondent's shipments are not included in these figures since the frozen desserts which it sold in Alabama were then being produced at its plant in Nashville, Tennessee. Not until 1959, with its acquisition of Dothan Ice Cream Co. (which will be hereinafter separately discussed), did respondent begin producing ice cream in Alabama.

H. *Dothan Ice Cream Company*

1. Respondent acquired the assets of Dothan Ice Cream Company on December 31, 1959, pursuant to an agreement dated December 18, 1959 (CX 371-A-W). The agreement was entered into with members of the Parkman family, as partners in Parkman Investment Company (which had formerly been named Dothan Ice Cream Company, also a partnership). The partnership owned all of the capital stock of the following Florida corporations: Dothan Ice Cream Company, Inc.; Supreme Ice Cream Company of Dothan, Inc.; Supreme Ice Cream Company of Montgomery, Inc.; Supreme Ice Cream Company of Panama City, Inc.; Supreme Ice Cream Company of Pensacola, Inc.; Frostie-Boy Vending Company; and Melody Frozen Foods Company. The partnership owned and leased to the above corporations the real estate and equipment used by such corporations in the operation of their respective businesses. The corporation, Dothan Ice Cream Company, Inc., was engaged in the manufacturing

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of ice cream and ice cream products in Dothan, Alabama. The other corporations were in the business of distributing the products of Dothan Ice Cream Company, Inc., in their respective areas. Under the agreement, the partners agreed to liquidate the corporations on or before December 26, 1959, and to sell certain of the assets of the partnership and the liquidated corporations to respondent for a consideration in excess of \$1,000,000 (CX 371-B, M). The agreement also provided for the leasing to respondent of the Dothan manufacturing plant and certain real estate in Florida at a total rental of \$217,500 (CX 371-Z 22, 40).

2. The parties are in disagreement as to what it is that respondent acquired. Respondent contends that it acquired a partnership and not any corporations, since the latter had already been dissolved when the transfer of assets actually took place. While not entirely clear from its argument, it is apparently respondent's position that since it acquired the assets of a partnership, rather than those of a corporation, the acquisition does not fall within the purview of Section 7 of the Clayton Act. Complaint counsel contend that the partnership "was formed during the negotiations for sale [and that it] is a clear subterfuge to circumvent the law" (Findings, p. 509). The record does not sustain the position of complaint counsel that the partnership was formed during the negotiations. The partnership existed as far back as the "early 50's," the distributing corporations having been formed in 1957 (R. 3641-42). The manufacturing corporation, however, apparently existed prior to 1957 and actually manufactured the ice cream which the distributing corporations distributed, while the partnership merely owned the real estate used by them (R. 3643). In any event, irrespective of when the partnership was formed, and despite the form of the transaction (in which the transfer of assets was technically made to respondent by the partnership), it is clear that in essence respondent acquired the business and assets of the corporations which were engaged in manufacturing and/or distributing ice cream products. These corporations were still operating when respondent entered into the agreement with the partnership, and the agreement specifically provided for the liquidation of the corporations and the ultimate purchase of their assets by respondent. The consideration paid by respondent was computed in contemplation of its acquiring the business and assets of the corporations.

3. In the year ending December 31, 1959, the net sales of Dothan Ice Cream Co., Inc., amounted to \$1,557,817. The net sales of the four Supreme Ice Cream Company distributing corporations, viz, Supreme

of Dothan, Panama City, Montgomery, and Pensacola, were approximately \$500,000 each. The sales of Melody Frozen Foods and Frostie-Boy Vending were approximately \$1300 and \$3500, respectively. The net income (by way of rents) of the partnership was \$148,000. The consolidated sales and income of the partnership and corporations was \$2,150,953 (CX 371-Z 70). The net profit of all the companies after taxes was \$69,275. The ice cream sales of the companies amounted to approximately 1,100,000 gallons annually (CX 371-Z 73).

4. Dothan Ice Cream Company, Inc., and its affiliated distributing companies sold ice cream in certain portions of the States of Alabama, Florida and Georgia. There is no indication in the record as to where the manufacturing corporation purchased its supply of raw milk and cream. However, respondent concedes that Dothan was engaged in interstate commerce by virtue of its sales of ice cream products (CX 371-Z 73; Findings, p. 106).

Market Conditions

5. Dothan Ice Cream Company, Inc., and its affiliated companies, distributed ice cream at wholesale in 17 counties in southeastern Alabama, in 9 counties in southwestern Georgia, and in 15 counties in northwestern Florida (CX 371-Z 64). Respondent did not sell ice cream or frozen dessert products in any portion of Dothan's distribution area (CX 371-Z 65). Its closest plant was at Nashville, Tennessee, and its distribution area in Alabama included the northern part of the State as far south as the Gadsden area. There were at least 19 companies distributing ice cream products, at wholesale, in various portions of the area served by Dothan and its affiliates (CX 371-Z 65). This included four so-called national companies, viz, National's Southern Dairies Division, Borden's Purity Ice Cream Division, Foremost Dairies, and Swift.

6. Complaint counsel contend that the area of effective competition relevant to the Dothan acquisitions is the entire area of distribution of the manufacturing company and its affiliates in the above-mentioned portions of Alabama, Georgia and Florida (Reply, p. 14). The only apparent explanation of why this is an appropriate market area is the fact that it is the area in which the acquired companies distributed. Respondent contends that the relevant market area is an area which it designates as "Market Area V" and which includes all of Alabama and Mississippi, and portions of Kentucky, Tennessee, Georgia and Florida (RX 82-E; Findings, pp. 103, 106). Respond-

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ent's position that this is an appropriate market area is based on the fact that "ice cream manufacturers distributing within that market area [are] independent of and unaffected by ice cream manufacturers located outside of that market" (Findings, p. 103).

7. While it may be, as respondent contends, that manufacturers outside of the area do not sell within it and that manufacturers within the area do not sell outside of it, this does not necessarily require the conclusion that the entire Six-State area is an appropriate market area. These facts merely delineate the outer limits of a broad regional area in which there is no possibility of competition between companies within and without the area. This does not, however, preclude a division of the area into smaller geographic units, based on separate groupings of companies which are engaged in substantial competition with one another and which do not substantially compete with other groupings of companies within the broad area. Respondent's graphic delineation of Area V (RX 81) discloses that there are separate groups of companies which distribute from different focal points within the area, that some companies distribute in only parts of the area and that none of the companies distribute throughout the area from any single distribution point. These facts are confirmed by the testimony of respondent's own witnesses.¹⁰⁸ Within the State of Alabama itself there are at least two different pricing patterns (R. 3627), which suggest that not even that State is a single market. The area proposed by complaint counsel, even though smaller than that proposed by respondent, likewise does not properly delineate the relevant market area. The fact that Dothan operated through different distributing companies and from separate distributing points within the area suggests that the entire area was not one homogeneous market area. A number of the companies with which Dothan competed sold in only portions of Dothan's overall territory.¹⁰⁹ In the absence of more definitive evidence concerning the distribution patterns of Dothan and its competitors, and as to the relative position of these companies within the area or areas within which they distributed, no finding can be made as to what comprises the relevant market or mar-

¹⁰⁸ Prior to its acquisition of Dothan, respondent distributed in only the northern part of Area V (R. 3629). The Dothan companies distributed only in the southern part of the territory. Even the large companies which distributed in most of the area did so from separate plants within the area (R. 3616-18).

¹⁰⁹ Of the companies listed as among Dothan's competitors (CX 371-Z 65), the testimony indicates that Kinnett Dairies, Wells Dairies and Brown Velvet sold in only portions of Dothan's territory (R. 3621, 3623). From the locations of their plants within the area, it seems likely that a number of the other independent ice cream companies sold in only portions of the territory.

kets applicable to the Dothan acquisition. It is clear, however, that neither Area V, as proposed by respondent, nor the entire distribution area of the Dothan companies, as proposed by complaint counsel, are appropriate market areas.

8. Complaint counsel offered no statistical evidence as to Dothan's market position within its distribution area (the market proposed by them) or in any portion thereof. The statistical evidence in the record relates mainly to Area V. Such evidence, which was offered by respondent, discloses that in 1950 (prior to its acquisition of Dothan) respondent accounted for 2.790% of the ice cream produced in Area V. In 1960 (after its acquisition of Dothan) respondent's production share in Area V was 5.794%. Of this share, 1.247% represented the production of the Dothan plant (RX 139-E). Contending that respondent's production share in Area V should be computed in terms of the portion of the area actually served by it, complaint counsel offered rebuttal evidence indicating that respondent's 1960 share of production in the portion of Area V served by it was 10.3%, as compared to 5.79% in the entire area (CX 432-D). While questioning the reliability of the statistical evidence introduced by complaint counsel, respondent offered surrebuttal evidence in terms of the portion of Area V served by the acquired company, rather than in terms of the area which it and the acquired company served.¹¹⁰ Such evidence discloses that respondent's 1960 share of production in Dothan's serving area was 4.72% (RX 165-C).

9. Since respondent's production share in Dothan's territory in the year following the acquisition was approximately 4.7% (a figure which complaint counsel accept as reasonably accurate), it seems apparent that Dothan's pre-acquisition market share in this territory could not have exceeded 5% of the area and was probably less.¹¹¹ It may be that in certain portions of its territory in southeastern Alabama, which may constitute a more appropriate market area than its entire

¹¹⁰ Unlike the statistical evidence introduced by respondent for Area V, in which the universe figure of production in the area is obtained from official U.S. Department of Agriculture sources, the universe figure used by complaint counsel is an estimated figure. Such estimated figure is computed on the assumption that the production in the area served by respondent bears the same ratio to the total production of the area as the population in such area bears to the population of the entire area. While questioning the correctness of such assumption, respondent's statistical evidence offered in surrebuttal is based on the same method, except that the percentage used is based on the population of the area served by Dothan rather than that of the entire area served by respondent.

¹¹¹ Respondent's 1960 production share of 4.7% is based on the production of 1,392,546 gallons in the Dothan plant. The evidence as to Dothan's pre-acquisition production in this plant is that it was of the order of magnitude of 1,100,000 gallons per year (CX 371-Z 73).

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serving area, Dothan's market share exceeded 5%. However, in the absence of evidence as to the proportion of Dothan's business done in the various portions of its territory and the total sales in the area, one can only speculate as to whether this would be so. The record is also lacking in evidence as to the extent of concentration in Dothan's serving area as a whole or at any particular portion thereof.

I. Dairyland Farms, Inc., and Valdair Creamery, Inc.

The Acquisition

1. Respondent acquired the business and certain of the assets of Dairyland Farms, Inc., an Alabama corporation, on March 1, 1961, pursuant to agreements dated January 10, 1961 (CX 391-A-Z 42). Included in the transaction were 680 shares of stock of Valdair Creamery, Inc., also an Alabama corporation (CX 391-K). The total consideration paid by respondent was \$581,211, plus a rental of \$990,000 for the leasing of certain real estate and equipment owned by Dairyland, for terms of 10 and 15 years (CX 391-R, Z 13, Z 29, Z 36). By a separate agreement of the same date respondent also acquired the business and assets of Valdair Creamery (CX 391-Z 54). Valdair had 2,000 shares of stock, of which 680 were owned by Dairyland, 120 were owned by three of Dairyland's stockholders, and 200 were owned by a member of the family which controlled Dairyland (CX 391-Z 63). The total consideration paid for Valdair's business and assets was \$425,000 (CX 391-Z 56).

2. Dairyland owned and operated a plant in Opelika, Alabama, in which it processed a general line of fluid milk products and manufactured ice cream. Valdair owned and operated a plant at Shawmut, Alabama, in which it processed fluid milk only. The fluid milk line of products was sold at both wholesale and retail home delivery, and the ice cream products were sold at wholesale only (CX 391-Z 87). Dairyland's net sales in 1958 and 1959 were in excess of \$2,350,000 and \$2,500,000, respectively. Its net profits before taxes were \$79,813 in 1958 and \$120,971 in 1959 (CX 391-Z). Its net sales for the first six months of 1960 were \$1,327,493, of which \$992,218 consisted of milk sales and \$335,274 consisted of ice cream sales (CX 391-Z 51). Its net profit before taxes for the six-month period was \$97,600. Valdair's net sales in 1958 and 1959 were in excess of \$800,000 and \$900,000, respectively (CX 391-Z 66). Its net income from sales in the year ending October 31, 1960, was \$1,050,443, with a net profit before taxes of \$68,729 (CX 391-Z 91).

3. The record does not indicate where Dairyland and Valdair obtained their supply of raw milk or other ingredients. However, both companies distributed fluid milk products and ice cream in at least three communities in western Georgia, as well as in a number of towns in eastern Alabama (CX 391-Z 89). Respondent concedes that they were engaged in interstate commerce (Findings, p. 144).

Market Conditions

4. As mentioned above, both companies distributed fluid milk products and ice cream in a number of communities in eastern Alabama and western Georgia. The Alabama communities included Opelika, Shawmut, Auburn, Alexander City, Tuskegee, Montgomery, Wetumpka and Phenix City. The Georgia communities consisted of West Point, La Grange and Hogansville (CX 391-Z 89). They did not distribute as far south as Dothan. Respondent did not distribute any fluid milk products in the territory of the acquired companies. However, it did sell ice cream, from its plant at Dothan (which it had acquired from Dothan Ice Cream Company in 1959), in several of the Alabama counties in which Dairyland distributed, viz, Elmore and Montgomery. There were at least 14 other dairy companies distributing dairy products in the territory served by Dairyland and Valdair, of which seven distributed milk or milk and ice cream, and six distributed ice cream only. These included three so-called national companies, viz, Foremost, National (Southern Dairies Division) and Borden (Purity Division). The first two companies mentioned distributed both milk and ice cream, while Borden distributed ice cream only (CX 391-Z 90).

5. The respective positions of the parties with respect to what constitutes the area of effective competition relevant to the Dairyland-Valdair acquisition are essentially the same as those heretofore discussed in connection with the Tro-Fe Dairy acquisition (p. 589, *supra*). Complaint counsel contend that the entire State of Alabama is the appropriate market area (Reply, p. 14), while respondent contends that the State is divisible into four market areas, with Dairyland falling into the "southeast market which includes the cities of Montgomery, Opelika, Dothan-Andalusia" (Findings, p. 142). As has been heretofore indicated in connection with the Tro-Fe acquisition, the record does not establish that the entire State is a single area of effective competition. Nor does the record establish that the entire southeastern regional area is the relevant market area. Dairyland did business in only the northern portion of this territory, viz, in the

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Opelika-Montgomery area. It did not operate in the southern half of the territory, viz, the Dothan-Andalusia area. Conversely, respondent's principal area of distribution was in the southern part of the territory around Dothan. It distributed no fluid milk products whatsoever in Dairyland's territory, and only "a relatively small amount of ice cream gallonage in the metropolitan area of Montgomery" where Dairyland also sold ice cream (CX 391-Z 90).¹¹² Such evidence as there is, suggests that in the fluid milk product line the southeastern Alabama area was divisible into at least two market areas at the time of the Dairyland acquisition, with the northern market including certain counties in western Georgia. The evidence also suggests the existence of a somewhat broader market in the ice cream product line. However, in the absence of more definitive evidence concerning the distribution patterns and sales volumes of the companies distributing in the area, no finding can be made concerning the relevant market or markets applicable to the Dairyland-Valdair acquisition.

6. As a practical matter, it is of little consequence whether the relevant market be considered to be all of southeastern Alabama, or a portion thereof, or a portion of southeastern Alabama and western Georgia, since there is no statistical evidence in the record on any basis from which Dairyland's market position and the extent of concentration in the area can be ascertained. As in the case of the Tro-Fe acquisition, the only statistical evidence in the record is that pertaining to the shipments of fluid milk by respondent and certain national companies in the State as a whole. Such evidence has heretofore been discussed and need not be repeated.

J. Louis Sherry, Inc.

The Acquisition

1. Respondent acquired the ice cream business and certain of the assets of Louis Sherry, Inc., a New York corporation, on March 1, 1955. The acquisition was made pursuant to an agreement entered into December 20, 1954, under which respondent acquired all of Sherry's assets and property used in the manufacture and distribution of ice cream and frozen desserts, except for its real property and cer-

¹¹² Complaint counsel contend that respondent "sold 1,353,833 gallons of frozen products produced at Dothan, in the seller's [Dairyland's] trade area" (Findings, p. 513). This contention is not supported by the record. The figure cited is that of respondent's sales in the entire territory served by its Dothan plant, consisting of 17 counties in southeastern Alabama, 9 counties in western Georgia and 15 counties in northwestern Florida. This area includes only 2 counties in Alabama where Dairyland sold frozen products (CX 391-Z 89, 92).

tain equipment consisting of ice cream cabinets and trucks (CX 25 A-Z 7). The agreement provided that the ice cream cabinets owned by Sherry would be sold to Anchor Equipment Rental Co., an Illinois corporation, and that its trucks would be sold to Transportation Service & Survey Corp., a New York corporation. The consideration paid by respondent for the assets which it acquired was \$440,379. The consideration paid by Anchor Equipment and by Transportation Service for the assets acquired by them was \$370,000 and \$75,000, respectively (CX 25-Q). Respondent guaranteed that in the event either Anchor or Transportation failed to make payment, it would do so. Respondent subsequently leased from these two companies the equipment acquired by them (R. 691). Simultaneously with the agreement between respondent and Sherry, respondent entered into another agreement with Childs Company, a New York corporation, of which Sherry was a wholly owned subsidiary. The agreement provided that Childs would purchase from respondent all of the requirements of ice cream for the chain of retail restaurants operated by it in the New York metropolitan area and in Pittsburgh, the duration of such commitment being for three years or until Childs had purchased a total of 300,000 gallons (CX 25-Z 45).

2. Sherry's net sales of ice cream and frozen desserts amounted to \$3,242,186 in the year ending December 31, 1953, and \$2,111,577 in the nine-month period ending September 30, 1954. It sustained a net loss on its operations, amounting to \$189,579 in 1953 and \$72,834 in the first nine months of 1954 (CX 25-Z 37). Sherry had current assets, as of September 30, 1954, amounting to \$538,885, and current liabilities of \$398,773 (CX 25-Z 33, 34). Sherry's gallonage sales of ice cream amounted to 900,000 gallons in 1953 and 700,000 gallons in the first ten months of 1954 (CX 25-Z 1). Respondent concedes that Sherry "was a viable independent company" (Findings, p. 105).

3. Sherry's plant was located in Long Island City, New York. It sold ice cream and other frozen desserts in the New York metropolitan area, including certain counties in northern New Jersey and southern Connecticut (CX 25-Z 41; R. 700-702). Respondent concedes that Sherry was "a corporation engaged in commerce" (Findings, p. 105). Respondent leased Sherry's plant for about a year and then consolidated its production with respondent's own plant in Brooklyn (R. 3580).

Market Conditions

4. As mentioned above, Sherry distributed ice cream and frozen desserts in the New York metropolitan area. Respondent sold frozen

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products in substantially the same area as that served by Sherry, except that respondent's territory covered certain additional counties in New Jersey which were not served by Sherry (CX 25-Z 56). While serving the same general area, respondent and Sherry sold different types of ice cream and catered to different types of customers. Sherry's ice cream was sold principally in bulk form under the "Louis Sherry" brand name. Its product was a "high grade catering type of ice cream that was expensively processed," and was typically sold to quality restaurants, drug stores, hotels and other so-called "prestige outlets" (R. 693, 3578; CX 25-K). It did not sell a "popular-price" package ice cream through supermarkets and similar outlets, as did respondent (R. 695). There were approximately 20 companies distributing ice cream in New York City, and approximately 100 in the overall area served by Sherry. A number of these were small companies or distributors for other manufacturers. Among the larger companies operating in the area were Borden and National Dairy (CX 16-Z 252, pp. 113-115; CX 25-Z 42; R. 3685-3690).

5. Complaint counsel contend that the market area relevant to the Louis Sherry acquisition is "the metropolitan New York City area" (Reply, p. 14). It is respondent's position that the appropriate market area consists of the "middle Atlantic States from Metropolitan New York to Norfolk," an area which respondent designates as "Market Areas III and IV," with Area III being the northern part of this coastal region and Area IV the southern part (Findings, p. 104). Respondent contends that the two areas may be considered as one area of effective competition because companies in the Philadelphia, southern New Jersey and Delaware area sell in both areas. However, respondent also recognizes that each area may be regarded as a separate market area. The basis of respondent's position that Areas III and IV, separately or together, are the appropriate market areas in which to consider the impact of the Louis Sherry acquisition is the fact that companies within these areas do not compete with companies doing business to the north, south and west of these areas.

6. Neither respondent's graphic delineation of the areas (CX 75, 80), nor the testimony of its witnesses, supports its position that Areas III or IV, separately or together, constitute appropriate market areas. Even the larger national companies within the area have separate plants and distribution points in the New York City metropolitan area and in the Philadelphia area, to say nothing of additional plants and distributing points further south in the Washington, D.C.-Baltimore area, and in the Richmond and Norfolk areas.

The independent companies serve only portions of Areas III and IV and, to the extent that they serve wider sections of such areas, they do so from separate plants or through independent distributors (RX 75, 80; R. 3572-76, 3528-32). It is the conclusion and finding of the examiner that the New York City metropolitan area is the appropriate market in which to weigh the probable competitive impact of the Louis Sherry acquisition. This is the area in which the acquired and acquiring companies competed and within which most of their important competitors distributed.

7. There is no statistical evidence in the record as to market shares in the New York metropolitan area, as such. However, the record does contain market share data for the somewhat smaller New York City area. Such data is for the year 1952, more than two years prior to the Sherry acquisition, but provides a basis for obtaining some approximation of the market position of respondent, Sherry and the other principal companies, within the New York City area. In 1952 respondent and Sherry accounted for approximately 4.7% and 3.4%, respectively, of the ice cream sold in the New York City area. The two largest factors in the New York City market were Borden and National Dairy with approximately 29.6% and 24.5%, respectively, of the area's ice cream sales. Respondent was the third ranking ice cream company in the market, and Sherry was tied for sixth place with Abbott Dairies, which was later acquired by Fairmont Foods.¹¹³

8. The record does not contain any evidence as to trends in market position in the New York City area since the acquisition of Louis Sherry by respondent. However, there is evidence of trend in terms of the larger market area designated as Market Area III by respondent, which extends from New York to the Philadelphia area. Such evidence reveals that in 1950, prior to the Sherry acquisition, respondent accounted for 1.44% of the ice cream sales in Area III and that in 1960, after the acquisition, respondent's share had increased to 3.50% (RX 139-C). The sales of the acquired company accounted

¹¹³ The above figures and references to market position, are based on CX 16-Z 252, pp. 112-115. As heretofore indicated (p. 31, footnote 20), this exhibit was prepared by respondent in connection with seeking approval of the Creameries acquisition. The figures of respondent's sales are based on its actual sales figures. However, the figures of all other companies are apparently based on estimates made by officials of respondent. While these figures do not purport to be precise, they are accepted, in the absence of countervailing evidence, as giving a reasonable approximation of the market position of these companies.

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for approximately .99% of the ice cream sold in Area III.¹¹⁴ From these figures it is apparent that while respondent's market share in Area III increased by approximately 2% between 1950 and 1960, approximately half of such increase represents the volume which it acquired from Sherry.

9. Since 1929 the so-called national companies have acquired approximately 30 companies selling milk and/or ice cream in the New York City area, including Long Island (CX 426-V, W). Of these, only three or four have been acquired since 1950 (CX 426-W, RX 161-J). The record does not contain data as to the decline, if any, in the number of plants manufacturing ice cream or processing milk in the New York City area. However, it does appear that in the area of New York State which includes New York City and seven counties immediately to the north, the number of independent companies producing a minimum of 250,000 gallons of ice cream a year has declined from 17 to 12 between 1951 and 1961 (RX 161-A, RX 82-C).

K. *Arden Farms Co. (Melvern-Fussell Division)*

The Acquisition

1. On June 1, 1960, respondent acquired the business and assets of the Melvern-Fussell Division of Arden Farms Co., a Delaware corporation. Arden Farms was a so-called national dairy company, having its headquarters in Los Angeles, California. The Melvern-Fussell Division had its headquarters in Alexandria, Virginia. Respondent acquired the Melvern-Fussell Division's wholesale ice cream and frozen dessert business, including its equipment, plant and real estate at Alexandria, Virginia, pursuant to an agreement dated May 19, 1960 (CX 376 A-F). The record does not disclose the total consideration paid for the business and assets of Melvern-Fussell, except that it was in excess of \$1,000,000. It included payment for (a) accounts receivable less a reserve for doubtful accounts (the amount thereof being \$192,816 as of May 31, 1960), (b) prepaid items such as taxes and insurance premiums (amounting to approximately \$27,000), (c) real estate and equipment (valued at approximately \$831,000), and (d) inventory at Melvern's cost (CX 376 A-C, G-H). The acquisition included Arden's trade names in the Alexandria area, including "Melvern," "Fussell" and "Supreme," but excluding the name and mark "Arden" (CX 376-A).

¹¹⁴ The record does not contain Sherry's 1950 gallonage sales. The above percentage is computed by comparing Sherry's 1953 volume of approximately 900,000 gallons with the total gallonage of Area III, based on U.S.D.A. figures for 1950.

2. The Melvern-Fussell Division manufactured and distributed a full line of ice cream and other frozen products, including ice milk, ice dessert and sherbet. In the calendar year 1959 it sold 1,580,200 gallons of frozen products. Its net dollar sales in that year amounted to \$2,382,833, on which it sustained a loss of \$64,922 (CX 376-L). It likewise sustained losses in the two previous years, 1957 and 1958, amounting to \$104,760 and \$81,096, respectively. In the first five months of 1960, preceding its acquisition by respondent, the Division lost \$66,971 on net sales amounting to \$870,577. The Division had operated at a loss each year that it was in business (CX 376-N).

3. Arden entered the Washington, D.C. metropolitan area in December 1951, when it acquired Fussell-Young Ice Cream Co. (CX 335-A).¹¹⁵ Shortly thereafter, in March 1952, Arden opened a new plant in Alexandria, Virginia, which it built at a cost of approximately \$1,000,000. The plant was designed to manufacture a product known as "Diced Cream" (ice cream packaged in small, individual portions), which Arden had marketed successfully in its principal operation on the West Coast (R. 3544, 3556). However, it was unable to generate enough volume with the sale of diced cream alone to justify its heavy plant expenditure, and decided to expand its operation to a full line of ice cream products. Consequently, it undertook plant modification around 1954, at an additional cost of \$250,000 (R. 3557-8, 3560-1). The plant, nevertheless, continued to operate at a loss, and beginning around 1956 Arden approached a number of dairy companies with a view to disposing of the plant so it could retire from the area (R. 3559). These efforts finally culminated in the sale to respondent in May 1960.

4. Respondent's interest in buying Arden's Alexandria plant and business arose from the fact that it was having difficulty in complying with the health laws at its own plant in Washington, D.C. The plant had been operated for over 30 years in an old building, which had been originally built as a brewery in the late nineteenth century. Complaints had been received from the District of Columbia Health Department, and the plant had been de-certified as a supplier of frozen products to the United States Armed Forces. Because of its age and type of construction, it was not considered practicable to remodel the plant, and respondent decided to close it in the spring of

¹¹⁵ Fussell-Young's address erroneously appears in the exhibit as "Georgetown, Maryland." The company was actually located in the Georgetown section of the District of Columbia (CX 409).

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1960 (R. 3536, 3302-3).¹¹⁶ It was at this point that the decision to purchase the Arden plant was made. After the purchase of the plant in Alexandria respondent sold its Washington, D.C. plant and moved its entire operation in the area over to the Alexandria plant. Prior to its acquisition of the Arden plant, respondent had been losing money in its Washington, D.C. operation. Thus, in the fiscal years ending February 28, 1958, 1959 and 1960, it had lost approximately \$7,000, \$49,000 and \$9,000, respectively, on sales of around \$2,000,000 (CX 393-395).

Market Conditions

5. Arden's Melvern-Fussell Division distributed ice cream and frozen dessert products in the District of Columbia and certain portions of Virginia, West Virginia, Maryland and Pennsylvania (CX 376-I). In Virginia it sold in 23 counties, which were mainly within an area of approximately 75 miles from Washington, D.C., but also included several counties in the Norfolk and Richmond areas. In Maryland, it distributed in a four-county area, located within approximately 65 miles of Washington, D.C. In West Virginia, it distributed in two counties located in the eastern part of the State, approximately 65 miles from Washington, D.C. In Pennsylvania, it supplied the stores of a single customer located in several communities in the southern part of the State just north of the Maryland line. Respondent's area of distribution from its Washington, D.C. plant included most of the areas served by Melvern-Fussell, except for southern Pennsylvania, and also included several counties in Delaware not served by Melvern-Fussell (CX 376-P). There were approximately 40 other companies distributing ice cream and frozen products in some or all of the areas in which respondent and Melvern-Fussell sold (CX 376-J). Included among the competitors were six other so-called national companies, viz, National Dairy, Borden, Pet, Foremost, Fairmont and Swift. However, there were only about 10 companies selling ice cream at wholesale in the immediate Washington, D.C. area. As of 1958, National Dairy and Borden were the only other so-called national companies distributing in the Washington, D.C. area.

6. Complaint counsel contend that the market area relevant to the Melvern-Fussell acquisition is the "metropolitan Washington, D.C.

¹¹⁶ Respondent also had a plant in Baltimore. However, it was engaged principally in the manufacture of ice cream novelties, and because of the location of the plant it was not considered feasible to transfer the manufacture of ice cream from Washington, D.C., to Baltimore (R. 3543, 3304).

area" (Reply, p. 15). Respondent contends that the proper market in which to measure the significance of the acquisition is an area which it describes as "Market Area IV," or a combination of this area and "Market Area III" (Findings, p. 104), which has been previously discussed in connection with the Louis Sherry acquisition (p. 602, *supra*). Market Area III extends from New York City south to the District of Columbia and Area IV extends from Philadelphia to Norfolk, with the area between Washington, D.C. and Philadelphia being included in both areas (RX 75; RX 80). It is the conclusion and finding of the examiner that the metropolitan area of Washington, D.C. is the appropriate area of effective competition. Companies selling north of this area, *e.g.*, in the Philadelphia area, generally do so from separate plants or branches than those from which they distribute in the Washington area. Those selling south of the area generally do so from plants and branches which do not distribute in the Washington, D.C. area. Many of the companies selling in Areas III or IV distribute in only portions of these areas and, in particular, do not sell in the Washington, D.C. metropolitan area, which was the heart of the territory served by Melvern-Fussell's and respondent's Washington-area plants.

7. The only market share data in the record for the Washington, D.C. area are for the year 1952, about eight years prior to the Melvern-Fussell acquisition. It is not clear whether such data include sales for the entire Washington metropolitan area or for only the District of Columbia and its immediate environs. However, it does provide some basis for obtaining an approximation of the market position of the various companies as of 1952. In that year respondent accounted for 22.9% of frozen product sales in Washington, D.C., and Arden (then selling as Fussell-Young) accounted for 5.3% (CX 16-Z 252, pp. 118-120).¹¹⁷ Another company, Melvern Dairies, which Arden later acquired in July 1953 (CX 335-A), accounted for 13.4% of Washington area frozen product sales. The company with the largest share of the Washington, D.C. market in 1952 was National Dairy, whose Southern Dairies and Breyer Divisions together accounted for 43.8% of frozen product sales in Washington, D.C.

8. While the above figures indicate that respondent and the two companies which became Arden's Melvern-Fussell Division, together, accounted for approximately 40% of Washington area sales in 1952, it is by no means clear that they were able to maintain this position up

¹¹⁷ As heretofore indicated (footnote 20), the figures in CX 16-Z 252 of the companies other than respondent are based on estimates of sales.

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to the time that the acquisition by respondent took place, approximately eight years later. Thus, the record indicates that the ice cream sales of respondent's Washington plant declined from 1,278,974 gallons in 1952 to 1,143,422 gallons in 1959 (CX 288, 394). Similarly, the record discloses that whereas respondent's share of the production of frozen desserts in Washington, D.C. was 18.0% in 1952 and increased to 24.5% in 1954, by 1957 it had declined to 16.9% (CX 456-H). In 1958 respondent accounted for only 11.1% of the value of shipments of frozen desserts in the District of Columbia (CX 425-D). These figures suggest that respondent had sustained a substantial decline in its relative market position in the Washington area between 1952 and 1958, just prior to the Melvern-Fussell acquisition. As above mentioned, there is no indication in the record as to whether Arden was able to maintain Fussell-Young's and Melvern Dairies' market position in the Washington area.

9. In terms of the market which respondent contends is the most appropriate area of effective competition, viz, Market Area IV (the area between Philadelphia and Norfolk), the record discloses that in 1950 respondent accounted for 3.18% of the ice cream production in the area, and that in 1960 its share had increased to 4.38% (RX 139-D). Melvern-Fussell's share of 1960 production in Area IV was 1.77%.¹¹⁸ From these figures it is apparent that, but for its acquisition of Melvern-Fussell, respondent's relative position in Area IV would have declined between 1950 and 1960, since its increase of 1.20% during this period was less than the share it acquired from Melvern-Fussell.

10. The record discloses that there were approximately six acquisitions of companies distributing milk or ice cream in the Washington area since 1929, by the so-called national companies (CX 426-C; CX 335-A). Of these, three were acquired since 1950. The three companies essentially involve two companies which were in existence prior to 1950, viz, Melvern Dairies and Fussell-Young which were acquired by Arden Farms, and the combined operation which respondent acquired from Arden in 1960.

L. Durham Dairy Products, Inc.

The Acquisition

1. Respondent acquired all of the issued and outstanding capital stock of Durham Dairy Products, Incorporated, a North Carolina

¹¹⁸ Melvern-Fussell's share is computed by comparing its 1959 volume (the latest figure available) with the official figures of the U.S.D.A. for 1960. This is the method used by respondent (Findings, p. 107).

corporation, on March 1, 1953, pursuant to an agreement dated February 27, 1953 (CX 14 A-D). The consideration paid for Durham's stock was 8,646 shares of respondent's common stock, which were capitalized at \$309,805 (CX 144, p. 1). Durham's total assets as of August 31, 1952, were \$455,624, and its total liabilities were \$179,239 (CX 14-E). Its net worth as of the time of the acquisition was certified to be not less than \$276,385 (CX 14-B).

2. Durham Dairy's plant was located at Durham, North Carolina, where it processed and distributed a full line of fluid milk and related products, at wholesale and retail, and also manufactured and distributed ice cream at wholesale. It operated 18 retail milk routes, 6 wholesale milk routes and 3 ice cream routes. It also operated 3 retail dairy stores, which were located in Durham, Chapel Hill and Roxboro (CX 144, p. 10). Durham Dairy's total net sales for the fiscal year ending August 31, 1952, were \$1,544,789, of which \$1,180,968 represented sales of fluid milk products and \$363,821 consisted of sales of ice cream (CX 14-F).

3. Durham Dairy received its supply of raw milk from producers located within a radius of 75 miles of its plant at Durham (CX 14-H), which was located approximately 50 miles from the Virginia State line. Some of Durham's raw milk supply was received from producers in Virginia (R. 677). Durham also purchased dairy products from suppliers in Staunton, Virginia, and Louisville, Kentucky (CX 133-A). Durham's sales were made principally in the State of North Carolina (CX 14-H). However, its sales territory also included one town in southern Virginia (CX 14-Q; R. 680).

Market Conditions

4. Durham Dairy's sales were made principally within a five-county area in north central North Carolina centered around Durham. Its territory included the city and county of Durham; Orange County which is located to the west of Durham and in which the principal towns served were Hillsboro and Chapel Hill; Person County lying to the north of Durham, in which the principal town served was Roxboro; Granville County lying to the northeast of Durham; and part of Chatham County lying southwest of Durham (CX 14-Q, H). Although located only 23 miles from Raleigh, Durham Dairy did not sell in Raleigh. Respondent did not distribute any dairy products in Durham's territory. Its closest plant was located at Norfolk, Virginia (185 miles from Durham), from which respondent distributed butter and ice cream, but not fluid milk. It was not

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then engaged in processing and distributing fluid milk in Virginia, North Carolina, Tennessee or South Carolina (CX 14-O). There were 11 other dairy companies distributing milk and/or ice cream in Durham's territory, plus 5 soft ice cream stands which were generally open about six months during the year (CX 14-P, Q). Included among Durham's competitors were three so-called national companies, viz, National Dairy's Southern Dairies Division, Borden and Pet Milk. The latter two companies distributed only ice cream in the territory.

5. Complaint counsel contend that the geographic market area relevant to the Durham Dairy acquisition is the 5-county area in which Durham distributed (Reply, p. 14). Respondent has not proposed any specific area as being the appropriate area of effective competition. Based on the evidence as to the companies which distributed within Durham's sales area, and in the absence of any countervailing evidence, it is the conclusion and finding of the examiner that Durham's distribution area is an appropriate geographic area in which to weigh the competitive impact of the acquisition here under consideration.

6. Of the six companies distributing fluid milk and other milk products in its territory, Durham Dairy was the second ranking company and accounted for 30.5% of such sales. The first ranking company was another Durham-based independent company with 50% of the area's milk sales, and the third ranking company was an independent company having its plant in Raleigh, with 11.7% of the area's sales. The only national company selling milk in the territory was the Southern Dairies Division of National Dairy, which accounted for only 1.8% of the area's milk sales. Of the approximately ten companies selling ice cream products in its area, Durham was the first ranking company with 25.4% of the area's ice cream sales. The second ranking company was another independent company (having its plant in Raleigh), which accounted for approximately 16% of the market. National Dairy's Southern Dairies Division was the third ranking company, with approximately 15.5% of the market. The other two so-called national companies were the fourth and fifth ranking companies, with approximately 8.6% and 7%, respectively, of the market (CX 14-P).

Other Acquisitions

7. In addition to its acquisition of Durham Dairy, respondent also acquired another dairy in the same area. On June 1, 1954, it acquired Durham Road Dairy of Chapel Hill. The consideration

paid for the acquisition was \$40,000, plus a one-year lease of Durham Road's plant for \$1,200 (CX 97 A-C). Durham Road accounted for approximately 4.2% of the milk sales in the territory served by Durham Dairy (CX 14-P). Durham Road was a partnership, and complaint counsel concede that the record does not establish its engagement in interstate commerce (Findings, p. 496). Another North Carolina acquisition made by respondent, but not in the Durham area, was Mitchell Dairy of Fayetteville. Mitchell had been a distributor for respondent and was acquired in April 1957 for approximately \$4,100 (CX 310-C). Mitchell was a partnership, and complaint counsel concede that the record fails to establish its engagement in commerce.

8. Since 1929, the so-called national companies have acquired approximately 33 companies selling milk and/or ice cream in North Carolina. Of these, six have been acquired since 1950. Only three of the acquisitions were made by respondent, all having been made since 1950 (CX 426 E-F).

9. The number of plants processing fluid milk in North Carolina has declined from 264 to 89 between 1951 and 1961 (CX 409, 412). All of the plants which have ceased operating had a volume of under 800 gallons a day or were in the "no volume listed" category. (See p. 496, *supra*.) The number of independent companies in North Carolina processing a minimum of 1,600 gallons daily has increased from 15 to 17 between 1953 and 1961 (RX 161-F). The number of plants manufacturing ice cream in North Carolina has declined from 67 to 45 between 1951 and 1961 (CX 409, 412). With one exception, all of the 12 plants which have ceased operating had a volume under 250,000 gallons annually or were in the "no volume reported" category. (See p. 499, *supra*.) The number of independent companies manufacturing a minimum of 250,000 gallons annually has increased from 7 to 11 between 1950 and 1960 (RX 161-C).

State "Market" Shares

10. In 1950 four so-called national companies (National Dairy, Borden, Pet Milk and Foremost) accounted for 35.4% of the frozen dessert production in North Carolina (CX 456-I). In 1957 five national companies (respondent having by that time entered the ranks of the national companies doing business in North Carolina) accounted for 46.5% of North Carolina production of frozen desserts. National Dairy, with 29.2%, had the largest production share, and respondent with 1.0% had the smallest share. Respondent's 1957 share represented a decline from its share of 1.2% in 1953 when it

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first entered the State. The only statistical evidence of State "market" shares in the fluid milk product line is for the year 1958, and is in terms of the value of shipments of that product. In that year, five national companies (National Dairy, Foremost, Pet, Borden and respondent) accounted for 41.6% of the value of shipments of fluid milk in North Carolina (CX 425-F). National Dairy had the largest share with 30.4%, and none of the other companies exceeded 4.0%, with respondent having the smallest share, viz, 2.1%.

M. Westerville Creamery Company

The Acquisition

1. On June 1, 1961, respondent acquired all of the assets and business of Westerville Creamery Company, an Ohio corporation, and Westerville's wholly owned subsidiaries, The Pestel Milk Co. and Belle Center Creamery Co., pursuant to an agreement dated May 20, 1960 (CX 389 A-Q). The consideration paid for the acquisition was 72,000 shares of respondent's common stock, which was then selling at approximately \$58.00 a share, making a total consideration of approximately \$4,175,000. Westerville's total assets, as of December 30, 1960, were \$4,256,000 and its net worth was \$3,565,516 (CX 389-Z 9).

2. Westerville's main plant was located at Covington, Ohio (approximately 20 miles north of Dayton), where it manufactured milk products, including evaporated milk in cans, condensed milk and powdered milk. It had another plant at Westerville, Ohio (approximately ten miles north of Columbus), where it processed fluid milk. It had a third small plant at Delaware (approximately 25 miles north of Columbus), where it manufactured ice cream (CX 389-Z 6). Westerville's total net sales in 1960 amounted to \$13,820,413, and its net income after federal taxes was \$311,748 (CX 398-Z 8). The record contains no breakdown of Westerville's sales on a dollar basis, as between the different product lines handled by it. However, it does appear that its fluid milk and ice cream sales represented "less than 25%" of its dollar sales (CX 398-Z 11). The record also discloses that, on a gallonage basis, Westerville processed 50,000 gallons of fluid milk per week and 75,000 gallons of frozen products per year (CX 389-Z 10).

3. Westerville purchased no raw milk or cream from sources located outside the State of Ohio (CX 389-Z 10). Its sales of fluid milk and ice cream were made entirely within the State of Ohio (CX 389-Z 6). However, its evaporated milk and other concentrated milk products were distributed in much of the eastern United States.

Respondent concedes that Westerville was engaged in interstate commerce in the sale of evaporated and powdered milk products (Findings, p. 181).

Market Conditions

4. Westerville distributed its fluid milk product line in an area consisting of all or portions of the following Ohio counties: Morrow, Delaware, Union, Franklin, Marion and Pickaway (CX 389-Z 6). Essentially, this area includes the city of Columbus (which is in Franklin County) and certain counties lying north of it (except for Pickaway County which is south of Columbus). Westerville distributed ice cream only in Delaware County, where its ice cream plant was located. As mentioned above, Westerville's evaporated milk and other concentrated milk products were sold in much of the Eastern United States. Respondent did not sell fluid milk or ice cream in any of the areas served by Westerville, its closest plant being located at Dayton (approximately 70 miles west of Columbus). However, there were at least 14 other companies selling milk and/or ice cream in various portions of Westerville's territory. The only so-called national company included among its competitors was Borden (CX 389-Z 7). Prior to the acquisition, respondent did not compete with Westerville in the evaporated milk product line since it had never before been engaged in manufacturing this product, the Westerville acquisition representing its initial entry into the business of manufacturing and packaging evaporated milk (CX 389-Z 11).

5. Complaint counsel contend that the Columbus, Ohio metropolitan area, including the counties above mentioned, is the appropriate market area in the fluid milk product line (Findings, p. 14). Respondent has proposed no market area with respect to the Westerville acquisition. It is the conclusion and findings of the examiner that the area proposed by complaint counsel, which is essentially Westerville's distribution area, is an appropriate market area in which to consider the acquisition. There are no precise market share data in the record, based on actual sales in this area. However, based on an estimate of the fluid milk consumed in Westerville's distribution area, it is possible to obtain some approximation of Westerville's market position in the fluid milk product line. Such evidence reveals that Westerville's market share was in the order of magnitude of 8% (CX 446).¹¹⁹ The record contains no market share data with

¹¹⁹ As in a number of other instances previously discussed, the universe figure, on which Westerville's market share is computed, has been obtained by multiplying the area's population by the per capita consumption, as revealed by U.S.D.A. figures. Westerville's sales are derived from its approximate gallonage sales (CX 389-Z 10).

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respect to any of the other companies operating in the area or any indication of the extent of concentration.

6. Complaint counsel have proposed no market area with respect to the ice cream product line, and the record contains no market share data concerning this product line. In the evaporated and condensed milk product line complaint counsel have proposed the "eastern United States" as the appropriate market area (Findings, p. 14). However, there are no market share data in the record for this market area. The only statistical evidence in the record with respect to this product line is for the United States as a whole, and indicates that in 1958 the four largest companies (not identified in the record) accounted for 50% of the value of shipments of concentrated milk products (including evaporated and condensed milk) in the United States (CX 424, p. 11). This represents a decline from the 1954 "market" share of 55% for the four largest companies. Since respondent was not engaged in this product line prior to 1961, it is clear that it was not among the ranks of the "big four." Nor is any claim made that Westerville ranked among the top four companies. On the contrary, it is clear that Westerville did not even rank among the 50 largest companies and that it was one of the smaller factors in the industry.¹²⁰

Other Ohio Acquisitions

7. Since 1950 respondent has acquired 11 other dairy companies in Ohio, in addition to Westerville Creamery. With a few exceptions these were small companies, which were not corporations and as to which it is conceded there is no proof of interstate commerce. The noncorporate acquisitions include: (a) Claggett Dairy of Newark, which was acquired in March 1951 for \$16,000, and was a distributor of respondent's milk products (CX 48); (b) Duncan Dairy of Conesville, which was acquired in October 1951 for \$1,400, and had one milk route (CX 64); (c) Norwalk Pure Milk Co. of Norwalk, which was acquired in May 1952 for \$18,000, had total sales of approximately \$163,000 and was operating at a loss (CX 4); (d) Dayton Ice Cream Co. of Dayton, which was acquired in November 1952 for approximately \$20,000 and had sales of approximately 35,000 gallons of ice cream annually and 100 gallons of milk daily (CX 9); (e) Dunmyer Dairy of Lindsey, which was acquired in

¹²⁰ The total value of shipments of all 149 companies in the concentrated milk industry in 1958 was \$769,552,000, with the top four companies accounting for annual shipments averaging approximately \$96,000,000 each and the top 50 companies accounting for annual shipments averaging approximately \$14,000,000 each. Westerville's total sales of concentrated milk products (which represented 75% of its sales) were approximately \$10,000,000 in 1961.

June 1954 for \$50,000 and had milk sales of approximately 1,200 gallons per day (CX 98); and (f) Spring Grove Dairy of Greenfield, which was acquired in January 1956 for approximately \$8,000 and sold approximately 5,000 gallons of ice cream annually (CX 126; R. 830). It is conceded that the record fails to establish that any of the foregoing noncorporate companies was engaged in interstate commerce.

8. With one exception, the Ohio corporations acquired by respondent were likewise relatively small companies. These include: (a) Gray & White of Tiffin, which was in the butter, eggs and poultry business and was acquired in April 1953 for \$20,000 (CX 15); (b) Linton & Linton, Inc. of Wilmington, whose ice cream business was acquired in October 1953 for \$20,000, and had annual sales of approximately 40,000 gallons (CX 13; R. 777); (c) Grocer's Dairy, Inc., of Dayton, which was acquired in January 1956 for \$65,000 and sold approximately 63,000 gallons of ice cream annually and 750 gallons of milk daily (CX 39); Smith Kool Dairy of Bucyrus, which was acquired in April 1960 for less than \$20,000 and sold approximately 14,000 gallons of milk a month (CX 374); and (e) Lindner Ice Cream Co. of Norwood, which was the only sizeable acquisition and will be hereinafter separately discussed. Complaint counsel concede that the record fails to establish engagement in interstate commerce by Grocer's Dairy and Smith Kool Dairy. The only evidence of interstate commerce as to Linton & Linton is that it purchased some bottled milk from respondent's Cincinnati plant which, in turn, received its raw milk from a milk shed extending into Kentucky. The record contains no evidence as to Linton & Linton's market position in any relevant market. Respondent sold some ice cream in Linton & Linton's distribution area (R. 779), but the record does not disclose its market position in the area. The only evidence of interstate commerce concerning Gray & White is that it may have distributed some indeterminate amount of its products into Pennsylvania (CX 15-O). The only market share data pertaining to it is that its sales of butter amounted to approximately 5% of the butter consumed in the northern Ohio area in 1952 (CX 15-Q). Respondent did not sell any butter in Gray & White's territory (CX 15-K).

9. Since 1928 the so-called national companies have acquired approximately 180 dairy companies in Ohio, of which approximately 21 were acquired after 1950. Most of the companies acquired were very small operators. In over 100 of the transactions the consideration paid was less than \$10,000, and in over 60 it was under \$5,000 (CX 426-Z 19-25).

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10. The number of plants processing fluid milk in Ohio declined from 778 in 1951 to 313 in 1961 (CX 409, 412). Of the plants which have ceased operating, 434 had a volume under 800 gallons daily or were in the "no volume listed" category. (See p. 496, *supra*.) The number of independent companies in Ohio processing a minimum of 1,600 gallons of milk per day has increased from 56 to 75 between 1953 and 1961 (RX 161-E). The number of plants manufacturing ice cream in Ohio has declined from 291 in 1951 to 200 in 1961 (CX 409, 412). All of the plants which have ceased operating had a volume of under 250,000 gallons annually or were in the "no volume reported" category. (See p. 499, *supra*.) The number of independent companies in Ohio producing a minimum of 250,000 gallons of ice cream annually has increased from 18 to 22 between 1950 and 1961 (RX 161-C).

State "Market" Shares

11. While, as in a number of the other areas heretofore discussed, the State is not an appropriate market area as such, market share data in terms of the entire State do provide a useful background in which to gauge the probable impact of acquisitions made in particular market areas within the State. Thus, it appears that in 1958 respondent accounted for 3.9% of the value of shipments of fluid milk in Ohio and 2.8% of the value of shipments of frozen desserts. In that year, the four national companies selling milk in Ohio accounted for 32.0% of the value of shipments of fluid milk, with the two largest, National Dairy and Borden accounting for 14.0% and 12.2% respectively. The five national companies selling frozen desserts in Ohio accounted for 37.7% of the value of shipments of frozen desserts in 1958, with Borden accounting for 19.5% and National Dairy accounting for 12.4% (CX 425-D, F). The record does not afford a basis for comparing the 1958 standing of the above companies with any earlier period, in terms of value of shipments, so as to permit a determination of the trend in market shares. However, in terms of the production of frozen desserts within the State, the record discloses that respondent's 1957 production share of 1.9% represented a decline from its 1950 share of 2.4%. The production share of the national companies, as a group, likewise declined from 38.2% in 1950 to 32.6% in 1957 (CX 456-D).

N. Lindner Ice Cream Company

The Acquisition

1. As previously mentioned, Lindner Ice Cream Company is the only sizeable Ohio company acquired by respondent other than

Westerville. Respondent acquired the business and assets of Lindner Ice Cream Company, an Ohio corporation, on June 2, 1956, pursuant to an agreement dated May 31, 1956 (CX 44 A-D). The consideration paid was \$196,800, plus payment for accounts receivable at book value and certain inventory items at cost. The acquisition did not include Lindner's real estate, certain items of personal property and six retail stores operated by it. Lindner's total assets, as of March 31, 1956, were \$284,954. Its current assets were \$106,619 and its current liabilities were \$52,975 (CX 44-I).

2. Lindner operated a plant at Norwood, Ohio, for the manufacture and sale of ice cream and other frozen desserts. Its net sales for the year ending March 31, 1956 were \$481,501, on which it had net earnings after taxes of \$9,058 (CX 44-J). Its annual gallonage sales were 318,329 gallons of ice cream and frozen dessert products (CX 44-C). Lindner had about 175 to 180 customers, some of which were located across the Ohio River in the State of Kentucky (R. 810-12). Respondent concedes in its answer that Lindner was engaged in commerce.

Market Conditions

3. Lindner distributed its frozen products within an area of approximately 13 miles from its plant at Norwood, a community located less than ten miles from Cincinnati. Lindner's distribution area included Cincinnati (CX 44-H). Respondent operated a plant in Cincinnati, from which it distributed frozen products in competition with Lindner. Respondent's distribution area was, however, considerably broader than Lindner's, including not only the city of Cincinnati and Hamilton County (in which the city is located), but seven other counties in southwestern Ohio, 20 counties lying south of Cincinnati in northern Kentucky, and eight counties lying west of Cincinnati in southeastern Indiana (CX 44-L). There were 22 companies distributing frozen products in Lindner's territory. In addition to respondent, the other so-called national companies doing business in the area included Borden, Swift and National Dairy's Frechtling Division.

4. Complaint counsel have not proposed any specific area as being the relevant geographic market (Findings, p. 375). However, since the market share statistics cited by them are in terms of Cincinnati and Hamilton County, it is assumed that they regard this as the appropriate area of effective competition. Respondent's position concerning the appropriate geographic market is likewise not clear (Findings, p. 180). However, it apparently contends that the Lindner acquisition falls within an area which it describes as "Market Area

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II" and which includes the entire States of Ohio, Indiana, and West Virginia, and certain counties in the States of Kentucky, Tennessee, Virginia and Pennsylvania (Findings, pp. 9, 76; RX 82-B, RX 74). As in the case of other such multi-state markets, proposed by respondent, which have been previously discussed, respondent's position that this is the appropriate market is based on the fact that the ice cream manufacturers in the area do not compete with those in the other broad regional areas. This does not, however, preclude a division of the broad regional area into smaller geographic units which conform to the distribution patterns of the companies which actually compete with one another. In the absence of more definitive evidence as to the distribution patterns of the companies doing business in the area in which Lindner and respondent distributed, the metes and bounds of the relevant geographic market area cannot be defined with precision. However, it is clear that it includes at least the city of Cincinnati and Hamilton County, within which both Lindner and respondent distributed, which is the only market for which the record contains any sales statistics.

5. While, as above stated, the market share data in the record pertain to the Cincinnati area, such data are for the year 1952, approximately four years prior to respondent's acquisition of Lindner. In 1952 respondent accounted for approximately 8.3% of the ice cream sold in the Cincinnati market, and Lindner accounted for approximately 5.8% (CX 16-Z 252, pp. 121-124).¹²¹ The company with the largest share of the Cincinnati market in 1952 was National Dairy, which accounted for approximately 23.3% of the area's sales. The company with the second largest share was an independent company, French-Bauer, with approximately 20.4% of the market. Swift was the third ranking company, with approximately 8.7% of the market. There is no evidence that Borden was then doing business in the Cincinnati area.

6. There is nothing in the record to indicate what respondent's and Lindner's market shares in the Cincinnati market were in 1956, when the acquisition took place, nor as to the extent of concentration in the market at that time. Complaint counsel refer to the fact that respondent's sales from its Cincinnati plant in 1956 were \$872,234 (CX 44-L), compared to Lindner's sales of \$488,610. However, this

¹²¹ As heretofore noted, the figures included in CX 16-Z 252 are estimated, except for respondent's own sales. To the extent that respondent's market share percentage is computed from a universe figure which is estimated, it too is not precise.

was for respondent's entire distribution area in Ohio, Kentucky and Indiana which is considerably broader than the Cincinnati market.¹²² In any event, there is no universe figure in the record for 1956, from which either respondent's or Lindner's share of the market can be computed.

7. Respondent operated Lindner's plant as a separate plant until October 1956, when it moved Lindner's equipment to its own plant in Cincinnati and consolidated the two operations. Following the acquisition, respondent lost some of the accounts which Lindner had served and was able to retain approximately 60% of Lindner's original volume (R. 811). Complaint counsel note that in 1957, following the acquisition, the sales of respondent's Cincinnati plant increased by 35%. However, if respondent had been able to retain Lindner's entire volume, its sales would have increased by 55%.¹²³ Complaint counsel further contend that the number of companies selling ice cream in the Cincinnati area between 1952 and 1956 declined by 19. This contention is erroneous since the record establishes that the number of companies distributing ice cream actually increased from 20 to 23 during this period.¹²⁴ With Lindner's acquisition, the number of ice cream companies presumably declined to 22.

8. In terms of the market which respondent contends is the appropriate market area, viz, Market Area II, the record discloses that respondent's share of the production of ice cream in this area increased from 4.06% in 1950 to 6.34% in 1960 (RX 139-B). During this period, respondent acquired not only Lindner, but Clover Dairy (in southwestern Virginia) and Kentucky Ice Cream Company, as well as a number of other smaller ice cream companies lying within Area II. If not for the volume acquired from Clover Dairy and Kentucky Ice Cream, respondent's 1960 share of production in Area II would have been 4.22%, which would represent an increase of only .15% between 1950 and 1960.

¹²² In 1952 respondent's total ice cream sales from its Cincinnati plant were \$798,807 (CX 288), of which \$329,615 was attributable to the Cincinnati area (CX 16-Z 252, p. 122). There is no indication in the record of the proportion of respondent's 1956 sales of \$872,234 (CX 292), which represents sales in the Cincinnati area.

¹²³ In the year prior to the acquisition, respondent's sales were \$878,234 and Lindner's were \$481,501 (CX 44-J, 11). In 1957 respondent's total sales from its Cincinnati operation were \$1,184,871 (CX 293). If it had been able to retain Lindner's volume, its sales would have been \$1,386,733.

¹²⁴ According to CX 16-Z 252, p. 122, there were 20 companies selling ice cream in Cincinnati in 1952. According to CX 44-K, in 1956 there were 22 companies selling in the area, in addition to Lindner. Complaint counsel apparently rely on CX 16-Z 252, p. 125, which is a list of companies distributing *butter*. There is no data in the record for 1956, with which to compare the list of butter companies in 1952. Such a comparison would be irrelevant, in any event, since Lindner was not in the butter business.

*O. Community Creamery**The Acquisition*

1. Respondent acquired the business and certain of the assets of Community Creamery, a Montana corporation, on April 1, 1960, pursuant to an agreement dated March 10, 1960 (CX 373 A-Q). The consideration paid was \$372,276. The transaction also involved the leasing by respondent of the real estate and certain of the equipment used by Community in its business, for a term of 18 years, at a total rental of \$1,604,000 (CX 373 R-Z 19). By a supplemental agreement dated March 25, 1960, respondent also purchased Community Creamery's 50% stock interest in Community Creamery Transport, also a Montana corporation, for the book value of such stock, plus \$22,500 (CX 373-Z 31). Community Creamery's current assets, as of March 31, 1959, were \$758,454, and its current liabilities were \$140,103 (CX 373-Z 39).

2. Community Creamery processed a full line of dairy products at its plant in Missoula, Montana, including fluid milk and ice cream (CX 373-Z 36). Its net sales for the calendar year 1957 (the last full year for which such figures are available) were \$3,045,420. Its sales for the nine-month period ending March 31, 1959, were \$2,302,829 (CX 373-Z 38). Its net earnings were \$385,614 in 1957 and \$267,884 in the nine months ending March 31, 1959. The record contains no product breakdown on a dollar basis. However, on a weight or quantity basis, the estimated breakdown was as follows: Ice cream, 300,000 gallons per year; fluid milk, 2½ to 3¾ million pounds per month; butter, 500,000 pounds per year; and cottage cheese, 750,000 pounds per year (CX 373-Z 41; CX 459-F, G).

3. Substantially all of Community Creamery's supply of milk was obtained from Montana producers. However, the record indicates that one farmer in Idaho may occasionally have sold a limited and undetermined amount of fluid milk to Community. Community's fluid milk sales were made within the State of Montana. However, one of its customers, an independent distributor in Idaho, purchased packaged fluid milk from Community at its dock in Missoula and resold it in Idaho (CX 459-B). Community's sales to the Idaho distributor amounted to approximately 3% of its fluid milk sales (CX 459-F).

Market Conditions

4. From its plant at Missoula, Community Creamery distributed dairy products in a nine-county area in western Montana (CX 373-Z 36). Respondent had a plant at Great Falls, Montana, from

which it distributed milk and ice cream in a portion of Community's territory (CX 373-Z 37). While respondent distributed fluid milk in a 15-county area and ice cream in a 14-county area in Montana, its fluid milk distribution area overlapped with Creamery's in only one county and its ice cream distribution area overlapped with Community's in only two counties (CX 373-Z 43). The ice cream distributed by respondent was manufactured at its Great Falls plant, but the milk which it distributed was bottled for it by an independent cooperative at Bozeman (CX 373-Z 37). Respondent's distribution area was generally to the north and east of Community's territory. Including respondent, there were 13 other companies distributing milk and/or ice cream in some portion of Community's territory (CX 373-Z 36). All of these companies had their plants in western Montana, except for one company which distributed ice cream from eastern Washington State. Respondent was the only national company distributing in the area.

5. Complaint counsel have proposed the following alternative areas, as the relevant market area: (a) Community's distribution area in western Montana, (b) the so-called "overlap area", *i.e.*, the area in which the distribution areas of Community and respondent coincided, and (c) the entire State of Montana "because it is geographically isolated from the neighboring states" (Reply Findings, p. 14). There appears to be no basis for considering either the narrow "overlap area" or the broad State area as a relevant market. All that appears with respect to the former area is that a portion of both Community's and respondent's sales territory fell within it. There is nothing to indicate that it is an area of effective competition, in the sense that any meaningful aggregation of companies compete within it. With respect to the broad State area, there is nothing to indicate that any significant group of companies distribute throughout the State. The mere fact that the State is "geographically isolated" from other states does not necessarily require the conclusion that it is all one market. The evidence of record indicates that the western portion of Montana in which Community distributed may be considered an appropriate market area. It may be that the area is divisible into several sub-markets, but it is immaterial whether this is done since the record contains no market-share data either for western Montana or any portion thereof.

6. The only market statistics in the record are for the State as a whole. To the extent that any conclusions concerning the acquisition are to be made, they can only be made in the light of the market

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data pertaining to the State as a whole. The record discloses that in 1958, two years before its acquisition of Community, respondent accounted for 24.4% of the value of frozen dessert shipments in Montana (CX 425-D). In the preceding year, 1957, respondent accounted for 24.2% of the production of frozen desserts in Montana (CX 456-M). The record does not disclose Community's share of the value of shipments or of production in Montana. However, based on its estimated annual ice cream sales of approximately 300,000 gallons (CX 373-Z 41), its share of frozen dessert production in Montana would be in the order of magnitude of 9.5%.¹²⁵ After only 11 months of operation of Creamery's plant, respondent's ice cream sales in Montana increased by 28% over 1960 (CX 395-396).

7. There are no precise market share data for the State as a whole in the fluid milk line of commerce, since respondent did not process fluid milk in the State prior to 1960 (purchasing its requirements from another dairy). However, based on its actual sales from its branches at Great Falls and Billings, amounting to \$525,600 in 1958 (CX 393), its shipments would represent approximately 4.4% of the value of fluid milk shipments in Montana.¹²⁶ Other data in the record, based on per capita consumption rates, indicates that respondent's share of milk sales in Montana was somewhere between 4.94% and 6.45% prior to its acquisition of Community (CX 444-B). While this figure is subject to a possible error of as much as 50% (R. 4721-2) it, together with the figure of 4.4% cited above, provides some basis for obtaining an approximation of the relative position of respondent within the State in the fluid milk line. There are, likewise, no precise data concerning Community's position in the State in fluid milk. However, based on the evidence that it had total sales in 1957 of \$3,046,000 (CX 373-Z 38), and that its milk sales were approximately 60% of its total sales (CX 459-H), its milk sales would represent approximately 15.5% of the value of shipments of milk in Montana as of 1958.¹²⁷ After only 11 months of operations of Community's plant, respondent's milk sales in Montana increased by 270% over 1960 (CX 395-396).

Other Montana Acquisitions

8. Respondent acquired three other dairy companies in Montana after 1950, in addition to Community Creamery. Complaint counsel concede that the record fails to establish that any of these companies

¹²⁵ The examiner has used the 1957 State production figure of 3,176,000 gallons (CX 456-M), as the universe figure in computing the above percentage.

¹²⁶ The universe figure of \$11,800,000 is taken from CX 425-F.

¹²⁷ Same as footnote 126.

was engaged in interstate commerce. Two of them were not corporations. The first of the acquisitions was Pioneer Dairy of Great Falls, which was acquired in June 1960, about two months after the acquisition of Community Creamery (CX 377 A-K). Pioneer Dairy, a Montana corporation, distributed milk principally in the city of Great Falls (CX 377-Z 2). Its sales for the year ending June 30, 1960, were approximately \$688,000 (CX 377-Z 5). The second company acquired was Billings Dairy & Creamery of Billings, Montana, a partnership, which was acquired on September 1, 1960 (CX 381 A-N). This company distributed milk and ice cream in an area around Billings. Its net sales for the year ending April 30, 1960, were \$1,540,000 (CX 381-Z 9). The third company acquired was Henne Products Co. of Butte, a single proprietorship, which respondent acquired on May 1, 1961 (CX 386 A-J). Henne was a distributor of the milk and ice cream products of respondent's Community Creamery Division and had formerly been a distributor of Community Creamery (CX 386-Z 14). Its net sales for the year ending August 31, 1960, were \$1,138,577 (CX 386-Z 17).

9. Respondent's fluid milk sales in the fiscal year ending February 28, 1961, increased to 4,302,732 gallons from 804,375 gallons in the previous year, or an increase of 435%. Such increase reflected sales of only 11 months for Community's plant, 9 months for Pioneer's plant, 6 months for Billings' plant, and none of the business acquired from Henne. During the same period its ice cream sales increased to 1,099,922 gallons from 771,777 gallons, or an increase of 42.5% (CX 395-396). Such increase likewise does not give full effect to the gallonage acquired from other companies. Respondent's market share in the fluid milk line in Montana in 1961 may be estimated as being between 26% and 34% (CX 444-B), without the benefit of a full year's operation of acquired plants or companies. Even making the maximum adjustment for possible error which respondent contends exists in these percentage estimates, respondent's State market share would be between 18% and 24% in 1961. During the decade from 1951 to 1961 the number of milk plants in Montana declined from 166 to 61, and the number of ice cream plants from 57 to 52.

P. James S. Merritt Company

The Acquisition

1. On September 3, 1958, respondent acquired certain of the assets (including trucks and ice cream cabinets) of James S. Merritt Company, a Missouri corporation (CX 352 A-B), for a consideration of

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\$55,950. The assets acquired were those used by the seller in the sale of bulk and package ice cream. The transaction did not include that part of the seller's assets and business which was devoted to the production and sale of frozen novelties, other than ice cream. The seller retained and continued to operate its frozen novelty business.

Market Conditions

2. At the time of the acquisition, Merritt distributed its products principally in the Kansas City metropolitan area (CX 352-C). Its sales of bulk and package ice cream products amounted to approximately 400,000 gallons annually (CX 352-A). Respondent distributed only a small amount of ice cream in the Kansas City area from its plant at Sedalia, Missouri. It served four customers in the Kansas City area and its ice cream sales amounted to approximately 10,000 gallons annually (CX 352-B). There were approximately 16 other companies serving the Kansas City area with ice cream. Included in this group were National Dairy, Borden, Foremost, Fairmont and Arden (CX 352 C-D).

3. Complaint counsel contend that the Kansas City metropolitan area is the market area relevant to this acquisition (Reply Findings, p. 14). Respondent contends that the relevant area of effective competition is a multi-State area consisting of Illinois, Iowa, Missouri, Nebraska, Kansas, Oklahoma and portions of Wisconsin, Minnesota and South Dakota, which respondent refers to as "Market Area I" (Findings, p. 77). The fact that manufacturers in this area may not compete with manufacturers in adjacent regional areas is not, as respondent contends, a sufficient basis for concluding that it is an appropriate market area. It is the opinion and finding of the examiner that the Kansas City metropolitan area is the most appropriate market area in which to weigh the competitive impact of the Merritt acquisition.

4. The record contains no market share data from which the market position of respondent or of Merritt in the Kansas City area can be determined as of the time of the acquisition or at any earlier or subsequent period. The record likewise contains no statistical data from which the extent of concentration in this market can be determined. It does appear, however, that since 1950 the so-called national companies have acquired five of the independent companies distributing frozen dairy products in Kansas City (CX 426-Z 50, 51).

Q. *Arden Farms Co. (Linwood Division)*

The Acquisition

1. As previously noted (p. 604), respondent acquired Arden's Melvern-Fussell Division of Alexandria, Virginia, on June 1, 1960,

pursuant to an agreement dated May 19, 1960. By a separate agreement of the same date, respondent also acquired the business and certain of the assets of Arden's Linwood Division, operating out of Kansas City, Missouri (CX 378 A-E). The transfer became effective June 6, 1960. The total consideration paid does not appear from the record. However, it included payment for accounts and notes receivable of approximately \$108,000 and fixed assets amounting to approximately \$237,000. Among the assets acquired by respondent was Arden's Kansas City plant. The plant was old and inefficient, and was closed immediately following the acquisition, its production being transferred to respondent's plant at Sedalia, Missouri (CX 378-K).

2. During the calendar year 1959, Arden's Linwood Division sold 655,569 gallons of ice cream and other frozen desserts, its net dollar sales amounting to \$844,965 (CX 378-I). The Linwood Division sustained a loss in two of the four years from 1957 to 1960, the amount of its profit in the two profitable years being small. Its net profit in 1959 was \$4,213. In the preceding year, 1958, it sustained a loss of \$1,608, and in the period from January 1, 1960, to June 5, 1960, it lost \$1,961.

3. The Linwood Division sold its products principally in the Kansas City metropolitan area, including Kansas City, Missouri, and the adjoining suburbs in the State of Kansas (CX 378-G). Complaint counsel contend that Arden's Linwood Division was engaged in commerce by virtue of its sales in Kansas. No issue is raised by respondent concerning the acquired company's engagement in commerce.

Market Conditions

4. As mentioned above, Linwood's principal distribution area was in the Kansas City metropolitan area. However, it also served some portions of northern and central Missouri (CX 378-G). Respondent distributed ice cream and frozen products in competition with Linwood from its plant in Sedalia, Missouri. There were approximately 30 other companies selling ice cream and other frozen dessert products in various portions of Linwood's distribution area (CX 378 G-H). Included in this group were such national companies as National Dairy, Borden, Foremost, Fairmont and Swift. Complaint counsel contend that the Kansas City metropolitan area is the appropriate geographic market in which to measure the competitive impact of the Linwood acquisition. As in the case of the Merritt acquisition, respondent contends that the multi-State area which it describes as "Market Area I" is the appropriate market area. It is the conclusion and finding of the examiner that the Kansas City

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metropolitan area is the most appropriate area in which to weigh the competitive impact of the Linwood acquisition.

5. The record contains no statistical data from which the market shares of the acquired and acquiring companies, or the extent of concentration in the Kansas City area, can be determined. All that appears is that Linwood's volume in that area was approximately 600,000 gallons in the period just prior to its acquisition (CX 378-K). While respondent's sales from its Sedalia plant were 1,842,233 gallons in the fiscal year ending February 28, 1961 (CX 378-M), the record does not disclose what part of this volume represented sales in the Kansas City area.¹²⁸ It does appear that in 1958, just prior to its acquisition of Merritt, respondent served four customers in the Kansas City area, with a total volume of approximately 10,000 gallons annually (CX 352-D). In September 1958, it acquired Merritt's bulk and package ice cream business, with a volume of approximately 400,000 gallons annually (CX 352-A). However, in the absence of evidence as to the total volume of frozen products sold in the Kansas City area, it is not possible to determine either Linwood's or respondent's market share in the Kansas City metropolitan area.

R. *Gateway Creamery Company*

The Acquisition

1. Respondent acquired the business and certain of the assets of Gateway Creamery Company, a Missouri corporation, on October 6, 1954, pursuant to an agreement dated September 28, 1954 (CX 19 A-D). The consideration paid was \$120,000. Gateway processed and distributed milk, cream, cottage cheese, ice cream and other frozen desserts (CX 19-Z 14). The record does not disclose what its total dollar sales were. However, it does appear that its annual milk sales were approximately 500,000 gallons and its annual ice cream sales were approximately 190,000 gallons in the three-year period prior to its acquisition (CX 19-Z 17, 19).

Market Conditions

2. Gateway distributed its milk products within a radius of 18 miles from its plant at Joplin, in southwestern Missouri (CX 19-Z 14). Its distribution area included Galena, Kansas (CX 19-Z 18). Gateway distributed its ice cream products in a larger area, including not only the Joplin area, but Pittsburg and Oswego, Kansas; Vinita, Oklahoma; and Springdale, Arkansas (CX 19-Z 14). Respondent sold

¹²⁸ The Sedalia plant distributed its products in a 38-county area in central and western Missouri, and in a 3-county area in eastern Kansas (CX 378-M).

milk and frozen products in the same general area as Gateway. However, its distribution area was much broader than that of the acquired company (CX 19-Z 25). The milk and frozen products sold by respondent were produced at its Sedalia plant. There were approximately 28 other companies distributing milk or ice cream in various portions of Gateway's territory (CX 19-Z 15). Among the other national companies selling in Gateway's territory were National Dairy, Foremost and Swift.

3. Complaint counsel contend that the geographic market relevant to the Gateway acquisition is Gateway's distribution area "in and around Joplin in southwestern Missouri" (Reply Findings, p. 15). Respondent does not propose any specific geographic market with respect to the fluid milk product line. It proposes the multi-State "Market Area I," discussed above, as the appropriate market in the ice cream product line (Findings, pp. 76-78, 80). It is the conclusion and finding of the examiner that the area around Joplin, Missouri, is an appropriate geographic market in which to weigh the competitive impact of the Gateway acquisition in the fluid milk product line. The area relevant to the ice cream product line is somewhat broader, but cannot be determined precisely on the basis of the limited evidence in the record. In any event, since the record contains no market share data for the ice cream product line in either the Joplin area or in any broader area around Joplin, it is unnecessary to attempt to delimit precisely the geographic market relevant to the ice cream product line.

4. The record contains no precise market share data for the fluid milk product line. However, based on the estimated population and per capita milk consumption in its distribution area, Gateway's share of the Joplin market may be estimated as being of the order of magnitude of 11% to 13% (CX 454). Although, as mentioned above, respondent distributed fluid milk in Gateway's territory, the record contains no evidence as to its market share either in Gateway's territory or in the much broader area in Missouri, Kansas and Oklahoma in which respondent distributed.¹²⁹ The record contains no statistical data from which concentration in the relevant milk market can be determined. As previously mentioned, the record likewise contains no statistical data from which market shares or concentration in the ice cream product line can be determined in Gateway's distribution area or any portion thereof.

¹²⁹ Respondent's milk distribution area included 5 counties in Missouri, 8 counties in Kansas and 17 counties in Oklahoma (CX 19-Z 25).

Other Missouri Acquisitions

5. In addition to its acquisition of Merritt, Linwood and Gateway, which were corporations claimed to be in commerce, respondent acquired eight other Missouri companies, which were either not corporations or which complaint counsel concede were not engaged in commerce. With two or three exceptions, these were very small companies and were acquired for a nominal consideration. The non-corporate enterprises acquired by respondent in Missouri were: Latta Ranch Dairy, Welcher Ice Cream Company, McAllister Brothers Creamery Co., Harris Dairy, John N. Costello Company, and Steele's Ice Cream Company. Only in the case of Costello and Steele is it contended that the non-corporate acquired companies were engaged in commerce. Costello was the largest of these companies, being acquired for a consideration of \$369,000 (CX 113-A). It sold a frozen dessert, known as Mellorine, in St. Louis and adjacent territory (CX 113-V). While the record indicates that in 1952 (some two or three years prior to the Costello acquisition) respondent had approximately 10% of the St. Louis ice cream market (CX 16-Z 252, p. 138), there is no evidence as to Costello's share of the market in either 1952 or at the time of its acquisition. The record contains no evidence of market shares or concentration in the case of the other company claimed to be in commerce, viz, Steele's Ice Cream Company.

6. The two corporations acquired by respondent in Missouri were Central Dairy Inc. of Columbia, and Bluff City Dairy Inc. of Hannibal, with respect to both of which complaint counsel concede that interstate commerce has not been proven. Central Dairy was acquired by respondent in October 1959 for a consideration of approximately \$76,000 (CX 362-D). While Central was a substantial factor in a number of the communities around Columbia, Missouri, where it distributed milk, ice cream and cottage cheese (CX 362-F), it had operated at a loss in four out of the five years prior to its acquisition by respondent, with its losses totalling almost \$100,000 (CX 362-G). The sale by Central to respondent was made after Central had been advised by the Commission that it contemplated no proceeding to declare the sale illegal (CX 362-L). Bluff City Dairy was acquired by respondent in July 1961 for a consideration in excess of \$25,000 (CX 388-A). Bluff City was a substantial factor in the fluid milk product line in the area around Hannibal, Missouri, where it distributed (CX 450). Respondent distributed only de minimis quantities of dairy products in Bluff City's territory (CX 388-O). The record does not disclose its over-all market position in the area.

7. Since 1925, six so-called national companies have acquired approximately 75 dairy companies in Missouri. Sixteen of these acquisitions were made since 1950, with respondent accounting for 11 of them (CX 426-Z 50-52). The number of milk plants in Missouri has declined from 321 to 126 between 1951 and 1961 (CX 409, 412). Substantially all of the plants which ceased operating had a volume under 800 gallons a day or were small plants in the "No Volume Listed" category. The number of ice cream plants in Missouri has declined from 111 to 84 between 1951 and 1961 (CX 409, 412). Except for three plants, all of the plants which ceased operating had a volume of less than 250,000 gallons annually or were in the "No Volume Reported" category.

State "Market" Shares

8. Respondent operates milk and ice cream plants at Sedalia, St. Joseph and St. Louis. The distribution area of the St. Louis plant is primarily in Illinois and Indiana (CX 440-D). In 1950 respondent accounted for 10.1% of the frozen desserts produced in the State of Missouri. By 1957 its share of production in the State had increased to 13.8% (CX 456-F). The record contains no data as to respondent's market position in the State in the fluid milk product line prior to 1958. In that year respondent accounted for 2.1% of the value of shipments of fluid milk in Missouri (CX 425-F). Five national companies accounted for 41.2% of the value of shipments of fluid milk in the State of Missouri in 1958, with National Dairy and Foremost Dairy having the largest shares, viz, 17.6% and 12.1%, and respondent having the smallest share among the national companies. In the frozen dessert product line, respondent accounted for 15.8% of the value of shipments in Missouri in 1958 (CX 425-D). Six national companies accounted for 41.5% of the value of frozen dessert shipments in that year, with respondent having the largest share.

S. Valley Creamery Company, Inc.

The Acquisition

1. On May 10, 1956, respondent (through its wholly owned subsidiary Russell Creamery Co.) purchased certain of the assets of Valley Creamery Company, Inc., of East Grand Forks, Minnesota. The record does not indicate the State in which Valley Creamery was incorporated. While Valley Creamery processed and distributed a broad line of dairy products, respondent acquired only certain of the assets devoted to the distribution of ice cream and frozen desserts. The consideration paid was approximately \$8,500 for certain trucks and ice cream cabinets, plus the leasing of refrigerated storage space in

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Valley Creamery's plant for two years at a rental of \$300 per month (CX 41 A-C). Valley Creamery's total sales in the 12-month period ending September 30, 1956, were \$553,834, of which 8.8% or \$47,106 represented the sale of frozen products (CX 41-F). Although Valley Creamery sold some frozen products at wholesale, most of its sales were made through its own retail stores.

2. Respondent made the acquisition of Valley Creamery's ice cream business in order to obtain more suitable storage space for its distributing branch at Thief River Falls. Valley Creamery agreed to lease storage room in its plant at East Grand Forks to respondent on condition that respondent would take over its small wholesale ice cream distribution (CX 41-F). Following the acquisition, respondent operated its former Thief River Falls distribution from the Valley Creamery plant.

Market Conditions

3. Valley Creamery distributed frozen products in the towns of East Grand Forks, Crookston, and Red Lake Falls in Minnesota, and in an area in North Dakota bounded by Lakota, Langdon, Hamilton and Grand Forks (CX 41-G). Respondent sold no dairy products in the area served by Valley Creamery, except for one account in Red Lake Falls and one in Crookston, Minnesota (CX 41-D). There were five other dairy companies distributing frozen products in Valley Creamery's territory. Complaint counsel have proposed no geographic area as the relevant market area. The record contains no statistical data from which the market shares of the acquired and acquiring companies, or the extent of concentration, in any area served by Valley Creamery can be ascertained.

Other Acquisitions

4. In addition to acquiring Valley Creamery's ice cream business, respondent acquired three other companies in Minnesota. Two of these companies were corporations with respect to which complaint counsel concede that the record fails to establish engagement in commerce. These were Bay View-Zenith Dairies, Inc., and Excel Ice Cream Company, Inc. Bay View, which processed and distributed fluid milk products within the city of Duluth, was acquired in November 1960 for a consideration of \$50,000 (CX 382 A-G). Bay View's annual sales during the period from 1957 to 1960 were between \$390,000 and \$370,000, on which it sustained losses of between \$18,000 and \$10,000 annually (CX 382 J-O). The record contains no data as to Bay View's market position in the Duluth area. Prior to the acquisition, respondent did not sell in Duluth. Excel Ice Cream Com-

pany manufactured ice cream and distributed both milk and ice cream within a radius of 25 miles from Hutchinson, Minnesota. It was acquired on May 1, 1961, for a consideration of approximately \$28,000 (CX 385-A). Excel's annual sales were around \$100,000, on which it sustained a loss in each of the five years prior to its acquisition, except for 1961 when it showed a profit of \$315.00 (CX 385 I-L). The record contains no data as to Excel's market position. Respondent sold frozen products to only two accounts in Excel's trade area (CX 385-H).

5. The third company acquired by respondent in Minnesota was Russell Creamery Co., a Minnesota corporation, which respondent acquired March 1, 1955 (CX 28 A-I). The acquisition actually involved Russell and four affiliated companies, one a corporation and the other three partnerships (CX 29 A-H; CX 125 A-K). Russell Creamery was engaged in the manufacture and sale of frozen desserts in the area of Brainerd, Minnesota. The other corporation, Brainerd Dairy Inc., was engaged in the processing and distribution of fluid milk products in the Brainerd area. The three partnerships, all known as Russell Creamery Co., were engaged, respectively, in the manufacture and sale of ice cream and milk products in the area of Superior, Wisconsin, and in the distribution of ice cream manufactured by the Russell corporation, in Bemidji and Fergus Falls, Minnesota. The consideration paid for the two corporations was 6,670 shares of respondent's stock (valued at approximately \$50 a share), and that paid for the partnership assets was \$700,000 (CX 28-F, 29-F, 125-E). The combined sales of all companies in 1953 was in excess of \$2,500,000, on which they realized a profit of \$235,000 (CX 28-Z 31). Complaint counsel concede that none of the corporations was engaged in commerce, and that only the Wisconsin partnership (which sold in several Minnesota towns) was in commerce. Prior to this acquisition respondent was not engaged in the sale of dairy products in Minnesota or in any portion of Wisconsin served by Russell (CX 125-Z 52). The record contains no market share data for any of the Russell companies.

State "Market" Shares

6. In 1958 respondent accounted for 0.3% of the value of shipments of fluid milk and 4.0% of the value of shipments of frozen desserts in Minnesota (CX 456 D, F). Three national companies accounted for 7.3% of the value of shipments of fluid milk, with respondent having the smallest share. Four national companies accounted for 25.9% of the value of shipments of frozen desserts, the

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top two companies accounting for 10% each, respondent being the third ranking company. In terms of the production of frozen desserts in Minnesota, respondent's share increased from nothing prior to 1954 to 2.9% in 1957 (CX 456-F).

T. A. L. Brumund Company

The Acquisition

1. Respondent purchased the business and assets of A. L. Brumund Company, an Illinois corporation, on October 1, 1951, for a consideration of approximately \$73,000 (CX 2 A-Z 2). The transaction also involved the leasing of a portion of Brumund's premises at a rental of \$100.00 a month. Brumund was engaged in processing and distributing fluid milk products and ice cream (CX 2-Z). Its total annual sales were approximately \$500,000. The record contains no breakdown of its sales, as between fluid milk products and ice cream products.

Market Conditions

2. The record is not entirely clear as to Brumund's distribution area. There is evidence that its sales were made entirely in Lake County, Illinois (CX 2-Z). However, since three of the ice cream cabinets which it sold to respondent were located in Wisconsin (CX 2-G, H), it seems likely that it had a few ice cream customers in that State. The extent or regularity of such extra-State sales do not appear from the record. Respondent sold fluid milk and ice cream in Brumund's territory from its plant in Waukegan. However, its distribution area was much broader than that of Brumund, including Lake, McHenry and Cook Counties. Its sales in this area in the fiscal year ending February 28, 1951, amounted to \$1,837,269, of which \$1,485,728 involved milk products and \$351,487 involved frozen products (CX 2-Z 6). So far as appears from the record, the only other national companies distributing in Brumund's territory in 1951 were National Dairy and Borden, with the former distributing only frozen products (CX 195-E, pp. 3, 17).

3. Complaint counsel have proposed no specific area, as being the appropriate geographic market area in which to weigh the impact of the Brumund acquisition. The record contains no statistical data for Lake County as a whole, which was Brumund's area of distribution. The only market data in the record is for the Waukegan-North Chicago area in Lake County. Such data consists of a consumer survey conducted by respondent in August 1951, and is based on interviews with 557 families (CX 195-E, p. 5), constituting less than 5%

of the population of the area.¹³⁰ The survey does not disclose actual quantities purchased by those interviewed, but merely the brands which they purchased. According to the survey, 22% of those interviewed purchased respondent's brand of milk in their homes and 16% purchased Brumund's brand. Approximately 45% purchased the brand of a local cooperative. Of those interviewed who purchased milk from the retail stores, respondent's brand accounted for 12% of such purchases and Brumund's brand 4%. In the ice cream product line, the survey discloses that of purchases made through retail stores, respondent's brand accounted for 11% and Brumund's 9% (CX 195-E, pp. 1, 3, 17). A later survey conducted by respondent in February 1955, following its acquisition of Brumund, reveals that of those interviewed 28.4% had purchased their home delivered milk from respondent, as compared to 38% which had purchased milk from both respondent and Brumund in 1951; similarly, purchases of respondent's brand of ice cream through stores had declined to 12% from the 20% which it and Brumund together accounted for in 1951 (CX 195, pp. 5, 24).

Other Illinois Acquisitions

4. Respondent acquired 12 other dairy companies in Illinois. With a few exceptions, these were very small companies, for which the consideration paid was around \$10,000 or less. In this category were: Fairfield Ice & Coal Co., Bianucci Ice Cream Co., Callison Dairy, Hansen's Dairy, Buchanan Farms, Inc., Home Dairy, Strandsdale Farm Products, and Schuyler Dairy. Among the slightly larger companies, which were acquired for considerations ranging from \$22,500 to \$68,000, were Midvale Dairy Farm, Wilson Ice Cream Co., and C. E. Thompson Company. Except for Buchanan and Thompson, none of the above-named companies were corporations, and complaint counsel concede that the record fails to establish that any of them was engaged in commerce. The only really sizeable company acquired in Illinois was John N. Costello Company, which was not a corporation but which it is contended was engaged in commerce. As previously mentioned in connection with the Missouri acquisitions, Costello had a plant in St. Louis, but the company also sold frozen desserts in the central Illinois area from a plant in Mendota, Illinois

¹³⁰ According to the testimony of respondent's president, the number of persons interviewed in consumer surveys conducted by respondent generally averaged less than 5% of the population of the various areas (R. 330). The record does not disclose what percentage of the population in the Waukegan-North Chicago area was interviewed in 1951. However, in a survey conducted by respondent in 1955, in which 620 families were interviewed, this was estimated to be one out of every 29 families, or 3.4% of the families in the area (CX 195, pp. 5, 10).

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(CX 113-E). Costello's frozen dessert "Mellorine" had a substantial degree of consumer acceptance in various Illinois towns (CX 215, 244, 279).

State "Market" Shares

5. In 1958 respondent accounted for 7.0% of the value of shipments of fluid milk in Illinois and 8.7% of the value of shipments of frozen desserts (CX 425-D, F). Three national companies accounted for 19.4% of the value of shipments of fluid milk and four national companies accounted for 41.0% of the value of shipments of frozen desserts. Respondent was the second ranking company among the national companies in fluid milk shipments and the third ranking company in frozen dessert shipments. In the frozen dessert product line, respondent's share of production in the State of Illinois declined from 8.6% in 1950 to 7.5% in 1957 (CX 456-D).

U. *Lagomarcino-Grupe Company*

The Acquisition

1. By agreement dated July 18, 1952, respondent acquired the ice cream business conducted at the Davenport, Iowa, branch plant of Lagomarcino-Grupe Company, an Iowa corporation (CX 7 A-D). The consideration paid by respondent was \$35,000. The seller's principal business consisted of the distribution of produce, and its main plant was at Burlington, Iowa (CX 7-O). It sold to respondent only the ice cream department of its branch plant at Davenport, the assets acquired by respondent consisting principally of ice cream cabinets, trucks and several items of plant equipment (CX 7-M). Lagomarcino sold approximately 107,000 gallons of frozen products in 1951, and its dollar sales amounted to approximately \$150,000 (CX 7-O).

Market Conditions

2. Lagomarcino distributed frozen products principally in the Tri-City area of Rock Island and Moline, Illinois, and Davenport, Iowa. Its distribution in Iowa extended into the adjacent territory in Scott and Clinton Counties (CX 7-K). Respondent was distributing frozen products in the same general area as Lagomarcino from its branch plant at Davenport, Iowa. The frozen products distributed by respondent were manufactured in its plant at Des Moines (CX 7-O). Respondent's distribution area included five additional counties in Iowa, and one additional county in Illinois, other than those where Lagomarcino distributed (CX 7-N). There were 11 other dairy companies distributing frozen products in Lagomarcino's territory, including three national companies, viz, National Dairy, Borden and Swift (CX 7-K).

3. Complaint counsel have proposed no specific geographic area, as being the appropriate market area in which to measure the competitive impact of the Lagomarcino acquisition. The record contains no market share data for the Tri-City area or any other area in the State of Iowa, except for the State as a whole. The statistical data for the State of Iowa will hereinafter be discussed, following consideration of the only other corporate acquisition in Iowa claimed to be engaged in commerce.

V. *Clinton Ice Cream Company*

The Acquisition

1. Respondent acquired the business and certain of the assets of Clinton Ice Cream Company, an Iowa corporation, on September 2, 1955, pursuant to agreement dated August 23, 1955 (CX 35 A-C). The consideration paid by respondent was \$9,400, plus an unspecified sum for usable inventories and accounts receivable. The assets acquired by respondent consisted principally of ice cream cabinets, trucks and certain items of plant equipment. The acquired company sold approximately 76,000 gallons of ice cream and other frozen products annually (CX 35-H).

Market Conditions

2. Clinton Ice Cream Company manufactured ice cream and other frozen products at its plant in Clinton, Iowa, which it distributed principally in the town of Clinton. However, it did sell to one small account each in the towns of Albany and Fulton, Illinois (CX 35-I). Respondent served a portion of Clinton's territory from its Davenport, Iowa, branch. It made no sales in Clinton itself, which was the acquired company's principal distribution area. However, respondent did serve one or two accounts in Albany and Fulton, Illinois, in which Clinton sold. There were seven other companies serving portions of Clinton Ice Cream Company's territory, including the national companies, National Dairy and Borden (CX 35-F, I).

3. Complaint counsel have proposed no specific geographic area as being the appropriate market area in which to measure the competitive impact of respondent's acquisition of Clinton Ice Cream Company. The record contains no statistical data for any area in the State of Iowa, other than the State as a whole. Such data is hereinafter discussed.

Other Iowa Acquisitions

4. In addition to Lagomarcino-Grupe and Clinton Ice Cream Company, respondent acquired 12 other dairies in Iowa. Only one of these companies was a corporation and only one was in commerce (the lat-

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ter not being a corporation). With one or two possible exceptions, the companies acquired were minute in size, and the consideration paid was under \$10,000. Among the companies acquired were: Farmers Creamery, Naber & Son Dairy, Letner Dairy, Springbrook Dairy, Red Oak Dairy, Miller-Hansen Dairy, Inc., George C. Kruse Homemade Ice Cream Co., Patzner Dairy, Royal Ice Cream Co., Squire Ice Cream Co., Shomont Ice Cream Co., and Kirchoff Ice Cream Co. The only corporation among these was Miller-Hansen Dairy, as to which complaint counsel concede the record fails to establish engagement in commerce (Findings, p. 235). Squire Ice Cream Company involves the only one of the above acquisitions concerning which complaint counsel claim to have established commerce, but it was not a corporation. The consideration paid for Squire was \$9,000 (CX 115-A). The only company for which any sizeable consideration paid was Shomont Ice Cream Co., for which respondent paid approximately \$100,000 (CX 112-A). Shomont was not a corporation and complaint counsel concede that they have failed to establish its engagement in commerce (Findings, p. 240).

State "Market" Shares

5. In 1958 respondent accounted for 3.9% of the value of fluid milk shipments and 14.7% of the value of frozen product shipments in the State of Iowa. Four national companies accounted for 24.6% of the value of shipments of fluid milk, Borden having the largest share with 10.0% and respondent being the third ranking company. Four national companies accounted for 42.8% of the value of shipments of frozen products, Borden having the largest share with 25.0% and respondent being the second ranking company (CX 425-D, F). In the frozen product line respondent's share of production in the State of Iowa increased by 1.8% from 14.2% in 1950 to 16.0% in 1957 (CX 456-F).

W. Andalusia Dairy Company

The Acquired Company

1. On June 10, 1952, respondent acquired the business and certain of the assets of the branch plant operated at Beaver Falls, Pennsylvania, by Andalusia Dairy Company, an Ohio corporation (CX 5 A-F). Andalusia Dairy's main plant was at Salem, Ohio, and it operated a branch plant at Alliance, Ohio (R. 607, 609). These plants were not included in the sale to respondent. The consideration paid by respondent was approximately \$50,000, which covered the acquisition of Andalusia's delivery trucks, ice cream cabinets, accounts receivable, inventory, and milk and ice cream routes operated from

the branch plant at Beaver Falls. Andalusia's milk sales were approximately \$150,000 a year and its ice cream sales were approximately \$200,000, its annual ice cream gallonage being approximately 40,000 gallons (R. 617). Andalusia's sales from its Beaver Falls branch were made entirely within the State of Pennsylvania. However, it received its supply of raw milk principally from Ohio (R. 610, 636).

Market Conditions

2. Andalusia Dairy distributed milk, ice cream and other dairy products from its Beaver Falls plant in the towns of Beaver Falls, Rochester and adjacent territory in north central Beaver County. Respondent sold in competition with Andalusia Dairy's Beaver Falls branch from its own plant in Pittsburgh. However, respondent's distribution area covered a much wider area than Andalusia's territory, including 15 counties in western Pennsylvania (CX 5-J). The record does not disclose the names or total number of companies which distributed in Andalusia's territory. However, it does appear that there were approximately 16 companies located in Beaver County in 1952 (CX 16-Z 106, p. A-2).

3. Complaint counsel have not proposed any specific area as being the appropriate geographic area in which to weigh the competitive impact of the Andalusia Dairy acquisition. It is not clear, therefore, whether complaint counsel contend that the portion of Beaver County in which Andalusia Dairy distributed is the appropriate geographic market, or whether they contend that the entire western Pennsylvania area in which respondent distributed is the appropriate market. The only area for which there is any statistical data in the record is a 13-county area in western Pennsylvania, which the State of Pennsylvania, for purposes of price controls on milk, designates as the "Pittsburgh Milk Marketing Area, Area No. 2." In 1952 the 130 companies doing business in this area, and for which the State maintained statistics, reported net sales of \$105,217,119 (CX 16-Z 106, p. A-9). Assuming that respondent's milk sales for the calendar year 1952 were substantially the same as its sales for the fiscal year ending February 28, 1952, viz, \$8,091,688 (CX 5-J), respondent would have approximately 7.6% of the western Pennsylvania milk market. Andalusia's milk sales of approximately \$150,000 would represent .001% of the market. The sales of the top 11 companies accounted for approximately 69% of the area's sales.

Other Acquisitions

4. In addition to Andalusia Dairy, respondent acquired three other companies distributing milk and/or ice cream in the western Penn-

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sylvania area. These were small companies, none of which was a corporation. The first of the acquisitions was P. Calistri & Sons, which was acquired in June 1952, for a consideration of approximately \$74,000 (CX 80-A). This company was engaged in the manufacture and distribution of ice cream in the area of Charleroi, Pennsylvania. The record contains no data as to its market position. Complaint counsel concede that the record fails to establish the company's engagement in commerce. The other two companies, Pettibon Dairy of Rochester, Pennsylvania, and Drinkmore Dairy of Aliquippa, Pennsylvania, were acquired in August 1953. They were owned by the same individuals and were acquired for a consideration of approximately \$82,000 (CX 91-A). The milk sales of both companies amounted to approximately \$200,000 in the first six months of 1953, and their ice cream sales amounted to approximately \$58,000 in the same period (CX 91-C). These companies distributed their products principally in the towns in which their plants were located (CX 91-M). However, they did purchase raw milk from farms in Ohio (R. 649). The record contains no data as to their market position in the areas in which they distributed.

State "Market" Shares

5. Respondent's dairy product sales in Pennsylvania are confined to the western counties around Pittsburgh. Respondent's market position in this area in the fluid milk line has been discussed above. The record also contains data reflecting its relative position in the State as a whole, in both the fluid milk and frozen product lines. In 1958 respondent accounted for 2.5% of the value of shipments of fluid milk in Pennsylvania and 1.5% of the value of shipments of frozen desserts (CX 425-D, F). Four national companies accounted for 23.0% of the value of fluid milk shipments, with respondent having the smallest share. Four national companies accounted for 45.3% of the value of frozen dessert shipments, with National Dairy and Foremost together accounting for 41.0%, and respondent ranking a poor third. In terms of the production of frozen desserts in Pennsylvania, respondent's share in 1957 was 2.0%, compared to 1.8% in 1950 (CX 456-C).

X. Coca-Cola Bottling Co. of Clifton Forge, Inc. (Peerless Creamery Division)

The Acquisition

1. On May 1, 1953, respondent acquired the ice cream business of Coca-Cola Bottling Company of Clifton Forge, Inc., a Virginia corporation (CX 11 A-G). The latter conducted its ice cream business

under the name of The Peerless Creamery. Peerless distributed milk as well as ice cream (R. 849). Respondent acquired only the ice cream portion of the Peerless business, including certain of the equipment at Peerless' plants in Clifton Forge and Covington, Virginia. The consideration paid was \$69,000, plus the leasing of space in the seller's plant in Covington for a period of ten months at \$200 a month. Peerless Creamery manufactured approximately 125,000 gallons of ice cream and sherbets in 1952, and its dollar sales were approximately \$183,000 (CX 11 A-B). It had approximately 325 customers.

Market Conditions

2. Peerless Creamery distributed frozen products in the towns of Clifton Forge and Covington and the adjacent territory in Allegheny, Bath and Highland Counties, Virginia, and in the towns of White Sulphur Springs and Lewisburg, West Virginia (CX 11-I). Respondent, whose closest plant was in Washington, D.C., had a distributing branch at Staunton, Virginia, from which it sold frozen products in competition with Peerless in the towns of Goshen and Brownsburg, Virginia (CX 11-I; R. 856). There were eight other companies selling in portions of Peerless' territory. Included among these companies was the Imperial Ice Cream Division of Fairmont Foods and two subsidiaries of National Dairy. Among the independent companies competing with Peerless were: Greenbrier Dairy of Beckley, West Virginia, which respondent acquired in December 1954; Kay's Dairy of Roanoke, which respondent acquired in January 1955; and Clover Dairy of Roanoke, which respondent acquired in March 1961.

3. Complaint counsel have proposed no specific area, as being the appropriate geographic market in which to consider the competitive impact of the Peerless acquisition. Such evidence as there is suggests that the appropriate market is considerably larger than Peerless' distribution area, and would include an area in southwestern Virginia extending from Staunton to Roanoke, and a portion of southeastern West Virginia. However, in the absence of more definitive evidence concerning the distribution patterns of the companies doing business in the area, it is not possible to make an informed determination concerning the metes and bounds of the relevant market. The record contains no reliable statistical evidence as to market shares in any specific market. The only evidence in the record as to market position is the testimony of the manager of respondent's Washington, D.C. plant to the effect that Peerless had "pioneered" in the ice cream business in its area, probably having 100% of the business originally, and estimating that it had "in the area of 80% of the volume in the area"

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when it was acquired "although I don't have any proof." Fairmont's Imperial Division was estimated to be in second place, with "perhaps five percent * * *. Maybe, it was as high as ten" (R. 848).

Other Acquisitions

4. As mentioned above, respondent acquired three other companies distributing ice cream in Peerless' territory. The facts relating to the acquisition of Greenbrier Dairy in December 1954 have heretofore been discussed in detail (*supra*, pp. 578-582). The next acquisition made by respondent in the area was the wholesale ice cream business of Kay's of Roanoke, Inc., which was acquired by respondent in January 1955 for a consideration of \$19,500 (CX 22-A). Kay's ice cream sales amounted to approximately \$42,545, and consisted of about 36,500 gallons (CX 22-J). Complaint counsel concede that the record fails to establish Kay's engagement in commerce (Findings, p. 468). The third company acquired in the area was Clover Creamery Co., Inc., of Roanoke, which was acquired by respondent on March 1, 1961, for a consideration of 30,220 shares of respondent's stock, valued in excess of \$50 a share (CX 383 B-D). Clover distributed a full line of dairy products, including milk and ice cream. In 1960 Clover sold 5,000,000 gallons of milk and 1,000,000 gallons of ice cream, its total net sales amounting to \$6,892,321 (CX 383-Z 43). Clover was a substantial factor in the fluid milk product line in the area served by it (CX 445), but the record does not disclose its position in the ice cream product line. Complaint counsel concede that the record fails to establish Clover's engagement in commerce (Findings, p. 469). Respondent, which has continued to operate the Clover plant, concedes that Clover was a "viable independent" (Findings, p. 94).

Y. Ritzmann Ice Cream Company, Inc.

The Acquisition

1. On June 7, 1959, respondent acquired the business and certain of the assets of Ritzmann Ice Cream Company, Inc., an Indiana corporation (CX 357-N). The consideration paid was \$27,580. The acquisition did not include Ritzmann's plant (CX 357-A). Despite its name, Ritzmann processed and distributed milk, as well as ice cream. Its net sales in 1957 and 1958 were \$153,673 and \$144,318, on which it sustained losses of \$7,572 and \$8,743, respectively (CX 357-L). In terms of the two principal products distributed by it, in 1958 Ritzmann sold 66,129 gallons of milk for \$63,484 and 40,929 gallons of ice cream for \$66,237 (CX 357-N). In response to a petition which it submitted to the Federal Trade Commission prior to the acquisition (CX 357 C-G), Ritzmann was advised that the Commission did not

contemplate any proceeding to declare the sale illegal if Ritzmann sold its assets to respondent (CX 357-H).

Market Conditions

2. Ritzmann distributed milk primarily in the town of Lawrenceburg and the immediate vicinity in Dearborn County, Indiana. It distributed ice cream in Dearborn and six other counties in southeastern Indiana, and had a small amount of distribution into the State of Ohio (CX 357-I). Respondent operated two routes from its plant in Cincinnati which sold some ice cream in the area served by Ritzmann. An independent distributor also sold respondent's milk products in the area served by Ritzmann (CX 357-J). There were seven other companies distributing milk and/or ice cream in Ritzmann's territory. Complaint counsel have proposed no specific area as the appropriate geographic market or markets for weighing the competitive impact of the Ritzmann acquisition. The record contains no market share or concentration data, other than for the State of Indiana as a whole.

Other Acquisitions

3. Respondent acquired 13 other dairy companies in Indiana, in addition to Ritzmann. With a few exceptions, these were small non-corporate businesses, and complaint counsel concede the record fails to establish that any of them were engaged in commerce. Among the small companies acquired by respondent were: Benton County Dairy, Modern Dairy, O'Neill Dairy, Richard L. Franson, Paulus Dairy, Princeton Dairy, Phillips Ice Cream Co., Nance's Creamery, Inc., Indiana Ice & Fuel Co., Heckaman's Ice Cream Co., and Elkhart Ice Cream Co. Among these only Nance's and Elkhart were corporations.

4. The largest dairy acquired by respondent in Indiana was Eskay Dairy Company, Inc., of Fort Wayne. Eskay Dairy Company, Inc., an Indiana corporation, was acquired on May 1, 1955, in exchange for 14,364 shares of respondent's common stock, with a value in excess of \$50 a share (CX 32-F). Eskay, which was engaged in processing and distributing milk products, had total sales in the year 1954 of \$2,111,177, of which 90% represented sales of fluid milk (CX 32-X). Its net earnings on such sales were \$38,799. Eskay's total assets in 1954 were \$837,059 (CX 32-W). Eskay sold entirely within the city of Fort Wayne and adjacent territory in Allen County. Respondent did not sell any fluid milk products in the area served by Eskay (CX 32-Z 7). Complaint counsel have proposed no specific market area with respect to the Eskay acquisition. Since complaint counsel concede that the record fails to establish Eskay's engagement in com-

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merce, the examiner finds it unnecessary to determine what the relevant geographic market was. The record does disclose that in the immediate Fort Wayne area in which it distributed, Eskay accounted for approximately 33-35% of the area's sales (CX 32-Z 12). In the somewhat broader area included in the Fort Wayne FMMO, it accounted for 17.7% of the area's sales (RX 35-C). In the northern Indiana area, which respondent contends is the appropriate geographic market, Eskay accounted for 2.85% of the area's milk sales in 1954 (RX 35-J).

5. The only other sizeable Indiana company acquired by respondent was Covalt Dairy Company, Inc., whose business and part of whose assets respondent acquired in July 1960, for a consideration in excess of \$350,000 (CX 379 A-H). The transaction also involved the leasing of Covalt's plant at an annual rental of \$15,000. In the fiscal year 1960 Covalt sold 1,547,594 gallons of milk for a total of \$1,399,972 (CX 379-I). It sold in the city of Muncie and surrounding towns. Respondent had an ice cream plant in Muncie, but did not process or sell milk in the area prior to the Covalt acquisition. Covalt was a substantial factor in the Muncie area (CX 432-Q). In the northern Indiana area it accounted for 1.72% of milk sales (RX 35-I). Complaint counsel concede that the record fails to establish Covalt's engagement in commerce.

State "Market" Shares

6. In 1958 respondent accounted for 5.3% of the value of fluid milk shipments and 8.0% of the value of frozen dessert shipments in the State of Indiana (CX 425-D, F). Respondent and Borden, together, accounted for 18.6% of the value of fluid milk shipments in 1958. Respondent and three other national companies accounted for 47.2% of the value of shipments of frozen desserts. Borden was the first ranking company in frozen dessert shipments with 23.7%; National Dairy ranked second with 14.3%; and respondent was the third ranking company. In terms of its share of production of frozen desserts within the State of Indiana, the record discloses no improvement in respondent's position between 1950 and 1957. In 1950 it accounted for 8.9% and in 1957, 8.5% (CX 456-D).

Z. Farmers Equity Co-operative Creamery Association, Inc.

The Acquisition

1. On August 12, 1952, respondent acquired from Farmers Equity Co-operative Creamery Association, Inc., a Nebraska corporation, 62 ice cream cabinets for a consideration of \$13,800 (CX 8-A). Farmers

Equity, a farmers' cooperative with headquarters in Alliance, Nebraska, had operated a small plant at Sheridan, Wyoming, which they had closed because it was unprofitable (CX 8-H). The record does not disclose how it disposed of the assets other than the ice cream cabinets which were sold to respondent. The ice cream cabinets were located on the premises of various customers which the cooperative had theretofore supplied. It undertook to advise these customers that the cabinets had been sold to respondent (CX 8-A). Farmers Equity had distributed a full line of dairy products in Sheridan, Wyoming, and adjacent territory. Its frozen product gallonage sales amounted to approximately 30,000 gallons annually (CX 8-F).

2. Complaint counsel contend that Farmers Equity was engaged in commerce "by virtue of the fact that it was a Nebraska corporation doing business in Wyoming" (Findings, p. 533). Although the record indicates that Farmers Equity's sales were made in "Sheridan, Wyoming and adjacent territory" (CX 8-F), there is evidence that one of the cabinets sold to respondent was located on the premises of a customer in Garryowen, Montana (CX 8-A). However, the amount and regularity of frozen products sales to such customer does not appear from the record.

Market Conditions

3. As mentioned above, Farmers Equity distributed frozen products in Sheridan, Wyoming and adjacent territory. Respondent sold in competition with Farmers Equity from the Sheridan branch of its plant in Billings, Montana (CX 8-H). However, respondent's distribution area was considerably broader than Farmers Equity's, covering 11 counties in Wyoming and 11 in Montana (CX 8-G). There were four other companies distributing frozen products in Farmers Equity's sales area. The only other national company among its competitors was Fairmont Foods (CX 8-F).

4. Complaint counsel have proposed no specific area as being the relevant geographic market. In the absence of more definitive evidence of the distribution patterns of the other companies selling in the area, it is not possible to make an informed determination as to the metes and bounds of the appropriate market area. The only market share data in the record is for the State of Wyoming as a whole. Such data reveals that Farmers Equity produced approximately 4% of the frozen desserts in the State (CX 456; CX 8-F). Since respondent had no facilities for the production of frozen desserts in the State of Wyoming, it is not possible to determine its relative position in the State.

Other Acquisitions

5. Respondent made three other acquisitions in the State of Wyoming. Only one of these involved a corporation. Complaint counsel concede that the record fails to establish that any of the three companies was engaged in commerce. The only corporation in the group was Worland Creamery Company, which respondent acquired in May 1959 for a consideration of \$37,000. Worland had sustained a loss on its operations in each of the two years prior to its acquisition (CX 358-N, R). The other two companies acquired were: Meredith Dairy, which respondent acquired in December 1951 for a consideration of \$8,500 (CX 69-A), and Yellowstone Dairy, which respondent acquired in May 1954 for \$65,000 (CX 110-A).¹³¹

Z-1. *Rose Lawn Dairies of Arkansas, Inc.*

The Acquisition

1. Rose Lawn Dairy operated as both a corporation and a partnership. The principal location of the business was in Muskogee, Oklahoma, and was operated by a partnership. There were two Rose Lawn distribution branches. One was in McAlester, Oklahoma, which the partnership operated. The other was in Fort Smith, Arkansas, which was operated as an Arkansas corporation, whose stock was wholly owned by the partnership. The partnership had originally manufactured its own ice cream and processed its own milk, which were distributed both from Muskogee and the two branch locations. However, in 1952 it ceased manufacturing ice cream because of financial difficulties and began purchasing its ice cream requirements from Swift & Co. In 1954, the continuation of its financial difficulties caused the company to cease processing milk, and it became a distributor of fluid milk purchased from respondent's plant at Tulsa, Oklahoma. In January 1955, when Rose Lawn was unable to repay respondent for milk and dairy products purchased from it, respondent took over the McAlester and Fort Smith branches, in partial repayment of the debt. Respondent did not acquire the principal business of the partnership at Muskogee. After operating the branches for a year, respondent offered to resell them to Rose Lawn, but the latter declined the offer (CX 21: CX 117).

2. Rose Lawn Dairies of Arkansas, Inc., had net sales in the seven-month period from April 1, 1954 to October 31, 1954, of \$227,477, on which it sustained a loss of \$30,026 (CX 21-G). The record does not disclose any breakdown of the operations of the partnership, as be-

¹³¹ See p. 567, *supra*, for a discussion of Yellowstone Dairy's market position in a portion of the area served by the Utah Division of Creameries of America.

tween the Muskogee and McAlester operations. In the 10 months up to October 31, 1954, the partnership had net sales of \$1,156,564, on which it sustained a loss of \$14,000 (CX 117-I). The record contains no data as to the gallonage sold by the Fort Smith branch operated by the corporation. The gallonage sales of the McAlester branch operated by the partnership were approximately 750 gallons of milk per day (CX 117-E).

Market Conditions

3. The branch operated by the corporation at Fort Smith distributed fluid milk and related products in the city of Fort Smith and adjacent territory (CX 21-D). These products were received from respondent's plant in Tulsa, Oklahoma. Respondent concedes in its answer that the Rose Lawn corporation was engaged in commerce. The branch at McAlester distributed fluid milk and related products in the counties of Pittsburg, Latimer and part of Pushmataha in the State of Oklahoma (CX 117-E). Respondent did not distribute any milk products in the areas in which its distributor sold. There were seven other dairy companies distributing dairy products in the area served by the Fort Smith branch (CX 21-D), and four in the area served by the McAlester branch (CX 117-E).

4. Complaint counsel have proposed no specific area, as being the relevant geographic market with respect to either the Fort Smith branch or the McAlester branch. In the absence of more definitive evidence than appears in the record, no finding can be made as to the relevant geographic market areas. The record contains no market share data with respect to the area in which the Fort Smith branch, operated by the corporation, sold. There is evidence that the market share of the Rose Lawn operation conducted by the partnership in McAlester was in the order of magnitude of 11 to 13% (CX 451).

Z-2. *Dahl-Cro-Ma, Ltd.*

The Acquisition

1. As heretofore mentioned (p. 569, *supra*), in December 1954 respondent acquired Dahl-Cro-Ma, Ltd., a Hawaiian corporation. The acquisition was actually made by Dairymen's Association, Ltd. (the name under which respondent's subsidiary, Creameries of America, operated in Hawaii). Under an agreement entered into December 27, 1954, Dairymen's acquired the business and assets of Dahl-Cro-Ma, including its trade name "Blue Bonnet." The transfer took place February 1, 1955, and the consideration paid was approximately \$100,000 (CX 24 A-E). Dahl-Cro-Ma was engaged in the manufacture and sale of ice cream and other frozen desserts. In the fiscal

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year ending June 30, 1954, Dahl-Cro-Ma's ice cream sales amounted to \$119,064, consisting of approximately 60,000 gallons (CX 24-Z 1). Its gross profit on ice cream sales was \$39,144, and its net profit on all sales, including frozen foods, was \$2,472 (CX 24-Y).

Market Conditions

2. Dahl-Cro-Ma's plant was located at Hilo on the Island of Hawaii, and its area of distribution was limited to that island (CX 24-X). So far as appears from the record, it did not distribute on the Island of Oahu, on which Honolulu is located. As heretofore mentioned, Dairymen's had a processing plant at Hilo and distributed frozen products on the Island of Hawaii in competition with Dahl-Cro-Ma (CX 16-Z 9). Although there were a number of other ice cream companies on the Island of Oahu (CX 24-Z), Dahl-Cro-Ma's only competitor on the Island of Hawaii was respondent's subsidiary, Dairymen's (CX 16-Z 9).

3. Complaint counsel contend that the "Island State of Hawaii" is the geographic market relevant to the Creameries of America acquisition (Reply Findings, p. 13). However, they propose no specific area as being the appropriate market area with respect to the Dahl-Cro-Ma acquisition. It is the conclusion and finding of the examiner that the Island of Hawaii is an appropriate market area in which to consider the impact of the Dahl-Cro-Ma acquisition. Dairymen's annual frozen products sales on Hawaii were approximately 100,000 to 120,000 gallons (CX 16-Z 9). Dahl-Cro-Ma's sales were approximately 50,000 to 60,000 gallons annually (CX 16-Z 9; CX 24-Z 1). On this basis, Dairymen's accounted for approximately two-thirds of the frozen products sold on Hawaii and Dahl-Cro-Ma accounted for approximately one-third. Following the acquisition, Dahl-Cro-Ma's operations were consolidated with Dairymen's Hilo plant (R. 1341). Dairymen's is at present the only company distributing ice cream at wholesale on the Island of Hawaii (CX 412).

Z-3. *Other Acquisitions*

1. The complaint as amended charges respondent with having acquired 175 dairy companies, of which 77 are alleged to have been corporations engaged in commerce. Complaint counsel have conceded, in their proposed findings, that the record establishes engagement in interstate commerce by only 37 of these companies.¹³² Appropriate

¹³² The 37 companies actually involve 29 different groups of companies, since some of the acquisitions involved multiple corporations which were commonly controlled. Thus, the Tro-Fe Dairy acquisition involved two corporations, an Alabama corporation and a Tennessee corporation; the Dairyland acquisition involved its affiliate company, Valdair; and the Dothan Ice Cream acquisition involved seven affiliated corporations, plus a partnership.

findings have been hereinabove made with respect to each of the corporations which complaint counsel contend were engaged in interstate commerce.¹³³ In order to provide a fuller picture of market conditions in the areas where respondent made acquisitions of corporations claimed to be in commerce, the examiner has briefly discussed the facts relating to respondent's acquisition of 83 other companies (corporate and non-corporate) in these areas. The 55 remaining companies which have not been hereinabove discussed or mentioned are either corporations with respect to which complaint counsel concede the record fails to establish engagement in commerce, or are non-corporate businesses which, in most instances, were also not in commerce. For the most part, these were small companies which were acquired for a consideration of \$25,000 or less.

2. The companies with respect to which findings have not been previously made were located in the States of Colorado, Nebraska, Kansas, Oklahoma, Wisconsin, Michigan, Tennessee, Kentucky, Maryland, South Dakota and Oregon. Only nine of these companies had annual sales of \$250,000 or over. These companies and their approximate sales were: Superior Dairy of Pueblo, Colorado (\$250,000); Sutter Dairy, Inc., of Grand Island, Nebraska (\$450,000); Weibel Dairy, Inc. of Enid, Oklahoma (\$413,000); Eckles Ice Cream & Dairy Co., Inc. of Baltimore, Maryland (\$446,000);¹³⁴ Princeton Creamery, Inc. of Princeton, Kentucky (\$735,000); Kentucky Ice Cream Co. Inc. of Richmond, Kentucky (\$840,000); Model Farms Dairy of Louisville, Kentucky (\$2,950,000); Daniel's Dairy & Ice Cream Co. of Paintsville, Kentucky (\$518,000); and Medo-Land Creamery Co. of Eugene, Oregon (\$4,200,000). Complaint counsel have conceded that the record fails to establish that those of the above-named companies which were corporations were engaged in commerce.

III. OTHER ALLEGED ILLEGAL PRACTICES

A. Customer Assistance

1. While this proceeding is aimed principally at respondent's acquisition of other dairy companies, the complaint, in Paragraph

¹³³ These have been grouped under 27 separate headings. Each of the acquisitions of multiple, commonly controlled corporations has been grouped together. In addition, the acquisition of two small Ohio companies claimed to be in commerce, viz, Gray & White and Linton & Linton, has been discussed under the heading "Other Ohio Acquisitions".

¹³⁴ The Eckles acquisition involved the acquisition by respondent of 32.4% of Eckles' preferred stock and 40% of its common stock. The company continued to operate as a separate entity in Baltimore. There is no indication in the record that, by this stock acquisition, respondent acquired control of Eckles.

Eight, alleges that respondent has engaged in a number of business practices, most of which involve various types of assistance to customers, or discrimination in favor of certain customers. These include, the loaning of money or equipment to customers, the performance of special services, and the granting of rebates or discriminatory prices. Most of these practices were the subject of a number of proceedings brought against nine of the principal manufacturers of frozen desserts, including respondent in this proceeding (Docket Nos. 6172-6179, and 6425). After extensive hearings, the complaints were ultimately dismissed on the ground that the record in such cases did not "support a finding that these practices have produced the requisite degree of competitive injury to support an order to cease and desist" (Order Dismissing Complaint, Docket No. 6174, May 23, 1962) [60 F.T.C. 1274, 1620]. Complaints have also been issued against some of the same companies, charging them with the granting of discriminatory prices, allegedly in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. Such a proceeding is now pending against respondent (Docket No. 7599).

2. At a pre-hearing conference held in this proceeding on January 17, 1957, counsel supporting the complaint agreed that they would not seek an order requiring respondent to cease and desist from engaging in any of the acts and practices set forth in Paragraph Eight of the complaint (see Pre-trial Order, February 8, 1957). The purpose in alleging such practices in the complaint herein was not to secure a re-trial of the earlier cases, but to provide a basis for offering evidence to show the economic power possessed by respondent vis-a-vis its smaller competitors, so as to provide a background for determining the competitive impact of the challenged acquisitions (R. 6, 18).

3. Complaint counsel have submitted a number of proposed findings with respect to some, but not all, of the allegations in Paragraph Eight. The examiner does not consider it necessary to make extensive findings with respect to these allegations. It is sufficient to note that the record does establish that respondent has made loans to some of its wholesale customers and that it has expended substantial sums in furnishing equipment to such customers. However, there is nothing in the record to show that respondent's practices in this regard are any different from those of dairy companies generally, or that their expenditures for such purposes are greater than that of other dairy companies, in proportion to the amount of

business done by them. The record also establishes that respondent has granted rebates or volume discounts to wholesale customers. However, there is nothing in the record to establish that respondent's practices differ from that of the other dairy companies or that their practices may result in substantial injury to competition.

B. "Market Leverage"

4. Although not charged in the complaint as an illegal practice, counsel supporting the complaint contend that respondent has deliberately sold milk or ice cream in certain areas at unreasonably low prices, while making abnormally high profits in other areas. Complaint counsel assert that respondent has used its economic power or "market leverage" to "act individually in specific market areas so as to give it a competitive advantage over a local single-product company or a local multi-product company" (Findings, p. 19). In support of this contention complaint counsel cite a number of instances in which various of respondent's plants operated at a loss in either the milk or ice cream product line.

5. Respondent does not deny that its profit and loss statements, which are in evidence, purport to show that it sustained losses in certain of its plants. It contends that some of these losses were mere bookkeeping losses, as where a branch plant which did not manufacture ice cream was charged a price above the cost of the manufacturing plant. In such instances, if the records of both plants are combined they show an overall profit. In other instances where the records disclose a loss on one product and a profit on another, respondent contends that this resulted from the arbitrary assignment of indirect expenses to a particular product, and that if such expenses were ratably divided, the records would reveal a profit on all products. Respondent concedes that in some instances its plants did in fact operate at a loss, but contends that this was not due to any deliberate policy on its part. Certain of such plants, which were not considered to be efficient plants, were later closed.

6. The examiner considers it unnecessary to make extensive findings with respect to the contention that respondent used its economic power or market leverage unfairly. It is sufficient to note that the record is lacking in substantial evidence to support a finding that respondent deliberately incurred losses in one area or in one product and/or obtained abnormally high profits in other areas or with respect to other products. However, while the charge that respondent engaged in what complaint counsel refer to as "predatory" pricing

practices is not sustained by the record, there is no question but that it enjoyed considerably greater market leverage than did its smaller competitors. As the Commission noted in the *Proctor & Gamble Co.* case, Docket No. 6901, November 26, 1963 [63 F.T.C. 1465], a multi-product firm operating in many markets enjoys "greater flexibility in pricing" than its smaller single-product or single-market competitors. This may lead to "below-cost selling of a particular product" even "without predatory motive." The likelihood of this occurring is particularly pronounced in the dairy industry, which is highly competitive and where profit margins are narrow.¹³⁵

CONCLUSIONS

I. AS TO THE ACQUISITIONS

A. Applicable Legal Principles

1. This proceeding involves principally a question of the legality of a series of acquisitions by respondent of the stock or assets of a number of other dairy companies. The only statute specifically dealing with the matter of acquisitions is Section 7 of the Clayton Act, as amended and approved December 29, 1950. Section 7 prohibits the acquisition by a corporation engaged in interstate commerce of the stock or assets of another corporation engaged in interstate commerce where "in any line of commerce in any section of the country the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." The constituent elements of a Section 7 violation are, (a) that the acquiring company be engaged in interstate commerce, (b) that the acquired company be engaged in interstate commerce, and (c) that the effect of the acquisition may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

Engagement in Commerce by Acquiring Company

2. There is no substantial issue raised here as to the acquiring company's engagement in commerce. Respondent admits in its answer that it and its subsidiaries are engaged in commerce, with the exception of "its inactive subsidiaries" and seven named subsidiaries. Since, with one possible exception, the acquisition of other corporations engaged in commerce were made directly by respondent, rather than through a subsidiary, it is unnecessary to consider further at

¹³⁵ During the period from 1951 to 1958 respondent's profit on sales, after taxes, ranged from a low of 1.7% to a high of 2.3% (CX 418, pp. 18-19).

this time the question of whether the particular subsidiary was engaged in commerce and, if not, whether the acquisition would, nevertheless, fall within the scope of Section 7 since the parent company was admittedly engaged in commerce.

Engagement in Commerce by Acquired Company

3. Two issues have been raised with respect to whether certain of the acquired companies were engaged in commerce within the meaning of Section 7, (a) whether the acquired company must be engaged in interstate commerce in the line of commerce in which the adverse competitive impact required to be shown by the statute occurred, and (b) whether a company which sells entirely within a State, but which purchases dairy supplies from outside the State, is engaged in commerce. With respect to the first issue, the Commission has already held in the *Foremost Dairies, Inc.* case, Docket No. 6495, April 30, 1962 [60 F.T.C. 944], that it is sufficient to meet the jurisdictional requirements of Section 7 if the acquired company is engaged in interstate commerce in any line of commerce in which it does business, and that it is unnecessary to show that it was engaged in interstate commerce in the line of commerce claimed to have been adversely affected by the acquisition. As a hearing examiner of the Commission, the undersigned is bound by this precedent. With respect to the second "commerce" issue raised by respondent, it was likewise held in the *Foremost Dairies* case that a company which regularly purchases dairy supplies from outside the State is engaged in interstate commerce, even though its sales take place entirely within the State. The cases cited by respondent, such as *Higgins v. Carr Bros.*, 317 U.S. 572, are in nowise contrary to the holding in the *Foremost* case. They involve principally the coverage, under the Fair Labor Standards Act, of employees engaged in activities which occurred after the out-of-State goods had come to rest within the State. They do not hold that the ordering and receipt of goods from out of the State does not constitute engagement in commerce.

4. In connection with the issue of whether the receipt of goods from out of the state constitutes engagement in commerce, respondent makes the further contention that, even assuming such transactions are in commerce, complaint counsel have failed to establish that such out-of-state purchases were of more than de minimis proportions. Respondent cites a number of cases arising under the Fair Labor Standards Act, in which employees spending only a small fraction of their time in the handling of interstate goods were held to fall within the de minimis rule. As respondent notes, the Supreme

Court in *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, subsequently held that the de minimis doctrine had no application to the Fair Labor Standards Act because the Act is made specifically applicable to the shipment in commerce of "any" goods produced in violation of its provisions. However, while stating that there was no warrant for assuming that "regular shipments in commerce are to be included or excluded dependent on their size," the Court, nevertheless, acknowledged that "sporadic or occasional shipments of insubstantial amounts of goods were not intended to be included" in the Act's coverage. Unlike the Fair Labor Standards Act, the Clayton Act does not speak in terms of the shipment of "any" goods in commerce. It is reasonable to assume, therefore, that the ordinary de minimis rule would apply in connection with establishing whether an acquired company was engaged in commerce. While the examiner is not aware of any cases arising under Section 7 of the Clayton Act in which the rule has been held to be applicable, it has been held to apply under the Robinson-Patman Amendment to the Clayton Act, which likewise uses the phrase "engaged in commerce." *Skinner v. U. S. Steel Corp.*, 233 F. 2d 762, 764 (CA 5, 1956).

The Product Market

5. The competitive impact of a merger or acquisition must be determined with reference to some "line of commerce." It is now well established that the phrase "line of commerce," as used in Section 7, refers to a "relevant product or services market." *U. S. v. Philadelphia National Bank*, 374 U.S. 321, 356. Complaint counsel propose, as the relevant product markets, "dairy products" generally, and various specific types of dairy products, such as bottled fluid milk and ice cream. They also propose the manufacture and sale of certain specific dairy products through different channels of distribution, such as wholesale and retail, as separate product markets.

6. It has been held that the "outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it," but that "within this broad market well-defined submarkets may exist which, in themselves, constitute product markets for anti-trust purposes." *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 325. The record in this proceeding does not disclose any such "interchangeability of use" or "cross-elasticity of demand" between the various specific products of the industry, as to justify a finding that dairy products as a whole constitute an appropriate product market. Companies which produce and distribute products derived from fluid milk are con-

sidered, in the broad sense, as being in the dairy products industry. Companies in the dairy industry are classified even more broadly by the Bureau of the Census, as being in the "Food and Kindred Products" industry. However, the products of this broad industrial grouping are divided into separate industry categories such as "Fluid Milk," "Ice Cream and Ices," "Creamery Butter," "Natural Cheese," etc. (CX 424). While there are some companies which produce most of the products that can be broadly classified as dairy products, the vast majority of the companies process and distribute only certain specific types of dairy products. For example, there are a great many companies which process and distribute only fluid milk products, such as bottled fluid milk, cream, skim milk and chocolate milk. There are a number of companies which manufacture and distribute only ice cream and other frozen desserts. There are a number of specialty companies producing such products as cheeses or butter.

7. It is the conclusion and finding of the examiner that the relevant product markets in this proceeding are, the processing and distributing of bottled fluid milk (including whole milk, cream, skim milk, buttermilk and flavored milk); the manufacturing and distributing of ice cream and other frozen desserts (including ice milk, sherbets, ices, mellorine and frozen novelties); the manufacture and distributing of frozen dessert mixes; the processing and distributing of butter; the processing and distributing of cheese; and the processing and distributing of condensed and evaporated milk. The fluid milk product line may be further subdivided into distribution through wholesale and retail channels, although the economic significance of this division has largely dwindled since most companies distribute through both retail stores and home delivery. The frozen dessert product line involves principally distribution through wholesale channels since there is little home delivery by manufacturers. There are some companies which sell through their own retail stores frozen desserts manufactured on the premises. However, none of the corporations engaged in commerce which were acquired by respondent fall in the retail classification.

The Geographic Market

8a. The product market in which competitive impact is to be determined must also be related to a "section of the country" or, as it has been differently described, to a "relevant geographical market." *U. S. v. Philadelphia Nat. Bank, supra*, at 356. As in the case of a product market, which may be divisible into product submarkets, "so may a geographic submarket be considered the appropriate 'section

of the country.’” *Brown Shoe Co. v. U. S.*, *supra*, at 336. Furthermore, the approach to defining a relevant market is “a pragmatic, factual” one and “not a formal, legalistic one.” [*Ibid.*] Since it is competition which Congress was trying to preserve, a delineation of the geographic market area does not depend merely on “where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate.” *U. S. v. Philadelphia Nat. Bank*, *supra*, at 357. The scope of this area “depends upon ‘the geographic structure of supplier-customer relations’” [*ibid.*] or, as the Court stated “in a related context ‘the area of effective competition in the known line of commerce must be charted by a careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.’” *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (emphasis supplied).” [*Id.* at 359.]

8b. Applying these principles to the dairy industry, in which distribution patterns are local or regional, rather than national, the scope of the appropriate geographic markets must be determined not merely in terms of the area in which the acquired and acquiring companies operated, but with reference to the pattern of supplier-customer relations in the area which will be affected by the acquired company’s departure as an independent business entity. The acquired company’s distribution area is merely a point of departure for determining the sources to which its customers can practicably turn for supplies. Since the ultimate question to be determined is one of effect on competition resulting from the acquired company’s departure, it is necessary to draw a line which will encompass the distribution areas of the companies with which it principally competed and to which its customers could turn as alternative sources of supply. In determining the area of effective competition, an appropriate balance must be made between the distribution patterns of the competing local companies which Congress was seeking to preserve as competitive entities, and those of large national or regional companies which distribute into more than one market. To the extent that the latter companies have consolidated their production facilities in the interest of achieving the economies of large-scale production, but distribute into remote areas through separate subplants or distribution branches, they may be regarded as operating in multiple markets.

Competitive Effect

9. Given the necessary jurisdictional prerequisites, the test of the legality of an acquisition under Section 7 of the Clayton Act is

whether "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly" in any product line in any geographic market. The "effects" clause in the statute is couched in general, non-specific terms. However, its meaning may be gleaned from its legislative history, and especially from recent court decisions interpreting that history and applying it in specific factual situations.

10. Any attempt to interpret the general language of the statute must be made against the background of the "dominant theme pervading congressional consideration of the 1950 amendments [which] was a fear of what was considered to be a rising tide of economic concentration in the American economy." *Brown Shoe Co. v. U.S.*, *supra*, at 315. Accompanying this concern was an affirmative conviction as to "the desirability of retaining 'local control' over industry and the protection of small businesses." *Ibid.* In addition to giving recognition to the congressional mood which was responsible for the amendment to Section 7, it is also necessary to bear in mind that Section 7 of the Clayton Act was enacted because of what was considered to have been the ineffectiveness of the Sherman Act "in halting the growth of 'trusts' and monopolies." *U.S. v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (SD NY, 1958). In using the words "may tend substantially to lessen competition" (emphasis supplied), Congress was thinking in terms of the "reasonable probability" of competitive injury, and not the "certainty" thereof. *Brown Shoe Co. v. U.S.*, *supra*, at 323, n. 39. It recognized that: "A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints." *Ibid.* At the same time, it indicated that the amendment would not apply to "the mere possibility" of competitive injury. *Ibid.*

11. Despite the foregoing expressions of congressional intent, there has been considerable argument concerning the quantum and type of evidence which, while falling short of establishing actual competitive injury or the certainty thereof, does establish the reasonable probability of such injury and not the mere possibility thereof. While it has been generally agreed, in theory at least, that a full-blown showing of monopoly conditions, of the type sufficient to meet the "Rule of Reason" requirements of the Sherman Act, is not necessary in a Section 7 case, there has been considerable disagreement as to just how far it is necessary to go to establish the "reasonable probability" of an adverse competitive impact. Such disputes have tended to polarize between the advocates of a "quantitative substantiality" test and those advocating a "qualitative substantiality" test. See *U.S. v.*

Bethlehem Steel Corp., *supra*, at 579 n. 51, and case cited therein; see also Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 249 (1960); Handler and Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 Columbia L. Rev. 671 (1961).

12. Much of the controversy stems from attempts to oversimplify the holding in the *Standard Stations* case (*Standard Oil Co. v. U.S.*, 337 U.S. 293), as resting entirely on the quantitative substantiality of the market share foreclosed. (Although *Standard Stations* arose under Section 3 of the Clayton Act, which deals with exclusive dealing and tying arrangements, the "effects" clause is substantially identical with that under Section 7.)¹³⁶ It has even been suggested that in the *Tampa Electric* case (*Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320), the Supreme Court abandoned the quantitative substantiality test of *Standard Stations* and "returned to an interpretation of section 3 of the Clayton Act which is faithful both to its legislative history and the philosophy of antitrust." Handler, *Recent Antitrust Developments*, 71 Yale L. J. 81 (1961). Whether the original interpretations of the *Standard Stations* case as establishing a quantitative substantiality test were justified or not, it is now clear from the Supreme Court's recent analysis of the Section 3 cases, in its *Philadelphia Nat. Bank* decision, that the Court itself does not regard its prior holdings as resting solely on the substantiality of the share of the market foreclosed. The Court in the *Philadelphia Nat. Bank* case noted the presence in the earlier cases of such other market factors as, the substantial market position of the company involved, the extent of concentration, the use of similar restrictive agreements by other major companies, and the possibilities of newcomers entering the market.¹³⁷

13. Despite the doubts which have been expressed in the past concerning the application of the Section 3 decisions to cases arising under Section 7 (see, for example, *Pillsbury Mills, Inc.*, 50 FTC 555),

¹³⁶ Such contracts are prohibited "where the effect [thereof] may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

¹³⁷ Thus the Court noted (at 366) that in the *Standard Stations* case, not only did the defendant have 6.7% of the market tied up by exclusive agreements, but it accounted for 23% of the area's sales (thus suggesting the possibility of further market foreclosure by it); in addition, the other major companies were using similar restrictive agreements and they, together with the defendant, accounted for 63% of the area's sales. It took note of the existence of a similar pattern in *FTC v. Motion Picture Adv. Serv. Co.*, 344 U.S. 392, where the defendant accounted for 20% of the market and the four major concerns had foreclosed 75% of the market. Commenting on the exclusive dealing cases, the Court observed: "Doubtless these cases turned to some extent upon whether 'by the nature of the market there is room for newcomers.' *FTC v. Motion Picture Advertising Service Co.*, *supra*, at 395."

it is now unmistakeably clear that the two sections must be interpreted in *pari materia*. As noted by the Supreme Court in the *Philadelphia Nat. Bank* case, *supra*, at 365:

The House Report states that the tests of illegality under Section 7 "are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act." H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8. Accordingly, we have relied upon decisions under these other sections in applying Section 7.

14. While it is now clear that the ratio decidendi of the exclusive dealing cases rests on more than merely the quantum of commerce foreclosed, it is also clear that the holding in such cases does not require any full-blown investigation into a wide spectrum of market factors.¹³⁸ Nor is any greater showing required in Section 7 cases than in exclusive dealing cases since, as stated by the Court in *Philadelphia Nat. Bank*, *supra*, at 366, "integration by merger is more suspect than integration by contract, because of the greater permanence of the former." The Court's holding in that case rested principally on the factors of substantial market shares and substantial increase in concentration, and it cited in support of its conclusions the "market share and market concentration figures in the contract integration cases." In its earlier holding in the *Brown Shoe* case, *supra*, at 322 n.38, the Court also recognized that "[s]tatistics reflecting the shares of the market controlled by the industry leaders and the parties are, of course, the primary index of market power * * *."

15. It is true that in *Brown Shoe* the Court, after noting the primacy of market share and concentration data, also observed that "only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger." This does not, however, require any probing in depth of market conditions. The Court itself, in *Brown Shoe* (at 322) alluded to some of the other factors which could properly be taken into account, "vary-

¹³⁸ There is little justification for the suggestion alluded to above that *Tampa Electric* constitutes a radical departure from *Standard Stations*, and requires a broad investigation into market factors. The Court while noting in *Standard Stations* (337 U.S. at 305), that "[t]ying agreements serve hardly any purpose beyond the suppression of competition," recognized (at 306) that: "Requirements contracts, on the other hand, may well be of economic advantage to buyers as well as sellers, and thus indirectly of advantage to the consuming public." *Tampa Electric* involved a case where the arrangement was deemed to be for the economic advantage of the customer and where, moreover, there was "neither a seller with a dominant position in the market as in *Standard Fashions*, *supra*, nor myriad outlets with substantial sales volume, coupled with an industry-wide practice of relying upon exclusive contracts, as in *Standard Oil*, *supra* * * *." 365 U.S. at 234.

ing in importance with the merger under consideration," viz, (a) whether the merger occurred in an industry "that was fragmented rather than concentrated," (b) whether the industry "had seen a recent trend toward domination by a few leaders or had remained fairly consistent in its distribution of market shares," (c) whether there was "easy access to markets by suppliers and easy access to suppliers by buyers," and (d) whether the industry "had witnessed the ready entry of new competition or the erection of barriers to prospective entrants." However, while these are all relevant factors, "the Court did not imply," as the Commission had occasion to observe in the *Brillo Manufacturing Co.* case, Docket No. 6557, July 31, 1963 [64 F.T.C. 245, 258], "that all of these factors would be relevant in every case."

16. In the *Philadelphia Nat. Bank* case, its most recent expression of opinion on the antimerger section, the Court (at 362) made pointed reference to "the danger of subverting congressional intent by permitting a too-broad economic investigation," and suggested that "in any case in which it is possible, without doing violence to the congressional objective embodied in Section 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration." Alluding to its earlier observation in the *Brown Shoe* case that the "dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy," the Court stated (at 363):

This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anti-competitive effects.

17. Further evidence that Congress did not intend to require a broad examination into market conditions may be gleaned from the illustrations, appearing in the legislative history, of the type of mergers which would be proscribed under the statute. The House Report (H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8), as summarized in the *Brown Shoe* case, *supra*, at 321 n.36, stated that the adverse effects to which the statute made reference—

* * * could be perceived through findings, for example, that a whole or material part of the competitive activity of an enterprise, which had been a substantial factor in competition, had been eliminated; that the relative size

of the acquiring corporation had increased to such a point that its advantage over competitors threatened to be "decisive"; that an "undue" number of competing enterprises had been eliminated; or that buyers and sellers in the relevant market had established relationships depriving their rivals of a fair opportunity to compete. [Emphasis supplied.]

Also significant, as reflecting congressional intent, are the examples cited in the *Brown Shoe* case (at 319) of the type of mergers which would *not* be proscribed under the statute, viz, "a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market, [or] a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market."

18. From the foregoing, certain guide lines may be distilled for judging the acquisitions in the instant case. First, it is clear that where a major factor in a market acquires a substantial competitor, with the result that there is a substantial increase in concentration in the market, the acquisition will be deemed to have the proscribed statutory effect, in the absence of evidence "to rebut the anti-competitive tendency manifested" by such a factual showing. *U. S. v. Philadelphia Nat. Bank*, *supra*, at 366. A clear example of such a merger is that involved in the *Philadelphia Nat. Bank* case, in which the merger resulted in a company having a 30% share of the market and in a 33% increase in concentration. While the percentages in that case were obviously high, the Court made it clear that it was not foreclosing the possibility of applying the same principles in a case involving smaller market share and concentration increase percentages.¹³⁹ Even where a particular merger does not result in a substantial increase in concentration, but is made by an important factor in the industry and involves a company which cannot be classified as being of small or negligible proportions, it may violate Section 7 if it occurs in an industry which is oligopolistic or is trending in that direction, or in which entry is becoming increasingly more difficult. An example of such a merger is that involved in the *Brown Shoe* case, in which the Court considered a combined market share of only 5% in a number of the local markets as significant, where "this share is held by a large national chain" and where there was a "history of tendency toward concentration in the industry." *Id.* at 344-345.

¹³⁹ The Court stated (at 364 n.4):

Needless to say, the fact that a merger results in a less-than-30% market share, or in a less substantial increase in concentration than in the instant case, does not raise an inference that the merger is *not* violative of Section 7. See, *e.g.*, *Brown Shoe Co.*, *supra*.

19. The dividing line between small and non-small companies, for purposes of determining competitive impact, is sometimes hard to draw. In *Crown Zellerbach v. FTC*, 296 F. 2d 800, 818 (CA 9), the court defined a "small company" as one "whose total sales and competitive impact was so small relative to all sales and all competition in the market that it lacked real importance." However, any determination of whether a company is so small "that it lacked real importance," must be made in the light of the congressional intent "to reach incipient monopolies and trade restraints outside the scope of the Sherman Act." *Brown Shoe v. U.S.*, *supra*, at 318 n.32. As stated in H.R. Rep. No. 1191, 81st Cong. 1st Sess. 8, which is cited in the *Brown Shoe* decision (*ibid*):

Acquisitions of stock or assets have a cumulative effect, and control of the market * * * may be achieved not in a single acquisition but as the result of a series of acquisitions. The bill is intended to permit intervention in such accumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition.

20. The application of the foregoing principles and guidelines presents no serious problem in cases involving strictly horizontal acquisitions, where the market shares of the acquired and acquiring companies, and the extent of concentration in a particular market, have an obvious relationship to the probabilities of an adverse competitive impact on the market. Their application is more difficult in situations where the acquired and acquiring companies do not compete in the same market, and where there can therefore be no discernible increase in concentration in the market occupied by the acquired company. Such acquisitions, in which the acquired and acquiring companies are in the same product line, but do not sell in the same geographic market, are referred to as "market-extension" acquisitions. *Foremost Dairies, Inc.*, Docket No. 6495, April 30, 1962 [60 F.T.C. 944]; *Procter & Gamble Company*, Docket No. 6901, November 26, 1963 [63 F.T.C. 1465]. They are considered to be akin to conglomerate acquisitions, but are deemed to be more closely related to horizontal acquisitions to the extent that they involve companies which are in the same industry. However such acquisitions may be designated, it is clear that they are reachable under Section 7 since "[a]ll mergers are within the reach of the amended Section 7, whether they be classified as horizontal, vertical or conglomerate, and all are to be tested by the same standard." *Procter & Gamble*, *supra*, p. 1546.¹⁴⁰

¹⁴⁰ The above quotation from the *Procter & Gamble* case is based on H.R. Rep. No. 1191, 81st Cong., 1st Sess. 11; and *Brown Shoe Co. v. U.S.*, *supra*, at 317 n.31.

21. While such quantitative factors as the acquiring company's market share in the acquisition area, and the increase in concentration in that area, are obviously not relevant in a market-extension situation, there are a number of similar factors, quantitative and otherwise, which have a bearing on the question of an adverse competitive impact. In the *Foremost Dairies* case the Commission considered national and state market-share and concentration data, the growth pattern of the acquiring company, "the 'leverage' advantage possessed by large, diversified and geographically dispersed firms," the type of firm which was being eliminated and the potentiality of competition between the two firms. In the *Procter & Gamble* case, among the factors considered by the Commission, were the position of the acquiring company in other markets, the "relative disparity in size and strength" between it and the other companies in the industry it was entering, the extent of concentration in the industry (although the markets were found to be regional), the economies enabled by the merger, and the potentiality of competition between the two companies.

22. Respondent suggests that since the United States and the individual states are not areas of effective competition, it is not appropriate to consider national or regional market-share and concentration data. While it is true that the markets in the dairy industry are essentially local in nature, the record demonstrates that what is occurring in the local markets is a reflection of a trend which is not peculiar to any one area. Evidence of national or regional trends may appropriately be considered in determining the probable impact of an acquisition in a particular area. Furthermore, the power possessed by a company in other geographic or product markets has a bearing on what may be anticipated in a newly entered market.

23. The record in this case, as in the *Foremost Dairies* case, demonstrates "the 'leverage' advantage possessed by large, diversified and geographically dispersed firms." The Commission in the *Procter & Gamble* case likewise took note of the "greater flexibility in pricing enjoyed by the multi-product firm * * * which is in competition with a small firm's single product." While the *Brown Shoe* case, in its retail aspect, involved a horizontal acquisition, the basis of the Court's decision was not so much the "small share of a particular market" which the combination would control, as it was the fact that "this share is held by a large national chain * * * [which] can insulate selected outlets from the vagaries of competition in particular locations" (at 344). The following statement in *Reynolds*

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Metals Co. v. U.S., 309 F. 2d 223, 229 (CA DC, 1962), although relating to a vertical acquisition, also has application to product or market-extension acquisitions:

Arrow's assimilation into Reynolds' enormous capital structure and resources gave Arrow an immediate advantage over its competitors * * *. The power of the "deep pocket" or "rich parent" * * * in a competitive group were previously no company was very large and all were relatively small opened the possibility and power to sell at prices approximating cost or below and thus to undercut and ravage the less affluent competition.

24. Respondent contends that as a matter of law it does not possess monopoly power, *i.e.*, the power to control prices or exclude competition, citing such cases as *Standard Oil Co. v. U.S.*, 221 U.S. 1, and *American Tobacco Co. v. U.S.*, 221 U.S. 106, arising under Section 2 of the Sherman Act. However, as the Commission pointed out in its *Foremost Dairies* decision, Sherman Act tests are inapplicable to Section 7 of the Clayton Act, which is intended to "cope with monopolistic tendencies in their incipency and before they attain Sherman Act proportions." *U.S. v. Bethlehem Steel Corp.*, 168 F. Supp. 576. While it may be that respondent does not possess monopoly power, there is no question as to its disparate economic strength vis-a-vis the great bulk of its competitors.

25. In 1950 respondent was the third ranking company in the production of frozen desserts in the United States, with 3.5% of production. While this figure does not seem inordinately high, it must be noted that there were some 4,200 ice cream plants in the United States in 1950, and that eight national companies accounted for 35.0% of U.S. production. By 1957 these eight companies accounted for 39.2% of U.S. production and respondent's share had increased to 4.7%. In 1958 the eight largest companies accounted for 48% of the value of ice cream shipments in the United States. With 1,171 companies which were primarily in the ice cream business, the average share of all remaining companies was .05%. In the fluid milk line respondent was the fourth ranking company in 1958, with 3.4% of the value of shipments. Eight national companies accounted for 31.0% of the value of fluid milk shipments. In terms of companies which were primarily in the fluid milk business, the top eight companies accounted for 29% of the value of shipments in the United States, with the remainder of the 5,008 companies having an average share of .001%. In addition to its product and geographic diversification in the dairy products field, respondent enjoyed further diversification in the food industry, with at least 30% of its sales in non-dairy products. During the decade from

1950 to 1960 respondent's sales increased by 116%. During the same period the number of milk plants decreased by 55% and the number of ice cream plants by 23%. While a substantial part of the decline in dairy plants has been due to technological conditions, there is no question but that keen competitive conditions and low profit margins have been significant factors. In this milieu the large national companies clearly possess the advantage. They have been the chief beneficiaries of the decision on the part of many of the smaller companies to give up the competitive struggle by selling out to the larger companies. The four largest national companies, National Dairy, Borden, Foremost and respondent have been responsible for a major portion of these acquisitions.

B. Creameries of America, Inc.

1. As has heretofore been found, Creameries distributed dairy products in an area of the western United States between the western slope of the Rockies and California. It also distributed in the then Territory of Hawaii. Creameries and respondent competed only in the State of California, which accounted for 26% of Creameries' sales. The acquisition, therefore, involved principally a market extension by respondent. Detailed findings have been made concerning market and competitive conditions in each of the market areas where Creameries did business. However, any evaluation of the impact of the acquisition must be made against the background of Creameries' and respondent's over-all positions, and the trends in concentration in the United States and the western portion thereof.

2. Creameries was one of the three largest dairy companies operating exclusively west of the Rockies, its annual sales of approximately \$50,000,000 being almost one-quarter of respondent's own sales at the time. Despite the fact that its San Jose and Los Angeles divisions had sustained small losses just prior to the acquisition, the company's over-all operation was profitable. Its profit rate in 1952 was comparable to respondent's. There is no question but that it was a substantial and viable company. As the Commission stated in the *Foremost Dairies* case with respect to the acquisition of Creameries' largest California competitor, Golden State (at p. 1077), "respondent eliminated precisely that firm which had the financial and other resources to offer it the greatest potential, as well as immediate, competition."

3. At the time of the Creameries acquisition, respondent ranked ahead of Foremost Dairies, as the third largest dairy company in

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the United States. From a small Midwestern beginning, respondent had expanded (largely by acquisition) until by 1950 its territory extended from the eastern United States to the eastern slope of the Rocky Mountains. Except for a portion of California, which it had entered by acquisition in the middle 1940's, it did not have any substantial business west of the Rockies. The acquisition of Creameries offered respondent an opportunity to diversify its operations geographically, by expanding into new areas at a cost lower than would be involved if it sought to develop new business in these areas. It also offered respondent an opportunity to enjoy the full benefits of its national advertising program, at a minimum additional cost.

4. The most obvious potential impact on competition of respondent's acquisition of Creameries was in the lower Bay area, in which respondent and Creameries' San Jose division both competed in the sale of ice cream and other frozen desserts. Both companies were substantial factors in the ice cream product line in this area. While the figures in the record are not precise, it is clear that respondent accounted for somewhere between 20 to 30% of the ice cream sold in this market, and Creameries accounted for between 13 to 16%. Their combined market share represented between one-third and two-fifths of the market, and gave them the largest share of any company in the area. Together with two other national companies (Borden and Carnation) and one large, California-based company (Golden State), they accounted for around 85% of the area's ice cream sales. Within a short time after the Creameries acquisition, Foremost Dairies acquired Golden State, and Borden acquired two other independent ice cream manufacturers in the lower Bay area. Thus, within a period of less than a year the number of non-national independent ice cream manufacturers doing business in the lower Bay area was reduced by almost one-half, from nine to five. The number of independents which were in business in 1953, when Creameries was acquired, was itself a reduction from the number which had previously sold in the territory, Borden having acquired two sizeable independents in 1951, and respondent having initially entered the territory by the acquisition of an independent. Respondent's acquisition of Creameries not only involved the acquisition of a substantial competitor in the ice cream product line, but enabled it to diversify its product line in the lower Bay area, since Creameries was also a substantial distributor of fluid milk.¹⁴¹ It also

¹⁴¹ Creameries was particularly strong in the Monterey-Santa Cruz milk market, with over 28% of the area's sales, and was a sizeable factor in the Santa Clara market, with almost 10% of that market.

resulted in a sizeable concentration of the fluid milk business among the national companies.¹⁴² Having obtained entry into the fluid milk line through its acquisition of Creameries, respondent in the following year acquired two other independent milk companies in the lower Bay area. Based on the record as a whole, including the detailed findings heretofore made with respect to the lower Bay area and the facts hereinabove discussed, it is concluded that the effect of respondent's acquisition of Creameries of America may be substantially to lessen competition, or to tend to create a monopoly in the ice cream and fluid milk product lines in the lower Bay area.

5. Since the law is violated "if anticompetitive effects of a merger are probable in 'any' significant market, the merger—at least to that extent—is proscribed." *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 337; see also *Brillo Manufacturing Co.*, Docket No. 6557, July 31, 1963. It is, accordingly, unnecessary to determine whether the Creameries acquisition had the proscribed statutory effect in each of the other areas in which that company did business. However, to the extent that the anticompetitive implications of the merger in other areas may have a bearing on the relief to be ordered. (*Brown Shoe Co. v. U.S.*, *ibid.*, n.65), brief reference will be made to the anticompetitive aspects of the merger in the other areas in which Creameries operated.

6. As has already been found, respondent and Creameries were both substantial factors in the ice cream product line in the lower San Joaquin Valley area. Creameries accounted for almost 23% of the ice cream sold in the Kern-Tulare portion of that area, while respondent accounted for one-third of the ice cream sales in the Fresno portion of the area. Their combined sales represented over 25% of the ice cream sold in the lower San Joaquin Valley. If respondent and Creameries cannot be considered as actual competitors in the lower San Joaquin Valley, they were certainly potential competitors. With over half of the companies which sold in Creameries' territory operating from plants in Fresno, it was just a matter of time before respondent would also have extended its operations south into Kern-Tulare. In acquiring Creameries, respondent not only acquired a substantial potential competitor in the ice cream product line, but was able to obtain the benefits of diversification of its product line in the lower San Joaquin Valley. While respondent had previously distributed only ice cream in the area, Creameries was one of the largest factors in the fluid milk product line, accounting

¹⁴² Three national companies, plus Golden State, would account for over 70% of milk sales in the five principal cities in the area.

for over one-fourth of the area's milk sales, and was the third ranking milk company in the entire San Joaquin Valley (although it only sold in two out of seven counties in the Valley).

7. In the Los Angeles area, in which Creameries and respondent competed in both the fluid milk and ice cream product lines, the acquisition enabled respondent to achieve various economies by consolidating the plants of both companies in the area. Its most significant effect was in the frozen dairy product line, where the merger resulted in a company which accounted for almost 71½% of the frozen dairy products sold in the Los Angeles area.¹⁴³ Since the top four companies in the Los Angeles area (out of a total of almost 200 distributors, large and small) accounted for 32% of the market, the merger enabled respondent to achieve a position comparable to the average share of the top four companies. The merger resulted in five companies controlling almost 40% of the ice cream sold in the Los Angeles area. With Foremost's acquisition of Golden State, which was one of the top four companies, all but one of the five leading companies were national companies.

8. The acquisition of Creameries' California divisions must be viewed against an industry background which saw the number of milk plants in the State of California decline by 38% between 1950 and 1961, and the number of ice cream plants decline by 17%. During this period at least 25 dairy companies were acquired by five national companies. The acquisition also took place in a period which saw the State production share of frozen desserts accounted for by the national companies increase from 35.1% in 1950 to 54.9% in 1957. While a large part of this increase was the result of Foremost's acquisition of Golden State, respondent's acquisition of Creameries played a part in the increase in concentration, with respondent's share increasing from 4.2% in 1950 to 7.4% in 1957, making it the third ranking national company in the State. Respondent's own position in the frozen product line has further improved since 1957, with its share of California production reaching 9.4% in 1960. Thus, in a period of ten years, its share of frozen dessert production more than doubled. A considerable portion of this was made possible by its acquisition of Creameries. The post-

¹⁴³ The examiner has included in respondent's share of the market, the ice cream which it produced for Jersey Maid under the special arrangement with that company. This volume was produced in respondent's plant, and there is no reason to believe that respondent did not receive a profit on such sales comparable to the other ice cream produced by it. Its production for Jersey Maid gave respondent the benefit of large-scale production, which presumably was reflected in the cost of the other ice cream produced by it.

acquisition developments in the fluid milk line (upon which respondent places emphasis), such as the decline in the market share of the top four companies and the increase in the market share of the largest independents, do not negate the anticompetitive aspects of the acquisition in the frozen product line in the State of California, let alone its anticompetitive aspects in individual market areas within the State.

9. While respondent did not compete with the other Creameries' divisions, there is no reason to believe that in due time it would not have expanded its operations into at least some of the other areas. Respondent cites the mountainous terrain in the Rocky Mountain area, as indicative of the lack of likelihood that it would have expanded into the western slope of the Rockies, from its Denver plant. Yet the record discloses that there were at least two other companies serving communities in western Colorado with frozen dairy products from plants in Denver (CX 16-Z 252, pp. 81, 83). Given respondent's growth pattern, it was inevitable that, had the opportunity for acquiring Creameries not presented itself, it would have expanded into the Intermountain area, either directly or by the acquisition of one or more small companies which would have become its base of operations in the area. It was already poised on the perimeter of the area, with bases of operations in California, Denver and Oklahoma.

10. Aside from the aspect of affecting potential competition in the areas where respondent and Creameries did not compete, the merger had other anticompetitive implications in these areas. Respondent's acquisition of Creameries resulted in the elimination of a strong, independent company, which was a very substantial factor in the Intermountain area. In the Utah divisional area Creameries accounted for almost 20% of sales in both the milk and ice cream product lines, and in some markets within the area its market share was even greater. In the Idaho divisional area Creameries accounted for over 30% of ice cream sales, although it was not as strong in the fluid milk line as in the Utah area. With the exception of the two subsidiaries of Pet Milk, which sold in only a portion of Utah and which eventually left the area, there were no strong national companies in the Utah-Idaho region. Respondent's acquisition of Creameries resulted in the injection into the area of a national company with economic power and leverage far beyond Creameries'. In the area served by its El Paso Division, Creameries was the largest, if not the dominant, factor in the area, with almost 50% of both milk and ice cream sales, and even larger shares in some individual mar-

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kets. Respondent's entry into this area resulted in a substantial increase in the concentration of business among the national companies. Thus, in the El Paso market respondent (as Creameries' successor) and Borden accounted for 73% of the area's ice cream sales.

11. Respondent's acquisition of Creameries paved the way for its acquisition of two other companies serving portions of the Intermountain area, and for a later extension of its operations into adjoining areas in Texas and Arizona by the acquisition of two large independent companies in those areas. As a result of its program of expansion through acquisition respondent, which did not do business in the Intermountain area prior to 1953, was able by 1960 to increase its market share in the portions of the six-state area served by the acquired companies to 23% in the frozen dessert line and approximately 21% in the fluid milk line. During the decade from 1951 to 1961 the number of milk plants in the Mountain States declined from 748 to 348, and the number of ice cream plants from 269 to 216.

12. In the area served by its Honolulu Division, Creameries was clearly the dominant company, in both the milk and ice cream product lines, with approximately 60% of the milk sales and 50% of the ice cream sales on the Island of Oahu, and two-thirds of the ice cream sales on the Island of Hawaii. Through its contract with the local producers association and its own dairy farm, Creameries was in a strong position to control the supply of raw milk. Respondent's injection into this market brought an even stronger and more powerful competitor into the area to face the relatively few local companies. Within a matter of months after respondent's acquisition of Creameries, the largest of Creameries' local competitors were acquired by Foremost, which had theretofore owned one relatively small company. Thus, in a short time the acquisitions of respondent and Foremost had transformed a dairy industry consisting of local or independent companies into one in which these two national companies accounted for 85% of the milk business and 75% of the ice cream business in Oahu. Within a year after its acquisition of Creameries, respondent acquired the only independent ice cream company doing business on the Island of Hawaii, thus completing the cycle of control of the dairy industry in the Territory of Hawaii by national companies.

13. Respondent suggests that the Creameries acquisition cannot be deemed to have anticompetitive implications in the areas where the two companies were not in competition, since respondent merely "re-

placed" another company in those areas (Memorandum, p. 9). It cites in support of its position the statement in *Crown Zellerbach Corp. v. FTC*, 296 F. 2d 800, 818, in which the court, referring to the fact that the acquired and acquiring companies did not compete in certain Western States, stated:

[W]e are confronted with great difficulty in understanding how the acquisition of St. Helens could operate substantially to lessen competition in those areas where it apparently did no business before the acquisition.

The quoted statement was made in connection with a discussion concerning the delineation of the relevant geographic market, rather than the criteria applicable to determining the competitive impact of an acquisition between noncompeting companies. Furthermore, the area in which the court thought there could be no adverse impact was one in which the acquiring company sold, but not the acquired company, whereas here the area involved is one in which the acquired company did operate. The examiner does not interpret the case as holding that there can be no adverse competitive effect if the acquiring company did not sell in the same market as the acquired company. To so interpret it would be contrary to the clear congressional intent to extend Section 7 to acquisitions other than those which are horizontal in nature.

14. Even if the anticompetitive aspects of the Creameries acquisition were deemed to be limited to one or more of the California areas where the two companies directly competed, any attempt to evaluate the impact of the acquisition solely in terms of those areas would be to ignore the principal benefits which respondent received from the acquisition. As has previously been noted (*supra*, p. 505), while respondent visualized that the California portion of Creameries' business would give it "an opportunity to possibly improve our profits in those areas" by consolidation of the two operations, it was generally dubious about the advantages to be gained from that portion of the business "due to the highly competitive situation and smaller margins in both milk and ice cream in California." The major advantage which it saw in the acquisition was the "opportunity for our company to go into new areas, which are growing areas with major operations, at a price lower than we could ever develop business in these areas." The areas referred to were "particularly * * * Texas, New Mexico, Utah and Idaho." With the exception of Bakersfield, Creameries was losing money in California, while operating at a substantial profit in the other divisional areas. Were the order in this proceeding to be limited to divestiture of those portions of Creameries' business which were in competition with

respondent, the latter would be permitted to retain the principal fruits of the acquisition, while ridding itself of those portions of the business of which it might well wish to unburden itself. Anyone purchasing the California portion of the business would obtain a shell of the Creameries operation, lacking in the substantial geographic diversification and economic leverage of the original company.

C. Boswell Dairies

1. Boswell is one of the acquired companies with respect to which respondent contends the record fails to establish engagement in commerce. The only evidence of Boswell's engagement in commerce is that during the 12-month period prior to its acquisition by respondent, it purchased some butter and cottage cheese curd from a company in Springfield, Missouri, which delivered same in its own trucks to Boswell's plant in Fort Worth, Texas. The volume of such out-of-state purchases, and the degree of regularity thereof during the 12-month period, do not appear from the record. Boswell was a company whose annual sales were in excess of \$7,000,000. There is nothing to indicate that Boswell's out-of-state purchases were of more than *de minimis* proportions. It is the conclusion of the examiner that the minimal showing made by complaint counsel is not sufficient to establish that, at the time of its acquisition, Boswell was engaged in commerce, within the meaning of the Clayton Act and Federal Trade Commission Act.

2. In view of the foregoing conclusion, it is technically unnecessary to determine whether the Boswell acquisition had the proscribed competitive impact. However, since the Commission may disagree with the examiner's conclusions as to Boswell's engagement in commerce and may desire the benefit of his views concerning the competitive impact of the acquisition, the examiner will briefly indicate his conclusions in this regard.

3. The record discloses that Boswell was a substantial and viable independent company, with total sales in 1957 in excess of \$7,000,000, consisting of milk, ice cream and other dairy products. While its main distribution area was in the city of Fort Worth and surrounding Tarrant County, complaint counsel contend that the North Texas FMMO area is the relevant market area. Boswell's share of this market area in fluid milk was 10.63% in 1957. However, this does not accurately reflect Boswell's market position in fluid milk, since its distribution area included 12 counties which were not in the North Texas FMMO area, and the FMMO area included 10

counties in which Boswell did not do business. The record contains no data as to Boswell's market position in the ice cream product line. Respondent did not compete with Boswell in the sale of dairy products, its closest plants being at El Paso and Oklahoma City.

4. Based on the record as a whole, and particularly the lack of reliable evidence as to Boswell's market position prior to the acquisition, it is the conclusion of the examiner that complaint counsel have failed to sustain the burden of proving that the effect of respondent's acquisition of Boswell may be substantially to lessen competition, or to tend to create a monopoly, in any product line in any section of the country.

D. Associated Dairy Products Company

1. Associated is another of the acquired companies with respect to which respondent contends the record fails to establish engagement in commerce. The only evidence of Associated's engagement in commerce is that during the 12-month period preceding its acquisition, it purchased butter and plastic cream from a company in Los Angeles and that "some or all of said products *may* have originated in states other than Arizona" (emphasis supplied). There is nothing in the record to indicate the volume or degree of regularity of purchases actually originating from outside the state. It is concluded that the minimal showing made by complaint counsel is not sufficient to establish that, at the time of its acquisition by respondent, Associated was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. In view of the foregoing conclusion, it is technically unnecessary to determine whether respondent's acquisition of Associated had the proscribed adverse competitive impact. However, since the Commission may disagree with the examiner's conclusions as to Associated's engagement in commerce, and may desire the benefit of his views concerning the probable impact of the acquisition, the examiner will briefly indicate his conclusions in this regard.

3. The record discloses that Associated was one of the largest, if not the largest, independent dairy in Arizona, with sales of approximately \$4,000,000, consisting principally of fluid milk and related products. It was acquired in October 1956 for a consideration of almost three quarters of a million dollars. It was a profitable and viable company. It has been found that both the State of Arizona and the Central Arizona FMMO area are appropriate market areas. In the State of Arizona as a whole, Associated accounted for 11.22%

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of fluid milk sales in 1955. It is probable that its market share was even higher in the Central FMMO area, which included the principal communities in which Associated distributed. While respondent and Associated were not yet in competition, the perimeters of their respective territories coincided.¹⁴⁴ Having extended its operations into west Texas and New Mexico through its acquisition of Creameries, it was inevitable that respondent would expand into Arizona. In 1958 two national companies, Carnation and Borden, accounted for 58.6% of the value of fluid milk shipments in Arizona. There is no reason to believe that their share was substantially lower in October 1956, when respondent acquired Associated. With respondent succeeding to Associated's business, three national companies accounted for 67.6% of the value of fluid milk shipments in Arizona in 1958. In the decade from 1951 to 1961, the number of milk plants in Arizona declined from 78 to 25, and five dairy companies were acquired by national companies.

4. Based on the record as a whole, including the evidence as to the high degree of concentration in the milk industry in Arizona among the national companies, the substantial decline in the number of small, independent plants and companies, the substantial position which Associated occupied within the State of Arizona, and the close proximity between its and respondent's respective territories, it is the conclusion of the examiner that the extension of respondent's operations into Arizona by the acquisition of Associated, was reasonably calculated to injure competition in that section of the country and to tend to monopoly. In reaching this conclusion, the examiner is not unmindful of the fact, emphasized by respondent, that by 1960 its market share in Arizona had declined by 2.8%. Such post-acquisition development is not of such magnitude or character as to negate the foregoing conclusion.

E. Greenbrier Dairy Products Company

1. Greenbrier is another of the acquired companies with respect to which respondent contends the record fails to establish engagement in commerce. The record discloses that during the year prior to its acquisition by respondent, Greenbrier made purchases of cream, milk powder and dry cheese curd from various out-of-state sup-

¹⁴⁴ While Associated's plant, just outside of Phoenix, was approximately 400 miles from respondent's main plant at El Paso, it had a branch office at Bisbee from which it distributed in Cochise County in southeastern Arizona adjacent to the New Mexico state line. Respondent had a branch at Deming in southwestern New Mexico, from which it distributed in Hidalgo and Grant Counties bordering on Arizona.

pliers, in the total amount of \$115,190. These products were used as ingredients in the manufacture of various dairy products sold by Greenbrier in West Virginia. It is concluded that the volume of Greenbrier's out-of-state purchases is sufficient to establish that, at the time of its acquisition by respondent on January 1, 1955, Greenbrier was engaged in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

2. Greenbrier, whose sales of milk, ice cream and other dairy products, were approximately \$3,775,000 in 1953, was acquired for a total consideration in excess of \$1,200,000. Respondent concedes that Greenbrier was "a viable independent * * * with modern processing equipment." Greenbrier's sales were made principally in the area of Charleston, Beckley and Logan, in which respondent did not distribute. However, it also sold in the area of Lewisburg, where respondent competed with it in the frozen-product line. It has been found that the Charleston area and the Charleston-Beckley-Logan area are appropriate market areas. In the Charleston area Greenbrier accounted for approximately 15% of milk sales, and in the larger Charleston-Beckley area its market share was substantially larger. While the record does not disclose the extent of concentration in Greenbrier's distribution area, in the larger Charleston-Beckley-Bluefield area Greenbrier and two national companies accounted for 30.7% of the milk sales in 1951. Although four large independent companies accounted for 48.2% of the area's milk sales, two of these were later acquired by an outside company. Greenbrier represented the first important acquisition made by respondent in West Virginia. Following this it acquired five other dairy companies in the State. By 1958 respondent had become the first ranking milk company in West Virginia, with 11.8% of the value of shipments of fluid milk (not including the share obtained from a large company acquired in 1959). During the decade from 1950 to 1960, the number of milk plants in West Virginia declined from 149 to 66, and 10 dairy companies were acquired by national companies. Based on the record as a whole, including Greenbrier's substantial market position, the fact that respondent was already competing with Greenbrier in the frozen dairy product line, the extent of and trend toward concentration in the market, and respondent's acquisition pattern in the State, it is concluded that the effect of respondent's acquisition of Greenbrier may be substantially to lessen competition or to tend to monopoly in the fluid milk product line in southern and central West Virginia.

F. Clarksburg Dairy Company

1. Clarksburg is another of the acquired companies with respect to which respondent contends the record fails to establish engagement in commerce. The only evidence of Clarksburg Dairy's engagement in commerce is that it purchased some aerated cream and butter from two out-of-state suppliers. The butter purchases never exceeded three or four cases per week (the dollar volume thereof not appearing), and the volume of aerated cream was "very small." It is the conclusion of the examiner that the evidence is insufficient to establish that, at the time of its acquisition, Clarksburg Dairy was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. In view of the foregoing conclusion, it is technically unnecessary to determine whether the Clarksburg acquisition had the proscribed competitive impact. However, in the event the Commission should disagree with the examiner's conclusions as to Clarksburg's engagement in commerce and should desire the benefit of his views concerning the competitive impact of the acquisition, the examiner will briefly indicate his conclusions in this regard.

3. Clarksburg Dairy and its wholly owned subsidiary Home Dairy were acquired in August 1955, seven months after the Greenbrier Dairy acquisition. The record discloses that Clarksburg Dairy was a substantial and viable independent company with total sales of \$1,635,000. It accounted for approximately 35% of the milk sales in the northern West Virginia area in which it distributed, and was the largest distributor in the market. Respondent, through its newly acquired Greenbrier Division, competed with Clarksburg in a small way. With respondent's acquisition of Clarksburg, it and Fairmont Foods accounted for approximately 60% of the area's milk sales. None of the remaining companies had more than 6½% of the market. Following its acquisition of another large dairy in 1959, respondent's share of fluid milk sales in the northern West Virginia area reached 46.8% of the area's sales by 1950. As previously mentioned, even prior to the last acquisition respondent had become the largest factor in the milk business in the State of West Virginia, with 11.8% of the value of fluid milk shipments in 1958. This position resulted principally from its acquisition of Clarksburg and Greenbrier.

4. Based on the record as a whole, including Clarksburg's substantial market position, the fact that respondent was already competing with it, the extent of and trend toward concentration in the

market, and respondent's acquisition pattern in the State, it is concluded that the effect of respondent's acquisition of Clarksburg and its subsidiary Home Dairy may be substantially to lessen competition, or to tend to create a monopoly in the fluid milk product line in the northern West Virginia area.

G. Tro-Fe Dairy Company, Inc.

1. There is no issue raised concerning the engagement in commerce of Tro-Fe Dairy, which obtained all of its supply of raw milk from its wholly owned subsidiary in Tennessee. Respondent concedes, and the examiner concludes, that Tro-Fe was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. At the time of its acquisition in June 1956, Tro-Fe was a substantial, viable company, with net sales of approximately \$3,000,000, of which approximately 73% consisted of fluid milk. It has heretofore been found that the Gadsden-Anniston area is the relevant market area. The record contains no reliable statistical evidence as to Tro-Fe's market share or the extent of concentration in this market area. At the time of the acquisition, respondent sold fluid milk in the adjoining market in northern Alabama, and competed with Tro-Fe in a small area where the two markets overlapped. The record does not disclose respondent's market position in the area where it distributed. It does appear that two years after the Tro-Fe acquisition respondent accounted for 14.6% of the value of fluid milk shipments in the State of Alabama as a whole. However, there is no way of determining how much of this share is attributable to the Tro-Fe acquisition.

3. In view of the lack of reliable evidence as to Tro-Fe's market position and the extent of concentration in the Gadsden-Anniston market, as well as the lack of evidence as to respondent's pre-acquisition position in any appropriate market, it is concluded that complaint counsel have failed to sustain the burden of proving that the effect of respondent's acquisition of Tro-Fe Dairy may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

H. Dothan Ice Cream Company

1. There is no issue raised concerning the engagement in commerce of Dothan Ice Cream Company and its affiliated distributing companies. Respondent concedes, and the examiner concludes, that

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Dothan and its affiliated companies were engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. At the time of their acquisition in December 1959, Dothan and its affiliated distributing companies were a group of substantial, viable companies, with total frozen product sales of over \$3,000,000. From its plant at Dothan, Alabama, Dothan distributed frozen products through its affiliated companies in various portions of southeastern Alabama, southwestern Georgia and northwestern Florida. Respondent distributed frozen products in northern Alabama from its plant in Nashville, Tennessee. It did not compete with the Dothan companies. The record does not contain sufficient evidence from which an informed determination as to the geographic market area or areas relevant to the Dothan acquisition can be made. Even if the relevant market were assumed to be the distributing area of Dothan and its subsidiary companies, as contended by counsel supporting the complaint, the record is lacking in evidence concerning Dothan's market share and the extent of concentration in this area. In a multi-state area encompassing the combined territories of respondent and the Dothan companies, respondent accounted for approximately 10.3% of frozen product production in 1960, the year following its acquisition of Dothan. In terms of the area which the Dothan companies had formerly served, respondent's production share in 1960 was approximately 4.7%.

3. In view of the unsatisfactory state of the record concerning what is the appropriate market area or areas, and the lack of evidence as to respondent's and Dothan's preacquisition market shares and the extent of concentration in an appropriate market, it is concluded that complaint counsel have failed to sustain the burden of proving that the effect of respondent's acquisition of Dothan may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country. Even assuming that respondent's and Dothan's combined distribution area, or that Dothan's distribution area alone, is an appropriate market, no conclusion as to any adverse competitive impact can be made merely from the post-acquisition market share figures alluded to above.

I. Dairyland Farms, Inc., and Valdair Creamery Inc.

1. There is no issue raised concerning the engagement in commerce of Dairyland and its affiliated company, Valdair. Respondent

concedes, and the examiner concludes, that Dairyland and Valdair were engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. At the time of their acquisition in March 1961, Dairyland and Valdair were substantial, viable companies, with combined sales of approximately \$3,500,000. They distributed milk products and ice cream in eastern Alabama and western Georgia. Respondent competed with these companies in only a small portion of their territory, and only in the ice cream product line. The record does not contain sufficient evidence to permit a determination as to the appropriate geographic markets in either the fluid milk or ice cream product lines. Even assuming that Dairyland's and Valdair's respective distribution areas could be considered to be the appropriate markets, the record does not contain any evidence as to their market shares or the extent of concentration in these markets. The only market-share data in the record pertains to the State of Alabama as a whole, and indicates that in 1958 respondent accounted for 14.6% of the value of fluid milk shipments in the State, and that four national companies accounted for 33.4% of such shipments, with respondent's share being the largest. It is not possible to determine Dairyland-Valdair's market position in the fluid milk line in the State as a whole, since the record contains no breakdown of its total sales as between fluid milk products and ice cream.

3. While it seems likely from the amount of their total sales that Dairyland and Valdair were substantial factors in their markets, in the absence of definitive evidence as to their market shares and the extent of concentration in an appropriate market, no conclusion can be drawn that the effect of their acquisition by respondent may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

J. Louis Sherry, Inc.

1. There is no issue raised concerning the engagement in commerce of Louis Sherry. Respondent concedes, and the examiner concludes, that Sherry was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. Sherry was a substantial, viable company at the time of acquisition in March 1955, with frozen products sales of over \$3,000,000. However, it had sustained substantial losses on its operations during the two-year period prior to its acquisition. While respondent and Sherry were in competition in the sale of frozen products in

the New York metropolitan area, they sold different types of ice cream and catered to different types of customers. The only market share data in the record is for 1952, almost three years prior to the acquisition. Such data reveal that respondent and Sherry accounted for 4.7% and 3.4%, respectively, of the New York market, and were the third and sixth ranking companies. The first two ranking companies, Borden and National Dairy, accounted for 29.6% and 24.5%, respectively, of the area's sales.

3. Considering respondent's relatively small share of the New York market vis-a-vis the top two companies, the lack of current market-share and concentration data in the record, Sherry's poor profit position at the time of the acquisition, and the limited extent of competition between it and respondent in terms of the types of product and customer served, it is the conclusion of the examiner that complaint counsel have failed to establish that the effect of respondent's acquisition of Sherry may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

K. Arden Farms Co. (Melvern-Fussell Division)

1. There is no issue raised concerning the engagement in commerce of the Melvern-Fussell Division of Arden Farms. The record discloses, and the examiner concludes, that Melvern-Fussell was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. Arden's Melvern-Fussell Division operated a substantial, viable frozen products plant in the Washington, D.C. metropolitan area at the time of its acquisition by respondent in 1960. However, the Division had lost money each year since Arden entered the market in 1951. Respondent and Melvern-Fussell competed in the sale of frozen products in the Washington metropolitan area and in a broad area of Virginia and Maryland. Respondent, while a substantial factor in the Washington market, had been losing money on its Washington operation for three years prior to its acquisition of Melvern-Fussell. It was considering closing its Washington plant due to the poor physical condition thereof and the impracticality of renovating it. The only market-share data in the record is for the year 1952, approximately eight years prior to the acquisition. While such data reveal that they were both substantial factors in the Washington market, there is other evidence indicating that the position of both companies had deteriorated substantially prior to the acquisition.

The largest company in the area was National Dairy, which accounted for 43.6% of the value of shipments of frozen desserts in the District of Columbia in 1958.

3. In view of the lack of current market-share and concentration data in the record, the poor financial condition of the Melvern-Fussell operation, the lack of profitability of respondent's operation in the area, and the overwhelming market position of the largest company in the area, it is the conclusion of the examiner that complaint counsel have failed to establish that the effect of respondent's acquisition of the Melvern-Fussell Division of Arden Farms may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

L. Durham Dairy Products, Inc.

1. The record discloses that Durham received a portion of its raw milk from Virginia, that it purchased other dairy products from suppliers in Virginia and Kentucky and that its sales territory included one town in Virginia. It is concluded that the record establishes Durham was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. At the time of its acquisition in March 1953, Durham was a substantial processor and distributor of fluid milk products and ice cream in a five-county area of North Carolina. It was the second ranking company in the fluid milk line, with 30.5% of the area's sales, and was the top ranking company in the ice cream product line, with 25.4% of the area's sales. At the time of the acquisition respondent was not selling any dairy products in Durham's territory. However, it did distribute frozen products in southern Virginia from its plant at Norfolk. Durham's competitors in the fluid milk line were principally local, independent companies. However, in the frozen product line National Dairy, Borden and Pet were substantial factors and, together, accounted for 31.1% of the frozen products sold in the market. With respondent's acquisition of Durham, the four national companies would account for over 55% of the frozen product sales in the market.

3. Based on the record as a whole, including the substantial position which Durham occupied in its market area in both the fluid milk and frozen product lines, the close proximity of its and respondent's territories in the frozen product line, the fact that the acquisition resulted in the injection of a strong national company into a fluid milk market which had theretofore consisted almost en-

tirely of local companies, and the substantial increase in concentration among national companies in the frozen product line, it is concluded that the effect of the acquisition of Durham Dairy by respondent may be substantially to lessen competition, or to tend to create a monopoly in the fluid milk and frozen product lines in Durham's sales area.

M. Westerville Creamery Co. and Other Ohio Acquisitions

1. There is no issue raised concerning the engagement in commerce of Westerville Creamery. Respondent concedes that Westerville was engaged in commerce in the sale of evaporated and powdered milk products. It is concluded that Westerville was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. Westerville was a substantial producer of manufactured milk products, including evaporated, condensed and powdered milk. It also processed and sold fluid milk and ice cream. Its total sales at the time it was acquired in June 1961 were almost \$14,000,000, of which more than three-fourths was accounted for by its manufactured milk products. Prior to the acquisition respondent had not been a manufacturer of evaporated and condensed milk products; nor had it distributed fluid milk or ice cream in Westerville's territory. The record reveals that Westerville had about 8% of the fluid milk sales in its territory, but there is no evidence as to its relative position or the extent of concentration in the market. The record contains no evidence as to market shares or the extent of concentration, in any appropriate market, in either the frozen product or manufactured milk product lines. It is concluded that the record fails to establish that the effect of respondent's acquisition of Westerville Creamery may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

3. Respondent acquired two other Ohio corporations, which complaint counsel contend were engaged in commerce. These were Linton & Linton and Gray & White. The record fails to establish that either company was engaged in commerce. The mere fact that Linton & Linton purchased some bottled milk from respondent in Ohio, which may have originated outside of the State in its raw form, does not establish its engagement in commerce. The fact that Gray & White may have purchased some indeterminate amount of butter from outside of the State of Ohio is insufficient to establish its en-

agement in commerce. Moreover, the record is lacking in substantial evidence that the effect of either of these acquisitions may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country. There is no market share or concentration data in the record with respect to the Linton & Linton acquisition. The only data pertaining to the Gray & White acquisition is that its sales of butter amounted to approximately 5% of the butter consumed in the northern Ohio area.

N. Lindner Ice Cream Company

1. There is no issue raised concerning the engagement in commerce of Lindner Ice Cream Company. Respondent concedes, and the examiner concludes, that at the time of its acquisition in June 1956 Lindner was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. Lindner was a moderate-sized ice cream company, selling in the area of Cincinnati, Ohio, with annual sales of \$480,000. Respondent competed with Lindner in the sale of ice cream in the Cincinnati market. The record is lacking in evidence as to the market shares of the acquired and acquiring companies, and as to the extent of concentration in the market, at or about the time of the acquisition. The only market data in the record are for a period four years prior to the acquisition, at which time respondent and Lindner accounted for approximately 8% and 5%, respectively, of the ice cream sales in Cincinnati. Respondent was then the fourth-ranking company, the first ranking company being National Dairy with 23% of the market, and the second ranking company being a large Ohio independent with approximately 20% of the market. It is concluded that the record fails to establish that the effect of respondent's acquisition of Lindner may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

O. Community Creamery

1. Respondent contends that it "is doubtful whether the Commission has sustained its burden of proof that Community was engaged in interstate commerce" (Proposed Findings, p. 171). The record discloses that respondent regularly sold packaged fluid milk to a distributor in Idaho, amounting to approximately 3% of its fluid milk sales. Respondent's position that such sales were not in commerce is apparently based on the fact that Community "made

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no direct sales to purchasers in Idaho" inasmuch as its Idaho distributor picked up the milk at Community's dock (*Id.*, p. 169). It is the opinion and conclusion of the examiner that Community was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act, since there was a practical continuity in commerce of the fluid milk sold to the Idaho distributor despite the fact that respondent did not itself deliver the milk across state lines.

2. At the time of its acquisition in April 1960, Community was one of the largest independent dairies in the State of Montana, with net sales in excess of \$3,000,000. Its sales territory in western Montana overlapped that of respondent, which served a somewhat larger area of the State. Respondent accounted for approximately 24% of the frozen product shipments in Montana, and Community's share may be estimated as approximately 9.5%.¹⁴⁵ Community was a larger factor in the fluid milk product line, with approximately 15.5% of the value of shipments in the State, while respondent accounted for approximately 4.4%. Within less than a year after its acquisition of Community, respondent had acquired three other substantial dairy companies, whose combined sales exceeded Community's sales by approximately \$300,000.¹⁴⁶ Respondent's sales in 1961, based on figures which reflect only a portion of the sales of the acquired companies, showed an increase of 43.5% in the fluid milk line and 42.5% in the ice cream product line. While there are no market share figures in the record for the three companies other than Community, it may be assumed that these three companies added at least 5% to respondent's State market share in the fluid milk product line, and made a somewhat smaller contribution to its position in the ice cream product line. It may be estimated that following these acquisitions, respondent's share of milk sold in the State of Montana was not less than 20 to 25%, and its share of ice cream sales not less than 35 to 40%. It was undoubtedly the largest, if not the dominant, factor in the dairy industry in the State.

¹⁴⁵ Although the figures in the record are percentages of shipments or production in the State, it may be assumed that they closely reflect the shares of sales made within the State, since the geographic isolation and mountainous terrain of the State minimize shipments in and out of the State.

¹⁴⁶ Respondent refers to these as being "small local * * * operations." In relation to the size of companies operating in Montana they were substantial companies. Pioneer Dairy's sales, which consisted entirely of fluid milk, were double the milk sales of respondent's Great Falls Plant. Billings Dairy's sales, which were divided between milk and ice cream, were almost double the milk and ice cream sales of respondent's Billings' plant. Henne's sales, which were in both milk and ice cream, were more than double those of respondent's Butte branch.

3. The appropriate market area has been found to be the western Montana area in which Community Dairy distributed. While there are no market-share figures in the record in terms of this area, there can be little doubt, in view of Community's sizeable share in the State as a whole, that in the relatively small portion of the State in which it distributed it must have been a major, if not the largest, factor in the market. Although respondent's distribution area was considerably larger than Community's, it seems evident that it too was a very substantial factor in its territory, particularly in the frozen product line, in view of its substantial position in the State as a whole.

4. Based on the record as a whole, including the substantial market position of both respondent and Community, the close proximity and overlap of their distribution areas, the substantial increase in concentration in the frozen product line resulting from the acquisition, the substantial improvement in the respondent's market position in the fluid milk line as a result of the acquisition, and respondent's pattern of acquisitions in the State, it is concluded that the effect of respondent's acquisition of Community Creamery may be substantially to lessen competition, or to tend to create a monopoly in the fluid milk and ice cream product lines in the western Montana area.

P. James S. Merritt Company

1. The record indicates that Merritt distributed frozen products in "Metropolitan Kansas City." Complaint counsel contend that Merritt's territory included the suburban area in the State of Kansas. However, the record does not establish this as a fact. It is, accordingly, concluded that complaint counsel have failed to sustain the burden of proving that Merritt was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. The Merritt acquisition, in September 1958, involved that part of Merritt's business which was devoted to the manufacture of bulk and package ice cream. The seller retained and continued to operate its frozen novelty business. Merritt sold approximately 400,000 gallons of bulk and package ice cream annually. Respondent's own sales in the Kansas City area were approximately 10,000 gallons. The record contains no evidence as to either company's market shares in the Kansas City area or as to the extent of concentration therein. It is concluded that complaint counsel have failed to establish that the effect of respondent's acquisition of Merritt may be substan-

tially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

Q. Arden Farms Co. (Linwood Division)

1. The record establishes that the Linwood Division of Arden Farms Co. was engaged in the distribution of frozen products in the Kansas City metropolitan area, including the adjoining suburbs in the State of Kansas. It is accordingly concluded that Linwood was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. At the time of its acquisition by respondent in June 1960, Linwood's sales were approximately \$850,000, consisting of 655,000 gallons of ice cream and other frozen products. It had operated at a loss in two of the four years prior to its acquisition. Although it appears that respondent had acquired James P. Merritt Company two years earlier, with a volume of approximately 400,000 gallons, the record does not disclose what respondent's volume was in the Kansas City area at the time of the Linwood acquisition. The record is also lacking in evidence as to the market shares of the acquired and acquiring companies, and as to the extent of concentration in the Kansas City metropolitan area. It is accordingly concluded that complaint counsel have failed to establish that the effect of respondent's acquisition of the Linwood Division of Arden Farms may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the country.

R. Gateway Creamery Company

1. Respondent admits in its answer, the record establishes, and the examiner concludes that Gateway Creamery was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. The record discloses that at the time of its acquisition by respondent in October 1954, Gateway had annual fluid milk sales of approximately 500,000 gallons and ice cream sales of approximately 190,000 gallons. Limited market share data in the record indicates that Gateway's share of the fluid milk market in the Joplin, Missouri area was of the order of magnitude of 11%. There is no evidence as to its market position in the ice cream product line. The record is also lacking in evidence as to respondent's market share and the extent of concentration in any appropriate market. It is accordingly concluded that complaint counsel have failed to establish that the

effect of respondent's acquisition of Gateway Creamery may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

S. Valley Creamery Company, Inc.

1. Valley Creamery Co. was acquired by respondent in May 1956, through its wholly owned subsidiary Russell Creamery Co. Although Russell was not engaged in commerce, respondent admittedly was. Section 7 of the Clayton Act prohibits a corporation engaged in commerce from making certain acquisitions, "directly or indirectly." It is the conclusion of the examiner that the acquisition of Valley Creamery was, in effect, an acquisition by respondent, and accordingly was an acquisition by a corporation engaged in commerce. Since Valley Creamery distributed in Minnesota and North Dakota, it is concluded that it too was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. Respondent acquired only the frozen products portion of the business of Valley Creamery, which was engaged in processing and distributing a broad line of dairy products. At the time of the acquisition Valley Creamery's frozen product sales were under \$50,000. The record contains no data as to the market shares of the acquired and acquiring companies, or the extent of concentration in any relevant market. It is concluded that complaint counsel have failed to establish that the effect of respondent's acquisition of the frozen products portion of Valley Creamery's business may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

T. A. L. Brumund Company

1. The record discloses that Brumund's sales were made almost entirely in Lake County, Illinois. There is some indication that it may have served a few customers in Wisconsin. However, the evidence is so fragmentary and insubstantial that it cannot be concluded complaint counsel have sustained the burden of proving that Brumund was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. At the time of its acquisition in October 1951, Brumund's annual sales were approximately \$500,000, consisting of fluid milk products and ice cream. It was acquired for a consideration of approximately \$73,000. The record is lacking in substantial and reliable data as to the market shares of the acquired and acquiring companies, and the

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extent of concentration in any appropriate market. The examiner does not regard the fragmentary consumers' survey in the record, as substantial and reliable evidence to establish market shares and concentration. It is accordingly concluded that complaint counsel have failed to establish that the effect of respondent's acquisition of Brumund may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

U. Lagomarcino-Grupe Company

1. Respondent admits in its answer, the record establishes, and the examiner concludes that Lagomarcino-Grupe was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. Respondent acquired the frozen products portion of Lagomarcino-Grupe's business in July 1952, for a consideration of \$35,000. While the record discloses that Lagomarcino-Grupe had frozen products sales of \$150,000, there is no evidence as to its market share or that of respondent in any appropriate market, nor as to the extent of concentration therein. It is concluded that complaint counsel have failed to establish that the effect of respondent's acquisition of the frozen products portion of Lagomarcino-Grupe's business may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

V. Clinton Ice Cream Company

1. The record establishes and the examiner concludes that Clinton Ice Cream Company was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. Clinton, which was acquired in September 1955 for a consideration of approximately \$10,000, had ice cream sales of approximately \$76,000. The record contains no evidence as to the market shares of the acquired and acquiring companies, or the extent of concentration in any appropriate market. It is concluded that complaint counsel have failed to establish that the effect of respondent's acquisition of Clinton may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

W. Andalusia Dairy Company

1. Based on the evidence that Andalusia received its supply of raw milk principally from outside the State, it is concluded that it was

engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. The acquisition involved only the business of Andalusia's branch plant in western Pennsylvania, which was acquired in June 1952 for a consideration of approximately \$50,000. The branch had milk and ice cream sales of approximately \$350,000. The record does not permit a determination as to what is the appropriate market area. In the broad western Pennsylvania milk market, respondent accounted for 7.6% of the area's milk sales and Andalusia had .001% of the market. It is concluded that complaint counsel have failed to establish that the effect of respondent's acquisition of Andalusia's branch operation may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

X. Coca-Cola Bottling Co. of Clifton Forge, Inc. (Peerless Creamery Division)

1. The record establishes and the examiner concludes that Coca-Cola's Peerless Division was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. The acquisition in May 1953 involved only the ice cream portion of the dairy business conducted by Coca-Cola's Peerless Division, and involved a consideration of approximately \$70,000. Peerless' ice cream sales were approximately \$183,000. The record does not permit an informed determination as to the appropriate market area. The record is also lacking in reliable evidence as to the market shares of the acquired and acquiring companies, or the extent of concentration in an appropriate market area. It is concluded that complaint counsel have failed to establish that the effect of respondent's acquisition of Coca-Cola Bottling Co.'s Peerless Division may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

Y. Ritzmann Ice Cream Company, Inc.

1. The record establishes and the examiner concludes that Ritzmann Ice Cream Company was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. Ritzmann was acquired in June 1959 for a consideration of approximately \$27,000. Its sales were approximately \$150,000, on which it had sustained losses in the two years prior to its acquisition. The acquisition was made after the seller had been advised by the Commission that it did not contemplate taking any action to declare

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the sale illegal. The record contains no evidence as to the market shares of the acquired and acquiring companies, or the extent of concentration in any appropriate market. It is concluded that complaint counsel have failed to establish that the effect of respondent's acquisition of Ritzmann may be substantially to lessen competition, or to tend to create a monopoly in any section of the country in any line of commerce.

Z. Farmers Equity Co-operative Creamery Association, Inc.

1. The evidence is insufficient to establish that Farmers Equity was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act. The mere fact that it was incorporated in a state other than that in which it did business does not establish its engagement in commerce. The evidence as to possible sales to a customer in Montana is too inconclusive to support a finding that it was engaged in commerce.

2. The acquisition in August 1952 involved the purchase of certain ice cream cabinets and a transfer of customers incident thereto, for a total consideration of \$13,800. Farmers Equity's sales were approximately 30,000 gallons annually. The record is lacking in evidence as to the market shares of the acquired and acquiring companies, and as to the extent of concentration in any appropriate market. It is concluded that complaint counsel have failed to establish that the effect of respondent's acquisition of certain of Farmers Equity's assets may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

Z-1. Rose Lawn Dairies of Arkansas, Inc.

1. Respondent admits in its answer, the record establishes, and the examiner concludes that Rose Lawn was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. Rose Lawn, which was a distributor of fluid milk, was acquired in January 1955 in partial repayment of a debt owing to respondent. Its net sales during a seven-month period prior to the acquisition were approximately \$225,000, on which it sustained a loss of \$30,000. The record contains no evidence as to the market share of the acquired or acquiring companies, or the extent of concentration in any appropriate market area. It is concluded that complaint counsel have failed to establish that the effect of respondent's acquisition of Rose Lawn

may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

Z-2. Dahl-Cro-Ma, Ltd.

1. Respondent admits in its answer, the record establishes, and the examiner concludes that Dahl-Cro-Ma was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. Dahl-Cro-Ma was acquired in December 1954 for a consideration of approximately \$100,000. Its sales, consisting entirely of frozen products, were approximately \$120,000 annually. Respondent and Dahl-Cro-Ma were the only two companies engaged in the sale of ice cream and other frozen products on the Island of Hawaii. Respondent had entered the Island a little over a year earlier through the acquisition of a subsidiary of Creameries of America. It accounted for approximately two-thirds of the frozen products sold on the Island of Hawaii, while Dahl-Cro-Ma accounted for approximately one-third. It has been found that the Island of Hawaii is an appropriate market area. It is concluded that the effect of respondent's acquisition of Dahl-Cro-Ma may be substantially to lessen competition or to tend to create a monopoly on the Island of Hawaii in the frozen product line.

Z-3. Other Acquisitions

1. The remaining acquisitions not hereinabove discussed were either, (a) corporations concerning which complaint counsel have conceded the record fails to establish engagement in commerce, or (b) non-corporate companies concerning which, with a few exceptions, complaint counsel likewise concede the record fails to establish engagement in commerce. Complaint counsel contend that the acquisition of such companies, corporate and non-corporate, is part of the constant and systematic elimination of actual and potential competitors which, together with the acquisition of corporations claimed to be in commerce, constitutes an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act.

2. In the original proposed order filed by them, complaint counsel did not seek any divestiture provision with respect to corporations not in commerce or with respect to non-corporate businesses. They contended, however, that while the remaining acquisitions "did not technically fall within the requirements of Section 7," they constituted an unfair method of competition, in violation of Section 5, and

that the public interest required respondent's drive toward a monopoly position be stopped by a cease and desist order preventing all further acquisitions. (Proposed Findings, pp. 580-1.)

3. Subsequent to the filing of their original proposed findings and order complaint counsel, pursuant to leave granted, filed an amended proposed order in which divestiture was sought with respect to all of the companies acquired by respondent, irrespective of whether they were in commerce and irrespective of whether they were corporations. The basis for counsel's filing of a proposed amended order is the Supreme Court decision in *Pan American World Airways, Inc. v. U.S.*, 371 U.S. 296 (1963). In that case the Court interpreted a provision of the Federal Aviation Act, conferring jurisdiction on the Civil Aeronautics Board over "unfair methods of competition in air transportation," as being in pari materia with the "unfair methods of competition" clause contained in Section 5 of the Federal Trade Commission Act. The Court further held that the authority of the Civil Aeronautics Board to enjoin "unfair methods of competition" carried with it the power to order divestiture. Complaint counsel argue that the constant and systematic acquisition of other dairy companies is an unfair method of competition, and hence that the Commission may order the divestiture of all companies so acquired, without regard to whether they are corporations or are engaged in commerce.

4. The examiner does not interpret the Supreme Court's decision in the *Pan American World Airways* case, as supporting the position now urged by complaint counsel. The power of divestiture which the Supreme Court said the Civil Aeronautics Board possessed presupposes that the unfair method of competition involved is one over which the Board has jurisdiction, viz, one which occurred "in air transportation." Similarly, divestiture would be appropriate in a Federal Trade Commission proceeding only where the unfair method of competition is one over which the Commission has jurisdiction, viz, an unfair method of competition "in commerce." The examiner does not understand that the Commission has jurisdiction over the acquisition of intrastate businesses merely because, as complaint counsel contends, the company acquiring them was in commerce. Furthermore, the mere acquisition of another company, whether or not in commerce, is not an unfair method of competition unless there is a showing of a probable adverse competitive effect resulting therefrom.

5. The examiner is not unaware that in an interlocutory ruling in the *Foremost Dairies* case, the Commission held that "practices not

technically within the scope of a specific section of the Clayton Act may, nevertheless, constitute a violation of Section 5 of the Federal Trade Commission Act." The Commission did not, however, rule that the acquisition of non-corporate businesses or of businesses not engaged in commerce is an unfair method of competition. In its final decision and order in the case the Commission considered it unnecessary to rule on whether the non-commerce and non-corporate acquisitions there involved would fall within Section 5, as an unfair method of competition, since it found that "the evidence in this record will not sustain a finding of the Section 7 adverse competitive effect requirements as to each of respondent's acquisition upon which counsel rely [at 52]." Consequently, even if the Section 7 requirement that the acquisition must involve a corporation engaged in commerce is overlooked in a Section 5 proceeding, there must be a showing of the type of adverse competitive impact which is contemplated by Section 7.

6. With respect to the requirement that the acquired company must be a corporation, it should be noted that in the *Pan American World Airways* case, the Supreme Court (at 312 n.17) studiously avoided overruling its earlier holding in *FTC v. Eastman Kodak Co.*, 274 U.S. 619, that divestiture was not an appropriate remedy in a Section 5 proceeding where it involved assets, the acquisition of which could not be challenged under the original version of Section 7 of the Clayton Act. While the amended Section 7 now covers both stock and asset acquisitions, it is still limited to the acquisition thereof from corporations engaged in commerce. It is inconceivable that Congress would have found it necessary to expand the Commission's jurisdiction to cover asset acquisitions from corporations engaged in commerce if the Commission already had jurisdiction under Section 5 of the Federal Trade Commission Act over acquisitions not covered by the Clayton Act, including non-corporate enterprises or businesses not in commerce.

7. Even if it be assumed that the acquisition of non-corporate businesses not covered by Section 7 may be reached under Section 5 of the Federal Trade Commission Act, it is still necessary to establish their engagement in commerce and the probable adverse impact of such acquisitions, in order to justify divestiture. In the case of the great bulk of the non-corporate acquisitions in this case, complaint counsel concede that the record fails to establish their engagement in commerce. With respect to the few such acquisitions as to which there is evidence of commerce, the record fails to establish the probability of any adverse competitive impact in an appropriate

market. To the extent that respondent's program of acquisitions, as a whole, has cumulative adverse competitive implications of the type referred to in the Commission's final decision in *Foremost Dairies* (at 52-53) [60 F.T.C. 1090], it can be dealt with in a manner other than that of ordering the divestiture of non-corporate businesses or of businesses not engaged in commerce. The examiner finds it unnecessary to determine whether respondent's "proclivity for growth by acquisitions" (*id.*, at 53) [60 F.T.C. 1091] is an unfair method of competition, within the meaning of Section 5 of the Federal Trade Commission Act, since adequate relief may be granted under Section 7 of the Clayton Act.

II. AS TO THE OTHER PRACTICES

1. The complaint, in Paragraph 8 thereof, alleges that respondent's great size and financial resources, in relation to that of its competitors, together with its product and geographic diversification, may give and have given it the power to engage in certain business practices. In Paragraph 12 of the complaint it is charged that all of the acquisitions, acts and practices alleged in the complaint constitute a violation of Section 5 of the Federal Trade Commission Act. However, as heretofore mentioned (p. 649), the purpose of pleading the practices alleged in Paragraph 8 was to permit a showing as to the economic power possessed by respondent and to provide a background for determining the competitive impact of the acquisitions made by it. Complaint counsel agreed that they would seek no cease and desist order with respect to such practices.

2. Complaint counsel make no contention in the proposed findings filed by them that the practices alleged in Paragraph 8 of the complaint constitute an unfair method of competition, within the meaning of Section 5. They have submitted no proposed order that respondent cease and desist therefrom. It is, accordingly, unnecessary to determine whether any of the practices alleged in Paragraph 8 of the complaint constitutes an unfair method of competition, in violation of Section 5 of the Federal Trade Commission Act.

FINAL CONCLUSIONS OF LAW

1. Respondent, Beatrice Foods Co., a corporation engaged in commerce, acquired the stock or assets of the following corporations engaged in commerce, as "commerce" is defined in the Clayton Act: Creameries of America, Inc., Greenbrier Dairy Products Company, Durham Dairy Products, Inc., Community Creamery, and Dahl-Cro-Ma, Ltd.

2. The acquisition by respondent, Beatrice Foods, Co., of the stock or assets of the aforementioned corporations was in violation of Section 7 of the Clayton Act.

3. Complaint counsel have failed to establish, by substantial, reliable and probative evidence, that the acquisition by respondent, Beatrice Foods Co., of the stock or assets of the corporations or individually owned concerns alleged in Paragraphs 6 and 7 of the complaint, other than those specified in Paragraph 1 hereof, was in violation of either Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act.

THE REMEDY

1. It is settled that normally divestiture is the appropriate remedy where a violation of Section 7 has been found. *U.S. v. E. I. duPont de Nemours & Co.*, 366 U.S. 316. There are no circumstances present in the instant proceeding to suggest that it would not be appropriate to order the divestiture of those corporations engaged in commerce which it has been hereinabove found were acquired in violation of Section 7 of the Clayton Act.

2. The only acquisition with respect to which it might be urged that complete divestiture of the acquired company is not appropriate is that of Creameries of America, Inc., a corporation doing business in a multi-state area, with respect to which it has been found that the most direct and immediate impact of the acquisition was in a group of counties in the lower San Francisco Bay area where respondent and the acquired company competed. The examiner has considered the dictum in the *Brown Shoe* case (at 337 n.65) that, where the acquired and acquiring companies compete in only a small portion of their respective territories, "that fact would * * * be properly considered in determining the equitable relief to be decreed." However, as the examiner has previously indicated, the Creameries acquisition has anticompetitive implications beyond the areas where the companies directly competed, and it would frustrate the intent of Section 7 to limit any order of divestiture to such areas.

3. Although only certain of the acquisitions have been found to be in violation of Section 7, the record discloses that respondent has followed a calculated policy of expansion by acquisition. Its growth in the dairy industry has been accomplished principally by the acquisition of other companies. While good management, energetic sales effort and sound fiscal policies have undoubtedly aided its growth, these have been built around a program of expansion by acquisition, rather than through internal expansion into new areas.

Many of its largest acquisitions have been financed by the issuance of additional stock, rather than through the expenditure of internally-generated resources.

4. As has been previously found, during the period between 1928 and 1950 respondent acquired over 70 dairy concerns. In the decade between 1951 and 1961, its acquisition program accelerated and it acquired approximately 175 additional dairy concerns, which were largely responsible for an increase in its sales during this decade of approximately 60%. Respondent's program of acquisitions has been paralleled by that of its principal large competitors. Eight of these companies, including respondent, acquired approximately 500 dairy companies during the period from 1950 to 1961.

5. In addition to the present complaint against respondent, the Commission has instituted similar proceedings against respondent's three largest competitors, viz, National Dairy, Borden and Foremost. These companies, together with respondent, are the four largest dairy companies in the United States. The proceeding against *Foremost Dairies*, Docket 6495 [60 F.T.C. 944], terminated in the issuance of an order of divestiture with respect to a number of the acquired companies. The Commission did not consider it appropriate to enjoin the making of further acquisitions since the order of divestiture would "reduce Foremost to less than one-half its present size and return it to approximately the same relative position it held in the industry prior to 1951." (*Id.* at 53 [60 F.T.C. 1092].) The proceeding in the *National Dairy* case, Docket 6651 [62 F.T.C. 120], terminated in an order by consent, pursuant to which National was ordered to divest itself of certain of the acquired companies and was enjoined from making any further dairy company acquisitions for a period of ten years, without prior approval of the Commission. The *Borden* proceeding, Docket 6652 [65 F.T.C. 296], is still pending before the Commission.

6. Complaint counsel in the instant proceeding seek an order which would prohibit any further acquisitions of dairy companies by respondent, without prior approval of the Commission. Such order is similar to that agreed to in the *National Dairy* case, except that it is without limitation as to time. In the opinion of the examiner a prohibition on future acquisitions, with an appropriate time limitation, is justified in the instant proceeding. Unlike the situation in the *Foremost Dairies* case, the divestitures here ordered will not return respondent substantially to its 1951 position.¹⁴⁷ Furthermore, whereas

¹⁴⁷ The companies acquired by respondent since 1950 had sales aggregating more than \$147,500,000. The sales of the companies ordered to be divested amounted to approximately \$57,120,000. One company, Creameries of America, accounted for \$49,000,000 of the latter figure.

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Foremost started from a relatively low base, with 1950 sales of approximately \$48,000,000, respondent's 1950 sales were already \$205,000,000 and it was by then one of the top companies in the dairy industry. Respondent has reached the point in its growth where, as the court stated in *U.S. v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (DC ED Pa.), *aff'd*, 365 U.S. 567, "it can be said that it is a reasonable probability that [further acquisitions] will have the prohibited effects when they are examined in the context of [respondent's] prominent position in the industry." In view of respondent's "proclivity for growth by acquisitions" (*Foremost Dairies*, at 53) [60 F.T.C. 1091], its "prominent position in the industry," and the fact that the cumulative effect of its acquisitions will not be dissipated by the divestitures here ordered, it is the opinion of the examiner that it should be enjoined from making any further dairy acquisitions, for a period of ten years, without prior approval of the Commission.

ORDER

It is ordered. That respondent, Beatrice Foods Co., a corporation, and its officers, directors, agents, representatives and employees, shall, within one (1) year from the date this order shall become final, divest itself absolutely, in good faith, of all stock, assets, properties, rights and privileges, tangible or intangible, including, but not limited to, all contract rights, plants, machinery, equipment, trade names, trademarks, and good will acquired by Beatrice Foods Co., as a result of the acquisition of the stock, share capital, or assets of each of the following named corporations: Creameries of America, Inc. and its subsidiaries, Greenbrier Dairy Products Company, Durham Dairy Products, Inc., Community Creamery, and Dahl-Cro-Ma, Ltd., together with all plants, machinery, buildings, improvements, equipment, and other property of whatever description that have been added to or placed on the premises of each of the former above-named corporations by respondent, as may be necessary to restore each of them as a going concern and to establish each of them as an effective competitor in substantially all the same basic lines of commerce in which each of the respective acquired corporations was engaged at the time of its acquisition.

Pending divestiture, respondent shall not make any changes in any of the above-mentioned plants, machinery, buildings, equipment, or other property of whatever description, which shall impair their present rated capacity for the production of their respective dairy products, or their market value, unless said capacity or value is restored prior to divestiture.

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Respondent in such divestiture shall not sell or transfer, directly or indirectly, any of the stock, assets, properties, rights or privileges, tangible or intangible, acquired, added, modified or placed on the premises of any of the above-named concerns by respondent, to anyone who, at the time of divestiture, is a stockholder of respondent, or to anyone who is or, at the time of acquisition, was an officer, director, representative, employee, or agent of, or otherwise, directly or indirectly, connected with, or under the control or influence of, respondent.

It is further ordered, That, in said divestiture, respondent shall not sell or transfer, directly or indirectly, any of the stock, assets, properties, rights or privileges, tangible or intangible, to any corporation, or to anyone who, at the time of said divestiture, is an officer, director, employee or agent of such corporation, which, at the time of such sale or transfer, is a substantial factor in the dairy products industry, if the effect of such sale or transfer might be to substantially lessen competition or tend to create a monopoly or oligopoly in any one of the said dairy products, in any section of the country.

It is further ordered, That the complaint herein be, and it hereby is, dismissed insofar as it alleges that respondent acquired dairy product concerns, other than those hereinabove specifically mentioned, in violation of Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act.

It is further ordered, That respondent, Beatrice Foods Co., shall, within such time as may be fixed by order of the Federal Trade Commission, submit in writing for the consideration and approval of the Commission, its plan for carrying out the provisions of this order, such plan to include the date within which full compliance may be effected.

It is further ordered, That for a period of ten (10) years from the date this order shall become final, respondent, Beatrice Foods Co., 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 non-corporate, 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.

OPINION OF THE COMMISSION

APRIL 26, 1965

BY ELMAN, *Commissioner*:

I

The complaint in this matter was issued on October 16, 1956, and subsequently amended. It challenges under Section 7 of the Clayton Act, as amended,¹ and Section 5 of the Federal Trade Commission Act² 175 acquisitions made by respondent beginning in 1951. Respondent is the third largest dairy company in the United States in terms of total annual sales (including nondairy products), which were \$443 million in 1959-1960. It ranks fourth in both fluid milk and frozen dessert shipments. While it is principally engaged in the purchase, manufacture, processing and distribution of dairy products throughout the continental United States and Hawaii, it also manufactures and/or sells other food products, including margarine, frozen foods, Chinese and Mexican foods, pickles and preserves, olives and oil, potato chips, candy, mints, and snack foods.³ It also operates a number of public cold-storage warehouses.

Until 1928, respondent was principally engaged in the butter, egg and poultry business. It then began to diversify into other product lines in the dairy field, particularly fluid milk and ice cream. Between 1928 and 1950 its net sales rose from \$57.4 million to \$205.3 million. This increase was due in large part to the acquisition of more than 70 concerns engaged in the purchase, manufacture, processing and distribution of fluid milk, ice cream, and other dairy products. Respondent's program of growth through acquisitions

¹ Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, provides in pertinent part:

"That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

² Section 5(a) (6) of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (6), provides:

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

³ In 1939 Beatrice began the distribution of frozen foods, primarily the Bird's Eye brand. In 1943 it acquired La Choy Food Products Company, a large manufacturer of Chinese foods. It has since acquired a number of other manufacturers of food and related products, including D. L. Clark Candy Co., D. Richardson Co. (mints), Mario's Food Products (olives and oil), Bond Pickle Company, Squire Dingee Company (pickles and preserves), Lutz & Schramm (pickles and preserves), Brown-Miller (pickles and preserves), Shedd-Bartush (margarine), Tasty Foods, Inc. (potato chips), Gebhardt Chili Powder Co. (Mexican foods), Mitchell Syrup and Preserve Co., M. J. Holloway & Co. (candy), Rosarita Mexican Foods, and Adams Corp. (snack foods). None of these non-dairy acquisitions is challenged in the complaint.

continued during the 1950's. Between 1951 and 1961 it acquired 175 dairy concerns; these are the acquisitions challenged in this complaint. The bulk of respondent's \$117 million sales increase between 1951 and 1961 can be traced directly to the companies Beatrice acquired in this period; and sales from plants acquired during the 1950's represented some 36% of Beatrice's total sales in 1961.

Respondent's pre-1950 acquisitions had established it as one of the nation's largest dairy concerns, but with its strength concentrated in the midwest. Respondent's post-1950 acquisitions made it a genuinely national concern, doing business in 37 states (and the District of Columbia), extending from Massachusetts and Alabama in the east to California and Hawaii in the west.

Before 1950, 90% of respondent's fluid milk had been processed and sold in an area extending from the Appalachian Mountains to the Continental Divide, principally composed of eight midwestern states—Ohio, Indiana, Illinois, Iowa, Missouri, Nebraska, Kansas and Oklahoma—and portions of western Pennsylvania and eastern Colorado. The area of distribution of respondent's ice cream and other frozen products was similar, but slightly wider, 80% being accounted for by the eight-state fluid milk area, West Virginia, and certain counties in Pennsylvania, Virginia, Tennessee, Kentucky, South Dakota, Wisconsin, Minnesota and Arkansas. Sixty-three of respondent's 175 post-1950 dairy acquisitions were of fluid milk facilities located in respondent's traditional distribution area, and 69 of ice cream concerns located in its traditional ice cream area. The remaining acquisitions, however, served to broaden respondent's marketing area. By 1956, respondent had plants in 29 states and the District of Columbia, and sales branches in eight additional states.⁴

Respondent now produces a full line of dairy and related products, including butter, eggs, poultry, ice cream, ice cream mix, ice milk, sherbet, Mellorine, water ices, milk, cream, buttermilk, skim milk, chocolate milk, bulk surplus milk, cheese, cottage cheese, condensed milk, powdered milk, fruitade, oleomargarine, frozen foods and specialties. Its products and sales activities are organized along departmental lines, including the following: Butter and Butter

⁴ As of August 31, 1956, respondent operated one or more dairy plants in the District of Columbia and the following states: Alabama, California, Colorado, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Wisconsin, West Virginia and Wyoming. In addition, it operated sales branches in a number of these states and in eight additional states: Arkansas, Massachusetts, New Hampshire, New Jersey, Oregon, Rhode Island, South Dakota, and Virginia. Since August 31, 1956, respondent has acquired the plant of a company in Arizona.

Byproducts, Eggs and Poultry, Ice Cream and Mix, Fluid Milk, Other Manufactured Dairy Products, and Other Sales and Services. Respondent's principal brand is "Meadow Gold"; it is used on butter, ice cream products and fluid milk throughout respondent's marketing area. Respondent also manufactures and distributes ice cream products under 44 other brand names, and fluid milk products under 28 other brand names, in one or more states. These brands are principally those of acquired companies. In addition to product and geographic diversification in the dairy products field, respondent, as has been mentioned, enjoys further diversification in the food industry. At least 30% of its sales are of groceries other than dairy products.

The 175 acquisitions made by respondent since 1950 and challenged in this complaint continue a pattern of growth through acquisitions which respondent has followed since 1928. This pattern is characterized by expansion into new geographic areas through the acquisition of companies having large, modern manufacturing or processing plants, followed by acquisitions of competitors of the acquired firms, thereby increasing the volume of the originally acquired plants. For convenience of reference we can regard mergers of the first type as "geographic market extensions" and mergers of the second type as "horizontals."⁵ Virtually all of the post-1950 horizontal acquisitions were preceded by market-extension acquisitions, and in many cases post-1950 market-extension acquisitions have already been fol-

⁵ "A horizontal merger, as ordinarily understood, is one between firms that make or sell the same product, or products which are close substitutes for each other. However, unless the firms actually operate within the same geographical market, the merger will have no immediate impact upon the market share of the acquiring firm—the hallmark of a conventional horizontal merger. Where the merger involves companies selling in different geographical markets (or, what may amount to the same thing, to different customer classes, cf. *Brillo Mfg. Co.*, F.T.C. Docket 6557 (decided (January 17, 1964)) [64 F.T.C. 245], we have what has been termed a market-extension merger. See *Foremost Dairies, Inc.*, F.T.C. Docket 6495 (decided April 30, 1962) [60 F.T.C. 944]. It may be a merger in which the acquired firm sells the same product as the acquiring firm and is a prospective entrant into the geographical market occupied by the acquiring firm. See *United States v. El Paso Natural Gas Co.*, 1962 CCH Trade Cases ¶ 70571 (D. Utah), prob. juris. noted, 373 U.S. 930; *Foremost Dairies, Inc.*, *supra*, pp. 48-49 [60 F.T.C. 1087-1088]. Or the acquiring firm may be a prospective entrant into the market of the acquired firm. *Foremost Dairies, Inc.*, *supra*, pp. 49-50 [60 F.T.C. 1088, 1089]. * * * Another variant of the conventional horizontal merger is the merger of sellers of functionally closely related products which are not, however, close substitutes. This may be called a product-extension merger." *Procter & Gamble Co.*, F.T.C. Docket 6901 (decided November 26, 1963), pp. 14-15 [63 F.T.C. 1465, 1542-1543]. It should be emphasized that these definitional distinctions are for convenience only, and "import no legal distinctions under Section 7." *Id.*, p. 21 [63 F.T.C. 1547]. Indeed, these categories are sometimes so loosely defined as to become meaningless. See, e.g., Adelman, *Market Issues: An Economist's View*, in *The Impact of Antitrust on Economic Growth* 25, 34 (Transcript of Third Special Conference on Antitrust in an Expanding Economy, Natl. Ind. Conf. Bd., March 5, 1964). Regardless of the nomenclature used, the legal test of any merger or acquisition challenged under Section 7 is the same: whether it may substantially lessen competition or tend to create a monopoly. See p. 26 [p. 715 herein], *infra*.

lowed by horizontals.⁶ In many instances, moreover, market-extension acquisitions have been followed by acquisitions of small dairy firms located and operating just outside respondent's markets, thereby expanding the market of the originally acquired plants, as well as increasing their volume; in all such cases the plants of the smaller acquired companies were closed and their locations became distribution branches for the main plant.

While the largest number of respondent's post-1950 acquisitions involved relatively small dairy concerns, 32 of the acquired companies had annual sales of at least \$500,000⁷ and 23 had sales of more than \$1 million. The combined sales of the 32 acquired firms amounted to \$129 million, in comparison to total combined sales for all of the acquired companies of \$147.5 million. Of the 32, 18 were horizontal acquisitions, 13 were market extensions, and 1 was both market-extension and horizontal. In terms of aggregate sales by type of acquisition, the breakdown of the 32 is as follows:

	Number	Aggregate sales (millions of dollars)	Percentage of aggregate sales
Horizontal.....	18	25.6	19.9
Market extension.....	13	54.3	42.1
Market extension and horizontal.....	1	49.0	38.0
Total.....	32	128.9	100.0

Thus, of the larger challenged acquisitions, almost one-quarter in terms of aggregate sales were purely horizontal acquisitions and 42% purely market extensions, while one acquisition—the largest—involved both market-extension and horizontal aspects and represented 38% of the aggregate sales of the 32 principal acquisitions.

The Commission's complaint challenged 77 of respondent's post-1950 acquisitions as unlawful under Section 7 of the Clayton Act and 98 as unlawful under Section 5 of the Federal Trade Commission Act. After extended proceedings, the hearing examiner issued an initial decision dismissing the complaint except as to five acquisitions challenged under Section 7:

⁶ For example: (1) Creameries of America (Idaho Creameries) followed by the acquisition of Baker Union Cooperative Creamery in Oregon; (2) Creameries of America (Dairymen's Association Ltd.) followed by the acquisition of Dahl-Cro-Ma Ltd. in Hawaii; (3) Creameries of America (Prices' Creameries) followed by the acquisition of Lester Ice Cream Co. in New Mexico; (4) Creameries of America (Arden Sunfreeze) followed by the acquisition of Yellowstone Dairy in Wyoming; (5) Boswell Dairies, Inc. followed by the acquisition of Palestine Creamery in Texas; (6) Durham Dairy Products, Inc. followed by the acquisition of Durham Road Dairy in North Carolina; (7) Russell Creamery Co. followed by the acquisitions of Valley Creamery Co. and Excel Ice Cream Co. in Minnesota.

⁷ The 32 acquisitions are listed in the table on p. 701, *infra*.

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Company	Annual sales	Type of acquisition
Creameries of America, Inc.-----	\$49, 000, 000	Market extension except in Cali- fornia.
Durham Dairy Products, Inc.-----	1, 544, 000	Market extension.
Greenbrier Dairy Products Co.-----	3, 483, 895	Horizontal.
Community Creamery-----	2, 302, 829	Do.
Dahl-Cro-Ma, Ltd.-----	119, 000	Do.

The hearing examiner ordered respondent (1) to divest itself of each of the five companies, including such "after-acquired" assets as necessary to restore each of them as a going concern and effective competitor in each of the basic product lines in which it was engaged as of the time of acquisition; and (2) to cease and desist for ten years from all future acquisitions in various dairy product lines without prior approval by the Commission.

Companies with annual sales of \$500,000 or over acquired by Beatrice, 1951-61

Company	Annual sales	Type of acquisition	Location
1. Creameries of America-----	\$49, 000, 000	Market extension except in California.	California, Hawaii, Idaho, Utah, New Mexico, Texas, Colorado.
2. Westerville Creamery-----	13, 820, 412	Market extension-----	Westerville, Ohio.
3. Boswell Dairies-----	7, 160, 907	do-----	Ft. Worth, Tex.
4. Clover Creamery-----	6, 892, 321	do-----	Roanoke, Va.
5. Medo-Land Creamery-----	4, 200, 000	do-----	Eugene, Oreg.
6. Assoc. Dairy Products-----	3, 947, 526	do-----	Glendale, Ariz.
7. Greenbrier Dairy Products-----	3, 483, 895	Horizontal-----	Beckley, W. Va.
8. Dairyland Farms and Valdair Creamery.	3, 300, 000	Market extension-----	Opelika and Shamut, Ala.
9. Louis Sherry, Inc.-----	3, 242, 000	Horizontal-----	New York City.
10. Tro-Fe Dairy, Inc.-----	2, 953, 067	do-----	Gadsden, Ala.
11. Model Farms Dairy-----	2, 795, 700	Market extension-----	Louisville, Ky.
12. Russell Creamery-----	2, 697, 464	do-----	Brainerd, Minn. and Superior, Wis.
13. Community Creamery-----	2, 302, 829	Horizontal-----	Missoula, Mont.
14. Dothan Ice Cream Co.-----	2, 150, 953	Market extension-----	Dothan, Ala.
15. Eskay Dairy Co.-----	2, 111, 000	do-----	Ft. Wayne, Ind.
16. Delview Dairy-----	1, 960, 990	do-----	Tuscaloosa, Ala.
17. Covalt Dairy-----	1, 681, 591	do-----	Muncie, Ind.
18. Clarksburg Dairy-----	1, 636, 410	Horizontal-----	Clarksburg, W. Va.
19. Durham Dairy Products-----	1, 544, 000	Market extension-----	Durham, N.C.
20. Billings Dairy-----	1, 540, 039	Horizontal-----	Billings, Mont.
21. Sanitary Milk and Ice Cream Co..	1, 500, 879	do-----	Morgantown, W. Va.
22. Bluff City Dairy-----	1, 305, 423	do-----	Hannibal, Mo.
23. Henne Dairy Products-----	1, 138, 577	do-----	Butte, Mont.
24. Twin Valley Products-----	939, 876	do-----	Emporia, Kans.
25. Melvern-Fussell (Arden Farms)---	870, 577	do-----	Alexandria, Va.
26. Linwood Division (Arden Farms)	844, 965	do-----	Kansas City, Mo.
27. Kentucky Ice Cream Co.-----	830, 813	do-----	Richmond, Ky.
28. Princeton Creamery-----	735, 604	do-----	Princeton, Ky.
29. Pioneer Dairy-----	687, 571	do-----	Great Falls, Mont.
30. Central Dairy-----	559, 866	do-----	Columbia, Mo.
31. Valley Creamery Co.-----	533, 834	do-----	East Grand Fork, Minn.
32. A. L. Brumund Co.-----	500, 000	do-----	Waukegan, Ill.

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Both parties have appealed to the Commission. Respondent challenges the hearing examiner's findings of violation, with the exception of the finding that the acquisition of Dahl-Cro-Ma violated Section 7, and his order. Complaint counsel urge that the hearing examiner's findings and order should be broadened in two respects:

(1) To include a finding of illegality under Section 7 of the Clayton Act and order divestiture with respect to two of respondent's acquisitions which the examiner concluded would have been unlawful had the acquired companies been engaged in commerce to a substantial degree. These were:

Company	Annual sales	Type of acquisition
Clarksburg Dairy.....	\$1, 636, 410	Horizontal.
Associated Dairy Products.....	3, 947, 526	Market extension.

(2) To include a finding that six other acquisitions of respondent violated Section 5 of the Federal Trade Commission Act. Complaint counsel do not, however, recommend divestiture or other relief against these particular acquisitions. Four of the acquired firms were not engaged in commerce; two were not corporations. The examiner made no detailed findings as to the effects on competition of these acquisitions. The acquisitions were:

Company	Annual sales	Type of acquisition
Billings Dairy.....	\$1, 540, 039	Horizontal.
Sanitary Milk and Ice Cream Co.....	1, 500, 879	Do.
Bluff City Dairy.....	1, 305, 423	Do.
Eskay Dairy Co.....	2, 111, 000	Market extension.
John Costello Co.....	(⁸)	Horizontal.
Clover Creamery.....	6, 892, 321	Market extension.

⁸ While the record contains no sales figures, Costello's sales were clearly substantial as shown by the production figures: 621-855 gallons of ice cream; 2,732,687 units of cottage cheese; and 409,688 units of Reddi-Whip.

The following tabulation gives some idea of the present posture of the case in terms of the 32 "large" (more than \$500,000 in sales) acquisitions. The hearing examiner found four of these acquisitions illegal, involving \$56 million of sales, or something more than 40% of the \$129 million of sales for the 32 challenged acquisitions of large concerns. If complaint counsel's appeal were to be upheld, the sales figure of illegal acquisitions would rise to \$75 million, or 58% of the \$129 million.

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Type	Number	Aggregate sales (millions of dollars)	Found illegal by hearing examiner	
			Number	Aggregate sales (millions of dollars)
Horizontal.....	18	25. 6	⁹ 2	5. 8
Market extension.....	13	54. 3	1	1. 5
Market extension and horizontal...	1	49. 0	1	49. 0
Total.....	32	128. 9	⁹ 4	⁹ 56. 3

Type	Appealed by complaint counsel		Hearing examiner plus appealed		Percent of aggregate sales challenged
	Num- ber	Aggregate sales (millions of dollars)	Num- ber	Aggregate sales (millions of dollars)	
Horizontal.....	¹⁰ 4	6. 0	6	11. 8	46. 1
Market extension.....	3	13. 0	4	14. 5	26. 7
Market extension and hori- zontal.....			1	49. 0	100. 0
Total.....	¹⁰ 7	¹⁰ 19. 0	11	75. 3	*58. 4

⁹ One smaller horizontal acquisition with \$119,000 sales was also found illegal.

¹⁰ Also, one other horizontal acquisition was appealed for which dollar sales are not in the record.

*Average.

II

The Commission brings to the consideration of individual cases its accumulated knowledge and experience, often acquired over a period of many years, of an industry's competitive conditions. Such knowledge and experience, which may be found in economic reports or studies conducted by the Commission, in the record of prior cases, and elsewhere,¹¹ is particularly valuable in a merger case, where an informed and expert judgment of probable competitive effects requires an understanding of the economic context of the merger which may be difficult to obtain from a single record. The economic context of dairy acquisitions has been illuminated by numerous studies and reports of the Commission¹² as well as by the

¹¹ Cf. *Republic Aviation Corp. v. Labor Board*, 324 U.S. 793; *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1097 (separate opinion); *Manco Watch Strap Co.*, 60 F.T.C. 495.

¹² *Report of the Federal Trade Commission on the Sale and Distribution of Milk*, 75th Cong., 1st Sess., H. Doc. No. 95 (1937); *Report of the Federal Trade Commission on the Merger Movement* (1948); *Federal Trade Commission Report on Corporate Mergers and Acquisitions* (1955); *Milk and Milk Products, 1914-1918* (1921); *Hearings on the Sale and Distribution of Milk in Connecticut and Philadelphia* (1935); *Interim Report With Respect to the Sale and Distribution of Milk and Milk Products* (1936); *Report on the Distribution and Sale of Milk and Milk Products, Boston, Baltimore, Cincinnati, St. Louis* (1936); *Report on the Sale and Distribution of Milk and Milk Products New York Sales Area* (1937); *Report on the Sale and Distribution of Milk and Milk Products in Connecticut and Philadelphia Milk Sheds* (1935).

records in a large number of cases involving a variety of competitive practices, especially price discrimination, by dairy companies.¹³ Mergers in the dairy industry have been under particularly close scrutiny by the Commission for the past quarter century. The Commission issued reports analyzing dairy acquisitions in 1937, 1948, and 1955,¹⁴ and in 1956 issued complaints—of which the complaint in the present case is one—challenging the legality of a large number of acquisitions made by each of the four leading dairy companies.¹⁵ A brief review of the Commission's prior merger cases in the dairy industry will help to place the present case in its proper perspective.

In *Foremost*, 60 F.T.C. 944, the complaint challenged a large number of acquisitions of dairy companies made by respondent between 1951 and 1955. The cumulative result of the challenged acquisitions was to transform Foremost from a medium-sized dairy to one of the four national leaders, with total sales in 1955 of almost \$400 million. The Commission's final order, requiring extensive divestiture, was appealed by respondent to the United States Court of Appeals for the Fifth Circuit. However, on November 23, 1962, all further review proceedings were, at the parties' request, stayed by the court to permit a practicable program of divestiture to be worked out. Subsequently, a plan of divestiture was agreed upon, the Commission's order of divestiture modified accordingly, and the litigation in the court of appeals terminated. The modified order (issued March 5, 1965) requires respondent to divest itself of the milk, frozen dessert, and related assets located in its southeastern and northeastern regions, including the assets formerly owned by Philadelphia Dairy Company, as well as two other properties located in other parts of respondent's marketing area. The order also prohibits re-

¹³ See, e.g., *United Buyers Corp.*, 34 F.T.C. 87 (price discrimination); *Badger-Brodhead Cheese Co.*, 31 F.T.C. 1017 (price-fixing and monopolization); *Carnation Co.*, 60 F.T.C. 1274 (exclusive dealing); *Independent Grocers Alliance Distribution Co. v. F.T.C.*, 203 F.2d 941 (7th Cir. 1953) (price discrimination); *Borden Co.*, 54 F.T.C. 563 (price discrimination); *National Dairy Products Corp.*, F.T.C. Docket 7018, complaint issued December 31, 1957 (pending on appeal before Commission) (price discrimination); *Borden Co. v. F.T.C.*, 339 F.2d 133 (5th Cir. 1964) (price discrimination); *Foremost Dairies, Inc.*, F.T.C. Docket 7475 (decided May 23, 1963) [62 F.T.C. 1344]; *Borden Co. v. F.T.C.*, 339 F.2d 953 (7th Cir. 1964) (price discrimination); *Beatrice Foods Co.*, F.T.C. Docket 7599, complaint issued September 28, 1959 (pending on appeal before Commission) (price discrimination); *Dean Milk Co.*, F.T.C. Docket 8032, complaint issued June 30, 1960 (pending on appeal before Commission) (price discrimination); and cases cited in note 15, *infra*.

¹⁴ *Report of the Federal Trade Commission on the Sale and Distribution of Milk*, note 12, *supra*; *Report of the Federal Trade Commission on the Merger Movement*, note 12, *supra*; and *Federal Trade Commission Report on Corporate Mergers and Acquisitions*, note 12, *supra*.

¹⁵ *Foremost Dairies, Inc.*, F.T.C. Docket 6495, 60 F.T.C. 944; *National Dairy Products Corp.*, F.T.C. Docket 6651 [62 F.T.C. 120]; *Borden Co.*, F.T.C. Docket 6652; and the present case.

spondent, for a period of 10 years, from acquiring without prior approval by the Commission any company engaged in the manufacture, processing or sale at wholesale or on retail milk routes of fluid milk, ice cream, ice milk, Mellorine, sherbet or water ices. The divested properties represent some 30% of Foremost's total sales in 1962, and about 36% of the combined pre-merger sales of the acquired companies.

The *National Dairy* case presented a somewhat different factual situation from *Foremost*. Although National Dairy had acquired some 600 dairy companies prior to 1951 and had thereby established itself as the leading firm in the nation in the fluid milk and frozen dessert industries, after the passage of the Celler-Kefauver merger law its pace of acquisition, in sharp contrast to Foremost's, slowed notably: Only 2 of the acquisitions challenged in the Commission's complaint were of substantial firms. The *National Dairy* proceeding was terminated by the entry of a consent order on January 30, 1963 [62 F.T.C. 120]. Divestiture of both substantial acquired firms, which between them accounted for 32% of the combined pre-merger sales of all the acquired companies, was ordered. In addition, a 10-year ban on future acquisitions, similar to that in the amended *Foremost* order, was imposed.

Like *National Dairy*, the *Borden* case presented special problems. While a large number of acquisitions made by Borden between 1951 and 1956 were challenged in the complaint, many of the acquired companies proved to be too unprofitable for their restoration as viable competitive factors to be practicable. However, by consent order issued April 15, 1964, Borden was directed to divest 8 of the acquired companies, representing some 23% of the combined pre-merger sales of all the acquired companies. The order also contains a 10-year ban on future acquisitions similar to those in *Foremost* and *National Dairy*.

The Commission's prior proceedings involving dairy acquisitions are pertinent to the consideration of the present case in several respects. First, they suggest the practical difficulty of unscrambling large numbers of acquisitions in the dairy industry made over a long period of years. These practical problems of relief must be borne in mind in fashioning any remedial order in this industry. Second, they indicate that the problem of acquisitions in the dairy industry is industry-wide. Not just one but several of the leading firms have embarked on extensive programs of acquisition. The Commission has not singled out any one of the major acquiring companies for remedial action, but has proceeded on an even-handed and equitable

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basis against all. Recognizing an industry-wide problem, the Commission has attempted, so far as possible, an industry-wide solution. The nature and dimensions of the dairy industry's merger problem can only be understood in terms of the economic structure and dynamics of that industry, to which we now turn.

III

The evidence in this case discloses that eight large dairy companies have made a total of more than 1900 acquisitions since 1905 (505 between 1951 and 1961 alone), a record which led a Congressional committee staff report to note that "[c]learly, the most merger-prone industry has been dairy products."¹⁶ What is the explanation for this phenomenon? To understand it, we must review briefly (1) the structure of the industry, (2) technological and market factors affecting its structure, and (3) the nature and extent of the merger movement in the industry.

The dairy industry today is composed of a few very large national and regional concerns and a large number of very small ones. In 1959-1960 the total sales of the eight largest national and regional dairy companies were as follows:

Company:	Sales (thousands)
National Dairy Products Corporation -----	\$1,667,176
Borden Company -----	956,014
Beatrice Foods Company -----	443,049
Foremost Dairies Company -----	436,981
Carnation Company -----	417,629
Arden Farms Company -----	364,996
Pet Milk Company -----	195,033
Fairmont Foods Company -----	97,295
	¹⁷ 4,578,183

¹⁶ Staff of H.R. Select Comm. on Small Business, *Mergers and Superconcentration—Acquisitions of 500 Largest Industrial and 50 Largest Merchandising Firms*, Nov. 8, 1962, 87th Cong., p. 26.

¹⁷ These sales figures reflect the total volume of sales activity of the principal dairy companies, not only in the dairy business, but in a variety of other areas of economic activity in which they are engaged. For example, National Dairy Products Corporation has grown "into a great international enterprise with a broad and varied line of quality food products . . . operating about 500 processing, manufacturing and distributing facilities in countries around the world, and exporting from many of these locations to other lands." (National Dairy Products Corp. Annual Report, 1963, p. 3). The president of National Dairy expounded on the company's position in the report of the 40th Annual Meeting (April 16, 1964, pp. 6-7) as follows:

"And so, from just two products in 1923, we now process jellies and preserves in New York State, and Vegemite in Australia—we turn out citrus products in Florida, and manufacture cream cheese in England—we refine edible oils in Tennessee, and make mayonnaise in Mexico—we package candy in Indiana, and bottle ketchup in West Germany—we make peanut butter in Canada, and salad products in Venezuela—and on and on, across a wide range of food products and across many geographical areas." Beatrice is similarly diversified. See p. 697, note 3, *supra*.

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There is considerable size disparity among the eight largest companies. The sales of National Dairy, the largest, are approximately 60% greater than those of Borden, the second largest. The third, fourth, fifth and sixth largest dairy companies are about on a par with each other in total sales, but each is only about one-quarter the size of National Dairy and less than one-half the size of Borden. In terms of total sales, National Dairy is 17 times larger than the eighth largest.

The largest proportion of sales of most dairy companies is in two categories, bottled fluid milk and frozen desserts. The share of total domestic shipments of these two products in 1958 of each of the largest companies was as follows:

Fluid Milk:	Percent
Borden.....	9.2
National.....	8.9
Foremost.....	4.3
Beatrice.....	3.4
Carnation.....	2.3
Arden.....	1.4
Fairmont.....	0.9
Pet.....	0.6
Total.....	31.0
Frozen Desserts:	
National.....	13.1
Borden.....	10.6
Foremost.....	6.4
Beatrice.....	4.9
Swift.....	2.7
Carnation.....	2.4
Arden.....	2.1
Fairmont.....	1.5
Pet.....	0.7
Total.....	44.4

The great majority of dairy companies after the leading eight are very small. In 1961-62, only 731 of the 7,176 fluid milk plants in America had an annual volume exceeding 5 million quarts. To put this another way, 9 out of 10 fluid milk plants had an annual volume of less than \$1 million.¹⁸ Whereas the eight largest companies averaged 4.0% of the value of shipments of fluid milk and 5.5% of the value of shipments of frozen desserts in the United States, the re-

¹⁸ Since 95% of all dairy companies are single-unit operations, the number of plants does not seriously overstate the number of companies in the fluid milk and frozen dessert industries. See *Nature of Competition in Fluid Milk Markets: Market Organization and Concentration* (U.S. Dept. of Agriculture Econ. Rep. No. 67), pp. 6, 46.

maintaining milk processors had an average of 0.01% of the value of shipments of fluid milk, making the average national company 400 times larger than the average remaining milk processor. Since the remaining frozen dessert manufacturer had an average of .05%, the average national company was 110 times larger than the average remaining manufacturer of frozen desserts.

In 1958 the fifty largest companies had 45% of the value of shipments of fluid milk in the United States and 69% of the value of shipments of frozen desserts. The disparity in size between the eight or nine largest and even the larger independents is illustrated by the fact that the eight largest companies had 64% of the share of fluid milk shipments held by the 50 largest companies and 69% of the share of frozen dessert shipments held by the 50 largest companies. In both product lines, therefore, the 42 largest independents averaged less than one-tenth the share of the eight largest companies in fluid milk and frozen dessert shipments. Moreover, fewer than 50 fluid milk companies have annual sales of as much as \$15 million, and only 45 fluid milk corporations have assets of more than \$5 million.¹⁹ Clearly, the vast majority of all dairy companies are very small.²⁰ Only a handful can be regarded as medium-sized or large.²¹

Since the marketing of both fluid milk and frozen desserts is primarily on a local or regional basis, the national sales figures substantially understate the degree of concentration in the actual dairy markets. In local markets concentration is very high. This is true regardless of whether market boundaries are drawn about particular cities or broader geographic regions. The four largest dairies typically account for well over 50% of total fluid milk and ice cream sales in the individual local markets where they do business. It is not uncommon in smaller markets for as few as three producers to account for 75% of the sales, and one producer for 50%. According to a recent study by the United States Department of Agriculture (*Nature of Competition in Fluid Milk Markets*, p. 13, *supra*, n. 18) the average market share of the four largest sellers in 71 fluid milk markets was 82.6%. In small markets the four largest had 95%, and in large markets about 61%. Concentration is very high even

¹⁹ *Nature of Competition in Fluid Milk Markets*, *supra*; I.R.S. *Source Book of Statistics of Income, Active Corp. Income Tax Returns, July 1961-June 1962*.

²⁰ In 1958, 75.9% of all fluid milk plants were operated by companies with total sales of less than \$700,000, and 85.6% of all plants were operated by companies with sales of less than \$1,400,000. *Nature of Competition in Fluid Milk Markets*, *supra*, p. 52.

²¹ Of the larger firms, only 7 are regarded by the Department of Agriculture as national, and 8 as regional. All the rest are essentially local. *Nature of Competition in Fluid Milk Markets*, *supra*, p. 6.

if market boundaries are drawn quite broadly. Thus, in 1957 just five national companies produced 55% of all the ice cream sold in the State of California. By all tests concentration in the sale of dairy products is very high. See *Procter & Gamble Co.*, F.T.C. Docket 6901 (decided November 26, 1963), p. 42 & nn. 40-41 [63 F.T.C. 1465, 1562].

Notwithstanding the paramount position of a few leading firms there were, at least until quite recently, a relatively large number of independent dairies in most markets. As recently as 1950 there were 16,089 fluid milk plants and 4,202 ice cream plants, owned for the most part by small single-plant companies (see note 18, *supra*). In the 1950's however, the number of fluid milk plants declined by nearly 9,000, to 7,176, and the number of ice cream plants fell by nearly 1,000, to 3,226. These substantial declines were in addition to those of previous decades. And, as we explain below, the high mortality rate among small dairies is likely to continue. Technological considerations alone may cause the demise, within the foreseeable future, of more than one-half the remaining fluid milk plants.

What is behind the drastic and continuing transformation in the structure of the industry? In the early decades of the twentieth century the dairy industry was highly fragmented. It was composed of many thousands of small, locally owned enterprises doing a local business. Because of the perishability of the product, and because many towns had ordinances requiring that the product be processed in the town in which it was sold, the typical milk market was small and completely local in nature. Entry into the industry and into particular local markets was easy, since capital entrance requirements were minimal and there were no substantial technological or other economies of scale.

With a technology and economic structure so suitable to local, independent, small-business operations, it is not surprising that the fluid milk industry in these early years consisted of a very large number of small producers serving separate, isolated town markets. Each locality had its local processors supplying the needs of the community. Many of them were producer-distributors, *i.e.*, farmers who produced the raw milk and bottled it for home sale and delivery. Those companies that did not produce their own milk purchased it from local farmers on the basis of individually-negotiated contracts. Home-delivered milk constituted over 60% of sales, and the price of milk sold in stores was usually the same as for home-delivered. Milk companies operating manual plants and selling un-

graded milk in glass-filled containers on local home-delivery routes could operate profitably on 500 gallons a day.

A number of developments tended to break down the link between producer and distributor. Among them were the growth of larger cities, the improvement of transportation (which permitted the rapid shipment of perishable products for city consumption), the invention of electrical refrigeration, and the widespread adoption of pasteurization.²² These technological developments weakened the position of the small independent dairy. They also made entry into new markets much more difficult for such dairies. Moreover, beginning in the early 1920's and extending through the 1930's, and indeed on to and including the 1950's, a vast merger movement swept the industry, as a result of which thousands of firms in the industry disappeared as independent competitive factors. It is impossible to disentangle the various root causes of the long-run decline in the number of independent dairy firms. But this much seems clear. Technological change may have dictated the demise or absorption of many marginal local dairy companies; it did not dictate the rise of vast, national, multi-plant dairy companies. That development is solely attributable to the merger movement, the character of which was described by the Commission in one of its studies of mergers:²³

[T]he growth of such outstanding Nation-wide companies as National Dairy Products Corp. and the Borden Co. could be likened to an acquisition itinerary, sweeping across the country from one large city to another, and gathering in its wake hundreds of companies serving small communities as well. During the 22-year period, 1924 through 1945, National Dairy Products acquired more than 400 concerns engaged in the processing and distribution of fluid milk, ice cream, cheese, butter, and condensed and evaporated milk.

* * * * *

[B]eginning in 1927, Borden embarked on a broad and ambitious program of diversification and expansion through acquisitions. From that date through 1945, Borden Co. has bought no less than 531 formerly independent enterprises or groups of enterprises embracing all divisions of the dairy products industry, including fluid milk, ice cream, cheese, butter, condensed and evaporated milk, milk byproducts, and miscellaneous other products.

²² "It was not until fifty years after its discovery that pasteurization came to have commercial importance in the processing of milk. The initiative came from the cities. Pasteurization of milk was begun in Cincinnati in 1897; in New York, 1898; in Philadelphia, 1899; in St. Louis, 1900; in Chicago, 1908. As late as 1900 only 5 percent of the milk consumed in New York was pasteurized. But between 1900 and 1920 most of the larger cities took the pledge. In 1910 it was estimated that about 50 percent of the milk sold in cities was pasteurized; by 1915 the volume had increased to 80 percent." Hamilton *et al.*, *Price and Price Policies* 455 (1938).

²³ *Report of the Federal Trade Commission on the Merger Movement* (1948), pp. 37-38.

The geographic scope of operation of these two leading dairy firms was described also (p. 38):

With plants located in all but 6 of the 48 States, National Dairy operates in every part of the United States east of the Rocky Mountains, gathering and distributing fluid milk, and manufacturing butter, cheese, ice cream, evaporated milk, or other milk products. Similarly, the Borden Co. covers most of the country, distributing fluid milk in 19 States and manufacturing ice cream in 27 States. In addition, it operates 16 cheese plants in Wisconsin and others in Illinois, New York, Ohio, and Tennessee.

The report pointed out that in achieving such geographical coverage, the leading dairy firms had relied almost completely upon acquisitions, and also that most of the acquired companies with significant market positions had achieved their positions by earlier mergers.

In the post-World War II years, the survival of the independent dairy sector continued to be endangered by the combined effects of technology and merger. Sanitary processes were greatly improved. The Grade A Model Code of the United States Public Health Service was almost universally adopted. Milk handling and pasteurization equipment was vastly improved. Packaging methods were changed radically; an almost complete shift from glass bottles to paper containers occurred and the half-gallon container emerged as the most popular package. There was a rapid transition from ordinary pasteurized to homogenized milk.²⁴ Processing and delivery equipment was greatly improved, diminishing the perishability of the product and enlarging the geographical scope of markets. And supermarkets came largely to replace home delivery as the major channel of fluid milk distribution. All of these developments have tightened the competitive pressure on the smaller producers and made efficient operation an increasingly expensive proposition in the dairy industry. Many of the smaller producers have not been able to adjust successfully to the new technological requisites of efficient competitive operation; this helps explain the marked decline noted above in the number of small fluid milk producers.²⁵

²⁴ In 1950 homogenized milk represented approximately 50 percent of the consumption; by 1962 virtually the whole consumption was of this type. *Changing Patterns in Fluid Milk Distribution* (U.S. Department of Agriculture, August 1956); *Milk Distributors' Operations* (U.S. Department of Agriculture, November 1962).

²⁵ Set forth below is a table comparing the number of fluid milk plants in the United States in 1950-1951 with those in 1961-1962.

Year	Number of fluid milk plants					Total
	No volume listed	Under 1 million quarts	1-5 million quarts	5-10 million quarts	Over 10 million quarts	
1950-51-----	8, 535	5, 453	1, 573	295	233	16, 089
1961-62-----	1, 858	3, 048	1, 539	365	366	7, 176
Percent change-----	- 79	- 44	- 2	+ 24	+ 57	- 55

Nor is there anything to indicate that in the future the high mortality rate among small dairies will subside. A fluid milk plant must have a volume of at least 1,500 gallons a day if it is to utilize economically the smallest automatic paper packaging equipment. This does not mean an enormous plant is required; one able to process about 1.5 million quarts per year would suffice. But in 1961-1962 70% (about 4,900) of all milk plants had an annual volume of less than 1 million quarts per year²⁶ and another 20% had an annual volume of between 1 and 5 million quarts per year. One of respondent's witnesses estimated that in 1960 there were only 1,098 independent fluid milk companies²⁷ in the entire United States which were processing 1,600 gallons per day—and the technological minimum-size plant may well be larger. Two of respondent's witnesses placed the minimum at approximately 2,000 gallons per day. These facts clearly portend a substantial decrease in the number of competitors in the years ahead.²⁸ Moreover, even a firm of efficient size may not be large enough to penetrate markets where the giants of the industry are well entrenched. Barriers to entry have reached a point where, it would appear, only a substantial firm can be reckoned a real competitive factor in this industry—and, as we have noted, after the big eight there are very few substantial firms. The middle tier of dairies is probably composed of few more than the 50 largest firms, the smaller of which probably have annual sales of only about \$10 million.

Similar technological changes have occurred in the ice cream industry during the post-war period. There has been a marked trend toward automation in manufacturing and packaging. Many plants of wholesale ice cream manufacturers have become semi-automated.

²⁶ This figure includes 1,858 plants whose productive capacity is unknown. The record indicates, however, that plants in this category consist principally of small plants whose volume is so small that the trade association which compiled the above data was unable to ascertain their volume.

²⁷ He defined an independent company as any processor except Arden, Beatrice, Borden, Carnation, Foremost, Fairmont, Kroger, National Dairy, Pet Milk, Safeway, Swift, and Hood.

²⁸ Respondent argues that the number of "viable independent competitors" is increasing because the number of fluid milk companies processing 1,600 gallons per day increased between 1950 and 1960—from 805 to 1,098. This reasoning is specious. It is not appropriate to estimate the number of viable competitors in 1950 on the basis of today's technology; in 1950 smaller plants may well have been viable competitors. All respondent's statistics show is that while nearly 9,000 small dairies discontinued operations during the 1950's, about 293 joined the over 1,600 gallon-per-day class; and, of course, most of these remain of very modest size.

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Some plants have become fully automatic; in them as few as two employees operate the entire plant by pushing a series of buttons at a central control board. Such equipment is expensive and requires a certain minimum volume to be efficient and economical. While there is dispute as to the precise dividing line between "viable" and "marginal" plants, the record indicates that inability to afford the requisite types of equipment, or to achieve sufficient volume to justify their purchase, have been significant factors in the demise of many small firms.²⁹

These technological changes of the 1950's were accompanied by another wave (or continuation of the old one) of dairy mergers: Between 1950 and 1961, the eight large national dairy companies—National Dairy Products, Borden, the present respondent (Beatrice), Foremost Dairies, Carnation, Arden Farms, Fairmont Foods, and Pet Milk—acquired 505 other dairy concerns, representing almost 40% of the total number of recorded acquisitions by these top dairy companies since the early 1900's. Many of these acquisitions have involved relatively small companies; but a substantial number have been of significant factors in various markets, and, on an overall national basis, the effect of the merger movement has been to increase the concentration of the bulk of the nation's dairy assets in the hands of a few firms. In fluid milk, mergers added to the absolute position of the big eight and produced a slight increase in their already substantial share of national sales. In the meantime, the tier of dairies below the big eight appears to have enhanced its relative position (though at a slower rate than they would have had not their ranks been depleted by acquisitions by the largest dairies, which since 1950 have acquired approximately 10 dairy companies

²⁹ There has been a substantial decline in the number of ice cream plants since 1950, although the decline has not been so great as that of milk plants. Set forth below is a table comparing the number of ice cream plants in the U.S. in 1961-1962, with those in 1950-1951:

Year	Number of plants			Total
	No volume reported	Volume less than 250,000 gallons	Volume over 249,999 gallons	
1950-51.....	1, 020	2, 772	411	4, 202
1961-62.....	520	2, 176	530	3, 226
Percent change.....	-49. 02	-21. 51	+28. 95	-23. 23

with assets of \$10 million or more), while at the lower end of the size scale great inroads were made in the number of small firms. In the frozen dessert end of the dairy business, mergers contributed not only to the absolute size of the big eight but also to a substantial increase in their share of total production, from 35.0% in 1950 to 39.2% in 1957.

The post-1950 dairy merger movement has in general resembled that of earlier years. The top regional and national firms have increased the multi-market scope of their operations through numerous market-extension mergers. But, at the same time, the recent mergers have broadened the multi-product character of the top firms. Not only have they filled out their dairy lines; they have expanded their businesses into related food products of the type marketed to the supermarket chains along with dairy products. The merger movement has thus enabled the leading dairy firms to straddle many markets, to market a full line of dairy products, and to supplement their lines with other grocery products.

These are the cardinal facts which emerge from a review of the economic structure and dynamics of the dairy industry: (1) Concentration has already reached formidable proportions in local areas, which are the economically relevant markets in which to measure competition in this industry. (2) The prospects of survival for small firms, and the conditions for entry of new small-business competitors into the industry and its markets, have worsened. There are relatively few firms outside of the leading eight which can be rated as really strong competitors under present market conditions. (3) The leading firms have been embarked on an extensive and far-reaching program of acquisitions, the result of which has been to increase concentration still further and speed the exit of the independents. (4) No showing has been made that these acquisitions (at least those that have taken place since 1950) were necessary for the leading dairies to achieve the economies of scale made possible by the industry's technological revolution, or that the acquired companies could not have achieved such economies through merger with firms much less powerful, well entrenched, and geographically far-flung than the big eight.

IV

In its express terms, the merger law proscribes any merger or acquisition involving corporations engaged in commerce—however the merger be classified, as horizontal, vertical, market-extension,

product-extension, or defying neat classification—if its effect, “in any line of commerce in any section of the country,” “may be substantially to lessen competition, or to tend to create a monopoly.” (See p. 699, note 5, *supra*.) The legislative history reflects the particular concern of Congress with the possible adverse competitive effect of mergers that were not strictly “horizontal” in the sense of a merger between companies actually competing with one another at the time of the merger, but that were, rather, geographical “market extensions,” involving firms which, while they sold the same product, were not actual competitors at the time of the merger since they sold in different geographical markets. See *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1050–52. The Commission, in its *Report on the Merger Movement* (1948), on which the framers of the Celler-Kefauver Act drew heavily, had given special emphasis to the dangers to competition posed by market-extension acquisitions, especially in the dairy industry where such acquisitions were so common.³⁰ The example of Borden’s market-extension acquisitions in the dairy industry between 1940 and 1947 was expressly cited in the committee deliberations on the bill that became the amended Section 7. See H.R. Rep. No. 1191, 81st Cong., 1st Sess., p. 11 & chart I (1949).

A fundamental concern of Congress in amending Section 7 of the Clayton Act in 1950 was the effect on competition of concentrating the business of a particular market or industry in the hands of too few sellers.³¹ In markets where one or a very few firms control a large part of the total sales, there is a tendency for all firms to refrain from vigorous price competition. Each large seller knows that if he makes an across-the-board price cut, the inroads on his major competitors’ market shares will be so palpable that they will be compelled immediately to make a corresponding price cut—and that consequently

³⁰ See p. 710, *supra*. The Report stated (p. 37).

“Typically, the firms which have followed this pattern have grown by buying up concerns making the same product in one or a few localities, strengthening their position in those localities by additional acquisitions, branching out to obtain control in other localities, consolidating their 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 Nation-wide organizations with a substantial degree of control in the Nation as a whole, a much higher degree in many of the important regions, and a near-monopoly position in numerous individual localities.

“It is in such fields as dairy products and bread that this type of merger activity has been pushed most vigorously. In fact, the growth of such outstanding Nation-wide companies as National Dairy Products Corp. and the Borden Co. could be likened to an acquisition itinerary, sweeping across the country from one large city to another, and gathering in its wake hundreds of companies serving small communities as well.”

³¹ See *Brown Shoe Co. v. United States*, 370 U.S. 294, 315; S. Rep. No. 1775, 81st Cong., 2d Sess. 5 (1950); *Procter & Gamble Co.*, F.T.C. Docket 6901 (decided November 26, 1963), p. 23. [63 F.T.C. 1465, 1548].

there is little advantage to be gained from price cutting. The small firms in such a market are also inhibited from initiating price competition. They know that the majors will react promptly, perhaps with drastic effect, to any attempt to disturb the price structure.

There may, however, be forces at work in such a market which counteract to some extent the adverse competitive conditions flowing from the fewness of the sellers. One such force is the condition of entry by new competitors. It may be such that many firms can and promptly do enter the market and establish themselves as viable and substantial competitors, thereby eroding the market power of the dominant sellers. Moreover, the mere prospect of new competition may have a salutary effect. The large seller in a concentrated market knows that the entry of new competitors would jeopardize the stable price structure of the market and might well lead to lower prices, as a result of greater competition, and lower profits. He also knows that if prices in the market are so high as to make it easy for a new competitor to cover his costs, make a healthy profit, and still be competitive with the firms presently operating in the market, the attractiveness of entry to prospective competitors will be great, and the likelihood of actual entry substantial. The most effective way of discouraging entry into a concentrated market is for the major sellers to keep their prices down to a level low enough to make entry unattractive to new competitors.

Thus, the condition of entry, or the state of potential competition, may have a significant bearing on the degree to which a concentrated market will exhibit the symptoms, such as high prices, of weak or ineffective competition; and a firm not actually selling in a market, a firm that is merely a prospective or potential competitor there, may nevertheless be a significant competitive factor in the behavior of the market. It disregards business realities to view such a firm, which may be as much a real competitive factor as the firms currently selling in the market, as being entirely "outside" the market, or to deny that, just as the elimination of an actual competitor may adversely affect the competitive structure of a market, so may the elimination of a potential competitor.

This does not mean that actual and potential competition are completely interchangeable concepts. Even in a competitively structured, unconcentrated market, the elimination of a substantial competitor may still be undesirable from the standpoint of maintaining competition, for it can bring the market structure significantly closer to a condition of such concentration that anticompetitive effects become foreseeable. See e.g., *Brown Shoe Co.*, *supra*, 370 U.S., at 343-

44. But the absorption of a potential competitor in such a market is likely to have much less competitive significance. If the market is competitive in structure, prices are likely to be at a competitive level, and so the restraining effect of potential competition on unduly high, noncompetitive price levels may be irrelevant.

Another difference between actual and potential competition is that the adverse effects that result from an absence of actual competition are rarely cancelled out completely by the presence even of substantial potential competition. Cf. *Ekco Products Co.*, F.T.C. Docket 8122 (decided June 30, 1964), pp. 6-7 [65 F.T.C. 1163, 1207-1208]. Potential competition may tend to keep prices in a concentrated market down to entry-discouraging levels, but obviously the price low enough to dissuade a firm from trying to force its way into a new market—always a risky venture—may be substantially higher than the price that would prevail if there were vigorous competition among the sellers already there.

That potential competition is an important and substantial, and not a theoretical or speculative, force for counteracting the anti-competitive and monopolistic conditions which tend to be present in concentrated markets has been given explicit recognition in a series of recent Supreme Court decisions interpreting Section 7 of the Clayton Act.³² In *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, the acquired company was deemed by the Court a "substantial factor in the California market" (376 U.S., at 658), which the acquiring company dominated, even though the acquired company had never succeeded in doing business in California. The Court considered the elimination of the potential competition provided by the acquired firm highly significant because, in the circumstances, "the mere efforts of Pacific Northwest [the acquired firm] to get into the California market, though unsuccessful, had a powerful influence on El Paso's business attitudes within the State." *Id.*, at 659. The Court went on to note: "The effect on competition in a particular market through acquisition of another company [not actually competing in that market] is determined by the nature or extent of that market and by the nearness of the absorbed company to it, that company's eagerness to enter that market, its resourcefulness, and so on." *Id.*, at 660.

³² See also *Foremost Dairies, Inc.*, *supra*, at 1089; *Procter & Gamble Co.*, F.T.C. Docket 6901 (decided November 26, 1963), p. 61 [63 F.T.C. 1465, 1577]; *Ekco Products Co.*, F.T.C. Docket 8122 (decided June 30, 1964), p. 21 [65 F.T.C. 1163, 1220]; Hines, *Effectiveness of "Entry" by Already Established Firms*, 71 Q. J. of Econ. 132 (1957), and authorities cited therein.

In another case, the Court again pointed out the importance of protecting potential competition under certain circumstances: "the competition with which § 7 deals includes not only existing competition but that which is sufficiently probable and imminent." *United States v. Continental Can Co.*, 378 U.S. 441, 458. "[L]ack of current competition" does not necessarily "significantly diminish . . . the adverse effect of the merger on competition. Continental might have concluded that it could effectively insulate itself from competition by acquiring a major firm not presently directing its market acquisition efforts toward the same end uses as Continental, but possessing the potential to do so." 378 U.S., at 464. The mere "possibility" of new competition, the Court stated, "over the long run acts as a deterrent against attempts by the dominant members of either industry to reap the possible benefits of their position by raising prices above the competitive level or engaging in other comparable practices." *Id.*, at 465-66.

The most complete statement of the Court's views on the importance of potential competition is to be found in *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, a case challenging a joint venture of Pennsalt Chemicals Corporation and Olin Mathieson Chemical Corporation:

There still remained for consideration the fact that Penn-Olin [the joint venture] eliminated the potential competition of the corporation that might have remained at the edge of the market, continually threatening to enter. Just as a merger eliminates actual competition, this joint venture may well foreclose any prospect of competition between Olin and Pennsalt in the relevant sodium chlorate market. The difference, of course, is that the merger's foreclosure is present while the joint venture's is prospective. Nevertheless, "[p]otential competition * * * as a substitute for * * * [actual competition] may restrain producers from overcharging those to whom they sell or underpaying those from whom they buy * * *. Potential competition, insofar as the threat survives [as it would have here in the absence of Penn-Olin], may compensate in part for the imperfection characteristic of actual competition in the great majority of competitive markets." Wilcox, *Competition and Monopoly in American Industry*, TNEC Monograph No. 21 (1940) 7-8. Potential competition cannot be put to a subjective test. It is not "susceptible of a ready and precise answer." As we found in *United States v. El Paso Natural Gas Co.*, *supra*, at 660, the "effect on competition * * * is determined by the nature or extent of that market and by the nearness of the absorbed company to it, that company's eagerness to enter that market, its resourcefulness, and so on." The position of a company "as a competitive factor * * * was not disproved by the fact that it had never sold * * * there. * * * [I]t is irrelevant in a market * * * where incremental needs are booming." The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be

a substantial incentive to competition which cannot be underestimated. 378 U.S., at 173-74.

While these decisions authoritatively confirm that the preservation of potential competition in concentrated markets is an important goal of antitrust policy, the Court's many references to the probability and imminence of new entry, and the eagerness, resourcefulness, or nearness of the potential competitor, suggest some important qualifications.

Since every firm in the country is in a sense a potential competitor of every other, and since an important source of potential competition is newly organized firms, the range of potential competitors in any given market or industry could be said to include all established firms and also all firms not yet in being. Much potential competition is simply too remote, speculative, or improbable to have demonstrable competitive significance. The elimination of such marginal potential competition is not so serious in its probable effects as to require remedial action under the antitrust laws. It is only where the entry of a potential competitor is *probable* that the threat of his entry is likely to exercise a restraining influence on the pricing and other behavior of the dominant firms in the market. It is, however, not necessary to establish that the potential competitor will actually enter at any time. If the firms already occupying the market are pricing so as to prevent the entry of potential competitors, new entry may be forestalled indefinitely. Elimination of a leading potential competitor could still have an adverse competitive effect by reducing competitive pressure on the established firms.

Even a firm whose imminent entry is certain, however, may not necessarily be a significant potential competitor. Suppose that a very small firm announces its intention of entering a certain market, but its size, and the competitive conditions of the market, make it appear unlikely that the firm can offer any real challenge to the principal firms or do anything but join the fringe of small firms living in the shadow of the dominant ones. In such a case, though the probability of new entry would be great, the interest in preventing the elimination of the prospective entrant would be slight. Such a firm would not have good prospects of obtaining a sufficiently large market share to cause erosion of the dominant firms' market position. Nor would the prospect of its entry be sufficiently alarming to the dominant firms to induce them to lower their prices in order to make entry unattractive. A related consideration is whether there is a limited number of potential entrants with the requisite ability and incentive. If there are a great many potential entrants equally

capable of entry, the elimination of only one of them may have no significant effect.

A merger or other acquisition may, by eliminating a potential competitor, sometimes gravely impair the health and vigor of competition. An example is the merger of two firms, both leading potential competitors in a particular market, which diminishes the number of significant potential competitors by one.²³ On the other hand, a merger between a very small factor—not one of the few dominant firms—in the market and a small concern from outside the market may increase, rather than lessen, competition by making the merged firm a more viable competitor.

The competitive effects are more difficult to predict when a very small factor in the market is acquired by a substantial potential competitor. The merger may increase competition in the market by injecting a substantial firm, one capable of challenging the dominant firms in the market, in place of a firm too small to be a significant competitive factor. But much would depend on the industry setting of the merger. Although individual mergers of this type may appear inoffensive or even salutary, the cumulative effect of a long series of such mergers by the leading firms in an industry—each capable of entering most markets by internal growth—may be to dry up the opportunities for growth of smaller enterprises which are much more dependent on merger as an entry device, and thereby impair competition in the long run.

The competitive effects are likely to be most serious where the merger is between one of the dominant firms in a concentrated market and a substantial potential competitor. In such a case there is no improvement in the competitive structure of the market—for one dominant firm has simply been replaced by another—and substantial potential competition is eliminated. The dominant firms in the market no longer have to concern themselves with the consequences of entry by the potential competitor; he is already in. Nor need they cope with any additional competition as a result of his entry; he has not increased the number of substantial competitors in the market but simply taken the place of one of those competitors. The potential competitor enters the market in circumstances where there is no change in the competitive structure of the market, except that he is eliminated as a prospective entrant. Such a merger is even more injurious to competition if the acquired firm is a potential competitor in one or more of the acquiring firm's markets. For

²³ *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (see pp. 718-719, *supra*), a joint venture between potential competitors, exemplifies this effect.

then potential competition is hurt twice: the merger eliminates the acquiring company as a potential entrant in the acquired firm's markets, and the acquired firm is eliminated as a potential entrant in the acquiring firm's markets.

The elimination of a particular leading potential competitor may assume added economic significance if the number of potential competitors is declining, whether due to technological or marketing reasons which make entry more difficult, or because of an industry-wide merger movement eliminating (or threatening to eliminate) significant numbers of potential competitors. In this event, overall industry trends take on the same significance in evaluating the probable competitive impact of a market-extension merger as in evaluating horizontal and vertical mergers. See *Brown Shoe Co. v. United States*, 370 U.S. 294. Such background trends may also be useful in determining whether certain sanctions should be placed on mergers between small concerns and substantial potential competitors, which, as noted above, otherwise might not be thought anticompetitive.

The Supreme Court has held that the elimination of an actual competitor in a concentrated market is forbidden by the Sherman Act if the acquired firm is a significant competitive factor. *United States v. First National Bank & Trust Co. of Lexington*, 376 U.S. 665. Section 7 of the Clayton Act was not intended to be interpreted and applied in accordance with Sherman Act standards. "The grand design [of Section 7] * * * was to arrest incipient threats to competition which the Sherman Act did not ordinarily reach." *Penn-Olin Chemical Co., supra*, 378 U.S., at 170-71. Congress, concerned with the long-range anticompetitive effects of mergers and acquisitions, determined that those mergers should be forbidden which endanger the competitive structure of markets and industries. Although the elimination of potential competition through a merger may not have the same immediately apparent effect on the competitive structure of a market as the elimination of an actual competitor, which diminishes the number of rival sellers by one and may appreciably increase concentration of the business of the market in the hands of a very few firms, it may jeopardize the long-run prospects for competition in a market at present unduly concentrated. Preservation of potential competition both allows for the eventual deconcentration of the market through vigorous new competitive infusions (cf. *United States v. Philadelphia National Bank*, 374 U.S. 321, 365, n. 42) and keeps in being a subtle, often difficult to measure, but nonetheless very important restraining force on non-

competitive behavior by the firms in a concentrated market. When it is considered how many markets and industries in the nation today are concentrated,³⁴ the importance of potential competition in the administration of a statute concerned with the long-range competitive prospects of the American economy is manifest.

We reject, as bad economics and bad law, respondent's argument that the preservation of potential competition is not a significant consideration in judging a market-extension acquisition: "[t]he concept of measuring potential competition and future level of competition is not a reliable, meaningful statutory test because it substitutes outright speculation for reliable evidence—unless as in the *El Paso* case the potential competition is so 'imminent' that it constitutes actual competition." (Respondent's Appeal Brief, p. 104.) Section 7 is expressly concerned with the "future level of competition." A determination of illegality under the statute "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future."³⁵ No such prediction can be "reliable" or "meaningful" if it fails to take into account the competitive significance of eliminating substantial potential competition in a concentrated market or industry.

Impairment of potential competition is not the only adverse competitive effect that may flow from a market (or product) extension merger. The substitution through merger of a firm not theretofore actually selling in the market for one of the dominant firms may have adverse competitive effects beyond merely the elimination of substantial potential competition—at least where the acquiring company is strong in a number of other markets.³⁶ These can be either

³⁴ The Bureau of the Census, in *Concentration Ratios in Manufacturing Industry 1958*, Part II, pp. 466-67 (report prepared for the Subcomm. on Antitrust and Monopoly of the S. Comm. on the Judiciary, comm. print 1962), reveals that of the 39 product classifications having shipments in excess of one billion dollars a year, 13—or $\frac{1}{3}$ —represent industries in which the 4 largest firms control at least 50% of total shipments. These are highly concentrated industries. Cf. Bain, *Industrial Organization* 127 (1959); Kaysen & Turner, *Antitrust Policy* 27 (1959).

³⁵ *United States v. Philadelphia National Bank*, 374 U.S. 321, 362. See Edwards, *Test of Probable Effect Under the Clayton Act*, 9 Antitrust Bull. 369 (1964).

³⁶ *Procter & Gamble Co.*, *supra*, pp. 48-49, 62-64 [63 F.T.C. 1465, 1566-1568, 1578-1580]. This was explained, with specific reference to the dairy industry, in the Commission's *Foremost* opinion:

"A small dairy operating in a single local market has its competitive behavior constrained by conditions existing in this market; a large diversified firm does not operate under similar market constraints. It may, if it chooses, outcompete the little man by subsidizing its operations in one market out of its operations elsewhere. Of course, this temporarily may lower slightly the average profits on its over-all operations. But for the little man, losses in one market mean no profits at all—no profits with which to expand, no profits with which to develop new production techniques, no profits with which to make product improvements: or, simply put, the little man is deprived of the profits which, in a free enterprise economy, makes it possible for him to survive in the long run." 60 F.T.C., at 1059-60.

other product markets or other geographic markets. A firm strongly entrenched in a number of markets may thereby be able to engage in deep, sustained, and discriminatory price cutting in selected markets to the detriment of weaker competitors. See, e.g., *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115. Predatory price cutting of this kind, at least where it involves discrimination in the price of goods of like grade and quality, has long been forbidden by the antitrust laws. See, e.g., *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234 (2d Cir. 1929). But there is a form of discriminatory price competition which, although it may hurt competition and promote or entrench monopoly, has not been directly prohibited by the antitrust laws and is, indeed, the subject of an express defense to the price discrimination law: discriminatory price cutting which does no more than meet the equally low price of a competitor.³⁷ In the hands of a powerful firm, able to sustain selective price cuts for so long as may be necessary to ensure against a loss of trade, such price cutting may be a potent weapon for repulsing new competition and preventing entry into concentrated markets.

A prospective entrant into a new market ordinarily faces an uphill fight. Because he has not sold in the market, his brand is unfamiliar and may at first lack consumer acceptance. Distributors may be unwilling to offend existing suppliers by dealing with the newcomer or may simply have a natural reluctance to do business with a firm not known to it. Natural business inertia will, therefore, make it difficult for a new entrant to gain a foothold. But entry may not be worthwhile unless the prospects for gaining substantial business from the existing competitors are reasonably good. A common method of penetrating a new market is to offer a low price during an initial promotional period.³⁸ This tactic will come to naught if the dominant firms in the market are capable of offering immediate and sustained selective price cuts to their customers to hold their business.

When a powerful multi-market firm absorbs one of the dominant sellers in a concentrated market, the result may be not only to eliminate a source of potential competition, but to increase the difficulty of new entry and thus reduce the prospects for future new competition. Suppose that a local market is dominated by three

³⁷ Section 2(b) of the Clayton Act, 15 U.S.C. § 13(b), provides "That nothing * * * shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor." See *Standard Oil Co. v. F.T.C.*, 340 U.S. 231.

³⁸ See Dirlam & Kahn, *Fair Competition: The Law and Economics of Antitrust Policy* 212 (1954); Brooks, *Injury to Competition Under the Robinson-Patman Act*, 109 U. Pa. L. Rev. 777, 787 (1961); Note, *Competitive Injury Under the Robinson-Patman Act*, 74 Harv. L. Rev. 1597, 1610 (1961).

firms, which, while they are large in that market, are small by industry standards and do no substantial business outside the one market. A company of the same size might be reluctant to challenge such firms for a share of the market. A powerful multi-market firm, however, having far greater resources than any of the dominant local competitors, might have no such inhibitions. Such a firm, in contrast to the single-market independent which must make a profit in that market or go under, is able to weather competitive storms in any particular local market by reason of its far-flung operations covering many markets.³⁹ If one of the powerful multi-market firms absorbed one of the dominant local competitors, a prospective entrant would have to reckon not only with local oligopolists but with a powerful multi-market firm having a position of dominance in the local market and well able to repulse new competition, whether by price discrimination or by other tactics which can be effective in preventing new competitors from gaining a foothold. A multi-market company that would not be deterred from challenging merely local oligopolists in a new market might be deterred from challenging an entrenched firm of equal or greater strength.

We do not suggest that every acquisition of a dominant local competitor by a large outside firm may have substantial anticompetitive effects: that will depend on such factors as the position of the outside firm in the markets where it is active, the degree to which the power of the outside firm may be brought to bear in behalf of the local competitor, and competitive methods and conditions in the local market. But where it is shown that the effect of such an acquisition may be to increase appreciably the difficulty of new entry, the adverse competitive effects flowing from the elimination of a potential competitor plainly are aggravated.

So far we have been speaking of the principles governing mergers challenged under Section 7 of the Clayton Act. The same principles govern mergers challenged under Section 5 of the Federal Trade Commission Act as "unfair methods of competition" or "unfair acts or practices."

On the basis of isolated excerpts from the legislative history of the Federal Trade Commission Act, respondent argues that Congress never intended that the prohibitions of Section 5 might overlap those of the Clayton Act. The courts have decided otherwise. They

³⁹ See p. 722, n. 36, *supra*; *Reynolds Metals Co. v. F.T.C.* 309 F. 2d 223, 229-30 (D.C. Cir. 1962). "[A] strong, national chain of stores can insulate selected outlets from the vagaries of competition in particular locations". *Brown Shoe Co. v. United States*, 370 U.S. 294, 344.

have made clear that conduct which "runs counter to the public policy declared in the Sherman and Clayton Acts" is "unfair" and unlawful under Section 5.⁴⁰ A merger or acquisition the effect of which may be substantially to lessen competition or tend to create a monopoly is "a practice which is plainly contrary to the policy of the Clayton Act," *Giant Food, Inc. v. F.T.C.*, 307 F. 2d 184, 186 (D.C. Cir. 1962), and hence, we think, forbidden by Section 5.

We need not pause over the thorny issue of whether, prior to the 1950 amendments to Section 7, the Commission could have proceeded against assets acquisitions under Section 5. Cf. *F.T.C. v. Eastman Kodak Co.*, 274 U.S. 619; *United States v. Philadelphia National Bank*, 374 U.S. 321, 339-40, n. 17. At that time the Clayton Act was limited to stock acquisitions. In plugging the "assets loop-hole" the 1950 amendments made explicit that mergers and assets acquisitions which may substantially lessen competition or tend toward monopoly are contrary to public policy.⁴¹ And the Commission's remedial powers to undo the ill effects of unlawful acquisitions are as broad in a Section 5, as in a Section 7, proceeding. *Ekco Products Co.*, F.T.C. Docket 8122 (decided June 30, 1964), pp. 12-13 [65 F.T.C. 1163, 1213-1214].

There is, however, at least one important difference in scope between Section 7 and Section 5. While Section 7 is applicable only to corporate acquisitions, Section 5 expressly forbids unfair methods of competition on the part of persons and partnerships as well as corporations. Had Congress deliberately limited Section 7 to corporations, determining that acquisitions involving persons and partnerships should not be governed by the same standards applicable to corporate acquisitions, we would hesitate to conclude that such acquisitions are to be tested in Section 5 proceedings under Section 7 standards. But no such congressional intent is discernible. So far as appears, Section 7 was not made applicable to noncorporate acquisitions only because corporate acquisitions were in the forefront of congressional concern and attention. In most industries, a corporate acquisition is far likelier to have substantial competitive effects than

⁴⁰ *Fashion Originators' Guild of America v. F.T.C.*, 312 U.S. 457, 463. *Accord*, *F.T.C. v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 395; *F.T.C. v. Cement Institute*, 333 U.S. 683, 693; *Grand Union Co. v. F.T.C.*, 300 F. 2d 92 (2d Cir. 1962). Cf. *Northern Pacific R. Co. v. United States*, 356 U.S. 1; *United States v. Columbia Steel Co.*, 334 U.S. 495, 507, n. 7.

⁴¹ The fact that this policy was declared long after the passage of the Federal Trade Commission Act is immaterial. "Unfair methods of competition" is a "flexible concept with evolving contents". *F.T.C. v. Bunte Bros.*, 312 U.S. 349, 353. It embraces practices declared contrary to public policy in statutes, such as the Robinson-Patman Act and the Celler-Kefauver Antimerger Act, enacted after 1914. *Grand Union Co.*, *supra* *Giant Food, Inc.*, *supra*.

the acquisition of purely personal or partnership assets. It is readily understandable, therefore, that Congress should have legislated with specific reference to corporate acquisitions.

We do not think that Congress, in making Section 7 applicable to corporate acquisitions, intended to open up a substantial loophole in the application of the antitrust laws in the field of mergers and acquisitions. Cf. *Philadelphia National Bank, supra*, at 343. This would be a particularly anomalous result since it would prevent fully effective remedial action in one of the industries with which Congress was particularly concerned, the dairy industry, where non-corporate acquisitions appear to have played a significant role in furthering concentration. Some of the largest acquisitions made by respondent and challenged in the present case are noncorporate. Nor can it tenably be argued that the omission of noncorporate acquisitions from the coverage of Section 7 reflects a policy of fostering small-business acquisitions—one of the corporate acquisitions found unlawful by the examiner involves a firm with annual sales of only \$119,000. No legislative policy would be advanced by adopting a test of illegality under Section 5 turning on the business form a firm happens to select.

It is well established that Section 5 reaches transactions which violate the standards of the Clayton Act though for technical reasons are not subject to that Act, unless such application of Section 5 would be an attempt to "supply what Congress has studiously omitted," *F.T.C. v. Simplicity Pattern Co.*, 360 U.S. 55, 67, or to "circumvent the essential criteria of illegality prescribed by the express prohibitions of the Clayton Act." *Report of the Attorney General's Natl. Comm. to Study the Antitrust Laws*, p. 149, n. 78 (1955). See *Grand Union Co., supra*, at 98. Applying Section 5 to noncorporate acquisitions effectuates, rather than circumvents or conflicts with, Congress' policy with respect to the prevention of anti-competitive acquisitions.

There is another legitimate and important role that Section 5 has to play in antitrust enforcement, and this with respect to corporate and noncorporate acquisitions alike. Acquisitions have often been questioned under the antitrust laws, not as being unlawful in themselves, but as forming an integral part of a larger offense such as monopolization.⁴² It may be appropriate to scrutinize a series of acquisitions over a long period of time from the standpoint not only

⁴² See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1; *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 307-12 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521; *United States v. Aluminum Co. of America*, 148 F. 2d 416, 434-36 (2d Cir. 1945); *United States v. Grinnell Corp.*, 236 F. Supp. 244, 248-49 (D. R.I. 1964).

of whether particular acquisitions violate Section 7 or Section 5, but also of whether the respondent's course of conduct viewed as a whole constitutes an attempt to monopolize or an unfair method of competition. Looked at in this way, the series of acquisitions may justify relief beyond what might be appropriate in a Section 7 or Section 5 case challenging a particular one or number of the acquisitions in the series, and irrespective of whether every individual acquisition, viewed separately, is unlawful.

V

The importance of developing, so far as practicable, clear and concrete legal standards for mergers for the guidance of businessmen, the enforcement agencies, and the tribunals which must decide Section 7 cases, need not be labored. It has been declared in emphatic terms by the Supreme Court⁴³ as well as by the Commission. See *Procter & Gamble Co.*, F.T.C. Docket 6901 (decided November 26, 1963), pp. 35-39 [63 F.T.C. 1465, 1556-1560]. The large number of mergers consummated every year, the economic costs incurred in protracted merger litigation, the chilling effect of legal uncertainty in this field on business initiative and decision making, and the unmanageable complexity of trial records in cases where the governing standards are ill-defined or overbroad, are all factors which make imperative the formulation of precise standards tailored to the particular facts and competitive conditions of individual industries. Thousands of mergers have taken place in the dairy industry in the last 50 years. In an industry so prone to extensive merger activity, the need to develop standards which will be clearly understood by the industry, and which will prevent unlawful mergers without deterring lawful ones, is especially urgent.

⁴³ " * * * [T]he ultimate question under § 7 [is] whether the effect of the merger 'may be substantially to lessen competition' in the relevant market. Clearly, this is not the kind of question which is susceptible of a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their 'incipiency.' Such a prediction is sound only if it is based upon a firm understanding of the structure of the relevant market; yet the relevant economic data are both complex and elusive. And unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded. So also, we must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation. And so in any case in which it is possible, without doing violence to the congressional objective embodied in § 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration." *Philadelphia National Bank*, *supra*, at 262 (citations omitted). See *Brown Shoe Co.*, *supra*, at 341 & n. 68; *Standard Oil Co. v. United States*, 337 U.S. 293, 313.

A fact critical to the requirements of the merger law as applied to the dairy industry today is the sharp and continuing decline in the competitive importance of single-plant and other very small or obsolete dairy firms. This sector of the dairy industry, once dominant, appears destined by technological change to play an increasingly diminished role. Respondent in the present case admits and indeed stresses this fact. The exit of many of these small firms, which can be foreseen over the next several decades, is likely to increase concentration in the local markets—so many of them already highly concentrated—where such firms operate. This class of firms, moreover, can no longer be regarded as an important source of potential competition in concentrated dairy markets.

Increasingly, therefore, medium-sized and large dairy firms must be relied on as the source of actual and especially potential competition in this industry. But, as has been noted (see p. 708, *supra*), there are relatively few substantial firms between the big eight at one end of the spectrum and the obsolete or obsolescent single-plant firms at the other.⁴⁴ At the same time, the largest firms in the industry have grown to a size at which their ability to repulse new competition in markets in which they are strongly entrenched has become formidable.⁴⁵ The Commission so found in *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1059–60. The examiner so found in the present case (initial decision, pp. 649–650), and we adopt his finding. This phenomenon is also extensively documented in the records of the many price discrimination cases brought by the Commission in this industry. See, e.g., initial decision filed September 15, 1964, in *Beatrice Foods Co.*, F.T.C. Docket 7599 [68 F.T.C. 286, 291].

On the basis of the fundamental facts of the dairy industry's structure, we conclude that any acquisition of a not insubstantial dairy company by one of the industry's giants (roughly, a company having annual sales of more than \$200 million) is highly suspect. While a small acquisition, considered in isolation, may not appear to enhance the size or market strength of a giant acquiring firm, the history of merger activity in the dairy industry shows that such acquisitions have in the aggregate contributed to the giant firms'

⁴⁴ It might be noted in this connection that there are only about 25 firms in the entire dairy industry that are publicly owned.

⁴⁵ Their power in this respect has been enhanced by the extensive product diversification of these firms, generally through mergers. "Threatened with competition in any one of its various activities, [such a diversified firm] * * * may sell below cost in that field, offsetting its losses through profits made in its other lines—a practice which is frequently explained as one of meeting competition." F.T.C., *Report on The Merger Movement* (1948), p. 59. See *Procter & Gamble Co.*, *supra*, pp. 48–49 [63 F.T.C. 1465, 1566–1568].

obtaining a position of such strength throughout their marketing areas as to raise substantial barriers to the entry of smaller firms. Such acquisitions, moreover, have tended to retard the emergence of a strong and healthy middle tier of medium-sized dairy companies capable of offering vigorous competition to the giant firms. Engrossing small firms by the thousands, as the industry leaders have done, has prevented the creation of strong, viable competitors through merger between small firms, as opposed to mergers between small firms and large.

In the present case, the examiner entered an order, comparable to the orders entered by the Commission against the three other largest dairy companies, forbidding respondent to make any future dairy acquisitions for a period of 10 years without the Commission's approval in advance. It is apparent that acquisition activity on the part of firms of similar size not under formal order is equally suspect and should be observed carefully by the Commission.

Another major objective of Section 7 in this industry is to prevent the repetition of the pattern of growth through acquisition whereby the firms which now dominate the industry achieved their positions of leadership. If the Commission were to sit idly by while firms now in, say, the \$40 million to \$60 million range engaged in acquisition programs calculated or likely to make them as large as the present respondent, the result would be the rapid transformation of the industry into one completely dominated by a handful of giant firms and far less competitive than at present. Accordingly, just as the Commission, in the *Foremost* case, challenged a series of acquisitions which transformed the respondent from a medium-sized to a very large dairy company, so any similar program of acquisitions undertaken by a medium-sized member of the industry should receive close scrutiny by the Commission.

However, not every acquisition by a medium-sized firm, in circumstances where no large-scale pattern of acquisition activity is perceivable, is necessarily suspect under the antitrust laws. Such an acquisition would be questionable if it eliminated another medium-sized firm, since such firms are few and are a critical source of actual and potential competition in this industry. Where, however, the acquired firm is small (say with sales of less than \$10 million), other factors must be considered. If the merger is conventionally horizontal in character and eliminates a significant competitor, it will probably be unlawful. The same will be true if one of the firms has a position of strength in a concentrated market and the other firm is a significant potential competitor in that market.

Congressional policy as expressed in Section 7 will be best served in this industry if merger activity is channeled toward the smaller firms. Certainly mergers between firms too small to achieve the economies of scale made possible by the technological revolution in the dairy industry or to function as strong, effective competitors and penetrate into new markets are lawful. Mergers between such firms may be a method of strengthening the competitive process in this industry. Section 7 does not prevent the exit through merger of firms too small to be viable. To be sure, where a small firm is acquired by a very large or even one of the moderately large multi-market dairy companies, the result may be to impair competition; such a merger is unlawful. But if the same small firm is acquired, rather, by another reasonably small firm, the merger is likely to result not in a weakening, but in a strengthening, of the competitive structure of this industry; such a merger is clearly lawful.

VI

Our analysis of the acquisitions challenged in the present case is considerably simplified due to the meticulous analysis by the hearing examiner in his 223-page initial decision. We have carefully reviewed the examiner's findings, and have concluded that, with the exception of his holding that mergers are not subject to challenge under Section 5 of the Federal Trade Commission Act (see pp. 518-520, *supra*), his findings and conclusions are factually correct and legally sound and should be adopted as findings and conclusions of the Commission.

Complaint counsel's appeal can be disposed of quickly. With respect to the Clarksburg and Associated acquisitions, we agree with complaint counsel and the examiner that they would be unlawful under Section 7 if the acquired companies could be shown to have been "engaged in commerce." We also agree with complaint counsel that it is immaterial, so far as satisfying this jurisdictional requirement of Section 7 is concerned, whether the amount of interstate commerce by the acquired company is, either relatively or absolutely, large or small,⁴⁶ and that purchase in commerce of goods for resale locally is a form of engaging in commerce embraced by the statute. *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1069.

On the other hand, we do not think that Congress intended the Act to embrace corporations whose involvement in commerce was completely insignificant, trivial, and sporadic. Cf. *Skinner v. United*

⁴⁶ Cf. *United States v. Yellow Cab Co.*, 332 U.S. 218, 225; *United States v. Socony-Vacuum Oil Company*, 310 U.S. 150, 225, n. 59.

States Steel Corp., 233 F.2d 762 (5th Cir. 1956). Even complaint counsel concede that it must be "shown that the acquired corporation is engaged in commerce * * * beyond an infinitesimal extent." Appeal Brief of Complaint Counsel, p. 13. The record does not disclose the dollar amount of either Clarksburg's or Association's purchases in commerce.⁴⁷ So far as appears, the interstate purchases of both acquired firms were too infinitesimal to satisfy the requirements of the statute.

With regard to the other acquisitions dismissed by the examiner as to which complaint counsel have appealed, no extended discussion is necessary, since complaint counsel seek neither divestiture nor other relief against these acquisitions. The sole reason offered by complaint counsel for seeking a Commission ruling on their legality is to support the 10-year ban on acquisition contained in the examiner's order. But we think the propriety of such a ban can be determined on this record irrespective of the legality of these six acquisitions, which, as the examiner noted, raise acute problems not only of relief but also of commerce and competitive effect.

We also do not find it necessary to determine on this record whether respondent's series of acquisitions, viewed as a pattern, violated Section 5 of the Federal Trade Commission Act. The only remedy sought by complaint counsel for this alleged violation is a ban on future acquisitions—and we think a demonstrated proclivity for making dairy acquisitions that violate Section 7, as the examiner found in the case of five of respondent's acquisitions, would in the circumstances justify, wholly without reference to Section 5, an order requiring respondent to obtain the Commission's approval in advance for all future acquisitions in this industry.⁴⁸ That brings us to the four acquisitions which the examiner found to be unlawful and ordered divested and as to which respondent has appealed from the examiner's findings and order.

On August 1, 1953, respondent acquired Creameries of America, Inc. Creameries, with annual sales of \$49 million, was a diversified dairy company and unquestionably one of the major competitive

⁴⁷ Neither made any sales in commerce.

⁴⁸ We have held that such an order is within the Commission's remedial power in enforcing Section 7. *Ekco Products Co.*, F.T.C. Docket 8122 (decided June 30, 1964), p. 15 [65 F.T.C. 1163, 1215]. Cf. *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545, 575 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567. It should be noted that an order forbidding future acquisitions without prior approval by the Commission is in no sense an absolute ban on such acquisitions. In deciding whether or not to approve a proposed acquisition submitted under such an order, the Commission is not free to act capriciously or unreasonably. It may deny approval only where the acquisition, if consummated, would conflict with the remedial objectives of the order.

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factors in the territory west of the Rocky Mountains. As noted earlier, Beatrice's traditional area of distribution was centered east of the Rocky Mountains. At the time of the acquisition, respondent had already begun to penetrate the western market and had come into actual competition with Creameries in several parts of California. The western area was regarded by respondent's officials as a natural and very desirable area into which to expand operations. It is likely that, but for its acquisition of Creameries, respondent would have continued to penetrate the various markets west of the Rockies. It clearly had the ability and incentive to do so. It was the leading potential competitor in these markets—while at the same time Creameries was a significant potential competitor of respondent in respondent's market areas east of the Rockies.

Creameries was a well-entrenched, and in many cases the dominant, dairy firm in a number of highly concentrated markets in the far west; these markets are analyzed at length in the initial decision. The substitution of respondent for Creameries in these markets eliminated precisely the kind of substantial and imminent potential competition that Section 7, for the reasons set forth earlier in this opinion, is designed to protect against impairment by mergers. Moreover, in view of the demonstrated capacity of large multi-market firms in this industry to repulse new competition in local markets where they are well entrenched, the uniting in one firm of the substantial resources possessed by respondent and by Creameries is, we find, likely to increase the difficulty of new entry into the concentrated markets where either respondent or Creameries was already a leading firm at the time of the acquisition, and so may lessen competition substantially. Creameries, finally, like Philadelphia Dairy, Sylvan Seal and other dairy firms whose acquisition by leading members of the dairy industry has been challenged in Commission proceedings, was just such a viable, medium-sized, independent firm whose preservation is essential to the long-run competitive prospects of the dairy industry.

On January 1, 1955, respondent acquired Greenbrier Dairy Products Company, a West Virginia dairy with annual sales of almost \$4 million. Respondent concedes that Greenbrier "is a viable independent * * * with modern processing equipment." Greenbrier had market shares of 15% or more in several concentrated markets in the state, and must be reckoned a major competitive factor at the time of the acquisition. Respondent was not in direct competition with Greenbrier at the time of the acquisition to any substantial

extent, but it was doing business in the vicinity, and it was a leading potential competitor in the concentrated markets where Greenbrier was very strong. Respondent used its acquisition of Greenbrier as a base from which to acquire other dairy companies in the state and thereby establish itself as the state's leading dairy company. We think this is the kind of market-extension acquisition that Section 7 was intended to prevent.

Durham Dairy Products, Inc., was acquired by respondent in March 1953. It was the second largest seller of fluid milk in a 5-county area of North Carolina, with a market share of 30.5%, and the largest seller of ice cream with 25.4%. The hearing examiner concluded (initial decision, pp. 679-680), we think correctly:

Based on the record as a whole, including the substantial position which Durham occupied in its market area in both the fluid milk and frozen product lines, the close proximity of its and respondent's territories in the frozen product line, the fact that the acquisition resulted in the injection of a strong national company into a fluid milk market which had theretofore consisted almost entirely of local companies, and the substantial increase in concentration among national companies in the frozen product line, it is concluded that the effect of the acquisition of Durham Dairy by respondent may be substantially to lessen competition, or to tend to create a monopoly in the fluid milk and frozen product lines in Durham's sales area.

Community Creamery, the last acquisition found unlawful by the examiner as to which respondent has appealed, was a horizontal merger which, for the reasons stated by the examiner, is clearly unlawful under the governing legal principles. We conclude that the examiner's findings of unlawfulness with respect to the foregoing four acquisitions (as well as his finding that the acquisition of Dahl-Cro-Ma was illegal, which was not appealed by respondent) were correct.

VII

The hearing examiner entered an order that would require respondent to divest the assets of the five acquired firms as to which he found a violation of Section 7. His order also imposes a ban on future acquisitions of dairy companies, corporate and noncorporate, for a period of 10 years without prior approval by the Commission. We have decided not to undertake at this time a full consideration of the questions bearing on the appropriate relief. We have already alluded to the difficult practical problems encountered in attempting divestiture of dairy concerns which may have been acquired many years ago. In addition, there is an obvious need to coordinate the

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relief afforded in the present case with the orders which have been entered and have become effective against the other leading firms in the dairy industry. Accordingly, we have determined that before the Commission attempts to fashion an order the respondent and complaint counsel should be given an opportunity to submit recommendations, pursuant to Section 3.24(c) of the Commission's Rules of Practice, for an order effectuating this decision and harmonizing with the other orders the Commission has entered in this industry. If the parties are unable to work out an order that adequately protects the public interest and remedies the violations found, they shall submit separate recommendations and the Commission will then proceed with the preparation of an order on the basis of the findings and conclusions adopted herewith.⁴⁹

Commissioner MacIntyre not participating. Commissioner Jones not participating for the reason that oral argument was heard prior to her taking the oath of office.

ORDER ADOPTING FINDINGS AND CONCLUSIONS AND DEFERRING
ENTRY OF FINAL ORDER*

Upon consideration of the cross-appeals of complaint counsel and respondent from the initial decision of the hearing examiner, and for the reasons stated in the accompanying opinion,

It is ordered, That, except as expressly noted in the accompanying opinion, the findings of fact and conclusions of law contained in the initial decision, as supplemented by the findings and conclusions in the accompanying opinion, are adopted as the decision of the Commission in this matter.

It is further ordered, That entry of a final order in this matter is deferred until further order by the Commission. Complaint counsel and counsel for respondent are directed to make written submissions, as described in the accompanying opinion, no later than sixty (60) days from the service of this order upon them.

Commissioner MacIntyre not participating, and Commissioner Jones not participating for the reason that oral argument was heard prior to her taking the oath of office.

*Final order to cease and desist issued Dec. 10, 1965, 68 F.T.C. 1003, modified June 7, 1967, 71 F.T.C. 797.

⁴⁹ Compare the procedure employed in the recent *United States v. Manufacturers Hanover Trust Co.* case (S.D.N.Y., March 10, 1965), where the district judge gave the parties ten days "to agree on appropriate relief and the form of the decree to be entered," stating that if the parties were unable to agree "the court will set a time and conduct hearings to determine the equitable relief necessary and appropriate in the public interest to eliminate the effects of the merger." 1965 CCH Trade Cases ¶ 71408 at p. 80780.

Complaint

IN THE MATTER OF

SUNMASTER ELECTRIC PRODUCTS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-894. Complaint, Apr. 26, 1965—Decision, Apr. 26, 1965*

Consent order requiring a New York City wholesaler of Sunmaster incandescent electric light bulbs and related merchandise, distributing through individual salesmen, to cease making false claims as to laboratory tests, guarantees, identity of users of their merchandise, misrepresenting the characteristics of competitors' light bulbs, and furnishing catalogs, advertising mats, and other promotional material to salesmen through which they may mislead prospective customers.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Sunmaster Electric Products, Inc., a corporation, and Nathan Bernard, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sunmaster Electric Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 133 West 19th Street, in the city of New York, State of New York.

Respondent Nathan Bernard is the president of Sunmaster Electric Products, Inc. He formulates, directs and controls the acts and practices of Sunmaster Electric Products, Inc., including the acts and practices hereinafter set forth. His office and principal place of business is located at the above stated address.

PAR. 2. Respondents have been and are now engaged at the wholesale level in the offering for sale, sale and distribution of Sunmaster incandescent light bulbs and related merchandise to individuals who act as salesmen and who resell such merchandise to the public. Such salesmen are sent through the mail catalogs, brochures, order forms, advertising mats and other promotional material designed and intended to induce sales of such merchandise to such salesmen and to be used to promote the resale of such merchandise to the public.