

IN THE MATTER OF

DAIRYMEN, INC.

DISMISSAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SEC. 7 OF THE CLAYTON ACT

Docket 9143. Complaint, July 31, 1980—Final Order, Sept. 20, 1983*

This Final Order dismisses the complaint issued against one of the nation's largest raw milk processors. The Commission found that the record did not support a finding that Dairymen's 1978 acquisition of Farmbest Foods, Inc. violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

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 Dairymen, Inc., a corporation subject to the jurisdiction of the Commission, has violated Section 7 of the Clayton Act, as amended, (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45) and Munford, Inc., a corporation subject to the jurisdiction of the Commission, has violated Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), 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.

DEFINITIONS

1. For purposes of this complaint, the following definitions apply.

a. The term *fluid milk* refers to the following products (including products sold in large container sizes to hotels, restaurants and institutions): (i) packaged fluid whole milk, partially skim milk (approximately two percent butterfat or less) and skim milk, (ii) buttermilk and cultured fluid milk products (excluding yogurt) and (iii) flavored milk and flavored milk drinks. These products are generally referred to by the dairy industry as Class I milk products.

b. The term *SMSA* refers to *Standard Metropolitan Statistical Area* as designated by the Office of Management and Budget. [2]

c. The *Tri-City market* refers to the Johnson City-Kingsport-Bristol, Tennessee SMSA. This area is composed of the Tennessee counties of

* Complaint as to Munford, Inc. dismissed 100 F.T.C. 533.

Carter, Hawkins, Sullivan, Unicoi and Washington and the Virginia counties of Scott and Washington and the Virginia portion of the city of Bristol.

d. The *Knoxville market* refers to the Knoxville, Tennessee SMSA. This area is composed of the counties of Anderson, Blount, Knox and Union.

e. The *Birmingham market* refers to the Birmingham, Alabama SMSA. This area is composed of the counties of Jefferson, St. Clair, Shelby and Walker.

f. The *Montgomery market* refers to the Montgomery, Alabama SMSA. This area is composed of the counties of Autauga, Elmore and Montgomery.

g. The *Columbus market* refers to the Columbus, Georgia SMSA. This area is composed of the Alabama county of Russell and the Georgia county of Chattahoochee and the Georgia city of Columbus.

ACQUISITION

2. Beginning in early 1978, Munford, Inc., ("Munford") entered into negotiations with Dairymen, Inc., ("DI") to sell Munford's wholly owned subsidiary, Farmbest Foods, Inc., ("Farmbest"). These negotiations culminated in a stock purchase agreement between Munford and DI, dated September 1, 1978.

3. Under the terms of that agreement, Munford sold all the stock of Farmbest to DI for approximately \$5.884 million in cash, plus the assumption and repayment by DI of approximately \$13 million in Farmbest-related debt. On September 1, 1978, Farmbest was merged into DI's fluid milk processing subsidiary, Flav-O-Rich, Inc., ("Flav-O-Rich").

ACQUIRING COMPANY

DI

4. Respondent DI is a corporation organized and existing under the laws of the State of Kentucky with its principal office at 10140 Linn Station Road, Louisville, Kentucky. At all times relevant herein, DI was engaged in commerce as "commerce" is defined in the Clayton Act, and was engaged in or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act.

5. DI is the third largest milk marketing cooperative in the United States and has almost 6,500 dairy farmer members in 14 southeastern states. DI is principally engaged in the [3] distribution and sale of raw milk. Also, through its wholly owned subsidiary, Flav-O-Rich (described below in paragraphs 9-12), DI is engaged in the processing and sale of fluid milk. DI's other operations include laboratories for the

testing of raw milk, a tanker fleet repair facility and plants manufacturing ice cream, cheese and butter, among other products. In 1979, DI had assets of approximately \$175 million.

6. During its fiscal years ending August 31, 1977, 1978 and 1979, DI's approximate consolidated sales were, respectively, \$658, \$662 and \$785 million. During each of these fiscal years, DI marketed nearly five billion pounds of raw milk.

7. DI distributes raw milk in Alabama, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Virginia and West Virginia.

8. Since its founding in 1968, DI has merged with or acquired the following dairies and cooperatives having processing plants (the year of the merger or acquisition is shown in parentheses):

- a. Supreme Milk Company, Canton, Mississippi (1968);
- b. Burke Farmers Cooperative, Morganton, North Carolina (1968);
- c. Yadkin Valley Cooperative, North Wilkesboro, North Carolina (1969);
- d. Wells Dairies Cooperative, Columbus, Georgia (1970);
- e. Irvindale Dairies, Atlanta, Georgia (1970);
- f. South Georgia Dairy Cooperative, Quitman, Georgia (1970);
- g. Flav-O-Rich, Inc., Fayette, Alabama (1971);
- h. Realicious Dairies, Inc., Columbus, Mississippi (1971);
- i. Walker Farms, Inc., Stoneville, Mississippi (1972);
- j. Westover Dairies, Inc., Lynchburg, Virginia (1972);
- k. Leatherwood Company, Bluefield, West Virginia (1973); [4]
- l. Golden Glow Dairies, Albany, Georgia (1973);
- m. Happy Valley Farms, Inc., Rossville, Georgia (1973);
- n. Cloverleaf Dairies, Monroe, Louisiana (1973);
- o. Green Brothers Dairy, Bastrop, Louisiana (1973);
- p. Hayesdale Farms, Dothan, Alabama (1973);
- q. Chappell's Products, Inc., Campbellsville, Kentucky (1973);
- r. Chappell's Dairy, Harlan, Kentucky (1973);
- s. Long Meadow Dairies, Durham, North Carolina (1974);
- t. The Milk House, Winnsboro, Louisiana (1974);
- u. Wolfe Enterprises, Knoxville, Tennessee (1974);
- v. United Dairies, Greensboro, North Carolina (1975);
- w. B&B Dairy Products Company, Brookhaven, Mississippi (1975);
- x. Jersey Farms, Nashville, Tennessee (1976);
- y. Consolidated Dairies, Inc., Birmingham, Alabama (1976);
- z. Brown's Dairy, Bowling Green, Kentucky (1976);
- aa. Strader's Dairy, Hiseville, Kentucky (1976);
- bb. Midwest Farms, Paducah, Kentucky (1976);
- cc. Ehrler's Dairy, Louisville, Kentucky (1977); [5]

Complaint

102 F.T.C.

- dd. Superior Dairies, Statesville, North Carolina (1977);
- ee. Ryan Milk Company, Murray, Kentucky (1978);
- ff. Ideal Pure Milk Company, Evansville, Indiana (1978);
- gg. Farmbest, Jacksonville, Florida (1978);
- hh. Avalon Dairies, Inc., Fayetteville, Tennessee (1979);
- ii. C.A Stewart's Dairy, Inc., Bogalusa, Louisiana (1980);
- jj. Pelican Creamery Co., New Iberia, Louisiana (1980); and
- kk. Superior Dairies, Inc., Jacksonville, Florida (1980).

Flav-O-Rich

9. Flav-O-Rich, a corporation organized and existing under the laws of the State of Kentucky, is the wholly owned dairy processing subsidiary of DI. Its principal office is at 10140 Linn Station Road, Louisville, Kentucky. At all times relevant herein, Flav-O-Rich was engaged in commerce as "commerce" is defined in the Clayton Act and was engaged in or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act.

10. Flav-O-Rich is controlled by DI. DI makes, and is responsible for, all of Flav-O-Rich's significant policy decisions.

11. Flav-O-Rich is engaged in the processing and sale of fluid milk in the southeastern United States. At the time of the Farmbest acquisition, it operated 17 dairy plants in Alabama, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Tennessee and Virginia. Flav-O-Rich markets numerous dairy products including fluid milk, ice cream, yogurt, whipping cream and cottage cheese.

12. During the years ending December 31, 1976, 1977 and 1978, Flav-O-Rich had approximate total sales of, respectively, \$186, \$213 and \$272 million. For its fiscal year ending August 31, 1978, Flav-O-Rich processed over one billion pounds of fluid milk. [6]

ACQUIRED COMPANY

Munford

13. Respondent Munford is a corporation organized and existing under the laws of the State of Georgia with its principal office at 68 Brookwood Drive, N.E., Atlanta, Georgia. At all times relevant herein, Munford was engaged in or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act.

14. Munford is a diversified company with the largest portion of its business in convenience stores. At the time of the acquisition, Munford operated or franchised over 1,000 convenience food store units throughout the southeastern United States under the name Majik Markets. Munford's approximate total sales during its fiscal years ending January 1, 1976, December 30, 1976 and December 29, 1977

were, respectively, \$273, \$335 and \$340 million. In 1977, Munford had total assets of approximately \$126 million.

Farmbest

15. Prior to the acquisition, Farmbest, a corporation organized and existing under the laws of the State of Delaware, was the wholly owned subsidiary of Munford. Munford had acquired Farmbest from IU North America, Inc., in 1975. Farmbest's principal office was at 7901 Baymeadows Way, Jacksonville, Florida. At all times relevant herein, Farmbest was engaged in commerce as "commerce" is defined in the Clayton Act and was engaged in or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act.

16. Farmbest's approximate total sales during its fiscal years ending January 1, 1976, December 30, 1976 and December 29, 1977 were, respectively, \$102, \$103 and \$105 million. Farmbest's approximate net income during these years was, respectively, \$1.2, \$1.5 and (\$.5) million. For the first eight months of 1978, Farmbest had sales of approximately \$73 million and a net income of approximately \$.3 million. On December 29, 1977, Farmbest had assets of approximately \$24 million.

17. Prior to the acquisition, Farmbest distributed and sold over 250 dairy items including fluid milk, cream, ice cream, cottage cheese, yogurt, sour cream and fruit drinks. It had five dairy plants and thirty distribution centers. Fluid milk was processed at plants in Jacksonville and St. Petersburg, Florida; Bristol, Virginia; and Montgomery, Alabama. Ice cream was manufactured in Jacksonville, Florida and Sylacauga, Alabama. The Bristol plant manufactured most of Farmbest's cultured products such as cottage cheese, yogurt and sour cream.

18. Prior to the acquisition, Farmbest was engaged in the processing and sale of fluid milk in the southeastern United [7] States. During the 12 months prior to the acquisition, Farmbest processed almost a half billion pounds of fluid milk. It distributed dairy products in Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, West Virginia and Puerto Rico.

BARRIERS TO ENTRY

19. The number of fluid milk processors has declined since 1950. Nationally, there were 8,195 processors in 1950, but only 1,439 by 1976.

20. There are high barriers to entry into the processing and sale of fluid milk, including economies of scale and entrenchment of established fluid milk processors in their markets. Often a dairy's brand recognition will contribute toward solidifying its market position, and

in their respective southeastern markets, both Flav-O-Rich and Farmbest have consumer recognized brands.

21. DI's vertical integration into dairy processing also creates a barrier to entry in those markets where it is both a processor and a major raw milk supplier. Potential entrants are deterred from entering a market in which they will have to compete with a vertically integrated cooperative from whom they must obtain all or a significant portion of their raw milk supplies.

TRADE AND COMMERCE

22. A relevant line of commerce is the processing and sale of fluid milk.

23. The Tri-City, Knoxville, Birmingham, Montgomery and Columbus markets are relevant sections of the country. Prior to the acquisition, Flav-O-Rich and Farmbest were actual competitors in the processing and sale of fluid milk in each of these markets. During September 1, 1976 through August 31, 1978 ("1976-78"), both Flav-O-Rich and Farmbest normally ranked among the four largest dairy processors in each of these markets. Their combined shares in each market exceeded 20%.

24. Concentration is high in the relevant line of commerce in the Tri-City, Knoxville, Birmingham, Montgomery and Columbus markets. During 1976-78, top four processor concentration normally exceeded 75% and top eight often was 100%.

25. Furthermore, prior to the acquisition, Flav-O-Rich and Farmbest were competitors in other metropolitan areas in the states of Alabama, Georgia, Kentucky, North Carolina, Tennessee, Virginia and West Virginia. [8]

EFFECTS

26. The effect of the acquisition of Farmbest by DI may be substantially to lessen competition or to tend to create a monopoly in the processing and sale of fluid milk in the relevant sections of the country in violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, in the following ways, among others:

- a. actual competition between Flav-O-Rich and Farmbest has been eliminated;
- b. Farmbest was eliminated as an independent competitor and consumers have been denied the benefits of the competitive vigor of Farmbest;
- c. high barriers to entry have been increased;
- d. high levels of concentration have been increased;

e. other dairy mergers and acquisitions may be triggered in response to the anticompetitive pressures created by this acquisition.

VIOLATIONS

27. For the foregoing reasons, by acquiring Farmbest, DI violated Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

28. For the foregoing reasons, by entering into and consummating the stock purchase agreement, DI and Munford violated Section 5 of the Federal Trade Commission Act, as amended.

FINAL ORDER RETURNING MATTER TO ADJUDICATION AND DISMISSING COMPLAINT

On July 31, 1980, the Commission issued an administrative complaint alleging that Dairymen, Inc. ("Dairymen") and Munford, Inc. ("Munford") violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission when Dairymen acquired Farmbest Foods, Inc. ("Farmbest") from Munford in 1978. On November 4, 1982, this matter was withdrawn from adjudication so that the Commission could consider a proposed consent. On March 25, 1983, the staff of the Bureau of Competition and the Bureau of Economics forwarded their analyses and recommendations to the Commission regarding the proposed consent.

At the time this action was filed, the Commission had been monitoring the Class I milk processing industry for more than twenty-five years. In the first ten years of its corporate existence, Dairymen acquired over thirty-one Class I milk processing plants in the southern United States. None of these individual acquisitions were challenged either by the Commission or by the Department of Justice ("Department") under Section 7 of the Clayton Act; however, in 1973, the Department brought a civil action against Dairymen alleging that it violated Section 2 of the Sherman Act and Section 3 of the Clayton Act by various [2] acts affecting the upstream raw milk industry.¹

¹ As part of the complaint, the Government alleged that eighteen of these acquisitions evidenced Dairymen's intent to monopolize the market in Grade A milk in the southeastern United States by foreclosing raw milk competitors from access to processing facilities and thereby forcing non-member producers either to join Dairymen's cooperative or to exit the raw milk market. The Government, however, did not seek to ban Dairymen from making future acquisitions in the relevant market. The District Court entered a supplemental judgment dismissing the attempted monopolization portion of the Government's complaint. The Sixth Circuit Court of Appeals in a *per curiam* opinion reversed the District Court's attempted monopolization holding, instructing the District Court in the correct legal standard and directing it to determine relevant geographic submarkets for evaluating the attempted monopolization allegation on the basis of "commercially significant areas in which [Dairymen's] customers could turn to other suppliers." *United States v. Dairymen, Inc.*, 660 F.2d 92 (6th Cir. 1981).

On remand, the District Court found that the Government had met its burden of showing that Dairymen had the requisite specific intent to monopolize a relevant submarket of five southeastern states (Kentucky, Tennessee, Georgia, Louisiana and Mississippi), but that the Government had failed to show a dangerous probability of success. The District Court held the evidence was insufficient to show that Dairymen had the power to control

(footnote cont'd)

This matter was in litigation throughout the development of the Commission's case concerning the Farmbest acquisition.

The Commission's complaint alleged that the Farmbest acquisition substantially lessened competition in the sale of Class I milk products in five standard metropolitan statistical areas ("SMSAs"): Johnson City-Kingsport-Bristol, Tennessee-Virginia; Knoxville, Tennessee; Birmingham, Alabama; Montgomery, Alabama; and Columbus, Georgia-Alabama. The evidence adduced in discovery to date, however, tends to support geographic markets of broader scope. For example, products were shipped 135 miles from the Bristol plant, 200 miles from the Montgomery plant, 140 miles from the Columbus, Georgia, plant and 195 miles from the Knoxville plant. The recent findings by the District Court on remand in *U.S. v. Dairymen, Inc.*, *supra*, also suggest broader geographic markets at the processing level. In that case the evidence showed that raw milk handlers in the five southeastern states market have purchased milk outside of that territory—sometimes from as far away as Wisconsin and Minnesota.² On the [3] other hand, our record does not conclusively rebut the plausibility of more confined markets. Shipments data are incomplete; thus, we are unsure of the frequency of or reason for the longer shipments. The proposed testimony of trial witnesses uniformly perceives the relevant geographic markets to be "local", although the scope of that definition is unclear.

The fact that the contours of the relevant geographic markets in milk processing are unclear raises the concern that the Farmbest acquisition has not had anticompetitive effects. Other factors strengthen that concern. The record indicates that entry barriers into milk processing are not high. A steady and substantial decline in the number of dairy processors for well over a decade has made numerous physical facilities available. Brand loyalty appears to be an insignificant competitive factor: witnesses do not emphasize it and Flav-O-Rich has not used the Farmbest name since the acquisition. Thus, the apparent lack of entry into the market appears to be due to increasing scale economies, rather than to any market power exercised by Dairymen Inc.³ These factors, coupled with the lack of other evidence of anticompetitive effects, have dissipated our initial concern about this acquisition. Therefore, because the record does not support a finding that the acquisition is likely to injure competition, the Commission no longer has reason to believe that respondent violated Section 7 of the

prices or exclude competitors in the relevant five-state market. *United States v. Dairymen, Inc.*, Civil Action No. C 7634A (W.D. Ky. June 9, 1983, slip op. at 14-15).

² *United States v. Dairymen, Inc.*, *supra*, slip op. at 5.

³ The District Court decision on remand in *Dairymen* also supports this view. The Court there held that Dairymen did not have the power to raise or fix prices or exclude competitors in the five Southeastern states market. *Dairymen*, *supra*, slip op. at 14-15.

Clayton Act or Section 5 of the Federal Trade Commission Act. Therefore,

It is ordered, That this matter be returned to adjudication and

It is further ordered, That the complaint issued in the matter be, and it hereby is, dismissed.

Chairman Miller did not participate in the decision of the Commission. Commissioner Pertschuk voted in the negative.

DISSENTING STATEMENT OF COMMISSIONER MICHAEL PERTSCHUK

I dissent from the Commission's decision to reject a proposed settlement and dismiss the complaint in this matter. The settlement that the Bureau of Competition has recommended was reached between complaint counsel and respondents shortly before trial was to begin, and consequently, we are not presented with a complete trial record. However, we have ample evidence showing there is reasonable support for the allegations in the 1980 complaint. Moreover, the relief in the proposed consent agreement provides for a reasonable resolution of this litigation by requiring Dairymen, which has been a prolific acquirer of smaller dairy processors, to obtain prior approval for future acquisitions for a limited period.¹ Therefore, the proper course is to accept the agreement for public comment.

The principal objection of the majority to accepting this agreement is the argument that the geographic markets may be substantially larger than the SMSA markets alleged in the complaint. The majority does not know what the appropriate market is but suggests indirectly that it may be a five-state area, in order to include points to which processed milk was [2] shipped from the five SMSA's—points that are in some instances 200 miles away.²

The problem with the majority's theorizing that the market must be at least large enough to accommodate any shipping is that this reasoning leads to a market for milk processing that is likely to be the North American continent. If we examined the processed milk shipping patterns from the hypothetical five-state market (which we have not), I have little doubt we would find that milk is shipped outside the area. If we expanded the circle to include those shipments, we would find more shipments outside that area, and so on. In short, the majority has created an impossible-to-meet standard for geographic mar-

¹ Dairymen, one of the largest Class I milk processors in the southeast U.S., acquired thirty-one Class I milk plants in the southeast between its formation in 1968 and the acquisition of Farmbest in 1978. Since then, it has acquired eight more processing facilities.

² The majority makes an extensive reference to separate litigation involving the raw milk market, but the court's analysis of different allegations and a different product market is of limited use in deciding upon market definition here.

kets. Furthermore, it has ignored evidence more than adequate to support the result of this proposed settlement.

The point is not to draw a market that captures all shipping, but one that captures enough of it to reflect the basic dynamics of price competition. Thus, Professors Elzinga and Hogarty have argued in influential articles that the relevant questions are: (1) whether the great majority of products sold in the area were produced there, and (2) whether most production in the area was sold there.³ At the time of trial preparation, [3] the staff did not have complete evidence on shipments, but they did have information showing that in four of the five markets more than 80% of milk sold in the SMSA was processed there in the year before the acquisition. In addition, several industry officials were prepared to testify that, notwithstanding the distances across which processed milk is shipped, prices in each SMSA varied independently from prices in the others and that from a business perspective they felt the individual SMSA's were separate markets. One processor told the staff that a Dairymen executive had tried to get him to fix prices in Knoxville and, further, had told him that the Nashville processors had been able to raise the price of wholesale milk in that SMSA by an agreement. If these cities were both in one large, multi-state market, such differences in pricing dynamics could not occur.

Commissioner Douglas argues that Farmbest and Flav-O-Rich cannot be part of an SMSA market if their plants are not located within the SMSA. This proposition is equivalent to stating that no geographic area can be a relevant market if there are shipments in from the outside or, alternatively, that sales of companies with shipments into a relevant geographic market from an outside plant cannot be considered as in the market. Neither of these conclusions is correct (otherwise, for example, no foreign manufacturer's imports into the U.S. would be considered as part of a U.S. market). [4]

Commissioner Douglas further argues that more than 50% of the production of Flav-O-Rich and Farmbest in any SMSA is shipped outside the SMSA (except in the case of Birmingham). Assuming this observation to be true (since, again, we have no trial record), the percentage shipped outside the SMSA's by these two companies does not tell us about shipments outside the SMSA's by all companies producing there. In addition, the "little out from inside" half of the Elzinga-Hogarty test is less dispositive than the "little in from the outside" half, because it turns on factual assumptions that may not hold true. The significance of shipments outside the area is that they

³ See Elzinga and Hogarty, "The Problem of Geographic Market Delineation in Antimerger Suits," 18 *The Antitrust Bulletin* 45-81 (1973) and "The Problem of Geographic Market Delineation Revisited: The Case of Coal," 23 *The Antitrust Bulletin* 1-18 (1978). The first article suggests a 75% standard for both factors; the second suggests 90% might be more appropriate.

might be diverted inside the area if prices are increased as a result of interdependent or collusive pricing. However, this theoretical market self-correction requires disrupting existing supply contracts and customer relationships, and therefore may not occur or occur only after substantial delay. Moreover, the possibility of diverting production into the area gives even less comfort when the major "exporter" is the (now merged) dominant firm, which stands to benefit from higher prices and reduced output.

If the SMSA's (or SMSA's plus the immediate surrounding areas) are relevant markets, the acquisition substantially increased market concentration levels. The table below shows how market shares increased after the acquisition:

City	Herfindahl Index		
	Pre-Acquisition	Post Acquisition	Change
Columbus	3763	3986	223
Montgomery	2815	2928	112
Birmingham	2615	2824	210
Knoxville	1843	2296	454
Tri-Cities	3322	4107	785 [5]

All these market share figures meet the Justice Department's "likely to challenge" standards.

The majority also argues that entry barriers are not high because there are unused plants available. Yet the majority also says that lack of entry is due to economies of scale, suggesting that the unused facilities are inefficient and that the requirement of sufficient scale is itself a barrier. Moreover, I do not believe that we should insist on proof of substantial barriers to entry here, because such large increases in market share resulted from the acquisition.⁴

Whenever issues are complex and the results of litigation are difficult to predict, the parties often have heightened incentives to compromise and settle their differences. Complaint counsel and Dairymen followed that course here. Yet it is precisely because of the complexity of the issues and inability to predict a certain outcome that the majority now reasons that the settlement must be rejected. Their principal mistake is to introduce a proof standard that will often be impossible to meet and is likely to doom many settlements that are in the public interest. This consent agreement should be accepted as a reasonable end to this litigation.

⁴ The majority's conclusion that entry barriers are low is based, in part, upon the belief that "[b]rand loyalty appears to be an insignificant competitive factor," as shown by Dairymen's abandonment of the Farmbest trade name. The majority has demonstrated the danger of deciding issues such as this without the benefit of an adjudicative record: Dairymen is presently using the Farmbest trade name on its aseptically packaged, shelf-stable milk, a new product in which Dairymen has invested millions of dollars in research, development, new production facilities and advertising.

CONCURRING STATEMENT OF COMMISSIONER GEORGE W. DOUGLAS

I fully endorse the analysis in the Commission Order in this matter. However, I would like to provide some additional analysis of the geographic market issues that Commissioner Pertschuk raises in his dissenting statement.

Commissioner Pertschuk supports treating five separate SMSAs—Columbus, Georgia; Montgomery, Alabama; Birmingham, Alabama; Knoxville, Tennessee; and Bristol, Tennessee (Tri-City)—as separate geographic markets in this case. However, this approach would not be consistent with treating Farmbest and Flav-O-Rich, the Dairymen processor subsidiary, as actual horizontal competitors, and would therefore logically require dismissing the complaint altogether.¹ Philip Areeda and Donald Turner, among others, have noted that different areas can be treated as separate markets when the price of the relevant product differs from one area to another and price movements among those areas are relatively uncorrelated.² In its Merger Guidelines, the Justice Department has applied that approach to merger analysis, pointing out that

the purpose of geographic market definition is to establish a geographic boundary that roughly separates firms that are important factors in the competitive analysis of a merger from those that are not.³

This implies that if each SMSA is treated as a separate market, then two firms that produce and sell the relevant product only in different SMSAs do not compete to a significant degree with one another, because the price that each firm charges does not significantly affect the price that the other firm charges. A merger between two such firms would be unlikely to substantially lessen actual horizontal competition. [2]

At the time of the acquisition, Farmbest operated processing plants in Bristol and Montgomery, while Flav-O-Rich operated processing plants in Columbus, Knoxville, and Birmingham. None of the five SMSAs included both a Farmbest and a Flav-O-Rich plant. These facts mean that Commissioner Pertschuk's approach requires accepting two conflicting hypotheses about each SMSA; the Knoxville SMSA, where Farmbest does not have a processing plant, provides an example. On the one hand, Commissioner Pertschuk suggests that the Knoxville SMSA should be treated as a separate geographic market.

¹ The complaint alleges only that the acquisition might eliminate actual competition between Farmbest and Flav-O-Rich in the five cited SMSAs. *Dairymen, Inc.*, Docket No. 9143 (Complaint), at 8-9.

² P. Areeda & D. Turner, II *Antitrust Law* 335 (1978).

³ *Justice Department Merger Guidelines* (June 14, 1982), reprinted in 42 ATRR Special Supplement (June 17, 1982), at S-5.

This means by definition that shipments by firms such as Farmbest into the Knoxville SMSA are so inconsequential that they will not significantly affect prices and price movements within the SMSA. On the other hand, Commissioner Pertschuk suggests that shipments by Farmbest into the Knoxville area are so substantial that Flav-O-Rich's acquisition of Farmbest may substantially lessen competition within the Knoxville SMSA. These conflicting hypotheses cannot be reconciled, and accepting the first therefore logically requires rejecting the second and dismissing the complaint.⁴

Commissioner Pertschuk also suggests that the test developed by Professors Elzinga and Hogarty supports treating each SMSA as a separate geographic market. However, that test requires considering both (1) the percentage of the relevant product *sold* in a postulated market that is also produced there *and* (2) the percentage of product *produced* in a postulated market that is also sold there. Commissioner Pertschuk notes that substantial percentages of the processed milk that is sold in the five SMSAs are also produced there. [3] However, the record evidence also shows that both Farmbest and Flav-O-Rich sold large percentages of the milk they processed in each SMSA—well over fifty percent in four of the five SMSAs in 1977—in areas outside the SMSAs in which the milk was processed.⁵ These data strongly suggest that the relevant geographic markets are substantially larger than the SMSAs upon which Commissioner Pertschuk relies.

Finally, the Commission's experience in *Southland Corp.* supports relying upon larger geographic markets. After the Commission sued to enjoin the acquisition at issue in that case, the District Court rejected its effort to define the relevant geographic market as the San Antonio SMSA. The Court noted that processing plants in areas as much as 345 miles away sold milk in San Antonio, and that plants located in San Antonio sold milk in areas as far away as Austin (77 miles), Laredo (153 miles), Waco (178 miles), and Houston (197 miles).⁶

In conjunction with the other evidence that the Commission Order discusses, these factors support the Commission determination that the complaint in this matter should be dismissed.

⁴ Commissioner Pertschuk suggests that this argument implies that no geographic area could be treated as a separate market if shipments from outside its boundaries were made into the area. That implication should not be drawn from the argument. The key question is not whether *any* shipments are made into a given area, but rather whether the shipments from outside are or could be substantial enough to significantly influence prices and price movements within the SMSA. If they are—and they certainly seem to be in this case—then larger areas should be treated as the relevant geographic markets.

⁵ Commissioner Pertschuk suggests that the "little out from inside" half of the Elzinga-Hogarty test is "less dispositive" than the "little in from outside" half. However, Professors Elzinga and Hogarty have not taken that position; they consider both halves of their test to be equally important. Moreover, it seems unlikely that "existing supply contracts and customer relationships" would make it any more difficult to change the magnitude of shipments to other areas than to change the magnitude of shipments from other areas.

⁶ *FTC v. Southland Corp.*, 471 F.Supp. 1, 2-4 (D.D.C. 1979).

IN THE MATTER OF
BORG-WARNER CORPORATION, ET AL.

MODIFYING ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION
OF SECS. 5 AND 8 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9120. Final Order, June 23, 1983—Modifying Order, Sept. 22, 1983

On September 22, 1983, the Federal Trade Commission modified its Final Order issued against Borg-Warner Corporation on June 23, 1983 (101 F.T.C. 863). The modification alters the reporting requirements of the annual director screening provisions contained in Paragraph IV of the Order.

OPINION OF THE COMMISSION

BY BAILEY, *Commissioner*:

Pursuant to Commission rule 3.55, 16 CFR 3.55 (1982), respondents in this proceeding filed on August 11, 1983, a "Petition for Reconsideration" ("Petition") of the Commission's final order in this matter. Respondents also filed a "Motion for Order Staying Effective Date of Decision and Tolling Statutory Time Period for Seeking Appellate Review." On August 19, 1983, complaint counsel filed their "Opposition to Respondents' Petition for Reconsideration." On September 2, 1983, respondent Borg-Warner filed a "Motion for Leave to File Reply," and on September 6, 1983, the remaining respondents also sought to file a reply to complaint counsel.

In their petition, respondents ask that the Commission reconsider and withdraw its June 23, 1983, final order in this matter, or in the alternative that the order be modified "to eliminate errors and unnecessary ambiguities." In their separate motion for a stay of the order, respondents ask the Commission, pending resolution of the issues contained in their reconsideration petition, to toll the sixty (60) day period by which respondents must file any petition for review of the Commission's decision and final order.¹

Complaint counsel urge that the order not be withdrawn, but while they oppose some of the clarifying modifications proposed by respondent as unnecessary, complaint counsel do not oppose them all. Complaint counsel take no position on the issue of staying the order or tolling the running of the statutory period for review.

Respondent's main argument is that to justify the entry of its order

¹ Commission rule 3.55 states that petitioning for reconsideration of a decision or order does not affect the 60 day statutory period (running from, in this case, the July 22, 1983 service date) within which respondents may petition for federal court review, unless the Commission orders a stay of the effective date of a decision or order, or tolls the running of the statutory period for filing for judicial review.