

Complaint

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IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION,  
Docket No. 8318

BRISTOL-MYERS COMPANY, Docket No. 8319

PLOUGH, INC., Docket No. 8320

STERLING DRUG, INC., Docket No. 8321

ORDERS, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION  
OF THE FEDERAL TRADE COMMISSION ACT*Dockets 8318, 8319,<sup>1</sup> 8320, 8321. Complaints, Mar. 14, 1961—  
Decisions, Apr. 7, 1965*

Order withdrawing complaints against four major drug manufacturers which charged them with false and misleading advertising of their analgesic preparations, rescinding earlier orders to submit special reports, and denying one respondent's motion for prehearing discovery on grounds of mootness.

COMPLAINT <sup>2</sup>

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 American Home Products Corporation, hereinafter referred to as respondent, has 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 American Home Products Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 20 East 40th Street in the city of New York, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the sale and distribution of a preparation which comes within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act.

The designation used by respondent for said preparation, the formula thereof and directions for use are as follows:

<sup>1</sup> Amended and Supplemental Complaint, *In the Matter of Bristol-Myers Co.*, Docket 8319, dated July 25, 1961.

<sup>2</sup> *In the Matter of American Home Products Corporation*, Docket No. 8318.

Designation: "Anacin."

Formula: Acetophenetidin three (3) grains per tablet, aspirin, caffeine.

Directions: One (1) to two (2) tablets with water. Repeat if necessary, one (1) tablet every three (3) hours.

PAR. 3. Respondent caused the said preparation, when sold, to be transported from its place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of its said business, respondent has disseminated, and caused the dissemination of, certain advertisements concerning the said Anacin by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines, and other advertising media, and by means of television and radio continuities broadcast over networks through stations located in various States of the United States, and in the District of Columbia, and by means of other radio and television continuities broadcast over stations having sufficient power to carry such broadcasts across State lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said Anacin; and has disseminated, and caused the dissemination of, advertisements concerning said Anacin by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical, but not all-inclusive, of the statements and representations contained in said advertisements and television and radio broadcasts disseminated as hereinabove set forth are the following:

Mere aspirin or even aspirin with buffering contains \* \* \* no special medication to relax nervous tension. But Anacin is a *combination* of medically proven ingredients, including special medication, which relieves pain incredibly fast, also relaxes nervous tension and releases painful pressure on nerves.

\* \* \* \* \*  
*Better than aspirin or aspirin with buffering for TENSION HEADACHES*  
 Most headaches are caused by tension that presses on nerves.  
 Anacin contains *special medication* that \* \* \* relaxes tension \* \* \*. This special medication is *not* obtainable in aspirin or any buffered aspirin.

Ladies Home Journal, February 1961.

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Video:	Audio:
Open profile of woman with headache.	Announcer: What causes a headache?
Start greying down to black silhouette.	Announcer: (V.O.) Doctors know most headaches are caused by * * *
Pop on large jagged word: "Tension".	(Echo) * * * tension!
The word "Tension" zooms down to neck. Muscle fibers form.	Tension * * *
Muscles continue to twist.	* * * Tightens muscles * * *
Pop on word "Tension"	Tension * * *
Word "Tension" zooms down to mid-head area. Nerves grow and vibrate.	puts nerves on edge.
Pop on: "Tension". Word zooms down to front head area.	Tension * * *
Pain lines grow and flash.	causes pain * * *
Muscles twisting nerves. Vibrating pain flashing. Word "Pain" zooms out.	Announcer: (V.O.) <i>headache pain!</i>
	* * * * *
Block wipe to package, with titles: "Relax the Tension," "Relieve the Pain."	"Anacin * * * has special ingredients to relax the tension * * * as it relieves the pain fast!"
Cut to profile of head. Title: "Aspirin." Single line of bubbles go to "Pain." Pain lines reduce flashing. Nerves and muscles continue action.	Look * * * aspirin has only one pain reliever—no special ingredient to relax tension.
Title: "Add Buffering." Single line of bubbles go to "Pain." Pain lines reduce flashing. Nerves and muscles continue action.	Add buffering, still nothing special for that cause of headache pain.

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Video: Audio:  
 Title: "Anacin." But \* \* \*

Pop on three lines of bubbles. \* \* \* Anacin has a combination of ingredients.  
 Pain, nerves and muscles  
 gradually stop action.

Pain lines out. To \* \* \* relieve pain fast \* \* \*

Nerves out. \* \* \* calm jittery nerves \* \* \* fast.

Muscles out. \* \* \* relax tension fast!

Match diss. to live woman. Woman: (sigh of complete relief) What relief!  
 \* \* \* \* \*  
 Wipe to split screen. Title: Announcer: Remember, aspirin even with buffer-  
 "Aspirin with Buffering" on ing has no special ingredient to relax the  
 left. One stream of bubbles tension.  
 to pain area in head. Title:  
 "Anacin" on right. Three  
 streams of bubbles. Nothing  
 in head.  
 \* \* \* \* \*  
 Block wipe to package, with Anacin \* \* \* to relax tension as it relieves the  
 titles: "Relax the Tension," pain.  
 "Relieve the Pain."

Lose titles. Zoom "Fast" out Anacin for fast \* \* \* fast \* \* \* fast relief!  
 of pkg. Three times.  
 "Truth or Consequences" Show, National Broadcasting Company  
 television network, August 26, 1960.  
 \* \* \* \* \*  
 Pop on title, "Anacin" with Anacin of the four leading headache remedies  
 three streams of bubbles to has special ingredients to \* \* \*  
 three panels [panels are  
 titled "Pain," "Depression"  
 and "Tension"]. Action in  
 each immediately slows  
 down.

Pain panel greys down. relieve pain \* \* \*.

Word "Fast" pops on in place fast.  
 of pain panel.

Depression panel greys down. Help overcome depression \* \* \*.

Word "Fast" grows and pops fast.  
 off depression panel.

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Video: Tension panel greys down. Audio: Relax tension \* \* \*.

Word "Fast" grows and pops fast.  
off tension panel.

\* \* \* \* \*  
Cut to include read (sic) projection screen, on which is split screen of two outline heads. Title on left: "Aspirin with buffering." Single stream of bubbles to first panel which is greyed down. Title on right: "Anacin" with three streams of bubbles to three panels all grayed down.

X-out left half of screen. no special ingredient for tension. Take Anacin. \* \* \*.

\* \* \* \* \*  
Cut to pkg. pop on word "Fast" in sync with audio. Anacin for fast \* \* \*

Pop on second word "Fast" nearer camera than first. fast \* \* \*

Zoom both words "Fast" onto pkg. incredibly fast relief.

Sugar Bowl Football Game, National Broadcasting Company  
television network, January 2, 1961.

PAR. 6. Through the use of said advertisements, and other similar thereto not specifically set out herein, respondent has represented, and is now representing, directly and by implication:

1. That Anacin acts with such incredible speed as to provide relief of pain faster than any other analgesic preparation available and offered for sale to consumers.
2. That Anacin relaxes tension.
3. That Anacin helps overcome depression.

PAR. 7. The said advertisements were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact:

1. There is no significant difference between the rate of speed with which Anacin provides relief of pain and the rate of speed with which other analgesic preparations available and offered for sale to consumers provide relief of pain.
2. Anacin will not relax tension.

3. Anacin will be of no benefit in the treatment of depression.

PAR. 8. The dissemination by the respondent of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

#### AMENDED AND SUPPLEMENTAL COMPLAINT<sup>3</sup>

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 Bristol-Myers Company, a corporation, hereinafter referred to as respondent, has 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 amended and supplemental complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Bristol-Myers Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 630 Fifth Avenue, in the city of New York, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the sale and distribution of two preparations which come within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act.

The designations used by respondent for said preparations, the formulas thereof and directions for use are as follows:

(1) Designation: "Bufferin"

Formula:—Each Bufferin tablet contains five (5) grains of aspirin and Bristol-Myers' brand aluminum glycinate and magnesium carbonate known as "Di-Alminate."

Directions:—For simple headaches, discomforts of colds, neuralgias, menstrual pain and minor muscular aches, one (1) or two (2) tablets, taken one (1) to six (6) times daily as needed. For temporary relief of minor arthritic pain two (2) tablets six (6) times daily as needed.

(2) Designation: "Excedrin"

Formula:—Each tablet contains:

Acetophenetidin .....	2¼ grs.
Salicylamide .....	2 grs.
Aspirin .....	2¼ grs.
Caffeine .....	1 grs.

Directions:—Adults take two (2) tablets with water. Repeat every three (3) hours with one or two (1 or 2) tablets as needed or follow directions of your physician. Dosage should not exceed eight (8) tablets per day. Children six to twelve (6-12) one half (½) the adult dose.

<sup>3</sup> In the Matter of Bristol-Myers Company, Docket No. 8319.

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PAR. 3. Respondent causes the said preparations when sold, to be transported from its place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of its said business, respondent has disseminated, and caused the dissemination of, certain advertisements concerning the said Bufferin and Excedrin by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines, and other advertising media, and by means of television and radio continuities broadcast over networks through stations located in various States of the United States, and in the District of Columbia, and by means of other radio and television continuities broadcast over stations having sufficient power to carry such broadcasts across State lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said preparations; and has disseminated, and caused the dissemination of, advertisements concerning said preparations by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical, but not all-inclusive, of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

## (1) Bufferin

And to relieve headache, body ache and to lower fever, take Bufferin. Bufferin adds special ingredients to its aspirin that rush the pain reliever into your system. For millions Bufferin acts *twice as fast as aspirin*.

\* \* \* \* \*  
Take Bufferin. The fast one. Good Housekeeping Magazine, February 1961.

## Video:

Scene of night street. Shot from rear of moving car. Super: "Bristol-Myers".

## Audio:

Anner: Tonight's episode of Peter Gunn is brought to you by Bristol-Myers, makers of \* \* \*.

Bufferin bottle, package.

Bufferin. For faster relief of headaches, neuralgia, painful cold miseries, take Bufferin.

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## Video:

Super on cue: "Twice as fast."

## Audio:

Bufferin works twice as fast as aspirin for millions, thanks to its exclusive Speed Ingredient, Di-Alminate.

"Peter Gunn" Show, American Broadcasting Company  
television network, September 12, 1960.

1. (Open on) Dark screen with title: "What's the Greatest Cause of Headache?" Anncr: (VO) What's the greatest cause of headache? \* \* \*
2. (Wipe to) Reveal woman feeding baby in high chair. Child spills milk. Super "Tension" up from zero. It's Tension! Sound: Ticking as of clock. It starts low and builds till we reach the clock shot in scene #3.
3. (Cut to) Child falling off tricycle. Super "Tension" up again. Tension!
4. (Cut to) Woman in kitchen burning clothes on ironing board. Super "Tension" zooms up again. Tension!
5. (Cut to angle shot of) Same woman in bed, tossing, turning. Clock in foreground. On word, "Suddenly," she puts hand to head. When things go wrong, Tension can build up and up! \* \* \* Suddenly \* \* \* you've got a miserable headache!
6. (Diss to angle shot of) Woman on edge of bed, holding neck. Nerves and muscles tighten!
7. (Diss to angle shot of) Woman standing beside bed, holding stomach. Stomach feels uneasy \* \* \* queasy! Sound: Ticking out.
8. (Diss to) Dark gray background. Bufferin bottle in center of screen. It moves to left of screen, reducing in size as it goes. Snap in first: "Relieves." Then in order: "Headache, Tight Nerves, Jittery Stomach." You need Bufferin! Bufferin relieves headache, tight nerves, jittery stomach—fast! Look \* \* \*



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(2) Excedrin:

*For headache, arthritis, sinus, cramps:* New extra-strength pain reliever  
*Excedrin* combats cause of pain.

\* \* \* \* \*

The symptom: Pain

Microscopic tissue cells surround nerves, joints, passages. Swelling of tissue  
 is the immediate cause of most pain.

The immediate cause: Swelling

When tissues swell and nerves are squeezed you feel pain. Swelling may  
 occur anywhere. Pain is only its symptom.

The treatment: Excedrin

Excedrin is a multi-action compound to simultaneously reduce swelling—  
 relieve pain—make you feel “good all over.”

Detroit (Michigan) Free Press Roto,  
 October 11 and November 8, 1959.

Swelling: the immediate cause.

When tissue swells the nerve is squeezed and stretched—you feel pain. This  
 swelling may occur in the head, at joints, around passages, anywhere.

Swelling is the immediate cause of most pain.

Excedrin: combats the cause.

Doesn't just dull senses, give pain special treatment (see nerve diagram).

Reduces tissue swelling, relieves pain.

Detroit (Michigan) Free Press Roto,  
 February 21, 1960.

Video:	Audio:
Head shot of statue	Pain strikes * * *
Cut in on angle	Man recoils * * *
Cut closer more angle	Agonized * * *
ECU of hand on head	Demoralized * * *
ECU cut to other statues head	Why? * * *
Dolly back slowly	What * * * is the cause of pain.
Zoom to full length statue	Your body * * *
Animate nervous system	has a network of nerves. And only nerves feel pain.
Nerves spread out around body	each nerve cell is surrounded by tissue
Move into statue dissolve to tissues	And when tissues swell,
Show swelling, squeezing, stretching	nerves are squeezed * * * stretched * * * * * * This is the immediate cause of most pain.
Pop on lab dots animate up then pop on Bristol-Myers	From Bristol-Myers * * *

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Video:	Audio:	
Lab changes to white bar with "Excedrin and Extra Strength Pain Reliever" zoom up.	comes Excedrin, the new extra-strength pain-reliever to combat the cause of pain * * *	
Pkg. forms around shape	Excedrin * * * combines more kinds of pain-relievers * * * contains more quantity of active ingredient.	
Dissolve out pkg. to black pop on two tablets equaling three tablets.	In fact two Excedrin equal three ordinary pain tablets * * * yet so safe you need no prescription.	
Reverse pain sequence above super Excedrin as tissues reduce logo zooms back.	Excedrin simultaneously reduces swelling * * * relieves pain * * *	
Tissue cells back to normal, Excedrin fades out.	makes you feel "good all over" * * *	
Cut to statue holding head.	Now for relief of headache, pain,	
ECU of statue eyes and nose. CU of cramps situations (and muscular aches).	sinus, cramps * * *	
* * * * *	* * * * *	
Package and title dissolve to pkg. Zoom extra strength pain reliever off box.	* * * take Excedrin * * * The new Extra-Strength pain reliever to combat the cause of pain."	
	Station WTMJ-TV, Milwaukee, Wisconsin; Station WXYZ-TV, Detroit, Michigan; Station WTOL-TV, Toledo, Ohio; Station WANE-TV, Ft. Wayne, Indiana, on or about May 14, 1960.	
* * * * *	* * * * *	
Bring on 3rd quarter, title: Tension Reliever.	A tension-reliever to relax you * * *	
Quickly animate 4th quarter into full pie title: Anti-depressant.	An anti-depressant to restore you.	
Pop on: 50% stronger.	In fact, Excedrin tablets are 50% stronger than aspirin	
* * * * *	* * * * *	

PAR. 6. Through the use of said advertisements, and others similar thereto not specifically set out herein, respondent has represented and is now representing directly and by implication:

1. That Bufferin provides relief from pain twice as fast as aspirin.
2. That Bufferin will relieve tension.

## 3. That Excedrin:

- a. Is an extra-strength pain reliever, is fifty per cent (50%) stronger than aspirin, and that two (2) Excedrin tablets equal three (3) ordinary pain tablets.
- b. Will combat the cause of pain by reducing the swelling of tissue.
- c. Will relieve tension.
- d. Will act as an anti-depressant.

PAR. 7. The said advertisements, were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact:

- 1. There is no significant difference between the rate of speed with which Bufferin provides relief of pain and the rate of speed with which aspirin provides relief of pain.
- 2. Bufferin will not relieve tension.
- 3. Excedrin:
  - a. Is not an extra-strength pain reliever, is not fifty per cent (50%) stronger than aspirin, and two (2) Excedrin tablets do not equal three (3) ordinary pain tablets in analgesic effect.
  - b. Will not reduce the swelling of tissue or otherwise combat the cause of pain.
  - c. Will not relieve tension.
  - d. Will not act as an anti-depressant.

PAR. 8. The dissemination by the respondent of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

COMPLAINT<sup>4</sup>

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 Plough, Inc., a corporation, hereinafter referred to as respondent, has 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 Plough, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business

<sup>4</sup>In the Matter of Plough, Inc., Docket No. 8320.

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located at 3022 Jackson Avenue in the city of Memphis, State of Tennessee.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the sale and distribution of a preparation which comes within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act.

The designation used by respondent for said preparation, the formula thereof and directions for use are as follows:

Designation: "St. Joseph Aspirin"

Formula: Each tablet contains five (5) grains of aspirin.

Directions: (Take) one (1) or two (2) tablets with water. May be repeated every four (4) hours. If pains persist, or are unusually severe, see physician.

PAR. 3. Respondent causes the said preparation when sold, to be transported from its place of business in the State of Tennessee to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of its said business, respondent has disseminated, and caused the dissemination of, certain advertisements concerning the said St. Joseph Aspirin by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers and magazines, and other advertising media and by means of television and radio continuities broadcast over networks through stations located in various States of the United States and in the District of Columbia, and by means of other radio and television continuities broadcast over stations having sufficient power to carry such broadcasts across State lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said St. Joseph Aspirin; and has disseminated, and caused the dissemination of, advertisements concerning said St. Joseph Aspirin by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical, but not all-inclusive of the statements and representations contained in said advertisements and television

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and radio broadcasts disseminated as hereinabove set forth are the following:

Ready to go to work *faster than other leading pain relief tablets!* \* \* \* St. Joseph Aspirin \* \* \* is ready to go to work faster than all three other leading pain relief tablets.

Ladies Home Journal, February 1961.

For the \* \* \* fastest relief from headaches, pains and aches of colds and flu \* \* \* millions have found \* \* \* All they need is \* \* \* St. Joseph Aspirin \* \* \*.

St. Joseph Aspirin \* \* \* *is ready to go to work faster than any other pain reliever tested.*

Ladies Home Journal, March 1959.

Scientific Disintegration Test Proves Which Pain Relief Tablet is the Fastest

\* \* \* \* \*

When you have a headache, cold, fever or muscle pain, you want relief—fast. St. Joseph Aspirin is ready to go to work faster to ease your pain and distress—*faster than all three other leading pain relief tablets!*

The Birmingham (Alabama) News, January 18, 1960.

Scientific tests prove that St. Joseph Aspirin \* \* \* actually starts to work faster than all three other leading pain relief tablets.

Radio Station KNUZ, Houston, Texas, March 7, 1960.

PAR. 6. Through the use of said advertisements, and other similar thereto not specifically set out herein, respondent has represented and is now representing, directly and by implication, that St. Joseph Aspirin provides relief of pain faster than any other analgesic preparation available and offered for sale to consumers.

PAR. 7. The said advertisements were and are misleading, in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, there is no significant difference between the rate of speed with which St. Joseph Aspirin provides relief of pain and the rate of speed with which other analgesic preparations available and offered for sale to consumers provide relief of pain.

PAR. 8. The dissemination by the respondent of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

COMPLAINT<sup>5</sup>

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 Sterling Drug, Inc.,

<sup>5</sup> In the Matter of Sterling Drug, Inc., Docket No. 8321.

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a corporation, hereinafter referred to as respondent, has 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 Sterling Drug, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1450 Broadway in the city of New York, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the sale and distribution of two preparations which come within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act.

The designations used by respondent for said preparations, the formulas thereof and directions for use are as follows:

(1) Designation: "Bayer Aspirin"

Formula: Each tablet contains five (5) grains of aspirin.

Directions: Take one (1) or two (2) tablets with water three (3) or four (4) times daily as required.

(2) Designation: "Bayer Aspirin for Children"

Formula: Each tablet contains one-and-one-quarter ( $1\frac{1}{4}$ ) grains of aspirin.

Directions: Under three (3) years, as prescribed by physician; three (3) to six (6) years, two (2) to four (4) tablets; six (6) to twelve (12) years, four (4) tablets. Dose may be repeated every three (3) hours but not more than three (3) times in one (1) day.

PAR. 3. Respondent causes the said preparations, when sold, to be transported from its place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of its said business, respondent has disseminated, and caused the dissemination of, certain advertisements concerning the said Bayer Aspirin and Bayer Aspirin for Children by the United State mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines, and other advertising media, and by means of television and radio continuities broadcast over networks through stations located

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in various States of the United States, and in the District of Columbia, and by means of other radio and television continuities broadcast over stations having sufficient power to carry such broadcasts across State lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said Bayer Aspirin and Bayer Aspirin for Children; and has disseminated, and caused the dissemination of, advertisements concerning said Bayer Aspirin and Bayer Aspirin for Children by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical, but not all-inclusive, of the statements and representations contained in said advertisements and television and radio broadcasts disseminated as hereinabove set forth are the following:

(Bayer Aspirin)

\* \* \* Bayer is ready to go to work *instantly*, for the fastest pain relief you can get.

National Broadcasting Company,  
Television Network, December 3, 1960.

(Bayer Aspirin for Children)

Bayer Aspirin enters the stomach as thousands of tiny flakes, to bring the fastest, gentlest relief your child can get from a headache or the pains and fever of a cold.

Good Housekeeping magazine, February 1961.

(Bayer Aspirin and Bayer Aspirin for Children)

BAYER  
BRINGS FASTEST RELIEF!  
. . . the fastest, most gentle to the stomach relief you can get from the aches, pains and fever of a cold or flu!

Look magazine, February 14, 1961.

PAR. 6. Through the use of said advertisements, and other similar thereto not specifically set out herein, respondent has represented, and is now representing, directly and by implication:

(1) That Bayer Aspirin provides relief of pain faster than any other analgesic preparation available and offered for sale to consumers.

(2) That Bayer Aspirin for Children provides relief of pain faster than any other children's analgesic preparation available and offered for sale to consumers.

PAR. 7. The said advertisements were and are misleading in material respects and constituted, and now constitute, "false advertisements"

as that term is defined in the Federal Trade Commission Act. In truth and in fact:

(1) There is no significant difference between the rate of speed with which Bayer Aspirin provides relief of pain and the rate of speed with which other analgesic preparations available and offered for sale to consumers provide relief of pain.

(2) There is no significant difference between the rate of speed with which Bayer Aspirin for Children provides relief of pain and the rate of speed with which other children's analgesic preparations available and offered for sale to consumers provide relief of pain.

PAR. 8. The dissemination by the respondent of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

#### OPINION OF THE COMMISSION <sup>6</sup>

On March 14, 1961, the Commission issued four complaints charging respondents therein with dissemination of false and misleading advertising in connection with their sale of analgesic products. On June 25, 1962, the Commission, being of the view that an investigation should be conducted to determine whether other firms in the industry were falsely advertising their analgesic preparations and, further, that the proceedings with respect to these four complaints should be suspended during such investigation, directed that the four cases be placed upon the suspense calendar until further notice.

On December 22, 1964, Bristol-Myers Company, respondent in Docket No. 8319, filed a motion "to dismiss the within proceeding with prejudice due to failure of the Commission to proceed with reasonable dispatch to conclude said proceeding, as required by Section 6(a) of the Administrative Procedure Act." In the alternative, respondent Bristol-Myers has moved that the Commission grant it leave to engage in certain discovery, by deposition and interrogatory, and to suspend its duty to respond to a recent Commission "Order to Submit Special Report" until after the completion of such discovery. Complaint counsel oppose the motion to dismiss the proceeding "with prejudice" and move in the alternative that the complaint be dismissed "without prejudice." At the same time, complaint counsel have filed substantially identical motions to dismiss the complaints in the other three proceedings that have been suspended. Respondents

<sup>6</sup> *In the Matters of American Home Products Corp.*, Docket No. 8318, *Bristol-Myers Company*, Docket No. 8319, *Plough, Inc.*, Docket No. 8320, *Sterling Drug, Inc.*, Docket No. 8321.

Bristol-Myers, American Home Products, and Sterling Drug have filed answers to the staff motions, all objecting to a dismissal without prejudice.

During the period in which these four matters have been held in suspense, the Commission has undertaken the general, industry-wide investigation of analgesic advertising previously announced. Pursuant to a resolution authorizing a general investigation of the advertising of analgesic products, the Commission has ordered the filing of special reports by a number of companies who do not themselves sell any over-the-counter analgesic product, but who are believed to have conducted tests with regard to the safety or efficacy of such products or their constituent drugs. Pursuant to the same resolution, the Commission has also served additional orders to file special reports upon these four respondents and several other companies that are currently engaged in the advertising of over-the-counter analgesic products.

As a consequence of a continuing survey of the advertising of analgesic products, the Commission has become aware of the prevalence of many advertising claims which may be subject to question under Sections 5 and 12 of the Federal Trade Commission Act, but which are not fairly put in issue by the complaints in the four suspended proceedings. Thus, even if the Commission were to determine that the purposes specified in its June 25, 1962, order would be best served by individual complaint proceedings under Section 5(b) of the Federal Trade Commission Act, it would not be in the public interest to adjudicate the issues raised by these four complaints as they now stand.

While the Commission could order amendment of the complaints in order to include additional or different charges, it seems more appropriate in this instance, in view of the lapse of time since the complaints were issued and the relatively early stage to which the proceedings have advanced, to withdraw the complaints and institute any future Section 5(b) proceedings by means of entirely new complaints. See *Druggists Service Council, Inc.*, Docket No. 8511 (order issued November 17, 1964) [66 F.T.C. 1124]. The Commission has concluded that the complaints heretofore placed upon the suspense calendar should now be withdrawn without an adjudication of the issues raised therein.

Several of the respondents have insisted that any such action of withdrawal or dismissal of the complaint should be made "with prejudice" whereas complaint counsel has strenuously urged that it be "without prejudice." We think this is a meaningless controversy over labels which have little applicability here. The Commission's

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statutory duty in the investigation of analgesic advertising is to bring about a general compliance with the standards of the Federal Trade Commission Act for truthful and non-deceptive advertising, should there be reason to believe that practices in the industry depart from those standards. If any of the representations challenged by the Commission's 1961 complaints have been abandoned with the intention not to resume them, little, if any, purpose would be served by subjecting such representations to challenge in some future Section 5(b) proceeding; and the Commission does not intend to do so. But if any of the advertising practices challenged by the 1961 complaints have been continued without substantial modification, the mere lapse of time and the withdrawal of these complaints without an adjudication of the merits could in no event afford any vested rights to engage in practices in violation of the law or preclude the Commission from taking whatever enforcement action under the Federal Trade Commission Act may be required by the law and the public interest.

It is finally necessary to consider the effect of withdrawal of the complaints upon the Orders to Submit Special Reports, which were served upon the respondents and which have not yet been returned. Although the Orders bore the caption of the particular proceeding in which each of these four companies is named as a respondent, they were issued pursuant to the resolution whereby the Commission entered upon a general investigation of analgesic advertising and they were plainly not merely discovery orders incident to the eventual litigation of those cases. Consequently, it does not appear that withdrawal of the complaints impairs the validity of the Orders under Section 6(b) of the Federal Trade Commission Act. Nevertheless, in order to avoid any possible doubt about the continuing validity of the orders and, in addition, to provide an opportunity to consider the clarification or simplification of a number of the questions, the Commission is now rescinding the Orders to Submit Special Reports.

ORDER WITHDRAWING COMPLAINT AS TO BRISTOL-MYERS COMPANY,  
DOCKET No. 8319

APRIL 7, 1965

The Commission having issued its amended and supplemental complaint in this matter and the proceedings with respect to the complaint having been placed upon the suspense calendar until further notice by order of June 25, 1962; and

The Commission having determined for the reasons stated in the accompanying opinion that the complaint in the above-captioned matter should now be withdrawn:

*It is ordered*, That (1) the complaint be, and it hereby is, withdrawn; (2) the Order to Submit Special Report, issued to the above-named respondent pursuant to the Resolution of September 9, 1964, be, and it hereby is rescinded; and (3) respondent's motion for pre-hearing discovery and depositions be, and it hereby is, denied on the ground of mootness.

ORDER WITHDRAWING COMPLAINTS AS TO AMERICAN HOME PRODUCTS CORP., DOCKET No. 8318; PLOUGH, INC., DOCKET No. 8320; STERLING DRUG, INC., DOCKET No. 8321

APRIL 7, 1965

The Commission having issued its amended and supplemental complaints in these matters and the proceedings with respect to the complaints having been placed upon the suspense calendar until further notice by order of June 25, 1962; and

The Commission having determined for the reasons stated in the accompanying opinion that the complaint in each of the above-captioned matters should now be withdrawn:

*It is ordered*, That (1) the complaints be, and they hereby are, withdrawn; and (2) the Orders to Submit Special Report, issued to the above-named respondents pursuant to the Resolution of September 9, 1964, be, and they hereby are, rescinded.

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IN THE MATTER OF  
NANCY GREER, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d)  
OF THE CLAYTON ACT

*Docket 8630. Complaint, June 30, 1964—Decision, Apr. 9, 1965*<sup>1</sup>

Consent order requiring a New York City manufacturer of wearing apparel products, to cease making discriminatory payments for advertising, promotional services, and other facilities and services to certain favored customers as compensation for promoting the sale of its wearing apparel products, by paying promotional allowances of \$4,499 during 1961 and \$3,951 during 1962 to a favored customer in Philadelphia, while not making

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<sup>1</sup>This order was made effective on, Aug. 9, 1965, see *Abby Kent Co., Inc., et al.*, Docket No. C-328, et al., Aug. 9, 1965, 68 F.T.C. 393.

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such payments available on proportionally equal terms to all customers competing with favored customer in the resale of such products of respondent, and postponing effective date of the order until further order of the Commission.

## COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly described, has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Nancy Greer, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1400 Broadway, New York 18, New York.

PAR. 2. Respondent is now and has been engaged in the manufacture, sale and distribution of women's dresses. Respondent sells its products to a large number of retail specialty and department stores located throughout the United States. Respondent's sales of its products are substantial, having exceeded \$4,900,000 for the fiscal year ending August 31, 1960.

PAR. 3. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondent sells and causes its products to be transported from its principal place of business located in the State of New York to customers located in other States of the United States and in the District of Columbia. There has been at all times mentioned herein a continuous course of trade in commerce in said products across State lines between said respondent and its customers.

PAR. 4. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

PAR. 5. Included among the payments alleged in Paragraph Four were credits, or sums of money, paid either directly or indirectly by way of discounts, allowances, rebates or deductions, as compensation or in consideration for promotional services, or facilities furnished by

customers in connection with the offering for sale, or sale of respondent's products, including advertising in various forms, such as newspapers, sometimes hereinafter referred to as promotional allowances.

For example, during the years 1961 and 1962, respondent made payments and allowances to various customers in various trading areas, including Boston, Massachusetts and Philadelphia, Pennsylvania, for advertising its products in newspapers. During the years 1961 and 1962, respondent paid the Jordan Marsh Company of Boston, Massachusetts, promotional allowances in the amounts of \$1,575.64 and \$2,753.30, respectively. In Philadelphia, Pennsylvania, during 1961, respondent paid promotional allowances to Bonwit Teller and John Wanamaker in the amounts of \$400 and \$4,499, respectively. During 1962, the respondent paid \$1,700 and \$3,951 to Bonwit Teller and John Wanamaker, respectively.

Respondent did not make, or offer to make, or otherwise make available such allowances on proportionally equal, or any, terms to all other customers in Boston and Philadelphia competing with those who received such allowances.

PAR. 6. The acts and practices of respondent as alleged above are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Section 13).

#### DECISION AND ORDER

The Commission issued its complaint in this proceeding on June 30, 1964, charging respondent with violations of Section 2(d) of the Clayton Act, as amended. The matter is presently before the Commission upon certification by the hearing examiner of an agreement containing a consent order to cease and desist duly executed by respondent. Complaint counsel have interposed no objection to acceptance of the agreement containing the consent order to cease and desist.

At the present time, over two hundred members of this industry have executed agreements containing consent orders which are identical in all respects with the purposed consent order tendered herein. The Commission has accepted the consent orders from these other members of the industry and has postponed the effective dates of said orders until further order.

The order agreed to by the respondent conforms in all respects to the order which the Commission included in the complaint as the form of order it had reason to believe should issue after a formal hearing upon the charges set forth in the complaint. Thus, acceptance of the proffered agreement would obviate the expenditure of sub-

stantial time and money in further hearings, and would place the respondent in the same position as other members of the industry charged with similar violations. In these circumstances, the Commission concludes that it is in the public interest to waive the provisions of § 2.4(d) of the Rules of Practice.

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

1. Respondent Nancy Greer, Inc., is a corporation organized and existing under the laws of the State of New York, with its office and principal place of business located at 1400 Broadway, New York, New York.

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

ORDER

*It is ordered.* That respondent Nancy Greer, Inc., a corporation, its officers, directors, agents, representatives and employees, directly or through any corporate or other device, in the course of its business in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of the respondent as compensation or in consideration for advertising or promotional services, or any other service or facility, furnished by or through such customer in connection with the handling, sale or offering for sale of wearing apparel products manufactured, sold or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing with such favored customer in the distribution or resale of such products.

*It is further ordered.* That the effective date of the order to cease and desist be, and it hereby is, postponed until further order of the Commission.

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IN THE MATTER OF

CYN LES SPORTSWEAR, INC., ET AL.

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

*Docket C-891. Complaint, Apr. 9, 1965—Decision, Apr. 9, 1965*

Consent order requiring a New York City importer of wool products to cease violating the Wool Products Labeling Act by misbranding the fiber content

of wool products, such as labeling certain sweaters as "70% Mohair, 30% Wool," when said sweaters contained substantially different fibers and amounts than represented, and using the term "Mohair" in lieu of the word "Wool" on labels to describe certain fibers that were not entitled to such designation.

#### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Cyn Les Sportswear, Inc., a corporation, and Jack Haber and Samuel Haber individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, 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 Cyn Les Sportswear, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Individual respondents Jack Haber and Samuel Haber are officers of said corporation and cooperate in formulating, directing, and controlling the acts, policies and practices of the corporate respondent including the acts and practices hereinafter referred to.

Respondents are importers of wool products with their office and principal place of business located at 989 Sixth Avenue, New York, New York.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have introduced into commerce, sold, transported, distributed, delivered for shipment, shipped and offered for sale in commerce as "commerce" is defined in said Act, wool products as "wool product" is defined therein.

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

Among such misbranded wool products, but not limited thereto, were sweaters stamped, tagged, labeled or otherwise identified as containing 70% Mohair, 30% Wool, whereas in truth and in fact, such sweaters contained substantially different amounts of fibers than represented.

PAR. 4. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939 in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder, in that the term "Mohair" was used in lieu of the word "Wool" setting forth the required fiber content information on labels affixed to wool products when certain of the fibers described as "Mohair" were not entitled to such designation, in violation of Rule 19 of the Rules and Regulations under the Wool Products Labeling Act of 1939.

PAR. 5. The acts and practices of the respondents as set forth above were, and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

#### DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent Cyn Les Sportswear, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 989 Sixth Avenue, in the city of New York, State of New York.

Respondents Jack Haber and Samuel Haber are officers of said corporation and their address is the same as that of said corporation.

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

## ORDER

*It is ordered*, That respondents Cyn Les Sportswear, Inc., a corporation and its officers, and Jack Haber and Samuel Haber, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from introducing into commerce, or offering for sale, selling, transporting, distributing, or delivering for shipment in commerce, wool sweaters or any other wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939.

1. Which are falsely or deceptively stamped, tagged, labeled or otherwise identified as to the character or amount of the constituent fibers contained therein.

2. To which is affixed a label wherein the term "Mohair" is used in lieu of the word "Wool" in setting forth the required information on labels affixed to such wool products unless the fibers described as "Mohair" are entitled to such designation and are present in at least the amount stated.

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

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 IN THE MATTER OF

## ALASKAN FUR COMPANY, INC., ET AL.

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

*Docket C-892. Complaint, Apr. 15, 1965 — Decision, Apr. 15, 1965*

Consent order requiring Kansas City, Mo., retailers and wholesalers of fur products to cease mislabeling, falsely invoicing, and deceptively advertising fur products in violation of the Fur Products Labeling Act, by failing to disclose on labels the country of origin of imported furs, failing to use the term "Natural" on labels, invoices, and in newspaper advertisements to describe furs which are not bleached, dyed, or artificially colored, failing

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to show the true animal name of furs on invoices and in advertisements, misrepresenting savings in newspaper ads and window signs through fictitious prices, and failing to maintain adequate records to support such pricing claims.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Alaskan Fur Company, Inc., a corporation, Meyer Finkel, Myron Wang and M. Leonard Markel, individually and as officers of the said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Alaskan Fur Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri.

Respondents Meyer Finkel, Myron Wang and M. Leonard Markel are officers of the corporate respondent and formulate, direct and control the acts, practices and policies of the said corporate respondent, including those hereinafter set forth.

Respondents are retailers and wholesalers of fur products with their office and principal place of business located at 1107 Walnut Street, Kansas City, Missouri.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed to show the country of origin of the imported furs contained in the fur product.

PAR. 4. Certain of said fur products were misbranded, in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder inasmuch as the term "natural" was not used on labels to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed:

1. To show the true animal name of the fur used in the fur product.
2. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.
3. To show the country of origin of imported furs used in fur products.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder inasmuch as the term "Natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored in violation of Rule 19(g) of said Rules and Regulations.

PAR. 7. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of said Act.

Among and included in the aforesaid advertisements, but not limited thereto, were advertisements of respondents which appeared in issues of the Kansas City Times, a newspaper published in the city of Kansas City, State of Missouri.

Among such false and deceptive advertisements, but not limited thereto, were advertisements which failed:

1. To show the true animal name of the fur used in the fur product.
2. To show that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored when such was the fact.

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PAR. 8. Respondents falsely and deceptively advertised fur products, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations promulgated thereunder by representing, directly or by implication, through oral statements, statements appearing in newspapers such as "ANNUAL AFTER THANKSGIVING FUR CLEARANCE SALE," "UNBELIEVABLE FASHIONS AT PRE-CHRISTMAS SALE PRICES," "AFTER CHRISTMAS SALE FUR CLEARANCE," "JANUARY FUR CLEARANCE SALE." "WE MUST HAVE NO CARRY OVERS; OUR ENTIRE STOCK IS OFFERED AT IMMEDIATE CLEARANCE PRICES," "JANUARY FUR CLEARANCE  $\frac{1}{3}$  TO  $\frac{1}{2}$  OFF," and window display signs containing such statements as "JANUARY FUR CLEARANCE" and "ENTIRE STOCK DRASTICALLY REDUCED! MANY UP TO  $\frac{1}{2}$  OFF OTHERS BELOW COST," that the prices of such fur products were reduced from the actual bona fide prices at which the respondents offered the products to the public on a regular basis for a reasonably substantial period of time in the recent regular course of business and the amount of such purported reduction constituted savings to purchasers of respondents' fur products. In truth and in fact the purported reductions were reductions from the respondents' ticketed prices which were fictitious in that they were inflated prices set forth on the labels affixed to such fur products and were not actual bona fide prices at which respondents had sold the products, intended to sell the products, or had offered the products to the public on a regular basis for a reasonably substantial period of time in the recent regular course of business and the said fur products were not reduced in prices as represented and savings were not afforded purchasers of respondents' fur products as represented.

PAR. 9. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in violation of the Fur Products Labeling Act in that said fur products were not advertised in accordance with the Rules and Regulations promulgated thereunder inasmuch as the term "Natural" was not used to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored in violation of Rule 19(g) of said Rules and Regulations.

PAR. 10. In advertising fur products for sale, as aforesaid, respondents made pricing claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Regulations under the Fur Products Labeling Act. Respondents in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such pricing claims and

representations were based, in violation of Rule 44(e) of the said Rules and Regulations.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

#### DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent Alaskan Fur Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri with its office and principal place of business located at 1107 Walnut Street, Kansas City, Missouri.

Respondents Meyer Finkel, Myron Wang and M. Leonard Markel are officers of the corporate respondent and their address is the same as that of the corporate respondent.

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

#### ORDER

*It is ordered*, That respondents Alaskan Fur Company, Inc., a corporation and its officers, and Meyer Finkel, Myron Wang and M.

Leonard Markel, individually and as officers of said corporation and respondents' representatives, agents and employees, directly or indirectly, or through any corporate or other device in connection with the introduction into commerce or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce of any fur product; or in connection with the sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act do forthwith cease and desist from:

A. Misbranding fur products by:

1. Failing to affix labels to fur products showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

2. Failing to set forth the term "Natural" as part of the information required to be disclosed on labels under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices as the term "invoice" is defined in the Fur Products Labeling Act showing in words and figures, plainly legible all the information required to be disclosed in each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Failing to set forth the term "natural" as part of the information required to be disclosed on invoices under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

C. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement or notice which is intended to aid, promote or assist, directly or indirectly in the sale or offering for sale of any fur product, and which:

1. Represents, directly or by implication in advertising or otherwise, that a purchase of respondents' product made

at less than the ticketed price or purported regular or former price, is a reduction from or savings on such price, unless the respondents are able to establish that such price is, in fact, the regular bona fide price at which the said respondents have sold or expect to make substantial sales.

2. Fails to set forth in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(a) of the Fur Products Labeling Act.

3. Fails to set forth the term "Natural" as part of the information required to be disclosed in advertisements under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

D. Making claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based.

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

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IN THE MATTER OF  
HANDMACHER CO., INC., ET AL.

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

*Docket C-893. Complaint, Apr. 15, 1965 — Decision, Apr. 15, 1965*

Consent order requiring Chicago, Ill., retailers of fur products, to cease misbranding, falsely and deceptively invoicing and advertising their fur products by misrepresenting prices of fur products on labels, on invoices, and in advertisements as reduced from prevailing retail prices, when the so-called retail prices were fictitious, failing to maintain adequate records to substantiate pricing and percentage claims, failing to use the term "Natural" on invoices to describe fur products which were not bleached or dyed, and failing to show on invoices the true animal name of furs.

Complaint

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## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Handmacher Co., Inc., a corporation, formerly Handmacher Company, a partnership and Abner T. Harris and Philip Handmacher, formerly copartners trading as Handmacher Company and hand-moor, and Abner T. Harris and Philip Handmacher, individually and as officers of said corporation, formerly copartners trading as Handmacher Company and hand-moor, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Handmacher Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, formerly Handmacher Company, a partnership and Abner T. Harris and Philip Handmacher, formerly copartners trading as Handmacher Company and hand-moor, and Abner T. Harris and Philip Handmacher, individually and as officers of said corporation, formerly copartners trading as Handmacher Company and hand-moor. Individual respondents Abner T. Harris and Philip Handmacher are officers of the said corporation and they formulate, direct and control the acts, practices and policies of the said corporation.

Respondents are retailers of fur products with their office and principal place of business located at 216 West Jackson Boulevard, Chicago, Illinois.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products, and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled or otherwise falsely and de-

ceptively identified, in violation of Section 4(1) of the Fur Products Labeling Act.

Among such falsely and deceptively labeled fur products but not limited thereto was a fur product with a label affixed thereto which contained a statement "Retail Price—\$175.00 Discount Price—Much Less." By means of the aforesaid statement respondents represented either directly or by implication, that substantial sales of such fur product had been made in the respondents' trade area at the indicated "Retail Price" of \$175.00, and that savings were afforded the purchasers of said fur product. In truth and in fact the indicated "Retail Price" was fictitious in that it was in excess of the prices at which substantial sales of such fur product were made in the respondents' trade area and the indicated savings were not afforded purchasers of such fur products as represented.

PAR. 4. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed to show the true animal name of the fur used in the fur product.

PAR. 5. Respondents falsely and deceptively invoiced fur products in violation of Section 5(b)(2) of the Fur Products Labeling Act by setting forth on invoices the statement "Prices Always Below Retail" thereby representing that the prices of respondents' fur products were always below the retail prices charged for such products in the respondents' trade area when in truth and in fact respondents' prices of fur products were not always below the prices charged for fur products in the respondents' trade area.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth on invoices in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(b) The term "natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

PAR. 7. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements, but not limited thereto, were advertisements of respondents which appeared in issues of the Chicago Tribune, a newspaper published in the city of Chicago, State of Illinois.

Among such false and deceptive advertisements, but not limited thereto, were advertisements wherein respondents falsely and deceptively advertised fur products in that said advertisements represented that the prices of fur products were reduced from respondents' former prices and that the amount of such price reductions afforded savings to the purchasers of respondents' fur products. In truth and in fact the alleged former prices were fictitious in that they were not actual, bona fide prices at which respondents offered the fur products to the public on a regular basis for a reasonably substantial period of time in the recent regular course of business and the said fur products were not reduced in price as represented and the represented savings were not thereby afforded to the purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations promulgated under the said Act.

PAR. 8. In advertising fur products for sale as aforesaid, respondents represented through such statements as "Guaranteed Savings of 30% to 50%" that prices of fur products were reduced in direct proportion to the percentages stated and that the amount of said reduction afforded savings to the purchasers of respondents' product when in fact such prices were not reduced in direct proportion to the percentages stated and represented savings were not thereby afforded to the said purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 9. Respondents falsely and deceptively advertised fur products, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the said Rules and Regulations in that labels affixed to fur products misrepresented the retail prices of such fur products in the respondents' trade area and misrepresented the savings available to purchasers of respondents' fur products.

Among such falsely and deceptively advertised fur products but not limited thereto, was a fur product with a label affixed thereto

which contained a statement "Retail Price—\$175.00 Discount Price—Much Less." By means of the aforesaid statement, respondents represented either directly or by implication that substantial sales of such fur product had been made in respondents' trade area at the indicated "Retail Price" of \$175.00 and that savings were afforded purchasers of such fur product. In truth and in fact the indicated "Retail Price" was fictitious in that it was in excess of the prices at which substantial sales of such fur product were made in the respondents' trade area and the indicated savings were not afforded purchasers of said fur products as represented.

PAR. 10. In advertising fur products for sale, as aforesaid, respondents made pricing claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Regulations under the Fur Products Labeling Act. Respondents in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such pricing claims and representations were based, in violation of Rule 44(e) of the said Rules and Regulations.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

#### DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said

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agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Handmacher Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, formerly Handmacher Company, a partnership and Abner T. Harris and Philip Handmacher, formerly copartners trading as Handmacher Company and hand-moor. Individual respondents Abner T. Harris and Philip Handmacher are officers of the said corporation, formerly copartners trading as Handmacher Company and hand-moor.

Respondents' office and principal place of business is located at 216 West Jackson Boulevard, Chicago, Illinois.

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

## ORDER

*It is ordered.* That respondents Handmacher Co., Inc., a corporation, formerly Handmacher Company, a partnership and Abner T. Harris and Philip Handmacher, formerly copartners trading as Handmacher Company and hand-moor, and its officers and Abner T. Harris and Philip Handmacher, individually and as officers of the said corporation, formerly copartners trading as Handmacher Company and hand-moor, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

## A. Misbranding fur products by:

1. Representing, directly or by implication on labels, that any price whether accompanied or not by descriptive terminology is the price of a fur product in the respondents' trade area when it is in excess of the price at which substantial sales of such fur products are made in the respondents' trade area.

2. Misrepresenting in any manner the savings available to purchasers of respondents' fur products.

B. Falsely and deceptively invoicing fur products by:

1. Failing to furnish invoices as the term "invoice" is defined in the Fur Products Labeling Act showing in words and figures plainly legible all the information required to be disclosed in each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Representing, directly or by implication on invoices through such statement as "Prices Always Below Retail" or words of similar import and meaning that respondents' prices of fur products are always below the retail prices charged for such products in the respondents' trade area when respondents' prices are not always below the retail prices charged for such products in the respondents' trade area.

3. Setting forth information required under Section 5(b)(1) of the Fur Products Labeling Act and Rules and Regulations promulgated thereunder in abbreviated form.

4. Failing to set forth the term "natural" as part of the information required to be disclosed on invoices under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

C. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement or notice which is intended to aid, promote or assist, directly or indirectly, in the sale, or offering for sale of a fur product and which:

1. Represents directly or by implication that any price whether accompanied or not by descriptive terminology is the respondents' former price of fur products when such amount is in excess of the actual, bona fide price at which respondents offered the fur products to the public on a regular basis for a reasonably substantial period of time in the recent regular course of business.

2. Represents directly or by implication that any price whether accompanied or not by descriptive terminology is the price of a fur product in the respondents' trade area when it is in excess of the price at which substantial sales of such fur products are made in the respondents' trade area.

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3. Represents directly or by implication through percentage savings claims that prices of fur products are reduced to afford purchasers of respondents' fur products the percentage of savings stated when the prices of such fur products are not reduced to afford to purchasers the percentage of savings stated.

4. Misrepresents in any manner the savings available to purchasers of respondents' fur products.

5. Falsely or deceptively represents in any manner that prices of respondents' fur products are reduced.

D. Making claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based.

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

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IN THE MATTER OF

CORO, INC., ET AL.

MODIFIED ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE  
FEDERAL TRADE COMMISSION ACT

*Docket 8346 Complaint, Apr. 5, 1961 — Decision, Apr. 23, 1965*

Order modifying, in accordance with a final decree of the Court of Appeals, First Circuit, of Nov. 10, 1964, 338 F.2d 149, 7 S.&D. 1022, by deleting reference to Gerald E. Rosenberger individually, from the Commission's cease and desist order of Nov. 6, 1963, 63 F.T.C. 1164, in the absence of evidence of personal involvement in the corporation's participation in unlawful conduct.

MODIFIED ORDER TO CEASE AND DESIST

Respondents having filed in the United States Court of Appeals for the First Circuit a petition to review and set aside the order to cease and desist issued herein on November 6, 1963 [63 F.T.C. 1164]; and the court on November 10, 1964 [7 S.&D. 1022], having rendered its decision, and entered its final decree modifying and, as modified, affirming and enforcing said order to cease and desist; and the United States Supreme Court having denied a petition filed

by respondent, Coro, Inc., for writ of certiorari to the court of appeals for review of said decision and final decree;

*Now therefore, it is hereby ordered,* That the aforesaid order to cease and desist be, and it hereby is, modified, in accordance with the said final decree of the court of appeals, to read as follows:

*It is ordered,* That respondent Coro, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of costume jewelry, watches or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication, on catalog insert sheets, on color positives for the printing of such catalog sheets, or on price lists, or in any other manner, that any amount is the usual and regular retail price of merchandise when such amount is in excess of the price at which such merchandise is usually and customarily sold at retail in the trade area or areas where the representations are made.

2. Supplying to, or placing in the hands of, any distributor, dealer or other purchaser, catalog sheets or other materials which are displayed to the purchasing public and which contain an indicated retail price for respondents' merchandise when the indicated retail price is in excess of the generally prevailing retail price for such merchandise in the trade area or when there is no generally prevailing retail price for such merchandise in the trade area.

3. Furnishing to others any means or instrumentality by or through which the public may be misled as to the generally prevailing retail prices of respondents' merchandise.

4. Putting into operation any plan whereby retailers or others may misrepresent the usual and regular prices of such merchandise.

5. Representing directly or by implication that any product is guaranteed unless the terms and conditions of such guarantee and the manner and form in which the guarantor will perform are clearly and conspicuously set forth.

6. Representing that any product is guaranteed when a service or other charge is imposed, unless the amount thereof is clearly and conspicuously set forth.

*It is further ordered,* That respondent Coro, Inc., a corporation, and its officers, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting

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forth in detail the manner and form in which they have complied with the order to cease and desist.

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IN THE MATTER OF  
MAGNAFLO COMPANY, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL  
TRADE COMMISSION ACT

*Docket 8422. Complaint, June 2, 1961—Decision, Apr. 24, 1965*

Pursuant to a remand of the case by the Court of Appeals, District of Columbia Circuit, 343 F. 2d 318, 7 S.&D. 1112, which prohibited a manufacturer of a battery additive from using the trade name "Lifetime Charge," the Commission adopted a supplementary initial decision which reaffirmed the original order issued Dec. 26, 1963, 63 F.T.C. 2024, the respondent having indicated that it did not wish to continue the proceeding.

*Mr. John W. Brookfield* and *Mr. Sheldon Feldman* supporting the Complaint.

*Mr. Albert A. Carretta*, of *Carretta & Cowihan*, Attorney for respondent, Magnaflo Company, Inc.

*Mr. Webster B. Harpman*, pro se.

SUPPLEMENTAL INITIAL DECISION, ON REMAND BY JOSEPH W. KAUFMAN  
MARCH 17, 1965

An order of the Commission dated February 18, 1965, and served by mail Friday, February 19, 1965, states as follows:

The United States Court of Appeals for the District of Columbia Circuit, by its judgment entered on February 4, 1965, having remanded this case for the further proceedings directed in its opinion of the same date:

*It is ordered*, That the matter be, and it hereby is, reopened.

*It is further ordered*, That the matter be, and it hereby is, remanded to Hearing Examiner Joseph W. Kaufman for such further proceedings, including hearings, as are necessary to comply fully with the directions contained in the opinion and judgment of the Court that respondent be given an expeditious and full opportunity to show that its trade name can be limited by the use of qualifying words so as to make unambiguous the claim that its product will conserve battery charge and prolong battery effectiveness.

*It is further ordered*, That the hearing examiner, upon completion of the further proceedings, shall file a supplemental initial decision based upon the record made prior to the remand and any additional evidence that may be received.

Pursuant to the direction in said order to comply with the judgment of the Court of Appeals, that respondent Magnaflo Company,

Inc., be given an "expeditious" and full opportunity to show that its trade name can be properly qualified, the examiner on February 19, 1965, telephoned Albert A. Carretta, attorney for said respondent, and was advised that he would call back on that day. Not hearing from him, the examiner wrote him by letter dated February 23, 1965, reminding him of the telephone call and stating that the "purpose was to arrange at least an informal prehearing conference this week on the remand," and also requesting him to advise the examiner or to contact complaint counsel.

On the same day, February 23, 1965, Mr. Carretta telephoned the examiner. He stated that the reason he did not call back sooner was that he had wished to talk to his client first, that he had now done so, and that the client wished to drop the case because of the cost and expense. The examiner assured him that he had an open mind on the issue involved in the remand—whether resolved by evidence, proposed qualifications, or both—but suggested that, if there was no change in the client's desire, a letter be sent to the examiner accordingly.

By letter dated February 24, 1965, Mr. Carretta advised the examiner as follows:

Mr. Norman Bramer, President of Respondent Magnaflo Company, Inc., yesterday advised me that he does not desire to carry on this litigation any further and that he will immediately comply with the provisions of the Order of the Commission. Consequently, this is to advise you that no further hearing will be necessary.

\* \* \* \* \*

Accordingly, the examiner believes and finds that he has faithfully adhered to and conformed to the Commission's order of remand dated February 18, 1965, as quoted above. In particular he further finds as follows:

1. The examiner has afforded respondent ample opportunity for such further proceedings as are necessary to comply fully with the directions of the Court of Appeals that respondent be given expeditious and full opportunity to show how its trade name can be fully qualified.
2. The opportunity so afforded the respondent for further proceedings consisted, in part, of the opportunity for "at least an informal prehearing conference" the week immediately following Friday, February 19, 1965, the date of mailing of the Commission's remand order.
3. The opportunity so afforded the respondent comprehended not merely further proceedings of an informal nature, such as prehearings and the like, but, by clear implication and understanding,

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further proceedings "including hearings," necessary to comply with the directions of the Court of Appeals that respondent be given a "full opportunity to show" that its trade name can be properly qualified.

4. The opportunity for further proceedings so afforded gave respondent "expeditious" as well as full opportunity, within the meaning of the Commission's order of remand.

5. Said respondent Magnaflo Company, Inc., has elected not to avail itself of the opportunity for further proceedings on this remand. It has, as shown above, declined even the opportunity for "at least an informal prehearing conference." It has advised by letter that "no further hearing will be necessary" and that it "does not desire to carry on this litigation any further," and that it "will immediately comply with the provisions of the order of the Commission."

Pursuant to the direction in the Commission's order of remand that the "examiner, upon completion of the further proceedings, shall file a supplemental decision based upon the record made prior to the remand and any additional evidence that may be received," the examiner declares and finds as follows:

I. There has been "completion of the further proceedings" ordered by the Commission, although these proceedings had not gone beyond a highly informal stage when respondent declared it "does not desire to carry on this litigation any further." Respondent has not submitted, even informally, proposals for qualifications which might make the trade name proper.

II. No "additional evidence," *i.e.*, to that contained in the record prior to remand has been received, so that there is no additional evidence on which this supplemental decision can be based.

III. Accordingly, "the record made prior to the remand" must serve as the record upon which this supplemental initial decision is based, supplemented only by the informal procedures, discussions, and correspondence recited herein.

IV. In conclusion, to the extent it may be deemed procedurally necessary, it is hereby declared that the examiner's initial decision filed May 25, 1962 [63 F.T.C. 2024, 2027], as supplemented by matters recited herein, is to be deemed the supplemental initial decision herein.

V. Accordingly, also, and in view of the respondent's advice that it "will immediately comply with the order of the Commission," no reason exists for modification of the Commission's order to cease and desist.

## ORDER ADOPTING SUPPLEMENTAL INITIAL DECISION

The Commission, by order issued February 18, 1965 [p. 1351 herein], having reopened this matter and remanded it to the hearing examiner in compliance with the directions contained in the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered on February 4, 1965 [7 S.&D. 1112]; and

The hearing examiner, pursuant to the Commission's order of February 18, 1965, having filed a supplemental initial decision wherein he states that upon remand, respondent Magnaffo Company, Inc., through counsel, advised that it did not desire to offer additional evidence and that it intended to comply with the Commission's order to cease and desist issued on December 26, 1963 [63 F.T.C. 2024]; and

The hearing examiner having concluded that no reason exists for modification of the order to cease and desist; and

The United States Court of Appeals for the District of Columbia Circuit having entered its decree on March 23, 1965, ordering that respondent Magnaffo Company, Inc., forthwith comply with the Commission's order to cease and desist issued on December 26, 1963 [63 F.T.C. 2024]; and

The Commission having determined that the supplemental initial decision complies with the direction set forth in its order of February 18, 1965:

*It is ordered*, That on April 24, 1965, the hearing examiner's supplemental initial decision after remand be adopted by the Commission.

*It is further ordered*, That respondent Magnaffo Company, Inc., a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the Commission's order to cease and desist issued on December 26, 1963 [63 F.T.C. 2024].

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IN THE MATTER OF  
BEATRICE FOODS CO.<sup>1</sup>

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*<sup>2</sup>

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

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

<sup>2</sup> Final order to cease and desist issued Dec. 10, 1965, 68 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.

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- (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, S23 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:

(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.

After having reviewed the entire record in this proceeding, and the proposed findings,<sup>1</sup> 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.,<sup>2</sup> 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

<sup>1</sup> 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.

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

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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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

<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> 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.

## Findings

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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):<sup>6</sup>

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):<sup>7</sup>

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<sup>6</sup> 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.

<sup>7</sup> 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
	31.0	Pet -----	0.7
			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.<sup>8</sup> 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.

<sup>8</sup>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).<sup>9</sup>

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,<sup>10</sup> 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

<sup>9</sup> 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.

<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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,

<sup>11</sup> The area is physically delineated in RX 3.

<sup>12</sup> 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-

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.<sup>13</sup> 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

<sup>13</sup> 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).<sup>14</sup>

#### 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

<sup>14</sup> 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.<sup>15</sup>

## 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

<sup>15</sup> 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

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	<sup>10</sup> 82, 251
Idaho	193, 536
Honolulu brewery	335, 842
Rawley frozen foods	13, 428
Unallocated general office expense (expenses)	34, 534

<sup>10</sup> 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).<sup>17</sup> 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.

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<sup>17</sup> 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.<sup>18</sup> 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-

<sup>18</sup> 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).

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.<sup>19</sup>

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

<sup>19</sup> 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*<sup>20</sup>

Area	Total sales <sup>21</sup>	Creameries'		Beatrice's	
		Sales	Market share	Sales	Market share
			<i>Percent</i>		<i>Percent</i>
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

<sup>20</sup> The figures in the above table are based on CX 16-Z 252, pp. 23-46, 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.

<sup>21</sup> 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*<sup>22</sup>

[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

<sup>22</sup> 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.

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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, 1952*<sup>23</sup>

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

<sup>23</sup> 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, 1952*<sup>24</sup>

Area	Total sales	Creameries' sales	Creameries' market share
			<i>Percent</i>
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

<sup>24</sup> 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, 1952*<sup>25</sup>

[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

<sup>25</sup> 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*<sup>26</sup>

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

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

<sup>27</sup> 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."<sup>28</sup> 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.<sup>29</sup> 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."<sup>30</sup>

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

<sup>28</sup> Agricultural Code of State of California, Section 4270 (CX 419).

<sup>29</sup> 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).

<sup>30</sup> 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.<sup>31</sup>

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.<sup>32</sup> 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."<sup>33</sup> 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.<sup>34</sup>

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

<sup>31</sup> 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).

<sup>32</sup> 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.

<sup>33</sup> 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.

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

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.<sup>35</sup> 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

<sup>35</sup> 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).<sup>36</sup>

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.<sup>37</sup> 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.

<sup>36</sup> 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).

<sup>37</sup> 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.<sup>38</sup> Dr. Clarke's report indicates that despite significant interarea shipments of fluid milk in 1954-1955,<sup>39</sup> the bulk of the milk sold within the various State milk marketing

<sup>38</sup> 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).

<sup>39</sup> 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).<sup>40</sup> 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

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<sup>40</sup>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.

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).<sup>41</sup> 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.<sup>42</sup> 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

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

<sup>42</sup> 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

Joaquin Valley (CX 409).<sup>43</sup> 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.<sup>44</sup> 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

<sup>43</sup> 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).

<sup>44</sup> 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.<sup>45</sup>

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

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

<sup>46</sup> 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-

<sup>45</sup> 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*<sup>47</sup>

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	

<sup>47</sup> 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*<sup>48</sup>

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

<sup>48</sup> 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*<sup>49</sup>

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

<sup>49</sup> 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*<sup>50</sup>

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	

<sup>50</sup> The above table is based on CX 16-Z 252, pp. 28-43. 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).<sup>51</sup>

<sup>51</sup> 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.<sup>52</sup> In terms of the broader market area proposed by respondent, viz, the entire San Joaquin Valley, Creameries' milk market share would be 9.32%.<sup>53</sup> In the ice cream and frozen dairy product line, Creameries' market shares in the Kern-Tulare market area proposed by complaint counsel

<sup>52</sup> 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).

<sup>53</sup> 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).<sup>54</sup> 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%.<sup>55</sup>

#### 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

<sup>54</sup> 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.

<sup>55</sup> 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,<sup>56</sup> 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.<sup>57</sup> However, since there is no reason to believe

<sup>56</sup> See page 520, *supra*, and footnote 38.

<sup>57</sup> 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.

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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.<sup>58</sup> 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.

<sup>58</sup> 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*<sup>59</sup>

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

<sup>59</sup> 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*<sup>60</sup>

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

<sup>60</sup> 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).