

Other Acquisitions

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

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

The Acquisition

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

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

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

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

Market Conditions

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

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

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

The Acquisition

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

Findings

67 F.T.C.

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

Market Conditions

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

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

Z-3. Other Acquisitions

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

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

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

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

III. OTHER ALLEGED ILLEGAL PRACTICES

A. Customer Assistance

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

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

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

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

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

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

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

B. "Market Leverage"

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

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

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

Conclusions

67 F.T.C.

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

CONCLUSIONS

I. AS TO THE ACQUISITIONS

A. Applicable Legal Principles

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

Engagement in Commerce by Acquiring Company

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

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

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

Engagement in Commerce by Acquired Company

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

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

Court in *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, subsequently held that the de minimis doctrine had no application to the Fair Labor Standards Act because the Act is made specifically applicable to the shipment in commerce of "any" goods produced in violation of its provisions. However, while stating that there was no warrant for assuming that "regular shipments in commerce are to be included or excluded dependent on their size," the Court, nevertheless, acknowledged that "sporadic or occasional shipments of insubstantial amounts of goods were not intended to be included" in the Act's coverage. Unlike the Fair Labor Standards Act, the Clayton Act does not speak in terms of the shipment of "any" goods in commerce. It is reasonable to assume, therefore, that the ordinary de minimis rule would apply in connection with establishing whether an acquired company was engaged in commerce. While the examiner is not aware of any cases arising under Section 7 of the Clayton Act in which the rule has been held to be applicable, it has been held to apply under the Robinson-Patman Amendment to the Clayton Act, which likewise uses the phrase "engaged in commerce." *Skinner v. U. S. Steel Corp.*, 233 F. 2d 762, 764 (CA 5, 1956).

The Product Market

5. The competitive impact of a merger or acquisition must be determined with reference to some "line of commerce." It is now well established that the phrase "line of commerce," as used in Section 7, refers to a "relevant product or services market." *U. S. v. Philadelphia National Bank*, 374 U.S. 321, 356. Complaint counsel propose, as the relevant product markets, "dairy products" generally, and various specific types of dairy products, such as bottled fluid milk and ice cream. They also propose the manufacture and sale of certain specific dairy products through different channels of distribution, such as wholesale and retail, as separate product markets.

6. It has been held that the "outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it," but that "within this broad market well-defined submarkets may exist which, in themselves, constitute product markets for anti-trust purposes." *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 325. The record in this proceeding does not disclose any such "interchangeability of use" or "cross-elasticity of demand" between the various specific products of the industry, as to justify a finding that dairy products as a whole constitute an appropriate product market. Companies which produce and distribute products derived from fluid milk are con-

sidered, in the broad sense, as being in the dairy products industry. Companies in the dairy industry are classified even more broadly by the Bureau of the Census, as being in the "Food and Kindred Products" industry. However, the products of this broad industrial grouping are divided into separate industry categories such as "Fluid Milk," "Ice Cream and Ices," "Creamery Butter," "Natural Cheese," etc. (CX 424). While there are some companies which produce most of the products that can be broadly classified as dairy products, the vast majority of the companies process and distribute only certain specific types of dairy products. For example, there are a great many companies which process and distribute only fluid milk products, such as bottled fluid milk, cream, skim milk and chocolate milk. There are a number of companies which manufacture and distribute only ice cream and other frozen desserts. There are a number of specialty companies producing such products as cheeses or butter.

7. It is the conclusion and finding of the examiner that the relevant product markets in this proceeding are, the processing and distributing of bottled fluid milk (including whole milk, cream, skim milk, buttermilk and flavored milk); the manufacturing and distributing of ice cream and other frozen desserts (including ice milk, sherbets, ices, mellorine and frozen novelties); the manufacture and distributing of frozen dessert mixes; the processing and distributing of butter; the processing and distributing of cheese; and the processing and distributing of condensed and evaporated milk. The fluid milk product line may be further subdivided into distribution through wholesale and retail channels, although the economic significance of this division has largely dwindled since most companies distribute through both retail stores and home delivery. The frozen dessert product line involves principally distribution through wholesale channels since there is little home delivery by manufacturers. There are some companies which sell through their own retail stores frozen desserts manufactured on the premises. However, none of the corporations engaged in commerce which were acquired by respondent fall in the retail classification.

The Geographic Market

8a. The product market in which competitive impact is to be determined must also be related to a "section of the country" or, as it has been differently described, to a "relevant geographical market." *U. S. v. Philadelphia Nat. Bank, supra*, at 356. As in the case of a product market, which may be divisible into product submarkets, "so may a geographic submarket be considered the appropriate 'section

of the country.’” *Brown Shoe Co. v. U. S.*, *supra*, at 336. Furthermore, the approach to defining a relevant market is “a pragmatic, factual” one and “not a formal, legalistic one.” [*Ibid.*] Since it is competition which Congress was trying to preserve, a delineation of the geographic market area does not depend merely on “where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate.” *U. S. v. Philadelphia Nat. Bank*, *supra*, at 357. The scope of this area “depends upon ‘the geographic structure of supplier-customer relations’” [*ibid.*] or, as the Court stated “in a related context ‘the area of effective competition in the known line of commerce must be charted by a careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.’” *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (emphasis supplied).” [*Id.* at 359.]

8b. Applying these principles to the dairy industry, in which distribution patterns are local or regional, rather than national, the scope of the appropriate geographic markets must be determined not merely in terms of the area in which the acquired and acquiring companies operated, but with reference to the pattern of supplier-customer relations in the area which will be affected by the acquired company’s departure as an independent business entity. The acquired company’s distribution area is merely a point of departure for determining the sources to which its customers can practicably turn for supplies. Since the ultimate question to be determined is one of effect on competition resulting from the acquired company’s departure, it is necessary to draw a line which will encompass the distribution areas of the companies with which it principally competed and to which its customers could turn as alternative sources of supply. In determining the area of effective competition, an appropriate balance must be made between the distribution patterns of the competing local companies which Congress was seeking to preserve as competitive entities, and those of large national or regional companies which distribute into more than one market. To the extent that the latter companies have consolidated their production facilities in the interest of achieving the economies of large-scale production, but distribute into remote areas through separate subplants or distribution branches, they may be regarded as operating in multiple markets.

Competitive Effect

9. Given the necessary jurisdictional prerequisites, the test of the legality of an acquisition under Section 7 of the Clayton Act is

whether "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly" in any product line in any geographic market. The "effects" clause in the statute is couched in general, non-specific terms. However, its meaning may be gleaned from its legislative history, and especially from recent court decisions interpreting that history and applying it in specific factual situations.

10. Any attempt to interpret the general language of the statute must be made against the background of the "dominant theme pervading congressional consideration of the 1950 amendments [which] was a fear of what was considered to be a rising tide of economic concentration in the American economy." *Brown Shoe Co. v. U.S.*, *supra*, at 315. Accompanying this concern was an affirmative conviction as to "the desirability of retaining 'local control' over industry and the protection of small businesses." *Ibid.* In addition to giving recognition to the congressional mood which was responsible for the amendment to Section 7, it is also necessary to bear in mind that Section 7 of the Clayton Act was enacted because of what was considered to have been the ineffectiveness of the Sherman Act "in halting the growth of 'trusts' and monopolies." *U.S. v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (SD NY, 1958). In using the words "may tend substantially to lessen competition" (emphasis supplied), Congress was thinking in terms of the "reasonable probability" of competitive injury, and not the "certainty" thereof. *Brown Shoe Co. v. U.S.*, *supra*, at 323, n. 39. It recognized that: "A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints." *Ibid.* At the same time, it indicated that the amendment would not apply to "the mere possibility" of competitive injury. *Ibid.*

11. Despite the foregoing expressions of congressional intent, there has been considerable argument concerning the quantum and type of evidence which, while falling short of establishing actual competitive injury or the certainty thereof, does establish the reasonable probability of such injury and not the mere possibility thereof. While it has been generally agreed, in theory at least, that a full-blown showing of monopoly conditions, of the type sufficient to meet the "Rule of Reason" requirements of the Sherman Act, is not necessary in a Section 7 case, there has been considerable disagreement as to just how far it is necessary to go to establish the "reasonable probability" of an adverse competitive impact. Such disputes have tended to polarize between the advocates of a "quantitative substantiality" test and those advocating a "qualitative substantiality" test. See *U.S. v.*

Bethlehem Steel Corp., *supra*, at 579 n. 51, and case cited therein; see also Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 249 (1960); Handler and Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 Columbia L. Rev. 671 (1961).

12. Much of the controversy stems from attempts to oversimplify the holding in the *Standard Stations* case (*Standard Oil Co. v. U.S.*, 337 U.S. 293), as resting entirely on the quantitative substantiality of the market share foreclosed. (Although *Standard Stations* arose under Section 3 of the Clayton Act, which deals with exclusive dealing and tying arrangements, the "effects" clause is substantially identical with that under Section 7.)¹³⁶ It has even been suggested that in the *Tampa Electric* case (*Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320), the Supreme Court abandoned the quantitative substantiality test of *Standard Stations* and "returned to an interpretation of section 3 of the Clayton Act which is faithful both to its legislative history and the philosophy of antitrust." Handler, *Recent Antitrust Developments*, 71 Yale L. J. 81 (1961). Whether the original interpretations of the *Standard Stations* case as establishing a quantitative substantiality test were justified or not, it is now clear from the Supreme Court's recent analysis of the Section 3 cases, in its *Philadelphia Nat. Bank* decision, that the Court itself does not regard its prior holdings as resting solely on the substantiality of the share of the market foreclosed. The Court in the *Philadelphia Nat. Bank* case noted the presence in the earlier cases of such other market factors as, the substantial market position of the company involved, the extent of concentration, the use of similar restrictive agreements by other major companies, and the possibilities of newcomers entering the market.¹³⁷

13. Despite the doubts which have been expressed in the past concerning the application of the Section 3 decisions to cases arising under Section 7 (see, for example, *Pillsbury Mills, Inc.*, 50 FTC 555),

¹³⁶ Such contracts are prohibited "where the effect [thereof] may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

¹³⁷ Thus the Court noted (at 366) that in the *Standard Stations* case, not only did the defendant have 6.7% of the market tied up by exclusive agreements, but it accounted for 23% of the area's sales (thus suggesting the possibility of further market foreclosure by it); in addition, the other major companies were using similar restrictive agreements and they, together with the defendant, accounted for 63% of the area's sales. It took note of the existence of a similar pattern in *FTC v. Motion Picture Adv. Serv. Co.*, 344 U.S. 392, where the defendant accounted for 20% of the market and the four major concerns had foreclosed 75% of the market. Commenting on the exclusive dealing cases, the Court observed: "Doubtless these cases turned to some extent upon whether 'by the nature of the market there is room for newcomers.' *FTC v. Motion Picture Advertising Service Co.*, *supra*, at 395."

it is now unmistakably clear that the two sections must be interpreted in *pari materia*. As noted by the Supreme Court in the *Philadelphia Nat. Bank* case, *supra*, at 365:

The House Report states that the tests of illegality under Section 7 "are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act." H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8. Accordingly, we have relied upon decisions under these other sections in applying Section 7.

14. While it is now clear that the ratio decidendi of the exclusive dealing cases rests on more than merely the quantum of commerce foreclosed, it is also clear that the holding in such cases does not require any full-blown investigation into a wide spectrum of market factors.¹³⁸ Nor is any greater showing required in Section 7 cases than in exclusive dealing cases since, as stated by the Court in *Philadelphia Nat. Bank, supra*, at 366, "integration by merger is more suspect than integration by contract, because of the greater permanence of the former." The Court's holding in that case rested principally on the factors of substantial market shares and substantial increase in concentration, and it cited in support of its conclusions the "market share and market concentration figures in the contract integration cases." In its earlier holding in the *Brown Shoe* case, *supra*, at 322 n.38, the Court also recognized that "[s]tatistics reflecting the shares of the market controlled by the industry leaders and the parties are, of course, the primary index of market power * * *."

15. It is true that in *Brown Shoe* the Court, after noting the primacy of market share and concentration data, also observed that "only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger." This does not, however, require any probing in depth of market conditions. The Court itself, in *Brown Shoe* (at 322) alluded to some of the other factors which could properly be taken into account, "vary-

¹³⁸ There is little justification for the suggestion alluded to above that *Tampa Electric* constitutes a radical departure from *Standard Stations*, and requires a broad investigation into market factors. The Court while noting in *Standard Stations* (337 U.S. at 305), that "[t]ying agreements serve hardly any purpose beyond the suppression of competition," recognized (at 306) that: "Requirements contracts, on the other hand, may well be of economic advantage to buyers as well as sellers, and thus indirectly of advantage to the consuming public." *Tampa Electric* involved a case where the arrangement was deemed to be for the economic advantage of the customer and where, moreover, there was "neither a seller with a dominant position in the market as in *Standard Fashions, supra*, nor myriad outlets with substantial sales volume, coupled with an industry-wide practice of relying upon exclusive contracts, as in *Standard Oil, supra* * * *." 365 U.S. at 334.

ing in importance with the merger under consideration," viz, (a) whether the merger occurred in an industry "that was fragmented rather than concentrated," (b) whether the industry "had seen a recent trend toward domination by a few leaders or had remained fairly consistent in its distribution of market shares," (c) whether there was "easy access to markets by suppliers and easy access to suppliers by buyers," and (d) whether the industry "had witnessed the ready entry of new competition or the erection of barriers to prospective entrants." However, while these are all relevant factors, "the Court did not imply," as the Commission had occasion to observe in the *Brillo Manufacturing Co.* case, Docket No. 6557, July 31, 1963 [64 F.T.C. 245, 258], "that all of these factors would be relevant in every case."

16. In the *Philadelphia Nat. Bank* case, its most recent expression of opinion on the antimerger section, the Court (at 362) made pointed reference to "the danger of subverting congressional intent by permitting a too-broad economic investigation," and suggested that "in any case in which it is possible, without doing violence to the congressional objective embodied in Section 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration." Alluding to its earlier observation in the *Brown Shoe* case that the "dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy," the Court stated (at 363):

This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anti-competitive effects.

17. Further evidence that Congress did not intend to require a broad examination into market conditions may be gleaned from the illustrations, appearing in the legislative history, of the type of mergers which would be proscribed under the statute. The House Report (H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8), as summarized in the *Brown Shoe* case, *supra*, at 321 n.36, stated that the adverse effects to which the statute made reference—

* * * could be perceived through findings, for example, that a whole or material part of the competitive activity of an enterprise, which had been a substantial factor in competition, had been eliminated; that the relative size

of the acquiring corporation had increased to such a point that its advantage over competitors threatened to be "decisive"; that an "undue" number of competing enterprises had been eliminated; or that buyers and sellers in the relevant market had established relationships depriving their rivals of a fair opportunity to compete. [Emphasis supplied.]

Also significant, as reflecting congressional intent, are the examples cited in the *Brown Shoe* case (at 319) of the type of mergers which would *not* be proscribed under the statute, viz, "a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market, [or] a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market."

18. From the foregoing, certain guide lines may be distilled for judging the acquisitions in the instant case. First, it is clear that where a major factor in a market acquires a substantial competitor, with the result that there is a substantial increase in concentration in the market, the acquisition will be deemed to have the proscribed statutory effect, in the absence of evidence "to rebut the anti-competitive tendency manifested" by such a factual showing. *U. S. v. Philadelphia Nat. Bank, supra*, at 366. A clear example of such a merger is that involved in the *Philadelphia Nat. Bank* case, in which the merger resulted in a company having a 30% share of the market and in a 33% increase in concentration. While the percentages in that case were obviously high, the Court made it clear that it was not foreclosing the possibility of applying the same principles in a case involving smaller market share and concentration increase percentages.¹³⁹ Even where a particular merger does not result in a substantial increase in concentration, but is made by an important factor in the industry and involves a company which cannot be classified as being of small or negligible proportions, it may violate Section 7 if it occurs in an industry which is oligopolistic or is trending in that direction, or in which entry is becoming increasingly more difficult. An example of such a merger is that involved in the *Brown Shoe* case, in which the Court considered a combined market share of only 5% in a number of the local markets as significant, where "this share is held by a large national chain" and where there was a "history of tendency toward concentration in the industry." *Id.* at 344-345.

¹³⁹ The Court stated (at 364 n.4):

Needless to say, the fact that a merger results in a less-than-30% market share, or in a less substantial increase in concentration than in the instant case, does not raise an inference that the merger is *not* violative of Section 7. See, e.g., *Brown Shoe Co., supra*.

19. The dividing line between small and non-small companies, for purposes of determining competitive impact, is sometimes hard to draw. In *Crown Zellerbach v. FTC*, 296 F. 2d 800, 818 (CA 9), the court defined a "small company" as one "whose total sales and competitive impact was so small relative to all sales and all competition in the market that it lacked real importance." However, any determination of whether a company is so small "that it lacked real importance," must be made in the light of the congressional intent "to reach incipient monopolies and trade restraints outside the scope of the Sherman Act." *Brown Shoe v. U.S.*, *supra*, at 318 n.32. As stated in H.R. Rep. No. 1191, 81st Cong. 1st Sess. 8, which is cited in the *Brown Shoe* decision (*ibid*):

Acquisitions of stock or assets have a cumulative effect, and control of the market * * * may be achieved not in a single acquisition but as the result of a series of acquisitions. The bill is intended to permit intervention in such accumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition.

20. The application of the foregoing principles and guidelines presents no serious problem in cases involving strictly horizontal acquisitions, where the market shares of the acquired and acquiring companies, and the extent of concentration in a particular market, have an obvious relationship to the probabilities of an adverse competitive impact on the market. Their application is more difficult in situations where the acquired and acquiring companies do not compete in the same market, and where there can therefore be no discernible increase in concentration in the market occupied by the acquired company. Such acquisitions, in which the acquired and acquiring companies are in the same product line, but do not sell in the same geographic market, are referred to as "market-extension" acquisitions. *Foremost Dairies, Inc.*, Docket No. 6495, April 30, 1962 [60 F.T.C. 944]; *Procter & Gamble Company*, Docket No. 6901, November 26, 1963 [63 F.T.C. 1465]. They are considered to be akin to conglomerate acquisitions, but are deemed to be more closely related to horizontal acquisitions to the extent that they involve companies which are in the same industry. However such acquisitions may be designated, it is clear that they are reachable under Section 7 since "[a]ll mergers are within the reach of the amended Section 7, whether they be classified as horizontal, vertical or conglomerate, and all are to be tested by the same standard." *Procter & Gamble, supra*, p. 1546.¹⁴⁰

¹⁴⁰ The above quotation from the *Procter & Gamble* case is based on H.R. Rep. No. 1191, 81st Cong., 1st Sess. 11; and *Brown Shoe Co. v. U.S.*, *supra*, at 317 n.31.

21. While such quantitative factors as the acquiring company's market share in the acquisition area, and the increase in concentration in that area, are obviously not relevant in a market-extension situation, there are a number of similar factors, quantitative and otherwise, which have a bearing on the question of an adverse competitive impact. In the *Foremost Dairies* case the Commission considered national and state market-share and concentration data, the growth pattern of the acquiring company, "the 'leverage' advantage possessed by large, diversified and geographically dispersed firms," the type of firm which was being eliminated and the potentiality of competition between the two firms. In the *Procter & Gamble* case, among the factors considered by the Commission, were the position of the acquiring company in other markets, the "relative disparity in size and strength" between it and the other companies in the industry it was entering, the extent of concentration in the industry (although the markets were found to be regional), the economies enabled by the merger, and the potentiality of competition between the two companies.

22. Respondent suggests that since the United States and the individual states are not areas of effective competition, it is not appropriate to consider national or regional market-share and concentration data. While it is true that the markets in the dairy industry are essentially local in nature, the record demonstrates that what is occurring in the local markets is a reflection of a trend which is not peculiar to any one area. Evidence of national or regional trends may appropriately be considered in determining the probable impact of an acquisition in a particular area. Furthermore, the power possessed by a company in other geographic or product markets has a bearing on what may be anticipated in a newly entered market.

23. The record in this case, as in the *Foremost Dairies* case, demonstrates "the 'leverage' advantage possessed by large, diversified and geographically dispersed firms." The Commission in the *Procter & Gamble* case likewise took note of the "greater flexibility in pricing enjoyed by the multi-product firm * * * which is in competition with a small firm's single product." While the *Brown Shoe* case, in its retail aspect, involved a horizontal acquisition, the basis of the Court's decision was not so much the "small share of a particular market" which the combination would control, as it was the fact that "this share is held by a large national chain * * * [which] can insulate selected outlets from the vagaries of competition in particular locations" (at 344). The following statement in *Reynolds*

Conclusions

67 F.T.C.

Metals Co. v. U.S., 309 F. 2d 223, 229 (CA DC, 1962), although relating to a vertical acquisition, also has application to product or market-extension acquisitions:

Arrow's assimilation into Reynolds' enormous capital structure and resources gave Arrow an immediate advantage over its competitors * * *. The power of the "deep pocket" or "rich parent" * * * in a competitive group were previously no company was very large and all were relatively small opened the possibility and power to sell at prices approximating cost or below and thus to undercut and ravage the less affluent competition.

24. Respondent contends that as a matter of law it does not possess monopoly power, *i.e.*, the power to control prices or exclude competition, citing such cases as *Standard Oil Co. v. U.S.*, 221 U.S. 1, and *American Tobacco Co. v. U.S.*, 221 U.S. 106, arising under Section 2 of the Sherman Act. However, as the Commission pointed out in its *Foremost Dairies* decision, Sherman Act tests are inapplicable to Section 7 of the Clayton Act, which is intended to "cope with monopolistic tendencies in their incipiency and before they attain Sherman Act proportions." *U.S. v. Bethlehem Steel Corp.*, 168 F. Supp. 576. While it may be that respondent does not possess monopoly power, there is no question as to its disparate economic strength vis-a-vis the great bulk of its competitors.

25. In 1950 respondent was the third ranking company in the production of frozen desserts in the United States, with 3.5% of production. While this figure does not seem inordinately high, it must be noted that there were some 4,200 ice cream plants in the United States in 1950, and that eight national companies accounted for 35.0% of U.S. production. By 1957 these eight companies accounted for 39.2% of U.S. production and respondent's share had increased to 4.7%. In 1958 the eight largest companies accounted for 48% of the value of ice cream shipments in the United States. With 1,171 companies which were primarily in the ice cream business, the average share of all remaining companies was .05%. In the fluid milk line respondent was the fourth ranking company in 1958, with 3.4% of the value of shipments. Eight national companies accounted for 31.0% of the value of fluid milk shipments. In terms of companies which were primarily in the fluid milk business, the top eight companies accounted for 29% of the value of shipments in the United States, with the remainder of the 5,008 companies having an average share of .001%. In addition to its product and geographic diversification in the dairy products field, respondent enjoyed further diversification in the food industry, with at least 30% of its sales in non-dairy products. During the decade from

1950 to 1960 respondent's sales increased by 116%. During the same period the number of milk plants decreased by 55% and the number of ice cream plants by 23%. While a substantial part of the decline in dairy plants has been due to technological conditions, there is no question but that keen competitive conditions and low profit margins have been significant factors. In this milieu the large national companies clearly possess the advantage. They have been the chief beneficiaries of the decision on the part of many of the smaller companies to give up the competitive struggle by selling out to the larger companies. The four largest national companies, National Dairy, Borden, Foremost and respondent have been responsible for a major portion of these acquisitions.

B. Creameries of America, Inc.

1. As has heretofore been found, Creameries distributed dairy products in an area of the western United States between the western slope of the Rockies and California. It also distributed in the then Territory of Hawaii. Creameries and respondent competed only in the State of California, which accounted for 26% of Creameries' sales. The acquisition, therefore, involved principally a market extension by respondent. Detailed findings have been made concerning market and competitive conditions in each of the market areas where Creameries did business. However, any evaluation of the impact of the acquisition must be made against the background of Creameries' and respondent's over-all positions, and the trends in concentration in the United States and the western portion thereof.

2. Creameries was one of the three largest dairy companies operating exclusively west of the Rockies, its annual sales of approximately \$50,000,000 being almost one-quarter of respondent's own sales at the time. Despite the fact that its San Jose and Los Angeles divisions had sustained small losses just prior to the acquisition, the company's over-all operation was profitable. Its profit rate in 1952 was comparable to respondent's. There is no question but that it was a substantial and viable company. As the Commission stated in the *Foremost Dairies* case with respect to the acquisition of Creameries' largest California competitor, Golden State (at p. 1077), "respondent eliminated precisely that firm which had the financial and other resources to offer it the greatest potential, as well as immediate, competition."

3. At the time of the Creameries acquisition, respondent ranked ahead of Foremost Dairies, as the third largest dairy company in

the United States. From a small Midwestern beginning, respondent had expanded (largely by acquisition) until by 1950 its territory extended from the eastern United States to the eastern slope of the Rocky Mountains. Except for a portion of California, which it had entered by acquisition in the middle 1940's, it did not have any substantial business west of the Rockies. The acquisition of Creameries offered respondent an opportunity to diversify its operations geographically, by expanding into new areas at a cost lower than would be involved if it sought to develop new business in these areas. It also offered respondent an opportunity to enjoy the full benefits of its national advertising program, at a minimum additional cost.

4. The most obvious potential impact on competition of respondent's acquisition of Creameries was in the lower Bay area, in which respondent and Creameries' San Jose division both competed in the sale of ice cream and other frozen desserts. Both companies were substantial factors in the ice cream product line in this area. While the figures in the record are not precise, it is clear that respondent accounted for somewhere between 20 to 30% of the ice cream sold in this market, and Creameries accounted for between 13 to 16%. Their combined market share represented between one-third and two-fifths of the market, and gave them the largest share of any company in the area. Together with two other national companies (Borden and Carnation) and one large, California-based company (Golden State), they accounted for around 85% of the area's ice cream sales. Within a short time after the Creameries acquisition, Foremost Dairies acquired Golden State, and Borden acquired two other independent ice cream manufacturers in the lower Bay area. Thus, within a period of less than a year the number of non-national independent ice cream manufacturers doing business in the lower Bay area was reduced by almost one-half, from nine to five. The number of independents which were in business in 1953, when Creameries was acquired, was itself a reduction from the number which had previously sold in the territory, Borden having acquired two sizeable independents in 1951, and respondent having initially entered the territory by the acquisition of an independent. Respondent's acquisition of Creameries not only involved the acquisition of a substantial competitor in the ice cream product line, but enabled it to diversify its product line in the lower Bay area, since Creameries was also a substantial distributor of fluid milk.¹⁴¹ It also

¹⁴¹ Creameries was particularly strong in the Monterey-Santa Cruz milk market, with over 28% of the area's sales, and was a sizeable factor in the Santa Clara market, with almost 10% of that market.

resulted in a sizeable concentration of the fluid milk business among the national companies.¹⁴² Having obtained entry into the fluid milk line through its acquisition of Creameries, respondent in the following year acquired two other independent milk companies in the lower Bay area. Based on the record as a whole, including the detailed findings heretofore made with respect to the lower Bay area and the facts hereinabove discussed, it is concluded that the effect of respondent's acquisition of Creameries of America may be substantially to lessen competition, or to tend to create a monopoly in the ice cream and fluid milk product lines in the lower Bay area.

5. Since the law is violated "if anticompetitive effects of a merger are probable in 'any' significant market, the merger—at least to that extent—is proscribed." *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 337; see also *Brillo Manufacturing Co.*, Docket No. 6557, July 31, 1963. It is, accordingly, unnecessary to determine whether the Creameries acquisition had the proscribed statutory effect in each of the other areas in which that company did business. However, to the extent that the anticompetitive implications of the merger in other areas may have a bearing on the relief to be ordered. (*Brown Shoe Co. v. U.S.*, *ibid.*, n.65), brief reference will be made to the anticompetitive aspects of the merger in the other areas in which Creameries operated.

6. As has already been found, respondent and Creameries were both substantial factors in the ice cream product line in the lower San Joaquin Valley area. Creameries accounted for almost 23% of the ice cream sold in the Kern-Tulare portion of that area, while respondent accounted for one-third of the ice cream sales in the Fresno portion of the area. Their combined sales represented over 25% of the ice cream sold in the lower San Joaquin Valley. If respondent and Creameries cannot be considered as actual competitors in the lower San Joaquin Valley, they were certainly potential competitors. With over half of the companies which sold in Creameries' territory operating from plants in Fresno, it was just a matter of time before respondent would also have extended its operations south into Kern-Tulare. In acquiring Creameries, respondent not only acquired a substantial potential competitor in the ice cream product line, but was able to obtain the benefits of diversification of its product line in the lower San Joaquin Valley. While respondent had previously distributed only ice cream in the area, Creameries was one of the largest factors in the fluid milk product line, accounting

¹⁴² Three national companies, plus Golden State, would account for over 70% of milk sales in the five principal cities in the area.

for over one-fourth of the area's milk sales, and was the third ranking milk company in the entire San Joaquin Valley (although it only sold in two out of seven counties in the Valley).

7. In the Los Angeles area, in which Creameries and respondent competed in both the fluid milk and ice cream product lines, the acquisition enabled respondent to achieve various economies by consolidating the plants of both companies in the area. Its most significant effect was in the frozen dairy product line, where the merger resulted in a company which accounted for almost 71½% of the frozen dairy products sold in the Los Angeles area.¹⁴³ Since the top four companies in the Los Angeles area (out of a total of almost 200 distributors, large and small) accounted for 32% of the market, the merger enabled respondent to achieve a position comparable to the average share of the top four companies. The merger resulted in five companies controlling almost 40% of the ice cream sold in the Los Angeles area. With Foremost's acquisition of Golden State, which was one of the top four companies, all but one of the five leading companies were national companies.

8. The acquisition of Creameries' California divisions must be viewed against an industry background which saw the number of milk plants in the State of California decline by 38% between 1950 and 1961, and the number of ice cream plants decline by 17%. During this period at least 25 dairy companies were acquired by five national companies. The acquisition also took place in a period which saw the State production share of frozen desserts accounted for by the national companies increase from 35.1% in 1950 to 54.9% in 1957. While a large part of this increase was the result of Foremost's acquisition of Golden State, respondent's acquisition of Creameries played a part in the increase in concentration, with respondent's share increasing from 4.2% in 1950 to 7.4% in 1957, making it the third ranking national company in the State. Respondent's own position in the frozen product line has further improved since 1957, with its share of California production reaching 9.4% in 1960. Thus, in a period of ten years, its share of frozen dessert production more than doubled. A considerable portion of this was made possible by its acquisition of Creameries. The post-

¹⁴³ The examiner has included in respondent's share of the market, the ice cream which it produced for Jersey Maid under the special arrangement with that company. This volume was produced in respondent's plant, and there is no reason to believe that respondent did not receive a profit on such sales comparable to the other ice cream produced by it. Its production for Jersey Maid gave respondent the benefit of large-scale production, which presumably was reflected in the cost of the other ice cream produced by it.

acquisition developments in the fluid milk line (upon which respondent places emphasis), such as the decline in the market share of the top four companies and the increase in the market share of the largest independents, do not negate the anticompetitive aspects of the acquisition in the frozen product line in the State of California, let alone its anticompetitive aspects in individual market areas within the State.

9. While respondent did not compete with the other Creameries' divisions, there is no reason to believe that in due time it would not have expanded its operations into at least some of the other areas. Respondent cites the mountainous terrain in the Rocky Mountain area, as indicative of the lack of likelihood that it would have expanded into the western slope of the Rockies, from its Denver plant. Yet the record discloses that there were at least two other companies serving communities in western Colorado with frozen dairy products from plants in Denver (CX 16-Z 252, pp. 81, 83). Given respondent's growth pattern, it was inevitable that, had the opportunity for acquiring Creameries not presented itself, it would have expanded into the Intermountain area, either directly or by the acquisition of one or more small companies which would have become its base of operations in the area. It was already poised on the perimeter of the area, with bases of operations in California, Denver and Oklahoma.

10. Aside from the aspect of affecting potential competition in the areas where respondent and Creameries did not compete, the merger had other anticompetitive implications in these areas. Respondent's acquisition of Creameries resulted in the elimination of a strong, independent company, which was a very substantial factor in the Intermountain area. In the Utah divisional area Creameries accounted for almost 20% of sales in both the milk and ice cream product lines, and in some markets within the area its market share was even greater. In the Idaho divisional area Creameries accounted for over 30% of ice cream sales, although it was not as strong in the fluid milk line as in the Utah area. With the exception of the two subsidiaries of Pet Milk, which sold in only a portion of Utah and which eventually left the area, there were no strong national companies in the Utah-Idaho region. Respondent's acquisition of Creameries resulted in the injection into the area of a national company with economic power and leverage far beyond Creameries'. In the area served by its El Paso Division, Creameries was the largest, if not the dominant, factor in the area, with almost 50% of both milk and ice cream sales, and even larger shares in some individual mar-

kets. Respondent's entry into this area resulted in a substantial increase in the concentration of business among the national companies. Thus, in the El Paso market respondent (as Creameries' successor) and Borden accounted for 73% of the area's ice cream sales.

11. Respondent's acquisition of Creameries paved the way for its acquisition of two other companies serving portions of the Intermountain area, and for a later extension of its operations into adjoining areas in Texas and Arizona by the acquisition of two large independent companies in those areas. As a result of its program of expansion through acquisition respondent, which did not do business in the Intermountain area prior to 1953, was able by 1960 to increase its market share in the portions of the six-state area served by the acquired companies to 23% in the frozen dessert line and approximately 21% in the fluid milk line. During the decade from 1951 to 1961 the number of milk plants in the Mountain States declined from 748 to 348, and the number of ice cream plants from 269 to 216.

12. In the area served by its Honolulu Division, Creameries was clearly the dominant company, in both the milk and ice cream product lines, with approximately 60% of the milk sales and 50% of the ice cream sales on the Island of Oahu, and two-thirds of the ice cream sales on the Island of Hawaii. Through its contract with the local producers association and its own dairy farm, Creameries was in a strong position to control the supply of raw milk. Respondent's injection into this market brought an even stronger and more powerful competitor into the area to face the relatively few local companies. Within a matter of months after respondent's acquisition of Creameries, the largest of Creameries' local competitors were acquired by Foremost, which had theretofore owned one relatively small company. Thus, in a short time the acquisitions of respondent and Foremost had transformed a dairy industry consisting of local or independent companies into one in which these two national companies accounted for 85% of the milk business and 75% of the ice cream business in Oahu. Within a year after its acquisition of Creameries, respondent acquired the only independent ice cream company doing business on the Island of Hawaii, thus completing the cycle of control of the dairy industry in the Territory of Hawaii by national companies.

13. Respondent suggests that the Creameries acquisition cannot be deemed to have anticompetitive implications in the areas where the two companies were not in competition, since respondent merely "re-

placed" another company in those areas (Memorandum, p. 9). It cites in support of its position the statement in *Crown Zellerbach Corp. v. FTC*, 296 F. 2d 800, 818, in which the court, referring to the fact that the acquired and acquiring companies did not compete in certain Western States, stated:

[W]e are confronted with great difficulty in understanding how the acquisition of St. Helens could operate substantially to lessen competition in those areas where it apparently did no business before the acquisition.

The quoted statement was made in connection with a discussion concerning the delineation of the relevant geographic market, rather than the criteria applicable to determining the competitive impact of an acquisition between noncompeting companies. Furthermore, the area in which the court thought there could be no adverse impact was one in which the acquiring company sold, but not the acquired company, whereas here the area involved is one in which the acquired company did operate. The examiner does not interpret the case as holding that there can be no adverse competitive effect if the acquiring company did not sell in the same market as the acquired company. To so interpret it would be contrary to the clear congressional intent to extend Section 7 to acquisitions other than those which are horizontal in nature.

14. Even if the anticompetitive aspects of the Creameries acquisition were deemed to be limited to one or more of the California areas where the two companies directly competed, any attempt to evaluate the impact of the acquisition solely in terms of those areas would be to ignore the principal benefits which respondent received from the acquisition. As has previously been noted (*supra*, p. 505), while respondent visualized that the California portion of Creameries' business would give it "an opportunity to possibly improve our profits in those areas" by consolidation of the two operations, it was generally dubious about the advantages to be gained from that portion of the business "due to the highly competitive situation and smaller margins in both milk and ice cream in California." The major advantage which it saw in the acquisition was the "opportunity for our company to go into new areas, which are growing areas with major operations, at a price lower than we could ever develop business in these areas." The areas referred to were "particularly * * * Texas, New Mexico, Utah and Idaho." With the exception of Bakersfield, Creameries was losing money in California, while operating at a substantial profit in the other divisional areas. Were the order in this proceeding to be limited to divestiture of those portions of Creameries' business which were in competition with

respondent, the latter would be permitted to retain the principal fruits of the acquisition, while ridding itself of those portions of the business of which it might well wish to unburden itself. Anyone purchasing the California portion of the business would obtain a shell of the Creameries operation, lacking in the substantial geographic diversification and economic leverage of the original company.

C. Boswell Dairies

1. Boswell is one of the acquired companies with respect to which respondent contends the record fails to establish engagement in commerce. The only evidence of Boswell's engagement in commerce is that during the 12-month period prior to its acquisition by respondent, it purchased some butter and cottage cheese curd from a company in Springfield, Missouri, which delivered same in its own trucks to Boswell's plant in Fort Worth, Texas. The volume of such out-of-state purchases, and the degree of regularity thereof during the 12-month period, do not appear from the record. Boswell was a company whose annual sales were in excess of \$7,000,000. There is nothing to indicate that Boswell's out-of-state purchases were of more than *de minimis* proportions. It is the conclusion of the examiner that the minimal showing made by complaint counsel is not sufficient to establish that, at the time of its acquisition, Boswell was engaged in commerce, within the meaning of the Clayton Act and Federal Trade Commission Act.

2. In view of the foregoing conclusion, it is technically unnecessary to determine whether the Boswell acquisition had the proscribed competitive impact. However, since the Commission may disagree with the examiner's conclusions as to Boswell's engagement in commerce and may desire the benefit of his views concerning the competitive impact of the acquisition, the examiner will briefly indicate his conclusions in this regard.

3. The record discloses that Boswell was a substantial and viable independent company, with total sales in 1957 in excess of \$7,000,000, consisting of milk, ice cream and other dairy products. While its main distribution area was in the city of Fort Worth and surrounding Tarrant County, complaint counsel contend that the North Texas FMMO area is the relevant market area. Boswell's share of this market area in fluid milk was 10.63% in 1957. However, this does not accurately reflect Boswell's market position in fluid milk, since its distribution area included 12 counties which were not in the North Texas FMMO area, and the FMMO area included 10

counties in which Boswell did not do business. The record contains no data as to Boswell's market position in the ice cream product line. Respondent did not compete with Boswell in the sale of dairy products, its closest plants being at El Paso and Oklahoma City.

4. Based on the record as a whole, and particularly the lack of reliable evidence as to Boswell's market position prior to the acquisition, it is the conclusion of the examiner that complaint counsel have failed to sustain the burden of proving that the effect of respondent's acquisition of Boswell may be substantially to lessen competition, or to tend to create a monopoly, in any product line in any section of the country.

D. Associated Dairy Products Company

1. Associated is another of the acquired companies with respect to which respondent contends the record fails to establish engagement in commerce. The only evidence of Associated's engagement in commerce is that during the 12-month period preceding its acquisition, it purchased butter and plastic cream from a company in Los Angeles and that "some or all of said products *may* have originated in states other than Arizona" (emphasis supplied). There is nothing in the record to indicate the volume or degree of regularity of purchases actually originating from outside the state. It is concluded that the minimal showing made by complaint counsel is not sufficient to establish that, at the time of its acquisition by respondent, Associated was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. In view of the foregoing conclusion, it is technically unnecessary to determine whether respondent's acquisition of Associated had the proscribed adverse competitive impact. However, since the Commission may disagree with the examiner's conclusions as to Associated's engagement in commerce, and may desire the benefit of his views concerning the probable impact of the acquisition, the examiner will briefly indicate his conclusions in this regard.

3. The record discloses that Associated was one of the largest, if not the largest, independent dairy in Arizona, with sales of approximately \$4,000,000, consisting principally of fluid milk and related products. It was acquired in October 1956 for a consideration of almost three quarters of a million dollars. It was a profitable and viable company. It has been found that both the State of Arizona and the Central Arizona FMMO area are appropriate market areas. In the State of Arizona as a whole, Associated accounted for 11.22%

of fluid milk sales in 1955. It is probable that its market share was even higher in the Central FMMO area, which included the principal communities in which Associated distributed. While respondent and Associated were not yet in competition, the perimeters of their respective territories coincided.¹⁴⁴ Having extended its operations into west Texas and New Mexico through its acquisition of Creameries, it was inevitable that respondent would expand into Arizona. In 1958 two national companies, Carnation and Borden, accounted for 58.6% of the value of fluid milk shipments in Arizona. There is no reason to believe that their share was substantially lower in October 1956, when respondent acquired Associated. With respondent succeeding to Associated's business, three national companies accounted for 67.6% of the value of fluid milk shipments in Arizona in 1958. In the decade from 1951 to 1961, the number of milk plants in Arizona declined from 78 to 25, and five dairy companies were acquired by national companies.

4. Based on the record as a whole, including the evidence as to the high degree of concentration in the milk industry in Arizona among the national companies, the substantial decline in the number of small, independent plants and companies, the substantial position which Associated occupied within the State of Arizona, and the close proximity between its and respondent's respective territories, it is the conclusion of the examiner that the extension of respondent's operations into Arizona by the acquisition of Associated, was reasonably calculated to injure competition in that section of the country and to tend to monopoly. In reaching this conclusion, the examiner is not unmindful of the fact, emphasized by respondent, that by 1960 its market share in Arizona had declined by 2.8%. Such post-acquisition development is not of such magnitude or character as to negate the foregoing conclusion.

E. Greenbrier Dairy Products Company

1. Greenbrier is another of the acquired companies with respect to which respondent contends the record fails to establish engagement in commerce. The record discloses that during the year prior to its acquisition by respondent, Greenbrier made purchases of cream, milk powder and dry cheese curd from various out-of-state sup-

¹⁴⁴ While Associated's plant, just outside of Phoenix, was approximately 400 miles from respondent's main plant at El Paso, it had a branch office at Bisbee from which it distributed in Cochise County in southeastern Arizona adjacent to the New Mexico state line. Respondent had a branch at Deming in southwestern New Mexico, from which it distributed in Hidalgo and Grant Counties bordering on Arizona.

pliers, in the total amount of \$115,190. These products were used as ingredients in the manufacture of various dairy products sold by Greenbrier in West Virginia. It is concluded that the volume of Greenbrier's out-of-state purchases is sufficient to establish that, at the time of its acquisition by respondent on January 1, 1955, Greenbrier was engaged in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

2. Greenbrier, whose sales of milk, ice cream and other dairy products, were approximately \$3,775,000 in 1953, was acquired for a total consideration in excess of \$1,200,000. Respondent concedes that Greenbrier was "a viable independent * * * with modern processing equipment." Greenbrier's sales were made principally in the area of Charleston, Beckley and Logan, in which respondent did not distribute. However, it also sold in the area of Lewisburg, where respondent competed with it in the frozen-product line. It has been found that the Charleston area and the Charleston-Beckley-Logan area are appropriate market areas. In the Charleston area Greenbrier accounted for approximately 15% of milk sales, and in the larger Charleston-Beckley area its market share was substantially larger. While the record does not disclose the extent of concentration in Greenbrier's distribution area, in the larger Charleston-Beckley-Bluefield area Greenbrier and two national companies accounted for 30.7% of the milk sales in 1951. Although four large independent companies accounted for 48.2% of the area's milk sales, two of these were later acquired by an outside company. Greenbrier represented the first important acquisition made by respondent in West Virginia. Following this it acquired five other dairy companies in the State. By 1958 respondent had become the first ranking milk company in West Virginia, with 11.8% of the value of shipments of fluid milk (not including the share obtained from a large company acquired in 1959). During the decade from 1950 to 1960, the number of milk plants in West Virginia declined from 149 to 66, and 10 dairy companies were acquired by national companies. Based on the record as a whole, including Greenbrier's substantial market position, the fact that respondent was already competing with Greenbrier in the frozen dairy product line, the extent of and trend toward concentration in the market, and respondent's acquisition pattern in the State, it is concluded that the effect of respondent's acquisition of Greenbrier may be substantially to lessen competition or to tend to monopoly in the fluid milk product line in southern and central West Virginia.

F. Clarksburg Dairy Company

1. Clarksburg is another of the acquired companies with respect to which respondent contends the record fails to establish engagement in commerce. The only evidence of Clarksburg Dairy's engagement in commerce is that it purchased some aerated cream and butter from two out-of-state suppliers. The butter purchases never exceeded three or four cases per week (the dollar volume thereof not appearing), and the volume of aerated cream was "very small." It is the conclusion of the examiner that the evidence is insufficient to establish that, at the time of its acquisition, Clarksburg Dairy was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. In view of the foregoing conclusion, it is technically unnecessary to determine whether the Clarksburg acquisition had the proscribed competitive impact. However, in the event the Commission should disagree with the examiner's conclusions as to Clarksburg's engagement in commerce and should desire the benefit of his views concerning the competitive impact of the acquisition, the examiner will briefly indicate his conclusions in this regard.

3. Clarksburg Dairy and its wholly owned subsidiary Home Dairy were acquired in August 1955, seven months after the Greenbrier Dairy acquisition. The record discloses that Clarksburg Dairy was a substantial and viable independent company with total sales of \$1,635,000. It accounted for approximately 35% of the milk sales in the northern West Virginia area in which it distributed, and was the largest distributor in the market. Respondent, through its newly acquired Greenbrier Division, competed with Clarksburg in a small way. With respondent's acquisition of Clarksburg, it and Fairmont Foods accounted for approximately 60% of the area's milk sales. None of the remaining companies had more than 6½% of the market. Following its acquisition of another large dairy in 1959, respondent's share of fluid milk sales in the northern West Virginia area reached 46.8% of the area's sales by 1950. As previously mentioned, even prior to the last acquisition respondent had become the largest factor in the milk business in the State of West Virginia, with 11.8% of the value of fluid milk shipments in 1958. This position resulted principally from its acquisition of Clarksburg and Greenbrier.

4. Based on the record as a whole, including Clarksburg's substantial market position, the fact that respondent was already competing with it, the extent of and trend toward concentration in the

market, and respondent's acquisition pattern in the State, it is concluded that the effect of respondent's acquisition of Clarksburg and its subsidiary Home Dairy may be substantially to lessen competition, or to tend to create a monopoly in the fluid milk product line in the northern West Virginia area.

G. Tro-Fe Dairy Company, Inc.

1. There is no issue raised concerning the engagement in commerce of Tro-Fe Dairy, which obtained all of its supply of raw milk from its wholly owned subsidiary in Tennessee. Respondent concedes, and the examiner concludes, that Tro-Fe was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. At the time of its acquisition in June 1956, Tro-Fe was a substantial, viable company, with net sales of approximately \$3,000,000, of which approximately 73% consisted of fluid milk. It has heretofore been found that the Gadsden-Anniston area is the relevant market area. The record contains no reliable statistical evidence as to Tro-Fe's market share or the extent of concentration in this market area. At the time of the acquisition, respondent sold fluid milk in the adjoining market in northern Alabama, and competed with Tro-Fe in a small area where the two markets overlapped. The record does not disclose respondent's market position in the area where it distributed. It does appear that two years after the Tro-Fe acquisition respondent accounted for 14.6% of the value of fluid milk shipments in the State of Alabama as a whole. However, there is no way of determining how much of this share is attributable to the Tro-Fe acquisition.

3. In view of the lack of reliable evidence as to Tro-Fe's market position and the extent of concentration in the Gadsden-Anniston market, as well as the lack of evidence as to respondent's pre-acquisition position in any appropriate market, it is concluded that complaint counsel have failed to sustain the burden of proving that the effect of respondent's acquisition of Tro-Fe Dairy may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

H. Dothan Ice Cream Company

1. There is no issue raised concerning the engagement in commerce of Dothan Ice Cream Company and its affiliated distributing companies. Respondent concedes, and the examiner concludes, that

Dothan and its affiliated companies were engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. At the time of their acquisition in December 1959, Dothan and its affiliated distributing companies were a group of substantial, viable companies, with total frozen product sales of over \$3,000,000. From its plant at Dothan, Alabama, Dothan distributed frozen products through its affiliated companies in various portions of southeastern Alabama, southwestern Georgia and northwestern Florida. Respondent distributed frozen products in northern Alabama from its plant in Nashville, Tennessee. It did not compete with the Dothan companies. The record does not contain sufficient evidence from which an informed determination as to the geographic market area or areas relevant to the Dothan acquisition can be made. Even if the relevant market were assumed to be the distributing area of Dothan and its subsidiary companies, as contended by counsel supporting the complaint, the record is lacking in evidence concerning Dothan's market share and the extent of concentration in this area. In a multi-state area encompassing the combined territories of respondent and the Dothan companies, respondent accounted for approximately 10.3% of frozen product production in 1960, the year following its acquisition of Dothan. In terms of the area which the Dothan companies had formerly served, respondent's production share in 1960 was approximately 4.7%.

3. In view of the unsatisfactory state of the record concerning what is the appropriate market area or areas, and the lack of evidence as to respondent's and Dothan's preacquisition market shares and the extent of concentration in an appropriate market, it is concluded that complaint counsel have failed to sustain the burden of proving that the effect of respondent's acquisition of Dothan may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country. Even assuming that respondent's and Dothan's combined distribution area, or that Dothan's distribution area alone, is an appropriate market, no conclusion as to any adverse competitive impact can be made merely from the post-acquisition market share figures alluded to above.

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

1. There is no issue raised concerning the engagement in commerce of Dairyland and its affiliated company, Valdair. Respondent

concedes, and the examiner concludes, that Dairyland and Valdair were engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. At the time of their acquisition in March 1961, Dairyland and Valdair were substantial, viable companies, with combined sales of approximately \$3,500,000. They distributed milk products and ice cream in eastern Alabama and western Georgia. Respondent competed with these companies in only a small portion of their territory, and only in the ice cream product line. The record does not contain sufficient evidence to permit a determination as to the appropriate geographic markets in either the fluid milk or ice cream product lines. Even assuming that Dairyland's and Valdair's respective distribution areas could be considered to be the appropriate markets, the record does not contain any evidence as to their market shares or the extent of concentration in these markets. The only market-share data in the record pertains to the State of Alabama as a whole, and indicates that in 1958 respondent accounted for 14.6% of the value of fluid milk shipments in the State, and that four national companies accounted for 33.4% of such shipments, with respondent's share being the largest. It is not possible to determine Dairyland-Valdair's market position in the fluid milk line in the State as a whole, since the record contains no breakdown of its total sales as between fluid milk products and ice cream.

3. While it seems likely from the amount of their total sales that Dairyland and Valdair were substantial factors in their markets, in the absence of definitive evidence as to their market shares and the extent of concentration in an appropriate market, no conclusion can be drawn that the effect of their acquisition by respondent may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

J. Louis Sherry, Inc.

1. There is no issue raised concerning the engagement in commerce of Louis Sherry. Respondent concedes, and the examiner concludes, that Sherry was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. Sherry was a substantial, viable company at the time of acquisition in March 1955, with frozen products sales of over \$3,000,000. However, it had sustained substantial losses on its operations during the two-year period prior to its acquisition. While respondent and Sherry were in competition in the sale of frozen products in

the New York metropolitan area, they sold different types of ice cream and catered to different types of customers. The only market share data in the record is for 1952, almost three years prior to the acquisition. Such data reveal that respondent and Sherry accounted for 4.7% and 3.4%, respectively, of the New York market, and were the third and sixth ranking companies. The first two ranking companies, Borden and National Dairy, accounted for 29.6% and 24.5%, respectively, of the area's sales.

3. Considering respondent's relatively small share of the New York market vis-a-vis the top two companies, the lack of current market-share and concentration data in the record, Sherry's poor profit position at the time of the acquisition, and the limited extent of competition between it and respondent in terms of the types of product and customer served, it is the conclusion of the examiner that complaint counsel have failed to establish that the effect of respondent's acquisition of Sherry may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

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

1. There is no issue raised concerning the engagement in commerce of the Melvern-Fussell Division of Arden Farms. The record discloses, and the examiner concludes, that Melvern-Fussell was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. Arden's Melvern-Fussell Division operated a substantial, viable frozen products plant in the Washington, D.C. metropolitan area at the time of its acquisition by respondent in 1960. However, the Division had lost money each year since Arden entered the market in 1951. Respondent and Melvern-Fussell competed in the sale of frozen products in the Washington metropolitan area and in a broad area of Virginia and Maryland. Respondent, while a substantial factor in the Washington market, had been losing money on its Washington operation for three years prior to its acquisition of Melvern-Fussell. It was considering closing its Washington plant due to the poor physical condition thereof and the impracticality of renovating it. The only market-share data in the record is for the year 1952, approximately eight years prior to the acquisition. While such data reveal that they were both substantial factors in the Washington market, there is other evidence indicating that the position of both companies had deteriorated substantially prior to the acquisition.

The largest company in the area was National Dairy, which accounted for 43.6% of the value of shipments of frozen desserts in the District of Columbia in 1958.

3. In view of the lack of current market-share and concentration data in the record, the poor financial condition of the Melvern-Fussell operation, the lack of profitability of respondent's operation in the area, and the overwhelming market position of the largest company in the area, it is the conclusion of the examiner that complaint counsel have failed to establish that the effect of respondent's acquisition of the Melvern-Fussell Division of Arden Farms may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

L. Durham Dairy Products, Inc.

1. The record discloses that Durham received a portion of its raw milk from Virginia, that it purchased other dairy products from suppliers in Virginia and Kentucky and that its sales territory included one town in Virginia. It is concluded that the record establishes Durham was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. At the time of its acquisition in March 1953, Durham was a substantial processor and distributor of fluid milk products and ice cream in a five-county area of North Carolina. It was the second ranking company in the fluid milk line, with 30.5% of the area's sales, and was the top ranking company in the ice cream product line, with 25.4% of the area's sales. At the time of the acquisition respondent was not selling any dairy products in Durham's territory. However, it did distribute frozen products in southern Virginia from its plant at Norfolk. Durham's competitors in the fluid milk line were principally local, independent companies. However, in the frozen product line National Dairy, Borden and Pet were substantial factors and, together, accounted for 31.1% of the frozen products sold in the market. With respondent's acquisition of Durham, the four national companies would account for over 55% of the frozen product sales in the market.

3. Based on the record as a whole, including the substantial position which Durham occupied in its market area in both the fluid milk and frozen product lines, the close proximity of its and respondent's territories in the frozen product line, the fact that the acquisition resulted in the injection of a strong national company into a fluid milk market which had theretofore consisted almost en-

tirely of local companies, and the substantial increase in concentration among national companies in the frozen product line, it is concluded that the effect of the acquisition of Durham Dairy by respondent may be substantially to lessen competition, or to tend to create a monopoly in the fluid milk and frozen product lines in Durham's sales area.

M. Westerville Creamery Co. and Other Ohio Acquisitions

1. There is no issue raised concerning the engagement in commerce of Westerville Creamery. Respondent concedes that Westerville was engaged in commerce in the sale of evaporated and powdered milk products. It is concluded that Westerville was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. Westerville was a substantial producer of manufactured milk products, including evaporated, condensed and powdered milk. It also processed and sold fluid milk and ice cream. Its total sales at the time it was acquired in June 1961 were almost \$14,000,000, of which more than three-fourths was accounted for by its manufactured milk products. Prior to the acquisition respondent had not been a manufacturer of evaporated and condensed milk products; nor had it distributed fluid milk or ice cream in Westerville's territory. The record reveals that Westerville had about 8% of the fluid milk sales in its territory, but there is no evidence as to its relative position or the extent of concentration in the market. The record contains no evidence as to market shares or the extent of concentration, in any appropriate market, in either the frozen product or manufactured milk product lines. It is concluded that the record fails to establish that the effect of respondent's acquisition of Westerville Creamery may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

3. Respondent acquired two other Ohio corporations, which complaint counsel contend were engaged in commerce. These were Linton & Linton and Gray & White. The record fails to establish that either company was engaged in commerce. The mere fact that Linton & Linton purchased some bottled milk from respondent in Ohio, which may have originated outside of the State in its raw form, does not establish its engagement in commerce. The fact that Gray & White may have purchased some indeterminate amount of butter from outside of the State of Ohio is insufficient to establish its en-

gagement in commerce. Moreover, the record is lacking in substantial evidence that the effect of either of these acquisitions may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country. There is no market share or concentration data in the record with respect to the Linton & Linton acquisition. The only data pertaining to the Gray & White acquisition is that its sales of butter amounted to approximately 5% of the butter consumed in the northern Ohio area.

N. Lindner Ice Cream Company

1. There is no issue raised concerning the engagement in commerce of Lindner Ice Cream Company. Respondent concedes, and the examiner concludes, that at the time of its acquisition in June 1956 Lindner was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. Lindner was a moderate-sized ice cream company, selling in the area of Cincinnati, Ohio, with annual sales of \$480,000. Respondent competed with Lindner in the sale of ice cream in the Cincinnati market. The record is lacking in evidence as to the market shares of the acquired and acquiring companies, and as to the extent of concentration in the market, at or about the time of the acquisition. The only market data in the record are for a period four years prior to the acquisition, at which time respondent and Lindner accounted for approximately 8% and 5%, respectively, of the ice cream sales in Cincinnati. Respondent was then the fourth-ranking company, the first ranking company being National Dairy with 23% of the market, and the second ranking company being a large Ohio independent with approximately 20% of the market. It is concluded that the record fails to establish that the effect of respondent's acquisition of Lindner may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

O. Community Creamery

1. Respondent contends that it "is doubtful whether the Commission has sustained its burden of proof that Community was engaged in interstate commerce" (Proposed Findings, p. 171). The record discloses that respondent regularly sold packaged fluid milk to a distributor in Idaho, amounting to approximately 3% of its fluid milk sales. Respondent's position that such sales were not in commerce is apparently based on the fact that Community "made

Conclusions

67 F.T.C.

no direct sales to purchasers in Idaho" inasmuch as its Idaho distributor picked up the milk at Community's dock (*Id.*, p. 169). It is the opinion and conclusion of the examiner that Community was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act, since there was a practical continuity in commerce of the fluid milk sold to the Idaho distributor despite the fact that respondent did not itself deliver the milk across state lines.

2. At the time of its acquisition in April 1960, Community was one of the largest independent dairies in the State of Montana, with net sales in excess of \$3,000,000. Its sales territory in western Montana overlapped that of respondent, which served a somewhat larger area of the State. Respondent accounted for approximately 24% of the frozen product shipments in Montana, and Community's share may be estimated as approximately 9.5%.¹⁴⁵ Community was a larger factor in the fluid milk product line, with approximately 15.5% of the value of shipments in the State, while respondent accounted for approximately 4.4%. Within less than a year after its acquisition of Community, respondent had acquired three other substantial dairy companies, whose combined sales exceeded Community's sales by approximately \$300,000.¹⁴⁶ Respondent's sales in 1961, based on figures which reflect only a portion of the sales of the acquired companies, showed an increase of 43.5% in the fluid milk line and 42.5% in the ice cream product line. While there are no market share figures in the record for the three companies other than Community, it may be assumed that these three companies added at least 5% to respondent's State market share in the fluid milk product line, and made a somewhat smaller contribution to its position in the ice cream product line. It may be estimated that following these acquisitions, respondent's share of milk sold in the State of Montana was not less than 20 to 25%, and its share of ice cream sales not less than 35 to 40%. It was undoubtedly the largest, if not the dominant, factor in the dairy industry in the State.

¹⁴⁵ Although the figures in the record are percentages of shipments or production in the State, it may be assumed that they closely reflect the shares of sales made within the State, since the geographic isolation and mountainous terrain of the State minimize shipments in and out of the State.

¹⁴⁶ Respondent refers to these as being "small local * * * operations." In relation to the size of companies operating in Montana they were substantial companies. Pioneer Dairy's sales, which consisted entirely of fluid milk, were double the milk sales of respondent's Great Falls Plant. Billings Dairy's sales, which were divided between milk and ice cream, were almost double the milk and ice cream sales of respondent's Billings' plant. Henne's sales, which were in both milk and ice cream, were more than double those of respondent's Butte branch.

3. The appropriate market area has been found to be the western Montana area in which Community Dairy distributed. While there are no market-share figures in the record in terms of this area, there can be little doubt, in view of Community's sizeable share in the State as a whole, that in the relatively small portion of the State in which it distributed it must have been a major, if not the largest, factor in the market. Although respondent's distribution area was considerably larger than Community's, it seems evident that it too was a very substantial factor in its territory, particularly in the frozen product line, in view of its substantial position in the State as a whole.

4. Based on the record as a whole, including the substantial market position of both respondent and Community, the close proximity and overlap of their distribution areas, the substantial increase in concentration in the frozen product line resulting from the acquisition, the substantial improvement in the respondent's market position in the fluid milk line as a result of the acquisition, and respondent's pattern of acquisitions in the State, it is concluded that the effect of respondent's acquisition of Community Creamery may be substantially to lessen competition, or to tend to create a monopoly in the fluid milk and ice cream product lines in the western Montana area.

P. James S. Merritt Company

1. The record indicates that Merritt distributed frozen products in "Metropolitan Kansas City." Complaint counsel contend that Merritt's territory included the suburban area in the State of Kansas. However, the record does not establish this as a fact. It is, accordingly, concluded that complaint counsel have failed to sustain the burden of proving that Merritt was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. The Merritt acquisition, in September 1958, involved that part of Merritt's business which was devoted to the manufacture of bulk and package ice cream. The seller retained and continued to operate its frozen novelty business. Merritt sold approximately 400,000 gallons of bulk and package ice cream annually. Respondent's own sales in the Kansas City area were approximately 10,000 gallons. The record contains no evidence as to either company's market shares in the Kansas City area or as to the extent of concentration therein. It is concluded that complaint counsel have failed to establish that the effect of respondent's acquisition of Merritt may be substan-

tially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

Q. Arden Farms Co. (Linwood Division)

1. The record establishes that the Linwood Division of Arden Farms Co. was engaged in the distribution of frozen products in the Kansas City metropolitan area, including the adjoining suburbs in the State of Kansas. It is accordingly concluded that Linwood was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. At the time of its acquisition by respondent in June 1960, Linwood's sales were approximately \$850,000, consisting of 655,000 gallons of ice cream and other frozen products. It had operated at a loss in two of the four years prior to its acquisition. Although it appears that respondent had acquired James P. Merritt Company two years earlier, with a volume of approximately 400,000 gallons, the record does not disclose what respondent's volume was in the Kansas City area at the time of the Linwood acquisition. The record is also lacking in evidence as to the market shares of the acquired and acquiring companies, and as to the extent of concentration in the Kansas City metropolitan area. It is accordingly concluded that complaint counsel have failed to establish that the effect of respondent's acquisition of the Linwood Division of Arden Farms may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the country.

R. Gateway Creamery Company

1. Respondent admits in its answer, the record establishes, and the examiner concludes that Gateway Creamery was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. The record discloses that at the time of its acquisition by respondent in October 1954, Gateway had annual fluid milk sales of approximately 500,000 gallons and ice cream sales of approximately 190,000 gallons. Limited market share data in the record indicates that Gateway's share of the fluid milk market in the Joplin, Missouri area was of the order of magnitude of 11%. There is no evidence as to its market position in the ice cream product line. The record is also lacking in evidence as to respondent's market share and the extent of concentration in any appropriate market. It is accordingly concluded that complaint counsel have failed to establish that the

effect of respondent's acquisition of Gateway Creamery may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

S. Valley Creamery Company, Inc.

1. Valley Creamery Co. was acquired by respondent in May 1956, through its wholly owned subsidiary Russell Creamery Co. Although Russell was not engaged in commerce, respondent admittedly was. Section 7 of the Clayton Act prohibits a corporation engaged in commerce from making certain acquisitions, "directly or indirectly." It is the conclusion of the examiner that the acquisition of Valley Creamery was, in effect, an acquisition by respondent, and accordingly was an acquisition by a corporation engaged in commerce. Since Valley Creamery distributed in Minnesota and North Dakota, it is concluded that it too was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. Respondent acquired only the frozen products portion of the business of Valley Creamery, which was engaged in processing and distributing a broad line of dairy products. At the time of the acquisition Valley Creamery's frozen product sales were under \$50,000. The record contains no data as to the market shares of the acquired and acquiring companies, or the extent of concentration in any relevant market. It is concluded that complaint counsel have failed to establish that the effect of respondent's acquisition of the frozen products portion of Valley Creamery's business may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

T. A. L. Brumund Company

1. The record discloses that Brumund's sales were made almost entirely in Lake County, Illinois. There is some indication that it may have served a few customers in Wisconsin. However, the evidence is so fragmentary and insubstantial that it cannot be concluded complaint counsel have sustained the burden of proving that Brumund was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. At the time of its acquisition in October 1951, Brumund's annual sales were approximately \$500,000, consisting of fluid milk products and ice cream. It was acquired for a consideration of approximately \$73,000. The record is lacking in substantial and reliable data as to the market shares of the acquired and acquiring companies, and the

extent of concentration in any appropriate market. The examiner does not regard the fragmentary consumers' survey in the record, as substantial and reliable evidence to establish market shares and concentration. It is accordingly concluded that complaint counsel have failed to establish that the effect of respondent's acquisition of Brumund may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

U. Lagomarcino-Grupe Company

1. Respondent admits in its answer, the record establishes, and the examiner concludes that Lagomarcino-Grupe was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. Respondent acquired the frozen products portion of Lagomarcino-Grupe's business in July 1952, for a consideration of \$35,000. While the record discloses that Lagomarcino-Grupe had frozen products sales of \$150,000, there is no evidence as to its market share or that of respondent in any appropriate market, nor as to the extent of concentration therein. It is concluded that complaint counsel have failed to establish that the effect of respondent's acquisition of the frozen products portion of Lagomarcino-Grupe's business may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

V. Clinton Ice Cream Company

1. The record establishes and the examiner concludes that Clinton Ice Cream Company was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. Clinton, which was acquired in September 1955 for a consideration of approximately \$10,000, had ice cream sales of approximately \$76,000. The record contains no evidence as to the market shares of the acquired and acquiring companies, or the extent of concentration in any appropriate market. It is concluded that complaint counsel have failed to establish that the effect of respondent's acquisition of Clinton may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

W. Andalusia Dairy Company

1. Based on the evidence that Andalusia received its supply of raw milk principally from outside the State, it is concluded that it was

engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. The acquisition involved only the business of Andalusia's branch plant in western Pennsylvania, which was acquired in June 1952 for a consideration of approximately \$50,000. The branch had milk and ice cream sales of approximately \$350,000. The record does not permit a determination as to what is the appropriate market area. In the broad western Pennsylvania milk market, respondent accounted for 7.6% of the area's milk sales and Andalusia had .001% of the market. It is concluded that complaint counsel have failed to establish that the effect of respondent's acquisition of Andalusia's branch operation may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

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

1. The record establishes and the examiner concludes that Coca-Cola's Peerless Division was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. The acquisition in May 1953 involved only the ice cream portion of the dairy business conducted by Coca-Cola's Peerless Division, and involved a consideration of approximately \$70,000. Peerless' ice cream sales were approximately \$183,000. The record does not permit an informed determination as to the appropriate market area. The record is also lacking in reliable evidence as to the market shares of the acquired and acquiring companies, or the extent of concentration in an appropriate market area. It is concluded that complaint counsel have failed to establish that the effect of respondent's acquisition of Coca-Cola Bottling Co.'s Peerless Division may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

Y. Ritzmann Ice Cream Company, Inc.

1. The record establishes and the examiner concludes that Ritzmann Ice Cream Company was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. Ritzmann was acquired in June 1959 for a consideration of approximately \$27,000. Its sales were approximately \$150,000, on which it had sustained losses in the two years prior to its acquisition. The acquisition was made after the seller had been advised by the Commission that it did not contemplate taking any action to declare

Conclusions

67 F.T.C.

the sale illegal. The record contains no evidence as to the market shares of the acquired and acquiring companies, or the extent of concentration in any appropriate market. It is concluded that complaint counsel have failed to establish that the effect of respondent's acquisition of Ritzmann may be substantially to lessen competition, or to tend to create a monopoly in any section of the country in any line of commerce.

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

1. The evidence is insufficient to establish that Farmers Equity was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act. The mere fact that it was incorporated in a state other than that in which it did business does not establish its engagement in commerce. The evidence as to possible sales to a customer in Montana is too inconclusive to support a finding that it was engaged in commerce.

2. The acquisition in August 1952 involved the purchase of certain ice cream cabinets and a transfer of customers incident thereto, for a total consideration of \$13,800. Farmers Equity's sales were approximately 30,000 gallons annually. The record is lacking in evidence as to the market shares of the acquired and acquiring companies, and as to the extent of concentration in any appropriate market. It is concluded that complaint counsel have failed to establish that the effect of respondent's acquisition of certain of Farmers Equity's assets may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

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

1. Respondent admits in its answer, the record establishes, and the examiner concludes that Rose Lawn was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. Rose Lawn, which was a distributor of fluid milk, was acquired in January 1955 in partial repayment of a debt owing to respondent. Its net sales during a seven-month period prior to the acquisition were approximately \$225,000, on which it sustained a loss of \$30,000. The record contains no evidence as to the market share of the acquired or acquiring companies, or the extent of concentration in any appropriate market area. It is concluded that complaint counsel have failed to establish that the effect of respondent's acquisition of Rose Lawn

may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce in any section of the country.

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

1. Respondent admits in its answer, the record establishes, and the examiner concludes that Dahl-Cro-Ma was engaged in commerce, within the meaning of the Clayton Act and the Federal Trade Commission Act.

2. Dahl-Cro-Ma was acquired in December 1954 for a consideration of approximately \$100,000. Its sales, consisting entirely of frozen products, were approximately \$120,000 annually. Respondent and Dahl-Cro-Ma were the only two companies engaged in the sale of ice cream and other frozen products on the Island of Hawaii. Respondent had entered the Island a little over a year earlier through the acquisition of a subsidiary of Creameries of America. It accounted for approximately two-thirds of the frozen products sold on the Island of Hawaii, while Dahl-Cro-Ma accounted for approximately one-third. It has been found that the Island of Hawaii is an appropriate market area. It is concluded that the effect of respondent's acquisition of Dahl-Cro-Ma may be substantially to lessen competition or to tend to create a monopoly on the Island of Hawaii in the frozen product line.

Z-3. Other Acquisitions

1. The remaining acquisitions not hereinabove discussed were either, (a) corporations concerning which complaint counsel have conceded the record fails to establish engagement in commerce, or (b) non-corporate companies concerning which, with a few exceptions, complaint counsel likewise concede the record fails to establish engagement in commerce. Complaint counsel contend that the acquisition of such companies, corporate and non-corporate, is part of the constant and systematic elimination of actual and potential competitors which, together with the acquisition of corporations claimed to be in commerce, constitutes an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act.

2. In the original proposed order filed by them, complaint counsel did not seek any divestiture provision with respect to corporations not in commerce or with respect to non-corporate businesses. They contended, however, that while the remaining acquisitions "did not technically fall within the requirements of Section 7," they constituted an unfair method of competition, in violation of Section 5, and

that the public interest required respondent's drive toward a monopoly position be stopped by a cease and desist order preventing all further acquisitions. (Proposed Findings, pp. 580-1.)

3. Subsequent to the filing of their original proposed findings and order complaint counsel, pursuant to leave granted, filed an amended proposed order in which divestiture was sought with respect to all of the companies acquired by respondent, irrespective of whether they were in commerce and irrespective of whether they were corporations. The basis for counsel's filing of a proposed amended order is the Supreme Court decision in *Pan American World Airways, Inc. v. U.S.*, 371 U.S. 296 (1963). In that case the Court interpreted a provision of the Federal Aviation Act, conferring jurisdiction on the Civil Aeronautics Board over "unfair methods of competition in air transportation," as being in pari materia with the "unfair methods of competition" clause contained in Section 5 of the Federal Trade Commission Act. The Court further held that the authority of the Civil Aeronautics Board to enjoin "unfair methods of competition" carried with it the power to order divestiture. Complaint counsel argue that the constant and systematic acquisition of other dairy companies is an unfair method of competition, and hence that the Commission may order the divestiture of all companies so acquired, without regard to whether they are corporations or are engaged in commerce.

4. The examiner does not interpret the Supreme Court's decision in the *Pan American World Airways* case, as supporting the position now urged by complaint counsel. The power of divestiture which the Supreme Court said the Civil Aeronautics Board possessed presupposes that the unfair method of competition involved is one over which the Board has jurisdiction, viz, one which occurred "in air transportation." Similarly, divestiture would be appropriate in a Federal Trade Commission proceeding only where the unfair method of competition is one over which the Commission has jurisdiction, viz, an unfair method of competition "in commerce." The examiner does not understand that the Commission has jurisdiction over the acquisition of intrastate businesses merely because, as complaint counsel contends, the company acquiring them was in commerce. Furthermore, the mere acquisition of another company, whether or not in commerce, is not an unfair method of competition unless there is a showing of a probable adverse competitive effect resulting therefrom.

5. The examiner is not unaware that in an interlocutory ruling in the *Foremost Dairies* case, the Commission held that "practices not

technically within the scope of a specific section of the Clayton Act may, nevertheless, constitute a violation of Section 5 of the Federal Trade Commission Act." The Commission did not, however, rule that the acquisition of non-corporate businesses or of businesses not engaged in commerce is an unfair method of competition. In its final decision and order in the case the Commission considered it unnecessary to rule on whether the non-commerce and non-corporate acquisitions there involved would fall within Section 5, as an unfair method of competition, since it found that "the evidence in this record will not sustain a finding of the Section 7 adverse competitive effect requirements as to each of respondent's acquisition upon which counsel rely [at 52]." Consequently, even if the Section 7 requirement that the acquisition must involve a corporation engaged in commerce is overlooked in a Section 5 proceeding, there must be a showing of the type of adverse competitive impact which is contemplated by Section 7.

6. With respect to the requirement that the acquired company must be a corporation, it should be noted that in the *Pan American World Airways* case, the Supreme Court (at 312 n.17) studiously avoided overruling its earlier holding in *FTC v. Eastman Kodak Co.*, 274 U.S. 619, that divestiture was not an appropriate remedy in a Section 5 proceeding where it involved assets, the acquisition of which could not be challenged under the original version of Section 7 of the Clayton Act. While the amended Section 7 now covers both stock and asset acquisitions, it is still limited to the acquisition thereof from corporations engaged in commerce. It is inconceivable that Congress would have found it necessary to expand the Commission's jurisdiction to cover asset acquisitions from corporations engaged in commerce if the Commission already had jurisdiction under Section 5 of the Federal Trade Commission Act over acquisitions not covered by the Clayton Act, including non-corporate enterprises or businesses not in commerce.

7. Even if it be assumed that the acquisition of non-corporate businesses not covered by Section 7 may be reached under Section 5 of the Federal Trade Commission Act, it is still necessary to establish their engagement in commerce and the probable adverse impact of such acquisitions, in order to justify divestiture. In the case of the great bulk of the non-corporate acquisitions in this case, complaint counsel concede that the record fails to establish their engagement in commerce. With respect to the few such acquisitions as to which there is evidence of commerce, the record fails to establish the probability of any adverse competitive impact in an appropriate

market. To the extent that respondent's program of acquisitions, as a whole, has cumulative adverse competitive implications of the type referred to in the Commission's final decision in *Foremost Dairies* (at 52-53) [60 F.T.C. 1090], it can be dealt with in a manner other than that of ordering the divestiture of non-corporate businesses or of businesses not engaged in commerce. The examiner finds it unnecessary to determine whether respondent's "proclivity for growth by acquisitions" (*id.*, at 53) [60 F.T.C. 1091] is an unfair method of competition, within the meaning of Section 5 of the Federal Trade Commission Act, since adequate relief may be granted under Section 7 of the Clayton Act.

II. AS TO THE OTHER PRACTICES

1. The complaint, in Paragraph 8 thereof, alleges that respondent's great size and financial resources, in relation to that of its competitors, together with its product and geographic diversification, may give and have given it the power to engage in certain business practices. In Paragraph 12 of the complaint it is charged that all of the acquisitions, acts and practices alleged in the complaint constitute a violation of Section 5 of the Federal Trade Commission Act. However, as heretofore mentioned (p. 649), the purpose of pleading the practices alleged in Paragraph 8 was to permit a showing as to the economic power possessed by respondent and to provide a background for determining the competitive impact of the acquisitions made by it. Complaint counsel agreed that they would seek no cease and desist order with respect to such practices.

2. Complaint counsel make no contention in the proposed findings filed by them that the practices alleged in Paragraph 8 of the complaint constitute an unfair method of competition, within the meaning of Section 5. They have submitted no proposed order that respondent cease and desist therefrom. It is, accordingly, unnecessary to determine whether any of the practices alleged in Paragraph 8 of the complaint constitutes an unfair method of competition, in violation of Section 5 of the Federal Trade Commission Act.

FINAL CONCLUSIONS OF LAW

1. Respondent, Beatrice Foods Co., a corporation engaged in commerce, acquired the stock or assets of the following corporations engaged in commerce, as "commerce" is defined in the Clayton Act: Creameries of America, Inc., Greenbrier Dairy Products Company, Durham Dairy Products, Inc., Community Creamery, and Dahl-Croma, Ltd.

2. The acquisition by respondent, Beatrice Foods, Co., of the stock or assets of the aforementioned corporations was in violation of Section 7 of the Clayton Act.

3. Complaint counsel have failed to establish, by substantial, reliable and probative evidence, that the acquisition by respondent, Beatrice Foods Co., of the stock or assets of the corporations or individually owned concerns alleged in Paragraphs 6 and 7 of the complaint, other than those specified in Paragraph 1 hereof, was in violation of either Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act.

THE REMEDY

1. It is settled that normally divestiture is the appropriate remedy where a violation of Section 7 has been found. *U.S. v. E. I. duPont de Nemours & Co.*, 366 U.S. 316. There are no circumstances present in the instant proceeding to suggest that it would not be appropriate to order the divestiture of those corporations engaged in commerce which it has been hereinabove found were acquired in violation of Section 7 of the Clayton Act.

2. The only acquisition with respect to which it might be urged that complete divestiture of the acquired company is not appropriate is that of Creameries of America, Inc., a corporation doing business in a multi-state area, with respect to which it has been found that the most direct and immediate impact of the acquisition was in a group of counties in the lower San Francisco Bay area where respondent and the acquired company competed. The examiner has considered the dictum in the *Brown Shoe* case (at 337 n.65) that, where the acquired and acquiring companies compete in only a small portion of their respective territories, "that fact would * * * be properly considered in determining the equitable relief to be decreed." However, as the examiner has previously indicated, the Creameries acquisition has anticompetitive implications beyond the areas where the companies directly competed, and it would frustrate the intent of Section 7 to limit any order of divestiture to such areas.

3. Although only certain of the acquisitions have been found to be in violation of Section 7, the record discloses that respondent has followed a calculated policy of expansion by acquisition. Its growth in the dairy industry has been accomplished principally by the acquisition of other companies. While good management, energetic sales effort and sound fiscal policies have undoubtedly aided its growth, these have been built around a program of expansion by acquisition, rather than through internal expansion into new areas.

Many of its largest acquisitions have been financed by the issuance of additional stock, rather than through the expenditure of internally-generated resources.

4. As has been previously found, during the period between 1928 and 1950 respondent acquired over 70 dairy concerns. In the decade between 1951 and 1961, its acquisition program accelerated and it acquired approximately 175 additional dairy concerns, which were largely responsible for an increase in its sales during this decade of approximately 60%. Respondent's program of acquisitions has been paralleled by that of its principal large competitors. Eight of these companies, including respondent, acquired approximately 500 dairy companies during the period from 1950 to 1961.

5. In addition to the present complaint against respondent, the Commission has instituted similar proceedings against respondent's three largest competitors, viz, National Dairy, Borden and Foremost. These companies, together with respondent, are the four largest dairy companies in the United States. The proceeding against *Foremost Dairies*, Docket 6495 [60 F.T.C. 944], terminated in the issuance of an order of divestiture with respect to a number of the acquired companies. The Commission did not consider it appropriate to enjoin the making of further acquisitions since the order of divestiture would "reduce Foremost to less than one-half its present size and return it to approximately the same relative position it held in the industry prior to 1951." (*Id.* at 53 [60 F.T.C. 1092].) The proceeding in the *National Dairy* case, Docket 6651 [62 F.T.C. 120], terminated in an order by consent, pursuant to which National was ordered to divest itself of certain of the acquired companies and was enjoined from making any further dairy company acquisitions for a period of ten years, without prior approval of the Commission. The *Borden* proceeding, Docket 6652 [65 F.T.C. 296], is still pending before the Commission.

6. Complaint counsel in the instant proceeding seek an order which would prohibit any further acquisitions of dairy companies by respondent, without prior approval of the Commission. Such order is similar to that agreed to in the *National Dairy* case, except that it is without limitation as to time. In the opinion of the examiner a prohibition on future acquisitions, with an appropriate time limitation, is justified in the instant proceeding. Unlike the situation in the *Foremost Dairies* case, the divestitures here ordered will not return respondent substantially to its 1951 position.¹⁴⁷ Furthermore, whereas

¹⁴⁷ The companies acquired by respondent since 1950 had sales aggregating more than \$147,500,000. The sales of the companies ordered to be divested amounted to approximately \$57,120,000. One company, Creameries of America, accounted for \$49,000,000 of the latter figure.

473

Order

Foremost started from a relatively low base, with 1950 sales of approximately \$48,000,000, respondent's 1950 sales were already \$205,000,000 and it was by then one of the top companies in the dairy industry. Respondent has reached the point in its growth where, as the court stated in *U.S. v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (DC ED Pa.), *aff'd.*, 365 U.S. 567, "it can be said that it is a reasonable probability that [further acquisitions] will have the prohibited effects when they are examined in the context of [respondent's] prominent position in the industry." In view of respondent's "proclivity for growth by acquisitions" (*Foremost Dairies*, at 53) [60 F.T.C. 1091], its "prominent position in the industry," and the fact that the cumulative effect of its acquisitions will not be dissipated by the divestitures here ordered, it is the opinion of the examiner that it should be enjoined from making any further dairy acquisitions, for a period of ten years, without prior approval of the Commission.

ORDER

It is ordered. That respondent, Beatrice Foods Co., a corporation, and its officers, directors, agents, representatives and employees, shall, within one (1) year from the date this order shall become final, divest itself absolutely, in good faith, of all stock, assets, properties, rights and privileges, tangible or intangible, including, but not limited to, all contract rights, plants, machinery, equipment, trade names, trademarks, and good will acquired by Beatrice Foods Co., as a result of the acquisition of the stock, share capital, or assets of each of the following named corporations: Creameries of America, Inc. and its subsidiaries, Greenbrier Dairy Products Company, Durham Dairy Products, Inc., Community Creamery, and Dahl-Cro-Ma, Ltd., together with all plants, machinery, buildings, improvements, equipment, and other property of whatever description that have been added to or placed on the premises of each of the former above-named corporations by respondent, as may be necessary to restore each of them as a going concern and to establish each of them as an effective competitor in substantially all the same basic lines of commerce in which each of the respective acquired corporations was engaged at the time of its acquisition.

Pending divestiture, respondent shall not make any changes in any of the above-mentioned plants, machinery, buildings, equipment, or other property of whatever description, which shall impair their present rated capacity for the production of their respective dairy products, or their market value, unless said capacity or value is restored prior to divestiture.

Order

67 F.T.C.

Respondent in such divestiture shall not sell or transfer, directly or indirectly, any of the stock, assets, properties, rights or privileges, tangible or intangible, acquired, added, modified or placed on the premises of any of the above-named concerns by respondent, to anyone who, at the time of divestiture, is a stockholder of respondent, or to anyone who is or, at the time of acquisition, was an officer, director, representative, employee, or agent of, or otherwise, directly or indirectly, connected with, or under the control or influence of, respondent.

It is further ordered, That, in said divestiture, respondent shall not sell or transfer, directly or indirectly, any of the stock, assets, properties, rights or privileges, tangible or intangible, to any corporation, or to anyone who, at the time of said divestiture, is an officer, director, employee or agent of such corporation, which, at the time of such sale or transfer, is a substantial factor in the dairy products industry, if the effect of such sale or transfer might be to substantially lessen competition or tend to create a monopoly or oligopoly in any one of the said dairy products, in any section of the country.

It is further ordered, That the complaint herein be, and it hereby is, dismissed insofar as it alleges that respondent acquired dairy product concerns, other than those hereinabove specifically mentioned, in violation of Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act.

It is further ordered, That respondent, Beatrice Foods Co., shall, within such time as may be fixed by order of the Federal Trade Commission, submit in writing for the consideration and approval of the Commission, its plan for carrying out the provisions of this order, such plan to include the date within which full compliance may be effected.

It is further ordered, That for a period of ten (10) years from the date this order shall become final, respondent, Beatrice Foods Co., shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital or assets (other than products sold in the course of business) of any domestic concern, corporate or non-corporate, engaged principally or as one of its major commodity lines at the time of such acquisition in any state of the United States in the business of manufacturing, processing or selling at wholesale or on retail milk routes (a) fluid milk, (b) ice cream, ice milk, mellorine, sherbets or water ices, (c) natural or processed cheese, or (d) butter, without the prior approval of the Federal Trade Commission.

OPINION OF THE COMMISSION

APRIL 26, 1965

BY ELMAN, *Commissioner*:

I

The complaint in this matter was issued on October 16, 1956, and subsequently amended. It challenges under Section 7 of the Clayton Act, as amended,¹ and Section 5 of the Federal Trade Commission Act² 175 acquisitions made by respondent beginning in 1951. Respondent is the third largest dairy company in the United States in terms of total annual sales (including nondairy products), which were \$443 million in 1959-1960. It ranks fourth in both fluid milk and frozen dessert shipments. While it is principally engaged in the purchase, manufacture, processing and distribution of dairy products throughout the continental United States and Hawaii, it also manufactures and/or sells other food products, including margarine, frozen foods, Chinese and Mexican foods, pickles and preserves, olives and oil, potato chips, candy, mints, and snack foods.³ It also operates a number of public cold-storage warehouses.

Until 1928, respondent was principally engaged in the butter, egg and poultry business. It then began to diversify into other product lines in the dairy field, particularly fluid milk and ice cream. Between 1928 and 1950 its net sales rose from \$57.4 million to \$205.3 million. This increase was due in large part to the acquisition of more than 70 concerns engaged in the purchase, manufacture, processing and distribution of fluid milk, ice cream, and other dairy products. Respondent's program of growth through acquisitions

¹ Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, provides in pertinent part: "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

² Section 5(a) (6) of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (6), provides: "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

³ In 1939 Beatrice began the distribution of frozen foods, primarily the Bird's Eye brand. In 1943 it acquired La Choy Food Products Company, a large manufacturer of Chinese foods. It has since acquired a number of other manufacturers of food and related products, including D. L. Clark Candy Co., D. Richardson Co. (mints), Mario's Food Products (olives and oil), Bond Pickle Company, Squire Dingee Company (pickles and preserves), Lutz & Schramm (pickles and preserves), Brown-Miller (pickles and preserves), Shedd-Bartush (margarine), Tasty Foods, Inc. (potato chips), Gebhardt Chili Powder Co. (Mexican foods), Mitchell Syrup and Preserve Co., M. J. Holloway & Co. (candy), Rosarita Mexican Foods, and Adams Corp. (snack foods). None of these non-dairy acquisitions is challenged in the complaint.

Opinion

67 F.T.C.

continued during the 1950's. Between 1951 and 1961 it acquired 175 dairy concerns; these are the acquisitions challenged in this complaint. The bulk of respondent's \$117 million sales increase between 1951 and 1961 can be traced directly to the companies Beatrice acquired in this period; and sales from plants acquired during the 1950's represented some 36% of Beatrice's total sales in 1961.

Respondent's pre-1950 acquisitions had established it as one of the nation's largest dairy concerns, but with its strength concentrated in the midwest. Respondent's post-1950 acquisitions made it a genuinely national concern, doing business in 37 states (and the District of Columbia), extending from Massachusetts and Alabama in the east to California and Hawaii in the west.

Before 1950, 90% of respondent's fluid milk had been processed and sold in an area extending from the Appalachian Mountains to the Continental Divide, principally composed of eight midwestern states—Ohio, Indiana, Illinois, Iowa, Missouri, Nebraska, Kansas and Oklahoma—and portions of western Pennsylvania and eastern Colorado. The area of distribution of respondent's ice cream and other frozen products was similar, but slightly wider, 80% being accounted for by the eight-state fluid milk area, West Virginia, and certain counties in Pennsylvania, Virginia, Tennessee, Kentucky, South Dakota, Wisconsin, Minnesota and Arkansas. Sixty-three of respondent's 175 post-1950 dairy acquisitions were of fluid milk facilities located in respondent's traditional distribution area, and 69 of ice cream concerns located in its traditional ice cream area. The remaining acquisitions, however, served to broaden respondent's marketing area. By 1956, respondent had plants in 29 states and the District of Columbia, and sales branches in eight additional states.*

Respondent now produces a full line of dairy and related products, including butter, eggs, poultry, ice cream, ice cream mix, ice milk, sherbet, Mellorine, water ices, milk, cream, buttermilk, skim milk, chocolate milk, bulk surplus milk, cheese, cottage cheese, condensed milk, powdered milk, fruitade, oleomargarine, frozen foods and specialties. Its products and sales activities are organized along departmental lines, including the following: Butter and Butter

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

Byproducts, Eggs and Poultry, Ice Cream and Mix, Fluid Milk, Other Manufactured Dairy Products, and Other Sales and Services. Respondent's principal brand is "Meadow Gold"; it is used on butter, ice cream products and fluid milk throughout respondent's marketing area. Respondent also manufactures and distributes ice cream products under 44 other brand names, and fluid milk products under 28 other brand names, in one or more states. These brands are principally those of acquired companies. In addition to product and geographic diversification in the dairy products field, respondent, as has been mentioned, enjoys further diversification in the food industry. At least 30% of its sales are of groceries other than dairy products.

The 175 acquisitions made by respondent since 1950 and challenged in this complaint continue a pattern of growth through acquisitions which respondent has followed since 1928. This pattern is characterized by expansion into new geographic areas through the acquisition of companies having large, modern manufacturing or processing plants, followed by acquisitions of competitors of the acquired firms, thereby increasing the volume of the originally acquired plants. For convenience of reference we can regard mergers of the first type as "geographic market extensions" and mergers of the second type as "horizontals."⁵ Virtually all of the post-1950 horizontal acquisitions were preceded by market-extension acquisitions, and in many cases post-1950 market-extension acquisitions have already been fol-

⁵ "A horizontal merger, as ordinarily understood, is one between firms that make or sell the same product, or products which are close substitutes for each other. However, unless the firms actually operate within the same geographical market, the merger will have no immediate impact upon the market share of the acquiring firm—the hallmark of a conventional horizontal merger. Where the merger involves companies selling in different geographical markets (or, what may amount to the same thing, to different customer classes, cf. *Brillo Mfg. Co.*, F.T.C. Docket 6557 (decided (January 17, 1964)) [64 F.T.C. 245], we have what has been termed a market-extension merger. See *Foremost Dairies, Inc.*, F.T.C. Docket 6495 (decided April 30, 1962) [60 F.T.C. 944]. It may be a merger in which the acquired firm sells the same product as the acquiring firm and is a prospective entrant into the geographical market occupied by the acquiring firm. See *United States v. El Paso Natural Gas Co.*, 1962 CCH Trade Cases ¶ 70571 (D. Utah), prob. juris. noted, 373 U.S. 930; *Foremost Dairies, Inc.*, *supra*, pp. 48-49 [60 F.T.C. 1087-1088]. Or the acquiring firm may be a prospective entrant into the market of the acquired firm. *Foremost Dairies, Inc.*, *supra*, pp. 49-50 [60 F.T.C. 1088, 1089]. * * * Another variant of the conventional horizontal merger is the merger of sellers of functionally closely related products which are not, however, close substitutes. This may be called a product-extension merger." *Procter & Gamble Co.*, F.T.C. Docket 6901 (decided November 26, 1963), pp. 14-15 [63 F.T.C. 1465, 1542-1543]. It should be emphasized that these definitional distinctions are for convenience only, and "import no legal distinctions under Section 7." *Id.*, p. 21 [63 F.T.C. 1547]. Indeed, these categories are sometimes so loosely defined as to become meaningless. See, e.g., Adelman, *Market Issues: An Economist's View*, in *The Impact of Antitrust on Economic Growth* 25, 34 (Transcript of Third Special Conference on Antitrust in an Expanding Economy, Natl. Ind. Conf. Bd., March 5, 1964). Regardless of the nomenclature used, the legal test of any merger or acquisition challenged under Section 7 is the same: whether it may substantially lessen competition or tend to create a monopoly. See p. 26 [p. 715 herein], *infra*.

Opinion

67 F.T.C.

lowed by horizontals.⁶ In many instances, moreover, market-extension acquisitions have been followed by acquisitions of small dairy firms located and operating just outside respondent's markets, thereby expanding the market of the originally acquired plants, as well as increasing their volume; in all such cases the plants of the smaller acquired companies were closed and their locations became distribution branches for the main plant.

While the largest number of respondent's post-1950 acquisitions involved relatively small dairy concerns, 32 of the acquired companies had annual sales of at least \$500,000⁷ and 23 had sales of more than \$1 million. The combined sales of the 32 acquired firms amounted to \$129 million, in comparison to total combined sales for all of the acquired companies of \$147.5 million. Of the 32, 18 were horizontal acquisitions, 13 were market extensions, and 1 was both market-extension and horizontal. In terms of aggregate sales by type of acquisition, the breakdown of the 32 is as follows:

	Number	Aggregate sales (millions of dollars)	Percentage of aggregate sales
Horizontal.....	18	25.6	19.9
Market extension.....	13	54.3	42.1
Market extension and horizontal.....	1	49.0	38.0
Total.....	32	128.9	100.0

Thus, of the larger challenged acquisitions, almost one-quarter in terms of aggregate sales were purely horizontal acquisitions and 42% purely market extensions, while one acquisition—the largest—involves both market-extension and horizontal aspects and represented 38% of the aggregate sales of the 32 principal acquisitions.

The Commission's complaint challenged 77 of respondent's post-1950 acquisitions as unlawful under Section 7 of the Clayton Act and 98 as unlawful under Section 5 of the Federal Trade Commission Act. After extended proceedings, the hearing examiner issued an initial decision dismissing the complaint except as to five acquisitions challenged under Section 7:

⁶ For example: (1) Creameries of America (Idaho Creameries) followed by the acquisition of Baker Union Cooperative Creamery in Oregon; (2) Creameries of America (Dairymen's Association Ltd.) followed by the acquisition of Dahl-Cro-Ma Ltd. in Hawaii; (3) Creameries of America (Prices' Creameries) followed by the acquisition of Lester Ice Cream Co. in New Mexico; (4) Creameries of America (Arden Sunfreeze) followed by the acquisition of Yellowstone Dairy in Wyoming; (5) Boswell Dairies, Inc. followed by the acquisition of Palestine Creamery in Texas; (6) Durham Dairy Products, Inc. followed by the acquisition of Durham Road Dairy in North Carolina; (7) Russell Creamery Co. followed by the acquisitions of Valley Creamery Co. and Excel Ice Cream Co. in Minnesota.

⁷ The 32 acquisitions are listed in the table on p. 701, *infra*.

473

Opinion

Company	Annual sales	Type of acquisition
Creameries of America, Inc.....	\$49, 000, 000	Market extension except in Cali- fornia.
Durham Dairy Products, Inc.....	1, 544, 000	Market extension.
Greenbrier Dairy Products Co.....	3, 483, 895	Horizontal.
Community Creamery.....	2, 302, 829	Do.
Dahl-Cro-Ma, Ltd.....	119, 000	Do.

The hearing examiner ordered respondent (1) to divest itself of each of the five companies, including such "after-acquired" assets as necessary to restore each of them as a going concern and effective competitor in each of the basic product lines in which it was engaged as of the time of acquisition; and (2) to cease and desist for ten years from all future acquisitions in various dairy product lines without prior approval by the Commission.

Companies with annual sales of \$500,000 or over acquired by Beatrice, 1951-61

Company	Annual sales	Type of acquisition	Location
1. Creameries of America.....	\$49, 000, 000	Market extension except in California.	California, Hawaii, Idaho, Utah, New Mexico, Texas, Colorado.
2. Westerville Creamery.....	13, 820, 412	Market extension.....	Westerville, Ohio.
3. Boswell Dairies.....	7, 160, 907	do.....	Ft. Worth, Tex.
4. Clover Creamery.....	6, 892, 321	do.....	Roanoke, Va.
5. Medo-Land Creamery.....	4, 200, 000	do.....	Eugene, Oreg.
6. Assoc. Dairy Products.....	3, 947, 526	do.....	Glendale, Ariz.
7. Greenbrier Dairy Products.....	3, 483, 895	Horizontal.....	Beckley, W. Va.
8. Dairyland Farms and Valdair Creamery.	3, 300, 000	Market extension.....	Opelika and Shamut, Ala.
9. Louis Sherry, Inc.....	3, 242, 000	Horizontal.....	New York City.
10. Tro-Fe Dairy, Inc.....	2, 953, 067	do.....	Gadsden, Ala.
11. Model Farms Dairy.....	2, 795, 700	Market extension.....	Louisville, Ky.
12. Russell Creamery.....	2, 697, 464	do.....	Brainerd, Minn. and Superior, Wis.
13. Community Creamery.....	2, 302, 829	Horizontal.....	Missoula, Mont.
14. Dothan Ice Cream Co.....	2, 150, 953	Market extension.....	Dothan, Ala.
15. Eskay Dairy Co.....	2, 111, 000	do.....	Ft. Wayne, Ind.
16. Delview Dairy.....	1, 960, 990	do.....	Tuscaloosa, Ala.
17. Covalt Dairy.....	1, 681, 591	do.....	Muncie, Ind.
18. Clarksburg Dairy.....	1, 636, 410	Horizontal.....	Clarksburg, W. Va.
19. Durham Dairy Products.....	1, 544, 000	Market extension.....	Durham, N.C.
20. Billings Dairy.....	1, 540, 039	Horizontal.....	Billings, Mont.
21. Sanitary Milk and Ice Cream Co..	1, 500, 879	do.....	Morgantown, W. Va.
22. Bluff City Dairy.....	1, 305, 423	do.....	Hannibal, Mo.
23. Henne Dairy Products.....	1, 138, 577	do.....	Butte, Mont.
24. Twin Valley Products.....	939, 876	do.....	Emporia, Kans.
25. Melvern-Fussell (Arden Farms)...	870, 577	do.....	Alexandria, Va.
26. Linwood Division (Arden Farms)	844, 965	do.....	Kansas City, Mo.
27. Kentucky Ice Cream Co.....	830, 813	do.....	Richmond, Ky.
28. Princeton Creamery.....	735, 604	do.....	Princeton, Ky.
29. Pioneer Dairy.....	687, 571	do.....	Great Falls, Mont.
30. Central Dairy.....	559, 866	do.....	Columbia, Mo.
31. Valley Creamery Co.....	533, 834	do.....	East Grand Fork, Minn.
32. A. L. Brumund Co.....	500, 000	do.....	Waukegan, Ill.

Opinion

67 F.T.C.

Both parties have appealed to the Commission. Respondent challenges the hearing examiner's findings of violation, with the exception of the finding that the acquisition of Dahl-Cro-Ma violated Section 7, and his order. Complaint counsel urge that the hearing examiner's findings and order should be broadened in two respects:

(1) To include a finding of illegality under Section 7 of the Clayton Act and order divestiture with respect to two of respondent's acquisitions which the examiner concluded would have been unlawful had the acquired companies been engaged in commerce to a substantial degree. These were:

Company	Annual sales	Type of acquisition
Clarksburg Dairy.....	\$1, 636, 410	Horizontal.
Associated Dairy Products.....	3, 947, 526	Market extension.

(2) To include a finding that six other acquisitions of respondent violated Section 5 of the Federal Trade Commission Act. Complaint counsel do not, however, recommend divestiture or other relief against these particular acquisitions. Four of the acquired firms were not engaged in commerce; two were not corporations. The examiner made no detailed findings as to the effects on competition of these acquisitions. The acquisitions were:

Company	Annual sales	Type of acquisition
Billings Dairy.....	\$1, 540, 039	Horizontal.
Sanitary Milk and Ice Cream Co.....	1, 500, 879	Do.
Bluff City Dairy.....	1, 305, 423	Do.
Eskay Dairy Co.....	2, 111, 000	Market extension.
John Costello Co.....	(⁶)	Horizontal.
Clover Creamery.....	6, 892, 321	Market extension.

⁶ While the record contains no sales figures, Costello's sales were clearly substantial as shown by the production figures: 621-855 gallons of ice cream; 2,732,687 units of cottage cheese; and 409,688 units of Reddi-Whip.

The following tabulation gives some idea of the present posture of the case in terms of the 32 "large" (more than \$500,000 in sales) acquisitions. The hearing examiner found four of these acquisitions illegal, involving \$56 million of sales, or something more than 40% of the \$129 million of sales for the 32 challenged acquisitions of large concerns. If complaint counsel's appeal were to be upheld, the sales figure of illegal acquisitions would rise to \$75 million, or 58% of the \$129 million.

473

Opinion

Type	Number	Aggregate sales (millions of dollars)	Found illegal by hearing examiner	
			Number	Aggregate sales (millions of dollars)
Horizontal.....	18	25.6	⁹ 2	5.8
Market extension.....	13	54.3	1	1.5
Market extension and horizontal...	1	49.0	1	49.0
Total.....	32	128.9	⁹ 4	⁹ 56.3

Type	Appealed by complaint counsel		Hearing examiner plus appealed		Percent of aggregate sales challenged
	Num- ber	Aggregate sales (millions of dollars)	Num- ber	Aggregate sales (millions of dollars)	
Horizontal.....	¹⁰ 4	6.0	6	11.8	46.1
Market extension.....	3	13.0	4	14.5	26.7
Market extension and hori- zontal.....			1	49.0	100.0
Total.....	¹⁰ 7	¹⁰ 19.0	11	75.3	*58.4

⁹ One smaller horizontal acquisition with \$119,000 sales was also found illegal.

¹⁰ Also, one other horizontal acquisition was appealed for which dollar sales are not in the record.

*Average.

II

The Commission brings to the consideration of individual cases its accumulated knowledge and experience, often acquired over a period of many years, of an industry's competitive conditions. Such knowledge and experience, which may be found in economic reports or studies conducted by the Commission, in the record of prior cases, and elsewhere,¹¹ is particularly valuable in a merger case, where an informed and expert judgment of probable competitive effects requires an understanding of the economic context of the merger which may be difficult to obtain from a single record. The economic context of dairy acquisitions has been illuminated by numerous studies and reports of the Commission¹² as well as by the

¹¹ Cf. *Republic Aviation Corp. v. Labor Board*, 324 U.S. 793; *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1097 (separate opinion); *Manco Watch Strap Co.*, 60 F.T.C. 495.

¹² *Report of the Federal Trade Commission on the Sale and Distribution of Milk*, 75th Cong., 1st Sess., H. Doc. No. 95 (1937); *Report of the Federal Trade Commission on the Merger Movement* (1948); *Federal Trade Commission Report on Corporate Mergers and Acquisitions* (1955); *Milk and Milk Products, 1914-1918* (1921); *Hearings on the Sale and Distribution of Milk in Connecticut and Philadelphia* (1935); *Interim Report With Respect to the Sale and Distribution of Milk and Milk Products* (1936); *Report on the Distribution and Sale of Milk and Milk Products, Boston, Baltimore, Cincinnati, St. Louis* (1936); *Report on the Sale and Distribution of Milk and Milk Products New York Sales Area* (1937); *Report on the Sale and Distribution of Milk and Milk Products in Connecticut and Philadelphia Milk Sheds* (1935).

records in a large number of cases involving a variety of competitive practices, especially price discrimination, by dairy companies.¹³ Mergers in the dairy industry have been under particularly close scrutiny by the Commission for the past quarter century. The Commission issued reports analyzing dairy acquisitions in 1937, 1948, and 1955,¹⁴ and in 1956 issued complaints—of which the complaint in the present case is one—challenging the legality of a large number of acquisitions made by each of the four leading dairy companies.¹⁵ A brief review of the Commission's prior merger cases in the dairy industry will help to place the present case in its proper perspective.

In *Foremost*, 60 F.T.C. 944, the complaint challenged a large number of acquisitions of dairy companies made by respondent between 1951 and 1955. The cumulative result of the challenged acquisitions was to transform Foremost from a medium-sized dairy to one of the four national leaders, with total sales in 1955 of almost \$400 million. The Commission's final order, requiring extensive divestiture, was appealed by respondent to the United States Court of Appeals for the Fifth Circuit. However, on November 23, 1962, all further review proceedings were, at the parties' request, stayed by the court to permit a practicable program of divestiture to be worked out. Subsequently, a plan of divestiture was agreed upon, the Commission's order of divestiture modified accordingly, and the litigation in the court of appeals terminated. The modified order (issued March 5, 1965) requires respondent to divest itself of the milk, frozen dessert, and related assets located in its southeastern and northeastern regions, including the assets formerly owned by Philadelphia Dairy Company, as well as two other properties located in other parts of respondent's marketing area. The order also prohibits re-

¹³ See, e.g., *United Buyers Corp.*, 34 F.T.C. 87 (price discrimination); *Badger-Brodhead Cheese Co.*, 31 F.T.C. 1017 (price-fixing and monopolization); *Carnation Co.*, 60 F.T.C. 1274 (exclusive dealing); *Independent Grocers Alliance Distribution Co. v. F.T.C.*, 203 F.2d 941 (7th Cir. 1953) (price discrimination); *Borden Co.*, 54 F.T.C. 563 (price discrimination); *National Dairy Products Corp.*, F.T.C. Docket 7018, complaint issued December 31, 1957 (pending on appeal before Commission) (price discrimination); *Borden Co. v. F.T.C.*, 339 F.2d 133 (5th Cir. 1964) (price discrimination); *Foremost Dairies, Inc.*, F.T.C. Docket 7475 (decided May 23, 1963) [62 F.T.C. 1344]; *Borden Co. v. F.T.C.*, 339 F.2d 953 (7th Cir. 1964) (price discrimination); *Beatrice Foods Co.*, F.T.C. Docket 7599, complaint issued September 28, 1959 (pending on appeal before Commission) (price discrimination); *Dean Milk Co.*, F.T.C. Docket 8032, complaint issued June 30, 1960 (pending on appeal before Commission) (price discrimination); and cases cited in note 15, *infra*.

¹⁴ *Report of the Federal Trade Commission on the Sale and Distribution of Milk*, note 12, *supra*; *Report of the Federal Trade Commission on the Merger Movement*, note 12, *supra*; and *Federal Trade Commission Report on Corporate Mergers and Acquisitions*, note 12, *supra*.

¹⁵ *Foremost Dairies, Inc.*, F.T.C. Docket 6495, 60 F.T.C. 944; *National Dairy Products Corp.*, F.T.C. Docket 6651 [62 F.T.C. 120]; *Borden Co.*, F.T.C. Docket 6652; and the present case.

spondent, for a period of 10 years, from acquiring without prior approval by the Commission any company engaged in the manufacture, processing or sale at wholesale or on retail milk routes of fluid milk, ice cream, ice milk, Mellorine, sherbet or water ices. The divested properties represent some 30% of Foremost's total sales in 1962, and about 36% of the combined pre-merger sales of the acquired companies.

The *National Dairy* case presented a somewhat different factual situation from *Foremost*. Although National Dairy had acquired some 600 dairy companies prior to 1951 and had thereby established itself as the leading firm in the nation in the fluid milk and frozen dessert industries, after the passage of the Celler-Kefauver merger law its pace of acquisition, in sharp contrast to Foremost's, slowed notably: Only 2 of the acquisitions challenged in the Commission's complaint were of substantial firms. The *National Dairy* proceeding was terminated by the entry of a consent order on January 30, 1963 [62 F.T.C. 120]. Divestiture of both substantial acquired firms, which between them accounted for 32% of the combined pre-merger sales of all the acquired companies, was ordered. In addition, a 10-year ban on future acquisitions, similar to that in the amended *Foremost* order, was imposed.

Like *National Dairy*, the *Borden* case presented special problems. While a large number of acquisitions made by Borden between 1951 and 1956 were challenged in the complaint, many of the acquired companies proved to be too unprofitable for their restoration as viable competitive factors to be practicable. However, by consent order issued April 15, 1964, Borden was directed to divest 8 of the acquired companies, representing some 23% of the combined pre-merger sales of all the acquired companies. The order also contains a 10-year ban on future acquisitions similar to those in *Foremost* and *National Dairy*.

The Commission's prior proceedings involving dairy acquisitions are pertinent to the consideration of the present case in several respects. First, they suggest the practical difficulty of unscrambling large numbers of acquisitions in the dairy industry made over a long period of years. These practical problems of relief must be borne in mind in fashioning any remedial order in this industry. Second, they indicate that the problem of acquisitions in the dairy industry is industry-wide. Not just one but several of the leading firms have embarked on extensive programs of acquisition. The Commission has not singled out any one of the major acquiring companies for remedial action, but has proceeded on an even-handed and equitable

Opinion

67 F.T.C.

basis against all. Recognizing an industry-wide problem, the Commission has attempted, so far as possible, an industry-wide solution. The nature and dimensions of the dairy industry's merger problem can only be understood in terms of the economic structure and dynamics of that industry, to which we now turn.

III

The evidence in this case discloses that eight large dairy companies have made a total of more than 1900 acquisitions since 1905 (505 between 1951 and 1961 alone), a record which led a Congressional committee staff report to note that "[c]learly, the most merger-prone industry has been dairy products."¹⁶ What is the explanation for this phenomenon? To understand it, we must review briefly (1) the structure of the industry, (2) technological and market factors affecting its structure, and (3) the nature and extent of the merger movement in the industry.

The dairy industry today is composed of a few very large national and regional concerns and a large number of very small ones. In 1959-1960 the total sales of the eight largest national and regional dairy companies were as follows:

Company:	Sales (thousands)
National Dairy Products Corporation -----	\$1,667,176
Borden Company -----	956,014
Beatrice Foods Company -----	443,049
Foremost Dairies Company -----	436,981
Carnation Company -----	417,629
Arden Farms Company -----	364,996
Pet Milk Company -----	195,033
Fairmont Foods Company -----	97,295
	<hr/>
	¹⁷ 4,578,183

¹⁶ Staff of H.R. Select Comm. on Small Business, *Mergers and Superconcentration—Acquisitions of 500 Largest Industrial and 50 Largest Merchandising Firms*, Nov. 8, 1962, 87th Cong., p. 26.

¹⁷ These sales figures reflect the total volume of sales activity of the principal dairy companies, not only in the dairy business, but in a variety of other areas of economic activity in which they are engaged. For example, National Dairy Products Corporation has grown "into a great international enterprise with a broad and varied line of quality food products . . . operating about 500 processing, manufacturing and distributing facilities in countries around the world, and exporting from many of these locations to other lands." (National Dairy Products Corp. Annual Report, 1963, p. 3). The president of National Dairy expounded on the company's position in the report of the 40th Annual Meeting (April 16, 1964, pp. 6-7) as follows:

"And so, from just two products in 1923, we now process jellies and preserves in New York State, and Vegemite in Australia—we turn out citrus products in Florida, and manufacture cream cheese in England—we refine edible oils in Tennessee, and make mayonnaise in Mexico—we package candy in Indiana, and bottle ketchup in West Germany—we make peanut butter in Canada, and salad products in Venezuela—and on and on, across a wide range of food products and across many geographical areas." Beatrice is similarly diversified. See p. 697, note 3, *supra*.

473

Opinion

There is considerable size disparity among the eight largest companies. The sales of National Dairy, the largest, are approximately 60% greater than those of Borden, the second largest. The third, fourth, fifth and sixth largest dairy companies are about on a par with each other in total sales, but each is only about one-quarter the size of National Dairy and less than one-half the size of Borden. In terms of total sales, National Dairy is 17 times larger than the eighth largest.

The largest proportion of sales of most dairy companies is in two categories, bottled fluid milk and frozen desserts. The share of total domestic shipments of these two products in 1958 of each of the largest companies was as follows:

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

The great majority of dairy companies after the leading eight are very small. In 1961-62, only 731 of the 7,176 fluid milk plants in America had an annual volume exceeding 5 million quarts. To put this another way, 9 out of 10 fluid milk plants had an annual volume of less than \$1 million.¹⁸ Whereas the eight largest companies averaged 4.0% of the value of shipments of fluid milk and 5.5% of the value of shipments of frozen desserts in the United States, the re-

¹⁸ Since 95% of all dairy companies are single-unit operations, the number of plants does not seriously overstate the number of companies in the fluid milk and frozen dessert industries. See *Nature of Competition in Fluid Milk Markets: Market Organization and Concentration* (U.S. Dept. of Agriculture Econ. Rep. No. 67), pp. 6, 46.

remaining milk processors had an average of 0.01% of the value of shipments of fluid milk, making the average national company 400 times larger than the average remaining milk processor. Since the remaining frozen dessert manufacturer had an average of .05%, the average national company was 110 times larger than the average remaining manufacturer of frozen desserts.

In 1958 the fifty largest companies had 45% of the value of shipments of fluid milk in the United States and 69% of the value of shipments of frozen desserts. The disparity in size between the eight or nine largest and even the larger independents is illustrated by the fact that the eight largest companies had 64% of the share of fluid milk shipments held by the 50 largest companies and 69% of the share of frozen dessert shipments held by the 50 largest companies. In both product lines, therefore, the 42 largest independents averaged less than one-tenth the share of the eight largest companies in fluid milk and frozen dessert shipments. Moreover, fewer than 50 fluid milk companies have annual sales of as much as \$15 million, and only 45 fluid milk corporations have assets of more than \$5 million.¹⁹ Clearly, the vast majority of all dairy companies are very small.²⁰ Only a handful can be regarded as medium-sized or large.²¹

Since the marketing of both fluid milk and frozen desserts is primarily on a local or regional basis, the national sales figures substantially understate the degree of concentration in the actual dairy markets. In local markets concentration is very high. This is true regardless of whether market boundaries are drawn about particular cities or broader geographic regions. The four largest dairies typically account for well over 50% of total fluid milk and ice cream sales in the individual local markets where they do business. It is not uncommon in smaller markets for as few as three producers to account for 75% of the sales, and one producer for 50%. According to a recent study by the United States Department of Agriculture (*Nature of Competition in Fluid Milk Markets*, p. 13, *supra*, n. 18) the average market share of the four largest sellers in 71 fluid milk markets was 82.6%. In small markets the four largest had 95%, and in large markets about 61%. Concentration is very high even

¹⁹ *Nature of Competition in Fluid Milk Markets, supra*; I.R.S. *Source Book of Statistics of Income, Active Corp. Income Tax Returns, July 1961-June 1962*.

²⁰ In 1958, 75.9% of all fluid milk plants were operated by companies with total sales of less than \$700,000, and 85.6% of all plants were operated by companies with sales of less than \$1,400,000. *Nature of Competition in Fluid Milk Markets, supra*, p. 52.

²¹ Of the larger firms, only 7 are regarded by the Department of Agriculture as national, and 8 as regional. All the rest are essentially local. *Nature of Competition in Fluid Milk Markets, supra*, p. 6.

if market boundaries are drawn quite broadly. Thus, in 1957 just five national companies produced 55% of all the ice cream sold in the State of California. By all tests concentration in the sale of dairy products is very high. See *Procter & Gamble Co.*, F.T.C. Docket 6901 (decided November 26, 1963), p. 42 & nn. 40-41 [63 F.T.C. 1465, 1562].

Notwithstanding the paramount position of a few leading firms there were, at least until quite recently, a relatively large number of independent dairies in most markets. As recently as 1950 there were 16,089 fluid milk plants and 4,202 ice cream plants, owned for the most part by small single-plant companies (see note 18, *supra*). In the 1950's however, the number of fluid milk plants declined by nearly 9,000, to 7,176, and the number of ice cream plants fell by nearly 1,000, to 3,226. These substantial declines were in addition to those of previous decades. And, as we explain below, the high mortality rate among small dairies is likely to continue. Technological considerations alone may cause the demise, within the foreseeable future, of more than one-half the remaining fluid milk plants.

What is behind the drastic and continuing transformation in the structure of the industry? In the early decades of the twentieth century the dairy industry was highly fragmented. It was composed of many thousands of small, locally owned enterprises doing a local business. Because of the perishability of the product, and because many towns had ordinances requiring that the product be processed in the town in which it was sold, the typical milk market was small and completely local in nature. Entry into the industry and into particular local markets was easy, since capital entrance requirements were minimal and there were no substantial technological or other economies of scale.

With a technology and economic structure so suitable to local, independent, small-business operations, it is not surprising that the fluid milk industry in these early years consisted of a very large number of small producers serving separate, isolated town markets. Each locality had its local processors supplying the needs of the community. Many of them were producer-distributors, *i.e.*, farmers who produced the raw milk and bottled it for home sale and delivery. Those companies that did not produce their own milk purchased it from local farmers on the basis of individually-negotiated contracts. Home-delivered milk constituted over 60% of sales, and the price of milk sold in stores was usually the same as for home-delivered. Milk companies operating manual plants and selling un-

graded milk in glass-filled containers on local home-delivery routes could operate profitably on 500 gallons a day.

A number of developments tended to break down the link between producer and distributor. Among them were the growth of larger cities, the improvement of transportation (which permitted the rapid shipment of perishable products for city consumption), the invention of electrical refrigeration, and the widespread adoption of pasteurization.²² These technological developments weakened the position of the small independent dairy. They also made entry into new markets much more difficult for such dairies. Moreover, beginning in the early 1920's and extending through the 1930's, and indeed on to and including the 1950's, a vast merger movement swept the industry, as a result of which thousands of firms in the industry disappeared as independent competitive factors. It is impossible to disentangle the various root causes of the long-run decline in the number of independent dairy firms. But this much seems clear. Technological change may have dictated the demise or absorption of many marginal local dairy companies; it did not dictate the rise of vast, national, multi-plant dairy companies. That development is solely attributable to the merger movement, the character of which was described by the Commission in one of its studies of mergers:²³

[T]he growth of such outstanding Nation-wide companies as National Dairy Products Corp. and the Borden Co. could be likened to an acquisition itinerary, sweeping across the country from one large city to another, and gathering in its wake hundreds of companies serving small communities as well. During the 22-year period, 1924 through 1945, National Dairy Products acquired more than 400 concerns engaged in the processing and distribution of fluid milk, ice cream, cheese, butter, and condensed and evaporated milk.

* * * * *

[B]eginning in 1927, Borden embarked on a broad and ambitious program of diversification and expansion through acquisitions. From that date through 1945, Borden Co. has bought no less than 531 formerly independent enterprises or groups of enterprises embracing all divisions of the dairy products industry, including fluid milk, ice cream, cheese, butter, condensed and evaporated milk, milk byproducts, and miscellaneous other products.

²² "It was not until fifty years after its discovery that pasteurization came to have commercial importance in the processing of milk. The initiative came from the cities. Pasteurization of milk was begun in Cincinnati in 1897; in New York, 1898; in Philadelphia, 1899; in St. Louis, 1900; in Chicago, 1908. As late as 1900 only 5 percent of the milk consumed in New York was pasteurized. But between 1900 and 1920 most of the larger cities took the pledge. In 1910 it was estimated that about 50 percent of the milk sold in cities was pasteurized; by 1915 the volume had increased to 80 percent." Hamilton *et al.*, *Price and Price Policies* 455 (1938).

²³ *Report of the Federal Trade Commission on the Merger Movement* (1948), pp. 37-38.

473

Opinion

The geographic scope of operation of these two leading dairy firms was described also (p. 38):

With plants located in all but 6 of the 48 States, National Dairy operates in every part of the United States east of the Rocky Mountains, gathering and distributing fluid milk, and manufacturing butter, cheese, ice cream, evaporated milk, or other milk products. Similarly, the Borden Co. covers most of the country, distributing fluid milk in 19 States and manufacturing ice cream in 27 States. In addition, it operates 16 cheese plants in Wisconsin and others in Illinois, New York, Ohio, and Tennessee.

The report pointed out that in achieving such geographical coverage, the leading dairy firms had relied almost completely upon acquisitions, and also that most of the acquired companies with significant market positions had achieved their positions by earlier mergers.

In the post-World War II years, the survival of the independent dairy sector continued to be endangered by the combined effects of technology and merger. Sanitary processes were greatly improved. The Grade A Model Code of the United States Public Health Service was almost universally adopted. Milk handling and pasteurization equipment was vastly improved. Packaging methods were changed radically; an almost complete shift from glass bottles to paper containers occurred and the half-gallon container emerged as the most popular package. There was a rapid transition from ordinary pasteurized to homogenized milk.²⁴ Processing and delivery equipment was greatly improved, diminishing the perishability of the product and enlarging the geographical scope of markets. And supermarkets came largely to replace home delivery as the major channel of fluid milk distribution. All of these developments have tightened the competitive pressure on the smaller producers and made efficient operation an increasingly expensive proposition in the dairy industry. Many of the smaller producers have not been able to adjust successfully to the new technological requisites of efficient competitive operation; this helps explain the marked decline noted above in the number of small fluid milk producers.²⁵

²⁴ In 1950 homogenized milk represented approximately 50 percent of the consumption; by 1962 virtually the whole consumption was of this type. *Changing Patterns in Fluid Milk Distribution* (U.S. Department of Agriculture, August 1956); *Milk Distributors' Operations* (U.S. Department of Agriculture, November 1962).

²⁵ Set forth below is a table comparing the number of fluid milk plants in the United States in 1950-1951 with those in 1961-1962.

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

Nor is there anything to indicate that in the future the high mortality rate among small dairies will subside. A fluid milk plant must have a volume of at least 1,500 gallons a day if it is to utilize economically the smallest automatic paper packaging equipment. This does not mean an enormous plant is required; one able to process about 1.5 million quarts per year would suffice. But in 1961-1962 70% (about 4,900) of all milk plants had an annual volume of less than 1 million quarts per year²⁶ and another 20% had an annual volume of between 1 and 5 million quarts per year. One of respondent's witnesses estimated that in 1960 there were only 1,098 independent fluid milk companies²⁷ in the entire United States which were processing 1,600 gallons per day—and the technological minimum-size plant may well be larger. Two of respondent's witnesses placed the minimum at approximately 2,000 gallons per day. These facts clearly portend a substantial decrease in the number of competitors in the years ahead.²⁸ Moreover, even a firm of efficient size may not be large enough to penetrate markets where the giants of the industry are well entrenched. Barriers to entry have reached a point where, it would appear, only a substantial firm can be reckoned a real competitive factor in this industry—and, as we have noted, after the big eight there are very few substantial firms. The middle tier of dairies is probably composed of few more than the 50 largest firms, the smaller of which probably have annual sales of only about \$10 million.

Similar technological changes have occurred in the ice cream industry during the post-war period. There has been a marked trend toward automation in manufacturing and packaging. Many plants of wholesale ice cream manufacturers have become semi-automated.

²⁶ This figure includes 1,858 plants whose productive capacity is unknown. The record indicates, however, that plants in this category consist principally of small plants whose volume is so small that the trade association which compiled the above data was unable to ascertain their volume.

²⁷ He defined an independent company as any processor except Arden, Beatrice, Borden, Carnation, Foremost, Fairmont, Kroger, National Dairy, Pet Milk, Safeway, Swift, and Hood.

²⁸ Respondent argues that the number of "viable independent competitors" is increasing because the number of fluid milk companies processing 1,600 gallons per day increased between 1950 and 1960—from 805 to 1,098. This reasoning is specious. It is not appropriate to estimate the number of viable competitors in 1950 on the basis of today's technology; in 1950 smaller plants may well have been viable competitors. All respondent's statistics show is that while nearly 9,000 small dairies discontinued operations during the 1950's, about 293 joined the over 1,600 gallon-per-day class; and, of course, most of these remain of very modest size.

Some plants have become fully automatic; in them as few as two employees operate the entire plant by pushing a series of buttons at a central control board. Such equipment is expensive and requires a certain minimum volume to be efficient and economical. While there is dispute as to the precise dividing line between "viable" and "marginal" plants, the record indicates that inability to afford the requisite types of equipment, or to achieve sufficient volume to justify their purchase, have been significant factors in the demise of many small firms.²⁹

These technological changes of the 1950's were accompanied by another wave (or continuation of the old one) of dairy mergers: Between 1950 and 1961, the eight large national dairy companies—National Dairy Products, Borden, the present respondent (Beatrice), Foremost Dairies, Carnation, Arden Farms, Fairmont Foods, and Pet Milk—acquired 505 other dairy concerns, representing almost 40% of the total number of recorded acquisitions by these top dairy companies since the early 1900's. Many of these acquisitions have involved relatively small companies; but a substantial number have been of significant factors in various markets, and, on an overall national basis, the effect of the merger movement has been to increase the concentration of the bulk of the nation's dairy assets in the hands of a few firms. In fluid milk, mergers added to the absolute position of the big eight and produced a slight increase in their already substantial share of national sales. In the meantime, the tier of dairies below the big eight appears to have enhanced its relative position (though at a slower rate than they would have had not their ranks been depleted by acquisitions by the largest dairies, which since 1950 have acquired approximately 10 dairy companies

²⁹ There has been a substantial decline in the number of ice cream plants since 1950, although the decline has not been so great as that of milk plants. Set forth below is a table comparing the number of ice cream plants in the U.S. in 1961-1962, with those in 1950-1951:

Year	Number of plants			Total
	No volume reported	Volume less than 250,000 gallons	Volume over 249,999 gallons	
1950-51.....	1,020	2,772	411	4,202
1961-62.....	520	2,176	530	3,226
Percent change.....	-49.02	-21.51	+28.95	-23.23

Opinion

67 F.T.C.

with assets of \$10 million or more), while at the lower end of the size scale great inroads were made in the number of small firms. In the frozen dessert end of the dairy business, mergers contributed not only to the absolute size of the big eight but also to a substantial increase in their share of total production, from 35.0% in 1950 to 39.2% in 1957.

The post-1950 dairy merger movement has in general resembled that of earlier years. The top regional and national firms have increased the multi-market scope of their operations through numerous market-extension mergers. But, at the same time, the recent mergers have broadened the multi-product character of the top firms. Not only have they filled out their dairy lines; they have expanded their businesses into related food products of the type marketed to the supermarket chains along with dairy products. The merger movement has thus enabled the leading dairy firms to straddle many markets, to market a full line of dairy products, and to supplement their lines with other grocery products.

These are the cardinal facts which emerge from a review of the economic structure and dynamics of the dairy industry: (1) Concentration has already reached formidable proportions in local areas, which are the economically relevant markets in which to measure competition in this industry. (2) The prospects of survival for small firms, and the conditions for entry of new small-business competitors into the industry and its markets, have worsened. There are relatively few firms outside of the leading eight which can be rated as really strong competitors under present market conditions. (3) The leading firms have been embarked on an extensive and far-reaching program of acquisitions, the result of which has been to increase concentration still further and speed the exit of the independents. (4) No showing has been made that these acquisitions (at least those that have taken place since 1950) were necessary for the leading dairies to achieve the economies of scale made possible by the industry's technological revolution, or that the acquired companies could not have achieved such economies through merger with firms much less powerful, well entrenched, and geographically far-flung than the big eight.

IV

In its express terms, the merger law proscribes any merger or acquisition involving corporations engaged in commerce—however the merger be classified, as horizontal, vertical, market-extension,

product-extension, or defying neat classification—if its effect, “in any line of commerce in any section of the country,” “may be substantially to lessen competition, or to tend to create a monopoly.” (See p. 699, note 5, *supra*.) The legislative history reflects the particular concern of Congress with the possible adverse competitive effect of mergers that were not strictly “horizontal” in the sense of a merger between companies actually competing with one another at the time of the merger, but that were, rather, geographical “market extensions,” involving firms which, while they sold the same product, were not actual competitors at the time of the merger since they sold in different geographical markets. See *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1050–52. The Commission, in its *Report on the Merger Movement* (1948), on which the framers of the Celler-Kefauver Act drew heavily, had given special emphasis to the dangers to competition posed by market-extension acquisitions, especially in the dairy industry where such acquisitions were so common.³⁰ The example of Borden’s market-extension acquisitions in the dairy industry between 1940 and 1947 was expressly cited in the committee deliberations on the bill that became the amended Section 7. See H.R. Rep. No. 1191, 81st Cong., 1st Sess., p. 11 & chart I (1949).

A fundamental concern of Congress in amending Section 7 of the Clayton Act in 1950 was the effect on competition of concentrating the business of a particular market or industry in the hands of too few sellers.³¹ In markets where one or a very few firms control a large part of the total sales, there is a tendency for all firms to refrain from vigorous price competition. Each large seller knows that if he makes an across-the-board price cut, the inroads on his major competitors’ market shares will be so palpable that they will be compelled immediately to make a corresponding price cut—and that consequently

³⁰ See p. 710, *supra*. The Report stated (p. 37).

“Typically, the firms which have followed this pattern have grown by buying up concerns making the same product in one or a few localities, strengthening their position in those localities by additional acquisitions, branching out to obtain control in other localities, consolidating their local acquisitions into broad regional or district organizations, bringing into the fold leading companies in the major regions, and, by this steady pattern of encroachment, becoming Nation-wide organizations with a substantial degree of control in the Nation as a whole, a much higher degree in many of the important regions, and a near-monopoly position in numerous individual localities.

“It is in such fields as dairy products and bread that this type of merger activity has been pushed most vigorously. In fact, the growth of such outstanding Nation-wide companies as National Dairy Products Corp. and the Borden Co. could be likened to an acquisition itinerary, sweeping across the country from one large city to another, and gathering in its wake hundreds of companies serving small communities as well.”

³¹ See *Brown Shoe Co. v. United States*, 370 U.S. 294, 315; S. Rep. No. 1775, 81st Cong., 2d Sess. 5 (1950); *Procter & Gamble Co.*, F.T.C. Docket 6901 (decided November 26, 1963), p. 23. [63 F.T.C. 1465, 1548].

there is little advantage to be gained from price cutting. The small firms in such a market are also inhibited from initiating price competition. They know that the majors will react promptly, perhaps with drastic effect, to any attempt to disturb the price structure.

There may, however, be forces at work in such a market which counteract to some extent the adverse competitive conditions flowing from the fewness of the sellers. One such force is the condition of entry by new competitors. It may be such that many firms can and promptly do enter the market and establish themselves as viable and substantial competitors, thereby eroding the market power of the dominant sellers. Moreover, the mere prospect of new competition may have a salutary effect. The large seller in a concentrated market knows that the entry of new competitors would jeopardize the stable price structure of the market and might well lead to lower prices, as a result of greater competition, and lower profits. He also knows that if prices in the market are so high as to make it easy for a new competitor to cover his costs, make a healthy profit, and still be competitive with the firms presently operating in the market, the attractiveness of entry to prospective competitors will be great, and the likelihood of actual entry substantial. The most effective way of discouraging entry into a concentrated market is for the major sellers to keep their prices down to a level low enough to make entry unattractive to new competitors.

Thus, the condition of entry, or the state of potential competition, may have a significant bearing on the degree to which a concentrated market will exhibit the symptoms, such as high prices, of weak or ineffective competition; and a firm not actually selling in a market, a firm that is merely a prospective or potential competitor there, may nevertheless be a significant competitive factor in the behavior of the market. It disregards business realities to view such a firm, which may be as much a real competitive factor as the firms currently selling in the market, as being entirely "outside" the market, or to deny that, just as the elimination of an actual competitor may adversely affect the competitive structure of a market, so may the elimination of a potential competitor.

This does not mean that actual and potential competition are completely interchangeable concepts. Even in a competitively structured, unconcentrated market, the elimination of a substantial competitor may still be undesirable from the standpoint of maintaining competition, for it can bring the market structure significantly closer to a condition of such concentration that anticompetitive effects become foreseeable. See e.g., *Brown Shoe Co.*, *supra*, 370 U.S., at 343-

44. But the absorption of a potential competitor in such a market is likely to have much less competitive significance. If the market is competitive in structure, prices are likely to be at a competitive level, and so the restraining effect of potential competition on unduly high, noncompetitive price levels may be irrelevant.

Another difference between actual and potential competition is that the adverse effects that result from an absence of actual competition are rarely cancelled out completely by the presence even of substantial potential competition. Cf. *Ekco Products Co.*, F.T.C. Docket 8122 (decided June 30, 1964), pp. 6-7 [65 F.T.C. 1163, 1207-1208]. Potential competition may tend to keep prices in a concentrated market down to entry-discouraging levels, but obviously the price low enough to dissuade a firm from trying to force its way into a new market—always a risky venture—may be substantially higher than the price that would prevail if there were vigorous competition among the sellers already there.

That potential competition is an important and substantial, and not a theoretical or speculative, force for counteracting the anti-competitive and monopolistic conditions which tend to be present in concentrated markets has been given explicit recognition in a series of recent Supreme Court decisions interpreting Section 7 of the Clayton Act.³² In *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, the acquired company was deemed by the Court a “substantial factor in the California market” (376 U.S., at 658), which the acquiring company dominated, even though the acquired company had never succeeded in doing business in California. The Court considered the elimination of the potential competition provided by the acquired firm highly significant because, in the circumstances, “the mere efforts of Pacific Northwest [the acquired firm] to get into the California market, though unsuccessful, had a powerful influence on El Paso’s business attitudes within the State.” *Id.*, at 659. The Court went on to note: “The effect on competition in a particular market through acquisition of another company [not actually competing in that market] is determined by the nature or extent of that market and by the nearness of the absorbed company to it, that company’s eagerness to enter that market, its resourcefulness, and so on.” *Id.*, at 660.

³² See also *Foremost Dairies, Inc.*, *supra*, at 1089; *Procter & Gamble Co.*, F.T.C. Docket 6901 (decided November 26, 1963), p. 61 [63 F.T.C. 1465, 1577]; *Ekco Products Co.*, F.T.C. Docket 8122 (decided June 30, 1964), p. 21 [65 F.T.C. 1163, 1220]; Hines, *Effectiveness of “Entry” by Already Established Firms*, 71 Q. J. of Econ. 132 (1957), and authorities cited therein.

In another case, the Court again pointed out the importance of protecting potential competition under certain circumstances: "the competition with which § 7 deals includes not only existing competition but that which is sufficiently probable and imminent." *United States v. Continental Can Co.*, 378 U.S. 441, 458. "[L]ack of current competition" does not necessarily "significantly diminish . . . the adverse effect of the merger on competition. Continental might have concluded that it could effectively insulate itself from competition by acquiring a major firm not presently directing its market acquisition efforts toward the same end uses as Continental, but possessing the potential to do so." 378 U.S., at 464. The mere "possibility" of new competition, the Court stated, "over the long run acts as a deterrent against attempts by the dominant members of either industry to reap the possible benefits of their position by raising prices above the competitive level or engaging in other comparable practices." *Id.*, at 465-66.

The most complete statement of the Court's views on the importance of potential competition is to be found in *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, a case challenging a joint venture of Pennsalt Chemicals Corporation and Olin Mathieson Chemical Corporation:

There still remained for consideration the fact that Penn-Olin [the joint venture] eliminated the potential competition of the corporation that might have remained at the edge of the market, continually threatening to enter. Just as a merger eliminates actual competition, this joint venture may well foreclose any prospect of competition between Olin and Pennsalt in the relevant sodium chlorate market. The difference, of course, is that the merger's foreclosure is present while the joint venture's is prospective. Nevertheless, "[p]otential competition * * * as a substitute for * * * [actual competition] may restrain producers from overcharging those to whom they sell or underpaying those from whom they buy * * *. Potential competition, insofar as the threat survives [as it would have here in the absence of Penn-Olin], may compensate in part for the imperfection characteristic of actual competition in the great majority of competitive markets." Wilcox, *Competition and Monopoly in American Industry*, TNEC Monograph No. 21 (1940) 7-8. Potential competition cannot be put to a subjective test. It is not "susceptible of a ready and precise answer." As we found in *United States v. El Paso Natural Gas Co.*, *supra*, at 660, the "effect on competition * * * is determined by the nature or extent of that market and by the nearness of the absorbed company to it, that company's eagerness to enter that market, its resourcefulness, and so on." The position of a company "as a competitive factor * * * was not disproved by the fact that it had never sold * * * there. * * * [I]t is irrelevant in a market * * * where incremental needs are booming." The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be

a substantial incentive to competition which cannot be underestimated. 378 U.S., at 173-74.

While these decisions authoritatively confirm that the preservation of potential competition in concentrated markets is an important goal of antitrust policy, the Court's many references to the probability and imminence of new entry, and the eagerness, resourcefulness, or nearness of the potential competitor, suggest some important qualifications.

Since every firm in the country is in a sense a potential competitor of every other, and since an important source of potential competition is newly organized firms, the range of potential competitors in any given market or industry could be said to include all established firms and also all firms not yet in being. Much potential competition is simply too remote, speculative, or improbable to have demonstrable competitive significance. The elimination of such marginal potential competition is not so serious in its probable effects as to require remedial action under the antitrust laws. It is only where the entry of a potential competitor is *probable* that the threat of his entry is likely to exercise a restraining influence on the pricing and other behavior of the dominant firms in the market. It is, however, not necessary to establish that the potential competitor will actually enter at any time. If the firms already occupying the market are pricing so as to prevent the entry of potential competitors, new entry may be forestalled indefinitely. Elimination of a leading potential competitor could still have an adverse competitive effect by reducing competitive pressure on the established firms.

Even a firm whose imminent entry is certain, however, may not necessarily be a significant potential competitor. Suppose that a very small firm announces its intention of entering a certain market, but its size, and the competitive conditions of the market, make it appear unlikely that the firm can offer any real challenge to the principal firms or do anything but join the fringe of small firms living in the shadow of the dominant ones. In such a case, though the probability of new entry would be great, the interest in preventing the elimination of the prospective entrant would be slight. Such a firm would not have good prospects of obtaining a sufficiently large market share to cause erosion of the dominant firms' market position. Nor would the prospect of its entry be sufficiently alarming to the dominant firms to induce them to lower their prices in order to make entry unattractive. A related consideration is whether there is a limited number of potential entrants with the requisite ability and incentive. If there are a great many potential entrants equally

capable of entry, the elimination of only one of them may have no significant effect.

A merger or other acquisition may, by eliminating a potential competitor, sometimes gravely impair the health and vigor of competition. An example is the merger of two firms, both leading potential competitors in a particular market, which diminishes the number of significant potential competitors by one.³³ On the other hand, a merger between a very small factor—not one of the few dominant firms—in the market and a small concern from outside the market may increase, rather than lessen, competition by making the merged firm a more viable competitor.

The competitive effects are more difficult to predict when a very small factor in the market is acquired by a substantial potential competitor. The merger may increase competition in the market by injecting a substantial firm, one capable of challenging the dominant firms in the market, in place of a firm too small to be a significant competitive factor. But much would depend on the industry setting of the merger. Although individual mergers of this type may appear inoffensive or even salutary, the cumulative effect of a long series of such mergers by the leading firms in an industry—each capable of entering most markets by internal growth—may be to dry up the opportunities for growth of smaller enterprises which are much more dependent on merger as an entry device, and thereby impair competition in the long run.

The competitive effects are likely to be most serious where the merger is between one of the dominant firms in a concentrated market and a substantial potential competitor. In such a case there is no improvement in the competitive structure of the market—for one dominant firm has simply been replaced by another—and substantial potential competition is eliminated. The dominant firms in the market no longer have to concern themselves with the consequences of entry by the potential competitor; he is already in. Nor need they cope with any additional competition as a result of his entry; he has not increased the number of substantial competitors in the market but simply taken the place of one of those competitors. The potential competitor enters the market in circumstances where there is no change in the competitive structure of the market, except that he is eliminated as a prospective entrant. Such a merger is even more injurious to competition if the acquired firm is a potential competitor in one or more of the acquiring firm's markets. For

³³ *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (see pp. 718-719, *supra*), a joint venture between potential competitors, exemplifies this effect.

then potential competition is hurt twice: the merger eliminates the acquiring company as a potential entrant in the acquired firm's markets, and the acquired firm is eliminated as a potential entrant in the acquiring firm's markets.

The elimination of a particular leading potential competitor may assume added economic significance if the number of potential competitors is declining, whether due to technological or marketing reasons which make entry more difficult, or because of an industry-wide merger movement eliminating (or threatening to eliminate) significant numbers of potential competitors. In this event, overall industry trends take on the same significance in evaluating the probable competitive impact of a market-extension merger as in evaluating horizontal and vertical mergers. See *Brown Shoe Co. v. United States*, 370 U.S. 294. Such background trends may also be useful in determining whether certain sanctions should be placed on mergers between small concerns and substantial potential competitors, which, as noted above, otherwise might not be thought anticompetitive.

The Supreme Court has held that the elimination of an actual competitor in a concentrated market is forbidden by the Sherman Act if the acquired firm is a significant competitive factor. *United States v. First National Bank & Trust Co. of Lexington*, 376 U.S. 665. Section 7 of the Clayton Act was not intended to be interpreted and applied in accordance with Sherman Act standards. "The grand design [of Section 7] * * * was to arrest incipient threats to competition which the Sherman Act did not ordinarily reach." *Penn-Olin Chemical Co., supra*, 378 U.S., at 170-71. Congress, concerned with the long-range anticompetitive effects of mergers and acquisitions, determined that those mergers should be forbidden which endanger the competitive structure of markets and industries. Although the elimination of potential competition through a merger may not have the same immediately apparent effect on the competitive structure of a market as the elimination of an actual competitor, which diminishes the number of rival sellers by one and may appreciably increase concentration of the business of the market in the hands of a very few firms, it may jeopardize the long-run prospects for competition in a market at present unduly concentrated. Preservation of potential competition both allows for the eventual deconcentration of the market through vigorous new competitive infusions (cf. *United States v. Philadelphia National Bank*, 374 U.S. 321, 365, n. 42) and keeps in being a subtle, often difficult to measure, but nonetheless very important restraining force on non-

competitive behavior by the firms in a concentrated market. When it is considered how many markets and industries in the nation today are concentrated,³⁴ the importance of potential competition in the administration of a statute concerned with the long-range competitive prospects of the American economy is manifest.

We reject, as bad economics and bad law, respondent's argument that the preservation of potential competition is not a significant consideration in judging a market-extension acquisition: "[t]he concept of measuring potential competition and future level of competition is not a reliable, meaningful statutory test because it substitutes outright speculation for reliable evidence—unless as in the *El Paso* case the potential competition is so 'imminent' that it constitutes actual competition." (Respondent's Appeal Brief, p. 104.) Section 7 is expressly concerned with the "future level of competition." A determination of illegality under the statute "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future."³⁵ No such prediction can be "reliable" or "meaningful" if it fails to take into account the competitive significance of eliminating substantial potential competition in a concentrated market or industry.

Impairment of potential competition is not the only adverse competitive effect that may flow from a market (or product) extension merger. The substitution through merger of a firm not theretofore actually selling in the market for one of the dominant firms may have adverse competitive effects beyond merely the elimination of substantial potential competition—at least where the acquiring company is strong in a number of other markets.³⁶ These can be either

³⁴The Bureau of the Census, in *Concentration Ratios in Manufacturing Industry 1958*, Part II, pp. 466-67 (report prepared for the Subcomm. on Antitrust and Monopoly of the S. Comm. on the Judiciary, comm. print 1962), reveals that of the 39 product classifications having shipments in excess of one billion dollars a year, 13—or $\frac{1}{3}$ —represent industries in which the 4 largest firms control at least 50% of total shipments. These are highly concentrated industries. Cf. Bain, *Industrial Organization* 127 (1959); Kaysen & Turner, *Antitrust Policy* 27 (1959).

³⁵*United States v. Philadelphia National Bank*, 374 U.S. 321, 362. See Edwards, *Test of Probable Effect Under the Clayton Act*, 9 *Antitrust Bull.* 369 (1964).

³⁶*Procter & Gamble Co.*, *supra*, pp. 48-49, 62-64 [63 F.T.C. 1465, 1566-1568, 1578-1580]. This was explained, with specific reference to the dairy industry, in the Commission's *Foremost* opinion:

"A small dairy operating in a single local market has its competitive behavior constrained by conditions existing in this market; a large diversified firm does not operate under similar market constraints. It may, if it chooses, outcompete the little man by subsidizing its operations in one market out of its operations elsewhere. Of course, this temporarily may lower slightly the average profits on its over-all operations. But for the little man, losses in one market mean no profits at all—no profits with which to expand, no profits with which to develop new production techniques, no profits with which to make product improvements; or, simply put, the little man is deprived of the profits which, in a free enterprise economy, makes it possible for him to survive in the long run." 60 F.T.C., at 1059-60.

other product markets or other geographic markets. A firm strongly entrenched in a number of markets may thereby be able to engage in deep, sustained, and discriminatory price cutting in selected markets to the detriment of weaker competitors. See, e.g., *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115. Predatory price cutting of this kind, at least where it involves discrimination in the price of goods of like grade and quality, has long been forbidden by the antitrust laws. See, e.g., *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234 (2d Cir. 1929). But there is a form of discriminatory price competition which, although it may hurt competition and promote or entrench monopoly, has not been directly prohibited by the antitrust laws and is, indeed, the subject of an express defense to the price discrimination law: discriminatory price cutting which does no more than meet the equally low price of a competitor.³⁷ In the hands of a powerful firm, able to sustain selective price cuts for so long as may be necessary to ensure against a loss of trade, such price cutting may be a potent weapon for repulsing new competition and preventing entry into concentrated markets.

A prospective entrant into a new market ordinarily faces an uphill fight. Because he has not sold in the market, his brand is unfamiliar and may at first lack consumer acceptance. Distributors may be unwilling to offend existing suppliers by dealing with the newcomer or may simply have a natural reluctance to do business with a firm not known to it. Natural business inertia will, therefore, make it difficult for a new entrant to gain a foothold. But entry may not be worthwhile unless the prospects for gaining substantial business from the existing competitors are reasonably good. A common method of penetrating a new market is to offer a low price during an initial promotional period.³⁸ This tactic will come to naught if the dominant firms in the market are capable of offering immediate and sustained selective price cuts to their customers to hold their business.

When a powerful multi-market firm absorbs one of the dominant sellers in a concentrated market, the result may be not only to eliminate a source of potential competition, but to increase the difficulty of new entry and thus reduce the prospects for future new competition. Suppose that a local market is dominated by three

³⁷ Section 2(b) of the Clayton Act, 15 U.S.C. § 13(b), provides "That nothing * * * shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor." See *Standard Oil Co. v. F.T.C.*, 340 U.S. 231.

³⁸ See Dirlam & Kahn, *Fair Competition: The Law and Economics of Antitrust Policy* 212 (1954); Brooks, *Injury to Competition Under the Robinson-Patman Act*, 109 U. Pa. L. Rev. 777, 787 (1961); Note, *Competitive Injury Under the Robinson-Patman Act*, 74 Harv. L. Rev. 1597, 1610 (1961).

firms, which, while they are large in that market, are small by industry standards and do no substantial business outside the one market. A company of the same size might be reluctant to challenge such firms for a share of the market. A powerful multi-market firm, however, having far greater resources than any of the dominant local competitors, might have no such inhibitions. Such a firm, in contrast to the single-market independent which must make a profit in that market or go under, is able to weather competitive storms in any particular local market by reason of its far-flung operations covering many markets.³⁹ If one of the powerful multi-market firms absorbed one of the dominant local competitors, a prospective entrant would have to reckon not only with local oligopolists but with a powerful multi-market firm having a position of dominance in the local market and well able to repulse new competition, whether by price discrimination or by other tactics which can be effective in preventing new competitors from gaining a foothold. A multi-market company that would not be deterred from challenging merely local oligopolists in a new market might be deterred from challenging an entrenched firm of equal or greater strength.

We do not suggest that every acquisition of a dominant local competitor by a large outside firm may have substantial anticompetitive effects: that will depend on such factors as the position of the outside firm in the markets where it is active, the degree to which the power of the outside firm may be brought to bear in behalf of the local competitor, and competitive methods and conditions in the local market. But where it is shown that the effect of such an acquisition may be to increase appreciably the difficulty of new entry, the adverse competitive effects flowing from the elimination of a potential competitor plainly are aggravated.

So far we have been speaking of the principles governing mergers challenged under Section 7 of the Clayton Act. The same principles govern mergers challenged under Section 5 of the Federal Trade Commission Act as "unfair methods of competition" or "unfair acts or practices."

On the basis of isolated excerpts from the legislative history of the Federal Trade Commission Act, respondent argues that Congress never intended that the prohibitions of Section 5 might overlap those of the Clayton Act. The courts have decided otherwise. They

³⁹ See p. 722, n. 36, *supra*; *Reynolds Metals Co. v. F.T.C.* 309 F. 2d 223, 229-30 (D.C. Cir. 1962). "[A] strong, national chain of stores can insulate selected outlets from the vagaries of competition in particular locations". *Brown Shoe Co. v. United States*, 370 U.S. 294, 344.

have made clear that conduct which "runs counter to the public policy declared in the Sherman and Clayton Acts" is "unfair" and unlawful under Section 5.⁴⁰ A merger or acquisition the effect of which may be substantially to lessen competition or tend to create a monopoly is "a practice which is plainly contrary to the policy of the Clayton Act," *Giant Food, Inc. v. F.T.C.*, 307 F. 2d 184, 186 (D.C. Cir. 1962), and hence, we think, forbidden by Section 5.

We need not pause over the thorny issue of whether, prior to the 1950 amendments to Section 7, the Commission could have proceeded against assets acquisitions under Section 5. Cf. *F.T.C. v. Eastman Kodak Co.*, 274 U.S. 619; *United States v. Philadelphia National Bank*, 374 U.S. 321, 339-40, n. 17. At that time the Clayton Act was limited to stock acquisitions. In plugging the "assets loophole" the 1950 amendments made explicit that mergers and assets acquisitions which may substantially lessen competition or tend toward monopoly are contrary to public policy.⁴¹ And the Commission's remedial powers to undo the ill effects of unlawful acquisitions are as broad in a Section 5, as in a Section 7, proceeding. *Ekco Products Co.*, F.T.C. Docket 8122 (decided June 30, 1964), pp. 12-13 [65 F.T.C. 1163, 1213-1214].

There is, however, at least one important difference in scope between Section 7 and Section 5. While Section 7 is applicable only to corporate acquisitions, Section 5 expressly forbids unfair methods of competition on the part of persons and partnerships as well as corporations. Had Congress deliberately limited Section 7 to corporations, determining that acquisitions involving persons and partnerships should not be governed by the same standards applicable to corporate acquisitions, we would hesitate to conclude that such acquisitions are to be tested in Section 5 proceedings under Section 7 standards. But no such congressional intent is discernible. So far as appears, Section 7 was not made applicable to noncorporate acquisitions only because corporate acquisitions were in the forefront of congressional concern and attention. In most industries, a corporate acquisition is far likelier to have substantial competitive effects than

⁴⁰ *Fashion Originators' Guild of America v. F.T.C.*, 312 U.S. 457, 463. *Accord*, *F.T.C. v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 395; *F.T.C. v. Cement Institute*, 333 U.S. 683, 693; *Grand Union Co. v. F.T.C.*, 300 F. 2d 92 (2d Cir. 1962). Cf. *Northern Pacific R. Co. v. United States*, 356 U.S. 1; *United States v. Columbia Steel Co.*, 334 U.S. 495, 507, n. 7.

⁴¹ The fact that this policy was declared long after the passage of the Federal Trade Commission Act is immaterial. "Unfair methods of competition" is a "flexible concept with evolving contents". *F.T.C. v. Bunte Bros.*, 312 U.S. 349, 353. It embraces practices declared contrary to public policy in statutes, such as the Robinson-Patman Act and the Celler-Kefauver Antimerger Act, enacted after 1914. *Grand Union Co.*, *supra* *Giant Food, Inc.*, *supra*.

the acquisition of purely personal or partnership assets. It is readily understandable, therefore, that Congress should have legislated with specific reference to corporate acquisitions.

We do not think that Congress, in making Section 7 applicable to corporate acquisitions, intended to open up a substantial loophole in the application of the antitrust laws in the field of mergers and acquisitions. Cf. *Philadelphia National Bank, supra*, at 343. This would be a particularly anomalous result since it would prevent fully effective remedial action in one of the industries with which Congress was particularly concerned, the dairy industry, where non-corporate acquisitions appear to have played a significant role in furthering concentration. Some of the largest acquisitions made by respondent and challenged in the present case are noncorporate. Nor can it tenably be argued that the omission of noncorporate acquisitions from the coverage of Section 7 reflects a policy of fostering small-business acquisitions—one of the corporate acquisitions found unlawful by the examiner involves a firm with annual sales of only \$119,000. No legislative policy would be advanced by adopting a test of illegality under Section 5 turning on the business form a firm happens to select.

It is well established that Section 5 reaches transactions which violate the standards of the Clayton Act though for technical reasons are not subject to that Act, unless such application of Section 5 would be an attempt to “supply what Congress has studiously omitted,” *F.T.C. v. Simplicity Pattern Co.*, 360 U.S. 55, 67, or to “circumvent the essential criteria of illegality prescribed by the express prohibitions of the Clayton Act.” *Report of the Attorney General's Natl. Comm. to Study the Antitrust Laws*, p. 149, n. 78 (1955). See *Grand Union Co., supra*, at 98. Applying Section 5 to noncorporate acquisitions effectuates, rather than circumvents or conflicts with, Congress' policy with respect to the prevention of anti-competitive acquisitions.

There is another legitimate and important role that Section 5 has to play in antitrust enforcement, and this with respect to corporate and noncorporate acquisitions alike. Acquisitions have often been questioned under the antitrust laws, not as being unlawful in themselves, but as forming an integral part of a larger offense such as monopolization.⁴² It may be appropriate to scrutinize a series of acquisitions over a long period of time from the standpoint not only

⁴² See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1; *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 307-12 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521; *United States v. Aluminum Co. of America*, 148 F. 2d 416, 434-36 (2d Cir. 1945); *United States v. Grinnell Corp.*, 236 F. Supp. 244, 248-49 (D. R.I. 1964).

of whether particular acquisitions violate Section 7 or Section 5, but also of whether the respondent's course of conduct viewed as a whole constitutes an attempt to monopolize or an unfair method of competition. Looked at in this way, the series of acquisitions may justify relief beyond what might be appropriate in a Section 7 or Section 5 case challenging a particular one or number of the acquisitions in the series, and irrespective of whether every individual acquisition, viewed separately, is unlawful.

V

The importance of developing, so far as practicable, clear and concrete legal standards for mergers for the guidance of businessmen, the enforcement agencies, and the tribunals which must decide Section 7 cases, need not be labored. It has been declared in emphatic terms by the Supreme Court⁴³ as well as by the Commission. See *Procter & Gamble Co.*, F.T.C. Docket 6901 (decided November 26, 1963), pp. 35-39 [63 F.T.C. 1465, 1556-1560]. The large number of mergers consummated every year, the economic costs incurred in protracted merger litigation, the chilling effect of legal uncertainty in this field on business initiative and decision making, and the unmanageable complexity of trial records in cases where the governing standards are ill-defined or overbroad, are all factors which make imperative the formulation of precise standards tailored to the particular facts and competitive conditions of individual industries. Thousands of mergers have taken place in the dairy industry in the last 50 years. In an industry so prone to extensive merger activity, the need to develop standards which will be clearly understood by the industry, and which will prevent unlawful mergers without deterring lawful ones, is especially urgent.

⁴³ " * * * [T]he ultimate question under § 7 [is] whether the effect of the merger 'may be substantially to lessen competition' in the relevant market. Clearly, this is not the kind of question which is susceptible of a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their 'incipiency.' Such a prediction is sound only if it is based upon a firm understanding of the structure of the relevant market; yet the relevant economic data are both complex and elusive. And unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded. So also, we must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation. And so in any case in which it is possible, without doing violence to the congressional objective embodied in § 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration." *Philadelphia National Bank*, *supra*, at 262 (citations omitted). See *Brown Shoe Co.*, *supra*, at 341 & n. 68; *Standard Oil Co. v. United States*, 337 U.S. 293, 313.

A fact critical to the requirements of the merger law as applied to the dairy industry today is the sharp and continuing decline in the competitive importance of single-plant and other very small or obsolete dairy firms. This sector of the dairy industry, once dominant, appears destined by technological change to play an increasingly diminished role. Respondent in the present case admits and indeed stresses this fact. The exit of many of these small firms, which can be foreseen over the next several decades, is likely to increase concentration in the local markets—so many of them already highly concentrated—where such firms operate. This class of firms, moreover, can no longer be regarded as an important source of potential competition in concentrated dairy markets.

Increasingly, therefore, medium-sized and large dairy firms must be relied on as the source of actual and especially potential competition in this industry. But, as has been noted (see p. 708, *supra*), there are relatively few substantial firms between the big eight at one end of the spectrum and the obsolete or obsolescent single-plant firms at the other.⁴⁴ At the same time, the largest firms in the industry have grown to a size at which their ability to repulse new competition in markets in which they are strongly entrenched has become formidable.⁴⁵ The Commission so found in *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1059-60. The examiner so found in the present case (initial decision, pp. 649-650), and we adopt his finding. This phenomenon is also extensively documented in the records of the many price discrimination cases brought by the Commission in this industry. See, e.g., initial decision filed September 15, 1964, in *Beatrice Foods Co.*, F.T.C. Docket 7599 [68 F.T.C. 286, 291].

On the basis of the fundamental facts of the dairy industry's structure, we conclude that any acquisition of a not insubstantial dairy company by one of the industry's giants (roughly, a company having annual sales of more than \$200 million) is highly suspect. While a small acquisition, considered in isolation, may not appear to enhance the size or market strength of a giant acquiring firm, the history of merger activity in the dairy industry shows that such acquisitions have in the aggregate contributed to the giant firms'

⁴⁴ It might be noted in this connection that there are only about 25 firms in the entire dairy industry that are publicly owned.

⁴⁵ Their power in this respect has been enhanced by the extensive product diversification of these firms, generally through mergers. "Threatened with competition in any one of its various activities, [such a diversified firm] * * * may sell below cost in that field, offsetting its losses through profits made in its other lines—a practice which is frequently explained as one of meeting competition." F.T.C., *Report on The Merger Movement* (1948), p. 59. See *Procter & Gamble Co.*, *supra*, pp. 48-49 [63 F.T.C. 1465, 1566-1568].

obtaining a position of such strength throughout their marketing areas as to raise substantial barriers to the entry of smaller firms. Such acquisitions, moreover, have tended to retard the emergence of a strong and healthy middle tier of medium-sized dairy companies capable of offering vigorous competition to the giant firms. Engrossing small firms by the thousands, as the industry leaders have done, has prevented the creation of strong, viable competitors through merger between small firms, as opposed to mergers between small firms and large.

In the present case, the examiner entered an order, comparable to the orders entered by the Commission against the three other largest dairy companies, forbidding respondent to make any future dairy acquisitions for a period of 10 years without the Commission's approval in advance. It is apparent that acquisition activity on the part of firms of similar size not under formal order is equally suspect and should be observed carefully by the Commission.

Another major objective of Section 7 in this industry is to prevent the repetition of the pattern of growth through acquisition whereby the firms which now dominate the industry achieved their positions of leadership. If the Commission were to sit idly by while firms now in, say, the \$40 million to \$60 million range engaged in acquisition programs calculated or likely to make them as large as the present respondent, the result would be the rapid transformation of the industry into one completely dominated by a handful of giant firms and far less competitive than at present. Accordingly, just as the Commission, in the *Foremost* case, challenged a series of acquisitions which transformed the respondent from a medium-sized to a very large dairy company, so any similar program of acquisitions undertaken by a medium-sized member of the industry should receive close scrutiny by the Commission.

However, not every acquisition by a medium-sized firm, in circumstances where no large-scale pattern of acquisition activity is perceivable, is necessarily suspect under the antitrust laws. Such an acquisition would be questionable if it eliminated another medium-sized firm, since such firms are few and are a critical source of actual and potential competition in this industry. Where, however, the acquired firm is small (say with sales of less than \$10 million), other factors must be considered. If the merger is conventionally horizontal in character and eliminates a significant competitor, it will probably be unlawful. The same will be true if one of the firms has a position of strength in a concentrated market and the other firm is a significant potential competitor in that market.

Congressional policy as expressed in Section 7 will be best served in this industry if merger activity is channeled toward the smaller firms. Certainly mergers between firms too small to achieve the economies of scale made possible by the technological revolution in the dairy industry or to function as strong, effective competitors and penetrate into new markets are lawful. Mergers between such firms may be a method of strengthening the competitive process in this industry. Section 7 does not prevent the exit through merger of firms too small to be viable. To be sure, where a small firm is acquired by a very large or even one of the moderately large multi-market dairy companies, the result may be to impair competition; such a merger is unlawful. But if the same small firm is acquired, rather, by another reasonably small firm, the merger is likely to result not in a weakening, but in a strengthening, of the competitive structure of this industry; such a merger is clearly lawful.

VI

Our analysis of the acquisitions challenged in the present case is considerably simplified due to the meticulous analysis by the hearing examiner in his 223-page initial decision. We have carefully reviewed the examiner's findings, and have concluded that, with the exception of his holding that mergers are not subject to challenge under Section 5 of the Federal Trade Commission Act (see pp. 518-520, *supra*), his findings and conclusions are factually correct and legally sound and should be adopted as findings and conclusions of the Commission.

Complaint counsel's appeal can be disposed of quickly. With respect to the Clarksburg and Associated acquisitions, we agree with complaint counsel and the examiner that they would be unlawful under Section 7 if the acquired companies could be shown to have been "engaged in commerce." We also agree with complaint counsel that it is immaterial, so far as satisfying this jurisdictional requirement of Section 7 is concerned, whether the amount of interstate commerce by the acquired company is, either relatively or absolutely, large or small,⁴⁶ and that purchase in commerce of goods for resale locally is a form of engaging in commerce embraced by the statute. *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1069.

On the other hand, we do not think that Congress intended the Act to embrace corporations whose involvement in commerce was completely insignificant, trivial, and sporadic. Cf. *Skinner v. United*

⁴⁶ Cf. *United States v. Yellow Cab Co.*, 332 U.S. 218, 225; *United States v. Socony-Vacuum Oil Company*, 310 U.S. 150, 225, n. 59.

States Steel Corp., 233 F.2d 762 (5th Cir. 1956). Even complaint counsel concede that it must be "shown that the acquired corporation is engaged in commerce * * * beyond an infinitesimal extent." Appeal Brief of Complaint Counsel, p. 13. The record does not disclose the dollar amount of either Clarksburg's or Association's purchases in commerce.⁴⁷ So far as appears, the interstate purchases of both acquired firms were too infinitesimal to satisfy the requirements of the statute.

With regard to the other acquisitions dismissed by the examiner as to which complaint counsel have appealed, no extended discussion is necessary, since complaint counsel seek neither divestiture nor other relief against these acquisitions. The sole reason offered by complaint counsel for seeking a Commission ruling on their legality is to support the 10-year ban on acquisition contained in the examiner's order. But we think the propriety of such a ban can be determined on this record irrespective of the legality of these six acquisitions, which, as the examiner noted, raise acute problems not only of relief but also of commerce and competitive effect.

We also do not find it necessary to determine on this record whether respondent's series of acquisitions, viewed as a pattern, violated Section 5 of the Federal Trade Commission Act. The only remedy sought by complaint counsel for this alleged violation is a ban on future acquisitions—and we think a demonstrated proclivity for making dairy acquisitions that violate Section 7, as the examiner found in the case of five of respondent's acquisitions, would in the circumstances justify, wholly without reference to Section 5, an order requiring respondent to obtain the Commission's approval in advance for all future acquisitions in this industry.⁴⁸ That brings us to the four acquisitions which the examiner found to be unlawful and ordered divested and as to which respondent has appealed from the examiner's findings and order.

On August 1, 1953, respondent acquired Creameries of America, Inc. Creameries, with annual sales of \$49 million, was a diversified dairy company and unquestionably one of the major competitive

⁴⁷ Neither made any sales in commerce.

⁴⁸ We have held that such an order is within the Commission's remedial power in enforcing Section 7. *Ekco Products Co.*, F.T.C. Docket 8122 (decided June 30, 1964), p. 15 [65 F.T.C. 1163, 1215]. Cf. *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545, 575 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567. It should be noted that an order forbidding future acquisitions without prior approval by the Commission is in no sense an absolute ban on such acquisitions. In deciding whether or not to approve a proposed acquisition submitted under such an order, the Commission is not free to act capriciously or unreasonably. It may deny approval only where the acquisition, if consummated, would conflict with the remedial objectives of the order.

Opinion

67 F.T.C.

factors in the territory west of the Rocky Mountains. As noted earlier, Beatrice's traditional area of distribution was centered east of the Rocky Mountains. At the time of the acquisition, respondent had already begun to penetrate the western market and had come into actual competition with Creameries in several parts of California. The western area was regarded by respondent's officials as a natural and very desirable area into which to expand operations. It is likely that, but for its acquisition of Creameries, respondent would have continued to penetrate the various markets west of the Rockies. It clearly had the ability and incentive to do so. It was the leading potential competitor in these markets—while at the same time Creameries was a significant potential competitor of respondent in respondent's market areas east of the Rockies.

Creameries was a well-entrenched, and in many cases the dominant, dairy firm in a number of highly concentrated markets in the far west; these markets are analyzed at length in the initial decision. The substitution of respondent for Creameries in these markets eliminated precisely the kind of substantial and imminent potential competition that Section 7, for the reasons set forth earlier in this opinion, is designed to protect against impairment by mergers. Moreover, in view of the demonstrated capacity of large multi-market firms in this industry to repulse new competition in local markets where they are well entrenched, the uniting in one firm of the substantial resources possessed by respondent and by Creameries is, we find, likely to increase the difficulty of new entry into the concentrated markets where either respondent or Creameries was already a leading firm at the time of the acquisition, and so may lessen competition substantially. Creameries, finally, like Philadelphia Dairy, Sylvan Seal and other dairy firms whose acquisition by leading members of the dairy industry has been challenged in Commission proceedings, was just such a viable, medium-sized, independent firm whose preservation is essential to the long-run competitive prospects of the dairy industry.

On January 1, 1955, respondent acquired Greenbrier Dairy Products Company, a West Virginia dairy with annual sales of almost \$4 million. Respondent concedes that Greenbrier "is a viable independent * * * with modern processing equipment." Greenbrier had market shares of 15% or more in several concentrated markets in the state, and must be reckoned a major competitive factor at the time of the acquisition. Respondent was not in direct competition with Greenbrier at the time of the acquisition to any substantial

extent, but it was doing business in the vicinity, and it was a leading potential competitor in the concentrated markets where Greenbrier was very strong. Respondent used its acquisition of Greenbrier as a base from which to acquire other dairy companies in the state and thereby establish itself as the state's leading dairy company. We think this is the kind of market-extension acquisition that Section 7 was intended to prevent.

Durham Dairy Products, Inc., was acquired by respondent in March 1953. It was the second largest seller of fluid milk in a 5-county area of North Carolina, with a market share of 30.5%, and the largest seller of ice cream with 25.4%. The hearing examiner concluded (initial decision, pp. 679-680), we think correctly:

Based on the record as a whole, including the substantial position which Durham occupied in its market area in both the fluid milk and frozen product lines, the close proximity of its and respondent's territories in the frozen product line, the fact that the acquisition resulted in the injection of a strong national company into a fluid milk market which had theretofore consisted almost entirely of local companies, and the substantial increase in concentration among national companies in the frozen product line, it is concluded that the effect of the acquisition of Durham Dairy by respondent may be substantially to lessen competition, or to tend to create a monopoly in the fluid milk and frozen product lines in Durham's sales area.

Community Creamery, the last acquisition found unlawful by the examiner as to which respondent has appealed, was a horizontal merger which, for the reasons stated by the examiner, is clearly unlawful under the governing legal principles. We conclude that the examiner's findings of unlawfulness with respect to the foregoing four acquisitions (as well as his finding that the acquisition of Dahl-Cro-Ma was illegal, which was not appealed by respondent) were correct.

VII

The hearing examiner entered an order that would require respondent to divest the assets of the five acquired firms as to which he found a violation of Section 7. His order also imposes a ban on future acquisitions of dairy companies, corporate and noncorporate, for a period of 10 years without prior approval by the Commission. We have decided not to undertake at this time a full consideration of the questions bearing on the appropriate relief. We have already alluded to the difficult practical problems encountered in attempting divestiture of dairy concerns which may have been acquired many years ago. In addition, there is an obvious need to coordinate the

Order

67 F.T.C.

relief afforded in the present case with the orders which have been entered and have become effective against the other leading firms in the dairy industry. Accordingly, we have determined that before the Commission attempts to fashion an order the respondent and complaint counsel should be given an opportunity to submit recommendations, pursuant to Section 3.24(c) of the Commission's Rules of Practice, for an order effectuating this decision and harmonizing with the other orders the Commission has entered in this industry. If the parties are unable to work out an order that adequately protects the public interest and remedies the violations found, they shall submit separate recommendations and the Commission will then proceed with the preparation of an order on the basis of the findings and conclusions adopted herewith.⁴⁹

Commissioner MacIntyre not participating. Commissioner Jones not participating for the reason that oral argument was heard prior to her taking the oath of office.

ORDER ADOPTING FINDINGS AND CONCLUSIONS AND DEFERRING
ENTRY OF FINAL ORDER*

Upon consideration of the cross-appeals of complaint counsel and respondent from the initial decision of the hearing examiner, and for the reasons stated in the accompanying opinion,

It is ordered, That, except as expressly noted in the accompanying opinion, the findings of fact and conclusions of law contained in the initial decision, as supplemented by the findings and conclusions in the accompanying opinion, are adopted as the decision of the Commission in this matter.

It is further ordered, That entry of a final order in this matter is deferred until further order by the Commission. Complaint counsel and counsel for respondent are directed to make written submissions, as described in the accompanying opinion, no later than sixty (60) days from the service of this order upon them.

Commissioner MacIntyre not participating, and Commissioner Jones not participating for the reason that oral argument was heard prior to her taking the oath of office.

*Final order to cease and desist issued Dec. 10, 1965, 68 F.T.C. 1003, modified June 7, 1967, 71 F.T.C. 797.

⁴⁹ Compare the procedure employed in the recent *United States v. Manufacturers Hanover Trust Co.* case (S.D.N.Y., March 10, 1965), where the district judge gave the parties ten days "to agree on appropriate relief and the form of the decree to be entered," stating that if the parties were unable to agree "the court will set a time and conduct hearings to determine the equitable relief necessary and appropriate in the public interest to eliminate the effects of the merger." 1965 CCH Trade Cases ¶ 71408 at p. 80780.

Complaint

IN THE MATTER OF

SUNMASTER ELECTRIC PRODUCTS, INC., ET AL.

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

Docket C-894. Complaint, Apr. 26, 1965—Decision, Apr. 26, 1965

Consent order requiring a New York City wholesaler of Sunmaster incandescent electric light bulbs and related merchandise, distributing through individual salesmen, to cease making false claims as to laboratory tests, guarantees, identity of users of their merchandise, misrepresenting the characteristics of competitors' light bulbs, and furnishing catalogs, advertising mats, and other promotional material to salesmen through which they may mislead prospective customers.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Sunmaster Electric Products, Inc., a corporation, and Nathan Bernard, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sunmaster Electric Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 133 West 19th Street, in the city of New York, State of New York.

Respondent Nathan Bernard is the president of Sunmaster Electric Products, Inc. He formulates, directs and controls the acts and practices of Sunmaster Electric Products, Inc., including the acts and practices hereinafter set forth. His office and principal place of business is located at the above stated address.

PAR. 2. Respondents have been and are now engaged at the wholesale level in the offering for sale, sale and distribution of Sunmaster incandescent light bulbs and related merchandise to individuals who act as salesmen and who resell such merchandise to the public. Such salesmen are sent through the mail catalogs, brochures, order forms, advertising mats and other promotional material designed and intended to induce sales of such merchandise to such salesmen and to be used to promote the resale of such merchandise to the public.

Individual respondent Nathan Bernard is now, and has been also engaged, directly or through another corporate device, in the offering for sale, sale and distribution of coffeemakers, in commerce; and for some time last past was similarly engaged in the offering for sale, sale and distribution of vitamins, in commerce.

PAR. 3. In the course and conduct of their business, respondents have caused and now cause said Sunmaster light bulbs and related merchandise, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in such merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of Sunmaster incandescent light bulbs, respondents have made numerous statements and representations concerning the characteristics of competitors' light bulbs, laboratory tests conducted, the identity of regular users, and the guarantee provided.

Typical and illustrative of such statements and representations are the following:

(a) **THE BIG COMPANIES SHORTEN BULB LIFE**

Just about fifteen years ago ordinary bulbs lasted 1,500 hours. Today, in spite of the fact that Sunmaster has a 10,000 hour bulb which is 100% guaranteed for 5 years—you're lucky if your ordinary bulb lasts 750 to 1,000 hours!

(b) **HERE'S WHAT INDEPENDENT LAB TESTS PROVE**

The sturdier filament and the improved construction make it possible for a Sunmaster 5-year bulb to withstand jars and knocks that would shatter an ordinary filament. Also:

- * * * the light is more relaxing, free from glare
- * * * it burns cooler—20% cooler than ordinary bulbs
- * * * it gives a steadier light
- * * * it actually lasts 13 times longer than ordinary bulbs.

(c) **EVEN BIG USERS ARE SWITCHING TO LONG LIFE BULBS**

Scores of industrial plants, offices and institutions are making the switch to this more economical way of lighting. For example, United States Steel Company, Grumman Aircraft, Tidewater Oil, Trans-Caribbean Airways, Gen. MacArthur Airport, Westover Air Force Base, Grumann Boat Works, and many others are regular, enthusiastic users.

(d) **Flattering light for 5 years—GUARANTEED**

We unconditionally guarantee all Sunmaster bulbs.

PAR. 5. Through the use of the aforesaid statements and representations, and others similar thereto, but not specifically set forth, respondents have represented, directly or by implication, that:

735

Complaint

(a) Approximately fifteen years ago the manufacturers of competitive standard incandescent light bulbs reduced the useful life of said standard bulbs from 1,500 hours to a substantially lesser amount.

(b) An independent testing laboratory has tested Sunmaster 5-year bulbs and verified the aforesaid claims made for such light bulbs.

(c) Tidewater Oil Company, Trans-Caribbean Airways, Grumman Aircraft and each of the other nationally known companies listed regularly use Sunmaster light bulbs.

(d) Sunmaster 5-year bulbs are unconditionally guaranteed in every respect for five years or for some other extended but unspecified period of time.

PAR. 6. In truth and in fact:

(a) Approximately fifteen years ago nor subsequent thereto the manufacturers of competitive standard incandescent light bulbs did not reduce the useful life of said standard bulbs from 1,500 hours to a substantially lesser amount or any lesser amount.

(b) An independent testing laboratory has not tested Sunmaster 5-year bulbs nor verified the aforesaid claims made for such light bulbs.

(c) Tidewater Oil Company, Trans-Caribbean Airways, Grumman Aircraft and each of the other nationally known companies listed do not regularly use Sunmaster light bulbs.

(d) Sunmaster 5-year light bulbs are not unconditionally guaranteed in every respect for five years or for some other extended but unspecified period of time. Such guarantee as may be provided is subject to numerous limitations.

Said statements and representations were, therefore, false, misleading and deceptive.

PAR. 7. By the aforesaid practices, respondents now place, and for some time last past have placed in the hands of Sunmaster salesmen, for the purpose of inducing the sale of Sunmaster light bulbs, the means and instrumentalities by and through which they may mislead the public.

PAR. 8. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals engaged in the sale of merchandise of the same general kind and nature as that sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading, and deceptive statements, representations and practices, has had,

Decision and Order

67 F.T.C.

and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of the respondents as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Deceptive Practices proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

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

The Commission, having reason to believe that the respondents have violated the Federal Trade Commission Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Sunmaster Electric Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 133 West 19th Street, in the city of New York, State of New York.

Respondent Nathan Bernard is an officer of the said corporation and his address is the same as that of the 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 Sunmaster Electric Products, Inc., a corporation, and its officers, and Nathan Bernard, individually and as an officer of said corporation, and their representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of Sunmaster incandescent electric light bulbs, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that approximately fifteen years ago the manufacturers of standard incandescent light bulbs reduced the useful life of said bulbs; or misrepresenting, in any manner, the changes or modification in durability, performance or other characteristics made by the manufacturer or producer of any competitive product.

2. Representing, directly or by implication, that any merchandise has been tested by an independent testing laboratory or that any claim has been verified by an independent testing laboratory or organization unless respondents establish that such is the fact; or misrepresenting in any manner, the results of any laboratory or other tests.

3. Representing, directly or by implication that any person, group, firm or corporation is a user of any merchandise unless respondents establish that such is the fact; or misrepresenting, in any manner, the extent of the use of such merchandise by any person, group, firm or corporation.

4. Representing, directly or by implication, that any merchandise is guaranteed unless the nature and extent of the guarantee, the manner in which the guarantor will perform, and the identity of the guarantor are clearly and conspicuously disclosed.

5. Furnishing or otherwise placing in the hands of salesmen or others the means and instrumentalities by and through which they may mislead or deceive the public in the manner or as to the things hereinabove prohibited.

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.

Complaint

67 F.T.C.

IN THE MATTER OF
JOHN H. WORTMAN

DOING BUSINESS AS
AMERICAN PLASTICS, ETC.

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

Docket C-895. Complaint, Apr. 27, 1965—Decision, Apr. 27, 1965

Consent order requiring a Chicago, Ill., seller of skip-tracing forms—postcard questionnaire forms—used for the purpose of obtaining information on delinquent debtors, to cease using such forms to obtain information without clearly revealing the purpose; representing falsely that “a new model car” or any other gift was being held for recipient pending receipt of completed form; and using such names as “Kar-Chance” to describe his business.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that John H. Wortman, an individual trading and doing business as American Plastics, Kar-Chance Division of American Plastics, or Kar-Chance, 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, John H. Wortman, is an individual trading and doing business under the name of American Plastics, Kar-Chance Division of American Plastics, or Kar-Chance, with its principal place of business located at 80 East Jackson Boulevard, Chicago, Illinois.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the business of selling a printed mailing form under his trade name. Respondent causes said printed material when sold, to be transported from his place of business in the State of Illinois to purchasers thereof at their respective points of location in various other States of the United States. Respondent maintains, and at all times hereinafter mentioned has maintained, a course of trade in his said form in commerce as “commerce” is defined in the Federal Trade Commission Act.

PAR. 3. The said printed form sold by the respondent, as heretofore alleged, is designed and intended to be used, and has been used, by

collection agencies, merchants and others to whom it is sold for the purpose of obtaining information concerning alleged delinquent debtors with the aid and assistance of respondent as hereinafter set forth.

The said printed material consists of a double postcard perforated so as to permit the two parts to be easily separated. The detachable portion of the card gives the address "Kar-Chance, Division of American Plastics, 600 Michigan Building, Detroit 26, Michigan," which is a mail pick up and telephone answering service office used by respondent. The part of the card retained by the addressee has affixed thereto a five-cent stamp, and the portion to be detached and returned to the respondent bears a notice that postage will be paid by the addressee. Said postcard form sets out questions which, if answered, will provide information which is considered to be of value in the collection of accounts owed or alleged to be owed by the addressee. The purchaser of respondent's printed material above referred to fills in the name and address of the alleged debtors and/or the name and address of a known relative of the debtor, and sends the forms in bulk to respondent c/o Kar-Chance, 600 Michigan Building, Detroit 26, Michigan address. Respondent then mails or causes to be mailed the form individually from the aforesaid Detroit, Michigan address thereby receiving a Detroit, Michigan postmark. If the addressee completes the form and returns it, an envelope containing a small plastic toy automobile is sent to the person filling in the form. Respondent then forwards the completed form to the purchaser who is identified to respondent by a coded number appearing on the face of the form.

PAR. 4. The following is typical of the printed form sold by respondent and used in the aforesaid manner.¹

PAR. 5. By use of the name "Kar-Chance," the printed statement on the postcard form, "This is to inform you that your name has been chosen as the recipient of a new modeled car" and by other words on said postcard form and the general format thereof, respondent represents, directly or by implication, to those to whom the said postcard form is mailed that the respondent is in some capacity connected with the awarding of a car as a prize or gift, earned or won, which is being held for the addressee and will be forwarded upon his filling in said postcard form.

PAR. 6. The aforesaid representations and implications were and are misleading and deceptive. In truth and in fact, respondent's busi-

¹ Pictorial printed form omitted in printing.

ness has, so far as the recipient of said cards are concerned, nothing to do with the awarding of a prize or gift of a new car as the phrase "a new car" is generally understood. The persons from whom the said cards are intended to obtain information are not winners of a prize nor donees of a gift car or automobile, in the generally accepted sense of "car" or "automobile." The "new modeled car" to which the cards refer is nothing more than a small plastic toy in the shape of an automobile. The sole business of respondent, conducted as aforesaid, is to sell the printed form to others to be used by them for the purpose of obtaining information concerning alleged delinquent debtors by subterfuge. This practice constitutes a scheme to mislead and conceal the purpose for which the information is sought.

PAR. 7. The use, as hereinbefore set forth, of said form has had, and now has, the tendency and capacity to mislead and deceive persons to whom said form is sent into the erroneous and mistaken belief that the said representations and implications are true and induce the recipients thereof to supply information which they otherwise would not have supplied.

PAR. 8. The aforesaid acts and practices of respondent, as herein alleged, were, and are, all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce, in violation of Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Deceptive Practices proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

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

The Commission, having reason to believe that the respondent has violated the Federal Trade Commission Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings and enters the following order:

1. Respondent John H. Wortman is an individual trading and doing business under the name American Plastics, Kar-Chance Division of American Plastics, or Kar-Chance, with principal place of business located at 80 East Jackson Boulevard, Chicago, Illinois.

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

ORDER

It is ordered, That respondent John H. Wortman, an individual trading and doing business as American Plastics, Kar-Chance Division of American Plastics, or Kar-Chance, or trading and doing business under any other name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the business of obtaining information concerning delinquent debtors, or the offering for sale, sale or distribution of forms, or other material, for use in obtaining information concerning delinquent debtors, or in the collection of, or attempting to collect, delinquent accounts in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, or placing in the hands of others for use, any form, questionnaire or other material, printed or written which does not clearly reveal that the purpose for which the information is requested is that of obtaining information concerning alleged delinquent debtors, or in the collection of, or attempting to collect, allegedly delinquent accounts.

2. Representing, or placing in the hands of others, any means by which they may represent, directly or by implication, that "a new modeled car." or other thing of value, is being held, readied or processed for proper delivery to persons from whom information is sought, unless respondent then has in his possession such new modeled car, or other thing of value, intended for such person and then only when the new modeled car, or other thing of value, is clearly and expressly disclosed and described.

Complaint

67 F.T.C.

3. Using the name "Kar-Chance Division of American Plastics," "Kar-Chance" or any other name of similar import to designate, describe, or refer to respondent's business.

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

IN THE MATTER OF
TOPPS CHEWING GUM, INC.

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

Docket 8463. Complaint, Jan. 30, 1962—Decision, Apr. 30, 1965

Order adopting in part and rejecting in part the initial decision in this proceeding and dismissing, for insufficiency of evidence, the complaint which charged the Nation's largest manufacturer of bubble gum with headquarters in Brooklyn, N.Y., with using unfair methods of competition in gaining control of the baseball picture card industry.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. Section 45), and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest hereby issues its complaint, charging as follows:

PARAGRAPH 1. Respondent is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal office and place of business located at 254 36th Street, Brooklyn, New York.

PAR. 2. Respondent is now, and has been for many years last past, engaged in the manufacture, distribution and sale of bubble gum. In addition, respondent also sells picture cards, including cards containing the picture of a uniformed major league baseball player, or other professional athlete, manager or coach, either separately or in connection with the sale of its bubble gum products.

PAR. 3. The respondent is now, and has been for many years last past, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent manufactures gum in its fac-