alloy has been affixed by an electrolytic process may be marked or described as gold electroplate or gold electroplated.

(6) Misrepresenting the carat fineness of the gold coating or surfacing of respondents' merchandise.

It is further ordered, That the amended initial decision, as herein modified, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondents, Lifetime Cutlery Corp., Benjamin R. Berlin and Muriel Berlin, 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 the order to cease and desist as modified.

Commissioner Mills not participating.

IN THE MATTER OF

PILLSBURY MILLS, INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 6000. Complaint, June 16, 1952[1]—Decision, Dec. 16, 1960

Order requiring the nation's second largest flour milling company to divest itself absolutely of two competitors it acquired: Ballard & Ballard, Louisville, Ky., purchased June 12, 1951, acquisition of which removed an important producer of family flour, flour-base home mix, and wheat flour milling products from the southeastern market and gave Pillsbury first place in that market in the sale of family flour; and Duff's Baking Mix Division of American Home Foods, Inc., Hamilton, O., selling its home mixes throughout the country, purchased in March of 1952.

INDEX

[1] Amended and Supplemental Complaint, June 30, 1954.

FINDINGS OF FACT—Continued

Mr. L. E. Creel, Jr., Mr. J. Wallace Adair and *Mr. Eugene Kaplan* for the Commission.

Mr. Joseph J. Smith, Jr., and *Mr. E. Barrett Prettyman, Jr.*, of *Hogan & Hartson*, of Washington, D.C., and *Mr. Terrance Hanold*, of Minneapolis, Minn., for respondent.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

PRELIMINARY STATEMENT

The Commission on June 16, 1952, issued a complaint against Pillsbury Mills, Inc. (now The Pillsbury Company), sometimes hereinafter referred to as Pillsbury, charging it with violation of Section 7 of the Clayton Act as amended and approved December 29, 1950, through the acquisition on June 12, 1951, of the assets of Ballard and Ballard Company, sometimes hereinafter referred to as Ballard, operating a flour mill and feed mill located in Louisville, Kentucky, and on or about March 10, 1952, the assets of the Duff's Baking Mix Division of the American Home Foods, Inc., sometimes hereinafter referred to as American Home, a subsidiary of American Home Products Corporation, engaged in the manufacture of packaged food products, including flour-base home mixes, sometimes hereinafter referred to as mixes. It was alleged in the Commission's complaint and denied by respondent that both Pillsbury and American Home were, prior to March 10, 1952, leaders throughout the United States in the sale of mixes, and that both Pillsbury and Ballard prior to June 12, 1951, were leaders in the southeastern part of the United States in the sale of family flour, bakery flour and mixes. Finally it was alleged in the complaint and denied by respondent that the effect of the aforesaid acquisitions by Pillsbury of the assets of Ballard and Duff's Baking Mix Division of American Home

* * * may be substantially to lessen competition, or to tend to create a monopoly in the lines of commerce, as "commerce" is defined in the Clayton Act, in which the acquired companies were engaged throughout various sections of the United States.

The foregoing acts and practices were alleged to be in violation of Section 7 of the Clayton Act as amended in 1950.

The taking of testimony in support of the allegations of the complaint was completed in January 1953. In April 1953 after oral argument, the examiner, without expressing an opinion as to whether or not Section 7 of the Clayton Act had been violated, issued an initial decision in which he granted a motion to dismiss on the grounds that the allegations of the complaint had not been supported by "reliable, probative and substantial" evidence in the record as required by the Administrative Procedure Act, and dismissed the complaint without prejudice. Counsel in support of the complaint on June 1, 1953, filed their appeal from this decision with the Commission.

During the course of the trial respondent had been served with a subpoena duces tecum to produce certain production and sales figures of the relevant products for the period of time before and after the respective dates of acquisition of the assets, which respondent had then declined to produce. The record did contain, however, actual production and sales figures for the respondent for the fiscal year 1949–50, which counsel for the respondent had furnished the Commission during the course of a preliminary investigation. The record at that time did not contain accurate figures with respect to the volume of sales of comparable products manufactured and sold by respondent after it acquired the assets of Ballard and Duff's Division of American Home. Furthermore it did not contain any authentic or reliable production or sales figures with respect to family flour and bakery flour or of mixes or commercial feeds of competitors of the respondent in the southeastern territory of the United States, and no attempt was made by Commission counsel to get such authentic sales figures from such competitors, counsel in support of the complaint relying upon estimates by respondent's officials and others in the trade and surveys made by newspapers and other independent agencies in specific market areas in the Southeast.

The Commission in an opinion rendered in December 1953, after reviewing the record in some detail, remanded the case to the hearing examiner for further consideration, being of the opinion that the principal evidence of the case which the hearing examiner refused to accept as reliable should be taken as prima facie evidence of the facts disclosed therein. This evidence consisted of several letters, hereinafter referred to as the Mintener letters, addressed to the Commission in which respondent through its Vice President and General Counsel, Bradshaw Mintener, set forth (1) its sales of the relevant products in the Southeast and in the nation, (2) the acquired companies' sales of the relevant products in the Southeast and in the nation, and (3) respondent's best estimates of its major competitors' shares of the relevant markets. It was pointed out by the Commission in its opinion written by Chairman Howrey that respondent's counsel did not object to the introduction of these letters as not being competent evidence but contended that there were no accurate, absolute figures available in the flour industry showing competitors' sales or total sales. The Commission then stated:

* * * According to the testimony of respondent's market analyst, the best data available showing the market position and trend of sales of respondent and certain of its competitors in the flour industry are surveys prepared by the Market Research Corporation of America. This organization makes a random sample audit of retail stores which the witness described as the only random sample available which he considered projectionable. Respondent must have considered this information reliable enough [sic] for its own purposes inasmuch as it paid about $50,000 per year for same.

* * * * * * *

The estimates were prepared by respondent and submitted to the Commission during the course of the preliminary investigation, and respondent asked the Commission to rely upon them in reviewing the case prior to the culmination of the acquisitions. Presumably respondent at that time, as an advocate, "put its best foot forward."

The Commission then in its opinion held that:

Under all the circumstances, it is believed that the "common sense" and "reasonable mind" tests have been met and the estimates are *prima facie* evidence of respondent's market position, the market position of the acquired companies and the market position of its major competitors.

The Commission then pointed out, however, that respondent when it puts in its case will have "full opportunity to rebut, explain or contradict".

The Commission in its order granting the appeal of counsel in support of the complaint in part and setting aside the hearing examiner's initial decision, also passed upon certain rulings of the hearing examiner wherein he had rejected certain surveys of newspapers and magazines. In one such ruling the examiner had excluded a Scripps-Howard newspaper survey which showed the brands of family flour and mixes on store shelves in a cross section of stores in twelve cities in 1950 and thirteen cities in 1951 as not having any bearing on sales. He also excluded a Good Housekeeping magazine survey consisting of the answers of 1,717 of its subscribers as to the brands of mixes they used, and also the survey of the New York World-Telegram showing the sales of mixes in 200 retail stores in the New York City area conducted in 1949 and 1950 as being too remote in time to be of any value in determining the effect of the acquisitions. The Commission was of the opinion that this evidence was erroneously excluded.

* * * Market information for 1949 and 1950 is of value in determining the issues in this proceeding. Such surveys, if properly conducted, while certainly not conclusive are indicators of market trends and the existence of competitive products in the market surveyed. Such indicators, along with other information, may be of value in assisting the Commission in determining the actual market conditions.

On June 30, 1954, the Commission issued its amended and supplemental complaint in this proceeding in which it included an allegation that respondent on or about December 21, 1953, had sold and transferred certain of its assets which had been acquired on March 10, 1952, from American Home to Duff Baking Mix Corporation, a New Jersey corporation organized on December 11, 1953, with its principal office and place of business in Newark, New Jersey.

* * * Said assets sold, assigned and transferred by Pillsbury to Duff Corporation included the business of selling and distributing prepared baking mixes, such as waffle, hot muffin, corn muffin, hot roll, layer cake, devil food, spice cake and gingerbread mixes, under the trade name "Duff's," the going-concern value, goodwill, trade-marks, copyrights and patents incident to said business; and the formulae and manufacturing methods, processes and techniques used in connection therewith. Said sale by Pillsbury to Duff Corporation did not include, among other things, the physical property and equipment acquired by Pillsbury from American such as land, buildings and machinery.

It was alleged in this amended complaint that the sale by Pillsbury of a portion of the assets previously acquired by it from American Home, as set forth in the amended complaint, did not constitute such a disposition of said assets as to render moot the violations of Section 7 of the Clayton Act as charged in the original and amended complaints.

Following the mandate of the Commission the hearing examiner resumed the taking of testimony in this proceeding in July 1954, in Philadelphia, Pennsylvania, at which time counsel for the respondent began to offer testimony in opposition to the allegations of the complaint. The first witness was Mr. Wroe Alderson, a management consultant of the firm of Alderson and Sessions, consultants for business organizations and government organizations on problems of economics and marketing. He is recognized as a marketing expert. Mr. Alderson had made a study of the record in this case up to that time and was engaged by the respondent to give his views of the acquisition of Ballard and Duff from an economic standpoint. Since that time testimony, principally of representative flour millers and blenders, wholesalers, retailers, supermarket and chain store operators relative to competitive conditions, has been taken in numerous cities in the Southeast and elsewhere. Alderson and Sessions also made a field study of the Birmingham and Louisville markets which was received in evidence. At the conclusion of the taking of such testimony counsel for respondent recalled Mr. Alderson for his opinion of the economic significance of the facts thus developed. Counsel for the respondent rested its case in June 1957. Thereupon rebuttal testimony was received until January 1958. A survey of the family flour market in the Southeast and of the mix market nationally and in the Southeast was made by the Economic Division of the Commission which was received in evidence. Counsel in support of the complaint also called a prominent economist, Dr. Theodore J. Kreps, Professor of Economics at Stanford University, a recognized expert in the field of competition from the economic viewpoint, to testify as to the significance of the facts developed in the record. Proposed findings have been filed by counsel for the respondent consisting of 544 printed pages with lengthy appendices and a brief in support thereof. Counsel in support of the complaint have also filed proposed findings consisting of 340 pages and an appendix of nearly 100 pages.

Consideration has been given to the proposed findings and all the reliable, probative and substantial evidence in the record upon all material issues of fact, law or discretion. Each of those proposed findings which has been accepted has been, in substance, incorporated into this initial decision. All proposed findings not so incorporated are hereby rejected. Appropriate findings, conclusions and order are hereinafter set forth:

FINDINGS OF FACT

I. Description of the Industries and Acquisitions Involved

A. *Family Flour Market in the Southeast*

1. *Definition.* Family flour is one of the products involved in this case. It may be defined as flour with a relatively low protein content, made from either soft or hard wheat or a blend of the two, packaged for use in the home—usually in 2-, 5-, 10- and 25-pound packages or bags; sometimes in 50- and 100-pound bags for rural trade. The most popular size of package sold in the urban trade is the 5- and 10-pound bags, whereas the 25-pound bag is most popular in many rural areas.

2. *The Family Flour Market in the Southeast is a Declining Market.* The market for family flour in the Southeast, that area south of the Potomac and Ohio Rivers and east of the Mississippi River, where Ballard sold its family flour, is gradually declining both in per capita consumption and in the aggregate sale and shipment of family flour. To quote from the Vice President and Director of Sales of General Mills, respondent's principal competitor in the sale of family flour and flour-base mixes in the United States as well as in the Southeast:

> * * * It is rather common knowledge that the production per capitawise is down for the past ten years, and the total tonnage is down for the past ten years. It is a shrinking market not only in the Southeast, but elsewhere in the family flour business. The decline, from our experience, has been slower in the Southeast than it has been on a national basis.[2]

[2] Tr. 28,263.

Official reports of the United States Bureau of Census support the opinion of this witness. In 1930 the per capita consumption of wheat flour was established to have been about 172 pounds. By 1940 this estimated per capita figure was down to 153 pounds and by 1950 it had declined to about 133 pounds. One of the reasons assigned for this decline is the increase in manufactured bakery flour and the consumption of bakery products. Another is the increased popularity of flour-base home mixes.

There has been a decline in the number of flour mills throughout the United States and also within the Southeast. For instance in 1939 there were 989 flour mills reporting in the 11 southeastern states. By 1945 there were 805 such mills and by 1953 only 412 mills were listed for these southeastern states. This decline has been most marked among the small and medium sized mills.

3. *Grades and Classification.* Family flour is offered on the market in the Southeast in three distinct quality grades; namely, premium, standard and "clears" or "cut offs". Premium flour is the most highly refined and the highest priced. Standard flour is less highly refined and uses more of the wheat grain. It regularly sells at a differential under the price of the premium grades. The "clears" or "cut offs", a low grade flour, which, in addition to being sold as a family flour, is also often sold as a bakery flour or for use in manufacturing crackers; also, in prepared mixes or for the manufacture of glue.

Premium flours fall into two distinct classes which are of real competitive significance—the advertised brands and the unadvertised brands. In the Southeast many of the unadvertised brands are sold by the miller to jobbers or wholesalers on an exclusive basis as an inducement to the jobber to push the sale of that brand.

The following methods of distribution are used by family flour millers and blenders in the Southeast:

(a) Small local miller to retail outlets in the immediate community.

(b) Medium-sized local miller to retail trade within a radius of 50 to 100 miles of mill, the distance a truck can make deliveries and return in one day.

(c) Large local or regional miller in addition to local retail trade sells and ships to jobber or own warehouses beyond their trucking area. Ballard was such a miller

(d) Western millers shipping family flour into the Southeast, selling nationally-advertised brands principally to large retailers and chains in urban areas and through jobbers to retailers in rural areas. General Mills and Pillsbury were such millers.

(e) Western millers shipping unadvertised brands principally to jobbers on an exclusive basis, who in turn sell mostly to retail trade in rural areas. Colorado Milling & Elevator Company was such a miller.

4. *Chains and Supermarkets Are Important Sales Outlets for Advertised Brands in Urban Areas.* In the Southeast as elsewhere in the United States, chains and supermarkets have become of increasing importance as volume retail outlets for family flour. They operate chiefly in urban and suburban centers so that the shifts of population from rural areas to cities and their suburbs have further increased their importance. These outlets give shelf space only to fast moving items and brands of merchandise. In family flour such outlets will stock only the heavily nationally-advertised premium brands such as Gold Medal, Pillsbury's Best, and one or two popular local or regional brands, and in most instances a private brand which is always a standard grade of flour. The competitive position of any particular family flour in the Southeast depends on its ability to gain access to the consumer market. Any brand that is not in a chain store or supermarket cannot always be considered to be competitive with brands that are on the shelves of chains or supermarkets. This is true even if such a brand is found in some of the smaller stores in the same general metropolitan area or its environs.

In the Southeast market, the nationally advertised premium brands of family flour, such as Pillsbury's Best and General Mills' Gold Medal, were the most aggressively promoted and therefore set the price standard in that area. Other regionally or locally advertised premium flours maintaining approximately the same prices although sometimes lower were Ballard's Obelisk (now owned by Pillsbury), the White Lily brand of J. Allen Smith & Company, Knoxville, Tennessee, and the Omega brand of H. C. Cole Milling Company of Chester, Ilinois.

5. *Leading Advertised Brands Sold Through Chains and Supermarkets in 1921.* Prior to 1951 the principal and leading premium brands of family flour sold throughout the Southeast area through the chain stores and supermarkets were General Mills' Gold Medal, Pillsbury's Best and Ballard's Obelisk. However, J. Allen Smith's White Lily brand, a soft wheat flour, was one of the leading brands in the Knoxville area and in Atlanta where the brand was advertised in newspapers and on the radio. The Roller Champion brand, a premium flour, manufactured by the Valley City Milling Company, a division of Russell Miller Milling Company of Minneapolis, Minnesota, was advertised and sold in a few of the metropolitan areas in the Southeast. Capitola, a premium brand of the Atlanta

Milling Company, a blender, priced from 20 to 25 cents per hundredweight below the Pillsbury's Best and Gold Medal prices was advertised and sold in Atlanta and Macon, Georgia. The Martha White brand of the Martha White Mills was a leading brand in Nashville, Tennessee. The Omega brand of H. C. Cole, the leading brand sold in Memphis, Tennessee, was advertised and promoted in the metropolitan area of Memphis. The Metropolitan brand of the Roanoke City Mills, Roanoke, Virginia, was a premium flour sold in and around Roanoke at 15 to 25 cents under the Pillsbury's Best and Gold Medal prices.

6. *Unadvertised Brands of Premium Flour Sold Generally Below Advertised Brands.* The premium quality flours which are generally unadvertised by the manufacturers normally sell at various differentials under the Pillsbury's Best and Gold Medal prices. For instance, the White Silk brand of Dixie-Portland Flour Co. sold at 50 to 75 cents under the Pillsbury's Best and Gold Medal prices. Also, the Colorado Milling & Elevator Company sold its premium brands at 80 cents under such prices and General Foods sold its premium brand Swans Down $1 per hundredweight under the Pillsbury's Best and Gold Medal prices.

7. *Leading Mills Selling Family Flour in Rural Areas in the Southeast.* The following mills in addition to General Mills, Ballard and Pillsbury, listed in the order of the importance of their deliveries of family flour in the Southeast, were, prior to the acquisition, selling premium flour in substantial quantities in the rural areas in the Southeast:

(a) The Colorado Milling & Elevator Company of Denver, Colorado. This company probably was one of the first of the western milling companies to begin selling family flour in the Southeast. By 1956 it was selling to more than 150 jobbers in rural areas, most of them on an exclusive basis. Although this mill sold a large number of brands of flour, 90% of the sales of the company were accounted for by 12 premium grades. The three principal brands were Kansas Maid, White Goose and Pike's Peak. Most of the premium brands were blended flour of soft wheat and hard wheat although some of them were exclusively of soft wheat. This firm has always catered to the country or rural trade selling most of its family flour in 25-pound bags rather than the smaller sizes demanded by the urban trade. The total sales of family flour of this firm in the Southeast in 1951 exceeded 1,400,000 hundredweights.

(b) Dixie-Portland Flour Co., Memphis, Tennessee. This company is engaged in the milling of family and bakery flour and distributes its family flour throughout the Southeast through wholesale grocers on an exclusive basis. It had mills located in Arkansas

City, Kansas; Higginsville, Missouri; and Chattanooga, Tennessee, and blending plants in Richmond, Virginia, and Memphis, Tennessee. It operated very similarly to the Colorado Milling & Elevator Company and its sales in 1951 exceeded 1,000,000 hundredweights.

(c) Martha White Mills, Inc., of Nashville, Tennessee. This company sold its principal premium brand of family flour, Martha White, most of which it blended at its blending plants in Tennessee, from both hard and soft wheat flour purchased in bulk from mills in Missouri, Indiana, Illinois, Michigan, Ohio, Kansas, Oklahoma and Nebraska. It distributed about 65% of its family flour by truck throughout rural Tennessee from the outskirts of Memphis to the outskirts of Knoxville principally through retailers. Its premium brands Falcon and Lily White were sold principally in the Chattanooga market. However, it also sold some to jobbers in parts of Kentucky, West Virginia, Mississippi, Alabama, Georgia and Florida on an exclusive basis. It sold its Martha White premium brand from 20 to 40 cents per hundredweight below Obelisk, which latter brand sometimes sold at a lower price than Pillsbury's Best and Gold Medal. Like Colorado Milling and Dixie-Portland this company sold its family flour principally in 25-pound bags to the country or rural trade.

(d) General Foods Corporation. This company with its flour mill at Clarksville, Tennessee, operated under its Iglehart Division; sold its family flour in the Southeast under several brands, but sold its leading premium brands, Swans Down and Tender Flake, principally to jobbers on an exclusive basis. Its flour was sold in Kentucky, Tennessee, Georgia and parts of Alabama, Mississippi, South Carolina, Virginia, North Carolina and Florida, mostly in rural areas, although it made some sales in the metropolitan area of Nashville.

(e) J. Allen Smith & Company, Knoxville, Tennessee. This company sold its principal premium brand of family flour, White Lily, at approximately the same price as Pillsbury's Best and Gold Medal throughout a number of the southeastern states. Although it concentrated its sales in the larger cities, as hereinbefore indicated, until recently it also sold in substantial quantities to jobbers in rural areas on an exclusive basis.

(f) International Milling Company, Minneapolis, Minnesota. This company sold its three premium brands of family flour—Robin Hood, Silver Mist and Town Crier—to jobbers on an exclusive basis principally in rural areas. It did some advertising—mostly signs on trees and telephone poles along the highways.

(g) Yukon Mill & Grain Company, Yukon, Oklahoma. This company sold its principal brand of premium grade flour, Yukon's

Best, in all the states of the Southeast to jobbers on an exclusive basis. It also sold a number of standard grades. It did not advertise its family flour and its sales effort was directed at selling jobbers rather than consumers and the sales of these jobbers were made for the most part in rural territory. Yukon's Best although a premium flour was sold at a differential of approximately 50 cents per hundredweight under the Pillsbury's Best and Gold Medal prices.

(h) Nebraska Consolidated Mills Company, Omaha, Nebraska. This company with its mill operated by its Alabama Flour Mills Division at Decatur, Alabama, sold both family and bakery flour. It sold its premium brand of family flour, Mother's Best, to jobbers on an exclusive basis in the rural areas throughout Alabama, most of Tennessee, the northern part of Mississippi and in small areas in Kentucky, Georgia and western North Carolina. This brand was advertised and sold quite extensively in Birmingham; however, this mill sold a number of standard grade flours, which were not advertised, to jobbers on an exclusive basis in rural areas.

(i) The New Era Milling Company. This comapny, with its mill located at Arkansas City, Kansas, manufactures both bakery and family flour. It sold its family flour through its own sales force in the Southeast to jobbers on an exclusive basis. Practically all its family flour was sold under the brand name Polar Bear, a premium flour. It sold to at least 50 jobbers scattered throughout the Southeast with the exception of Mississippi, Louisiana and southern Florida. Its Polar Bear brand was sold at a retail differential from 30 to 50 cents per hundredweight under the Pillsbury's Best and Gold Medal prices. It catered to the country trade and did not advertise its family flour extensively relying upon the exclusive dealership to popularize its brands.

(j) Cosby-Hodges Milling Company, Birmingham, Alabama. This company was engaged in the blending and sale of family flour, as well as formula feed, which it distributed to retailers through its own warehouse system. It distributed its principal premium brand of family flour, White Tulip, throughout the area surrounding its warehouses located in Montgomery, Mobile, Dothan, Attalla and Decatur, Alabama; Pensacola, Florida; and Columbus, Georgia. It did some cooperative newspaper, billboard and radio advertising.

(k) The Buhler Mill & Elevator Co., Buhler, Kansas. This company sold its premium brand of family flour, Dixie Lily, to wholesalers on an exclusive basis, who in turn sold to retailers in Florida and scattered areas in Mississippi, Alabama, Tennessee, Georgia and North Carolina at prices from 70 to 80 cents per hundredweight under the Pillsbury's Best and Gold Medal prices.

(l) Shawnee Milling Company. This company with its principal mill at Shawnee, Oklahoma, is engaged in the milling of family and bakery flour. It shipped its family flour into the southeast where its premium grade of flour was sold mostly in 25-pound bags under the trade name Shawnee's Best on an exclusive basis to jobbers located principally in Mississippi, Alabama, southern Georgia, South Carolina and the southern part of North Carolina. Its sales were concentrated largely in rural areas.

(m) Harris Milling Company. This company with its mill located in Michigan sold its two principal premium brands of family flour, Famo and Cream, through brokers to jobbers in scattered areas in the Southeast in Tennessee, Georgia, Alabama and North Carolina on an exclusive basis. It did no advertising but depended upon the jobbers to promote the sale of its flour.

(n) Statesville Flour Mills Co. This company is located at Statesville, North Carolina, where it manufactures and distributes family flour, bakery flour and formula feeds. It sold and distributed its premium brands of family flour through its warehouses direct to jobbers and retailers including some chains located principally in North and South Carolina. The premium grades sold below the Pillsbury's Best and Gold Medal prices. It did not advertise its family flour.

(o) The Western Star Mill Co. This miller of Salina, Kansas, sold its principal premium grade brands of family flour to a few jobbers in the Southeast on an exclusive basis. These jobbers sold this flour principally in rural areas in northern Mississippi, western Tennessee, southern West Virginia and western Virginia.

(p) H. C. Cole Milling Company, Chester, Illinois. This company sold its premium grade of family flour Omega not only in the city of Memphis, as hereinbefore indicated, but also to wholesalers and retailers in other parts of the Southeast including the western third of Tennessee, the extreme western part of Kentucky, the states of Mississippi, Alabama, Florida and most of Georgia. This brand of flour was sold at approximately the same price as Ballard's Obelisk.

(q) The Abilene Flour Mills Company. This company with its mill located in Abilene, Kansas, sold four premium grade brands of flour, the principal one of which was Tastee Biscuit, to wholesalers on an exclusive basis, and to a few chains and retailers scattered throughout the states of Mississippi, Alabama, Georgia, Florida, Tennessee, Kentucky, the western part of Virginia and West Virginia.

(r) Griffin Grocery Company, Griffin, Georgia. This company is a wholesale grocer, doing business as Happyvale Flour Mills, operating a flour blending plant at Griffin, Georgia, and a small flour mill at Fort Valley, Georgia. It sold its own brands of family flour and the Hollyhock brand of the Colorado Milling & Elevator Company to retailers in rural areas throughout the state of Georgia and the suburban trade in and around Macon and Atlanta, Georgia.

Although there were a number of other small millers and blenders selling family flour in local communities in the Southeast in 1951, the foregoing mentioned mills accounted for approximately 70% of the total sales of flour mills in operation in the Sotuheast in 1952.

8. *Total Family Flour Sales in Southeast Prior to Acquisition of Ballard.* The record does not contain accurate production or sales figures of family flour for the Southeast for the period of time just prior to June 1951, the date of the acquisition of Ballard by Pillsbury, but there is in evidence a statement in one of the Mintener letters, hereinbefore mentioned, entitled "Statement Regarding Sales of Similar or Comparable Products in Southeast Area in which Ballard and Pillsbury Operate and Compete" as follows:

We estimate that in the said Southeast area, the following volumes of sales, and Ballard's and Pillsbury's respective shares thereof during the fiscal year 1949–1950 were as follows:

	Volume (cwt.)	*Share (percent)*
Total family flour sold in area	20, 000, 000	
Ballard	930, 000	4. 65
Pillsbury	732, 475	3. 66
Combined Ballard and Pillsbury totals	1, 662, 475	[1] 8. 31

[1] CX 85–N.

The same statement estimates that General Mills sold the largest volume of family flour in the Southeast area with sales between 1,500,000 hundredweights and 1,800,000 hundredweights or 7.50% to 9.0% of the total volume sold in the area. In presenting these figures to the Commission Mr. Mintener stated, "We do feel that the figures are reasonably accurate". It appears that these estimates were based on data furnished by the Market Research Corporation of America to Pillsbury and that they were prepared from what is known as the National Consumer Panel. The Commission tentatively accepted these figures at the time the Commission opinion was written. An attempt has been made by counsel for the respondent to discredit the said estimate, and new estimates have been prepared by Mr. Detlefsen, the Pillsbury accountant and statistician, in which he estimates that the total aggregate of family flour sales in the Southeast for the same period of time was approximately 27,093,000 hundredweights. This larger figure is not accepted as it is not believed that the estimate made by Mr. Detlefsen is as reliable as the one made by the Market Research Corporation of America and furnished the Commission in the Mintener letters.

B. *The Flour-Base Home Mix Market*

1. *Definition and Classification.* The prepared flour-base home mix industry is of a comparatively recent origin. At first there were two firms Pillsbury and Quaker Oats manufacturing pancake mixes. The modern flour-base home mixes, sometimes herein referred to as mixes, however, had their beginning about 1931 or 1933 when Duff and Dromedary began the manufacture and sale of cake mixes which included shortening, sugar, baking powder and other ingredients which required the addition of a liquid or liquid and eggs to form a batter. With these mixes the housewife could make a cake in a much shorter period of time than it would take to do so under the usual method of mixing the ingredients.

At first these two companies manufactured and sold a gingerbread mix and then later added a devils food mix the latter part of the 1930's and a white cake mix just before the Second World War at which time they discontinued both products because of the government sugar quotas. Subsequent to 1946 they resumed the manufacture of cake mixes. About 1946 General Foods, General Mills, Pillsbury and Quaker Oats began the manufacture of cake mixes in addition to the pancake mix which Pillsbury and Quaker Oats had been manufacturing prior to the War. The only other manufacturer of cake mixes prior to the War was Cinch Products, Inc., located in Los Angeles, California, which also resumed the manufacture of cake mixes after the War. It sold most of its products on the west coast and 90 to 95% in states west of the Mississippi River.

The principal types of mixes on the market in 1951 were cake mixes including white, chocolate, devils food and yellow. Other popular flavors have been added since that time such as angel food, spice cake, marble cake and orange cake. A second classification would include hot roll mixes, since they have yeast as a leavening. A third classification would include pie crust mixes, which have recently been made available in both powder and stick form. A fourth classification would include pancake and waffle mixes. There are numerous other mixes such as muffins, cookies, etc.

2. *Leading Mix Manufacturers Prior to Acquisition of Ballard and Duff.* Whereas the family flour market has been declining, the flour-base home mix market has been expanding, particularly in

urban areas. Pillsbury prior to 1951 was one of the four largest mix manufacturers in the United States. In the Mintener letters it was estimated that during the fiscal year ended July 1950, the total sale of mixes in the United States was approximately 7,600,000 hundredweights of which General Mills was the largest producer with approximately 1,625,000 hundredweights or 21.29% of the total; Pillsbury was second with 1,219,000 or a percentage of 15.97 of the total; American Home, which at that time was manufacturing the Duff line, accounted for approximately 453,000 hundredweights or 5.93% of the total; Ballard was credited with 80,000 hundredweights or 1.13% of the total. Other manufacturers of consequence in the United States were Quaker Oats which manufactured the Aunt Jemima line of mixes including pancake with 13.88%; General Foods, manufacturing Swans Down mixes with 6.48% and Hills Brothers manufacturing the Dromedary line of mixes with 4.04% of the total.

Turning to the Southeast area where Ballard operated, it was estimated in the Mintener letters that the total production and sales of mixes in the Southeast was approximately 666,000 hundredweights of which Pillsbury accounted for 151,000 or 22.7% of the total; American Home (Duff) 68,000 or 10.2%; and Ballard with 80,000 or 12% of the total. The aggregate of the sales of these three manufacturers as of that time, as estimated by respondent in the Mintener letters, was approximately 45% of the total mix industry sales in the Southeast.

3. *Chain Stores and Supermarkets Important Sales Outlets for Mixes in Urban Areas.* In the mix industry, even more pronounced than in the family flour industry, the chain stores and supermarkets are the principal sales outlets in urban areas, and the manufacturer must successfully create a substantial consumer demand for his product before the supermarkets and chain stores will give the product shelf space. This results in intensive advertising in competition for shelf space. The objective of the advertising is to presell the consumer on a particular brand. The creation and maintenance of consumer demand is a prerequisite to obtaining shelf space in chains and supermarkets. This situation is true in the Southeast as well as throughout the country.

C. *Description of Respondent and Corporations Acquired and their Acquisition*

1. *The Respondent Pillsbury Mills, Inc.* (By action taken on September 15, 1958, the corporate name of respondent was changed from Pillsbury Mills, Inc., to The Pillsbury Company.) The orig-

inal business of respondent was established in 1869 under the name of C. A. Pillsbury & Company.) In 1889 this company was consolidated with the Washburn Milling Company forming the Pillsbury-Washburn Flour Mills Co., Ltd. The present corporation was formed in 1935 under the name of Pillsbury Mills, Inc., at which time it acquired the assets of Pillsbury Flour Mills, Inc., a holding company, and the Pillsbury Flour Mills Company of Minnesota, an operating company, along with the latter's three subsidiaries which nad been acquired prior to that time. Pillsbury's office and principal place of business is presently in the Pillsbury Building in Minneapolis, Minnesota.

As of June 1, 1940, Pillsbury owned or operated six flour mills in the states of Oregon, Kansas, New York, Oklahoma, Minnesota and Illinois with a total daily capacity of 69,200 hundredweights, two pancake mix plants in Kansas and Illinois with a total daily capacity of 3,934 hundredweights. It also had formula feed plants in Kansas and Minnesota with a total daily capacity of 700 tons of formula feeds and grain storage elevator facilities with a total storage capacity of 16,510,000 bushels of grain.

As of June 1, 1951, Pillsbury owned or operated eight flour mills located in the states of Oregon, Kansas, New York, Oklahoma, Minnesota, Utah, California and Illinois with a total daily capacity of 84,200 hundredweights; three flour-base mix plants located in the states of California, Utah and Illinois with a total daily capacity of 10,109 hundredweights of cake, hot roll, pie crust, pancake and biscuit mixes. It also had 10 formula feed plants located in the states of Kansas, Iowa, California, Minnesota and Utah with a total daily capacity of 1,595 tons of formula feeds and 26 grain storage elevator facilities with a total storage capacity of 25,125,000 bushels of grain. In terms of total milling capacity on the basis of hundredweights of flour per 24 hours, at the beginning of the year 1951 Pillsbury was the second largest flour miller in the United States.

During the fiscal year ended May 31, 1950, it is estimated by Pillsbury officials that Pillsbury was the second largest seller of family flour in the United States, with sales amounting to approximately $38,000,000; the third largest seller of bakery flour with sales amounting to approximately $62,000,000; and the second largest seller of flour-base mixes with sales amounting to approximately $26,000,000.

In the Southeast during this fiscal year it was estimated by officials of Pillsbury that it was the fifth largest company in volume of sales of family flour with sales of 732,000 hundredweights; third largest in the sale of bakery flour with 680,000 hundredweights; and first in the sale of flour-base mixes with 151,000 hundredweights.

During the fiscal year ending May 31, 1951, Pillsbury produced more than 21,000,000 hundredweights of flour of which approximately 5,000,000 hundredweights was sold as family flour and approximately 1,400,000 hundredweights of mixes for home consumption. Its proportion of flour that year in the United States was approximately 9.18% of the total production according to a United States Bureau of the Census report.

Between June 1, 1940, and June 1, 1951, Pillsbury made acquisitions of flour mills, plants and elevators as follows: In July 1940 it paid approximately $3,500,000 for all the assets of the Globe Grain and Milling Co. of Los Angeles, California, which had flour mills at Los Angeles, San Francisco and Ogden, Utah, and feed plants at Los Angeles, Colton, San Francisco and Sacramento in California and in Ogden, Utah, also a blending plant at Little Rock, Arkansas, with grain elevators and other miscellaneous properties in the states of California, Arkansas, Idaho and Utah; in 1942, a formula feed plant and laboratory at Clinton, Iowa, from the Champion Milling & Grain Company and the W. J. Young & Co. both of Clinton, Iowa; in 1943 a soybean processing plant and a feed plant at Centerville, Iowa, from the Standard Soy Bean Processing Co.; and a number of grain elevators in Illinois and Iowa between 1945 and 1951.

Prior to June 1951 Pillsbury did not have a flour mill located in the Southeast territory but for a number of years had been shipping flour, formula feeds and mixes into that territory. During the fiscal year ending May 31, 1950, Pillsbury delivered approximately 740,000 hundredweights of family flour and approximately 850,000 hundredweights of bakery flour into that territory. During the fiscal year ending May 31, 1951, Pillsbury delivered approximately 820,000 hundredweights of family flour into the Southeast, nearly all of which were of its Pillsbury's Best brand. During the latter fiscal year Pillsbury delivered approximately 795,000 hundredweights of bakery flour and approximately 11,940 tons of formula feeds into the Southeast market. Pillsbury began to ship mixes (other than pancake mix) into the Southeast in 1947–48. During that year it shipped into that area approximately 30,000 hundredweights of pie crust and hot roll mix in addition to 40,000 hundredweights of pancake mix. In the fiscal year 1950–51 Pillsbury shipped 168,070 hundredweights of mixes to customers located in the Southeast. It is estimated that of its total business, Pillsbury shipments into the Southeast in that fiscal year accounted for about 15% of all Pillsbury deliveries of family flour, about 8% of its bakery flour, 12% of its mixes and 4% of its formula feeds.

Pillsbury sells its family flour and mixes primarily through its own sales organization to jobbers, wholesalers, chains, supermarkets and large retailers.

During the 10-year period from May 31, 1940, to May 31, 1950, Pillsbury's net sales of all products increased from approximately \$47,000,000 to approximately \$201,000,000; its total assets were increased from approximately \$30,000,000 to approximately \$62,000,000.

2. *Ballard and Ballard Company.* Ballard and Ballard Company was organized in 1909 as the successor to a partnership of the same name established in 1880 with its principal office in Louisville, Kentucky. Prior to 1951 Ballard milled and sold family flour and bakery flour; manufactured, or caused to be manufactured, packaged and sold mixes, such as pie crust, hot roll, cake and pancake mixes, as well as a line of refrigerated dough products known as Oven-Ready biscuits. It also manufactured and sold formula feeds and mill feeds and handled a number of other products. The cake and pie crust mixes were manufactured for it by the Patten Food Products Division of the Chattanooga Medicine Co., Chattanooga, Tennessee. Ballard distributed these products through its own sales organization and warehouses except the Oven-Ready biscuits which were sold through Kraft Foods, a subsidiary of the National Dairy Products Corporation.

Ballard's principal plants were located in Louisville, Kentucky, where it had a flour mill with a capacity of approximately 5,000 hundredweights per 24-hour day, as well as elevator storage for about 2,000,000 bushels of grain; flour storage for about 44,000 hundredweights of flour; a new packing plant with facilities for packaging 1,000,000 hundredweights of flour annually; and facilities for mixing and packaging about 182 hundredweights of pancake mixes and hot roll mixes per 16-hour day. It also had a new formula feed plant with total capacity of 720 tons per 24-hour day.

During the 10-year period from June 30, 1940, to June 30, 1950, Ballard's net annual sales increased approximately from \$8,000,000 to \$30,000,000; its total assets increased approximately from \$2,600,-000 to \$11,300,000, and its net worth approximately from \$2,500,000 to \$5,800,000. Total sales of Ballard products for the 11-month period beginning July 1, 1950, ending May 31, 1951, amounted to approximately \$33,000,000. As of May 31, 1951, Ballard's total assets amounted to approximately \$14,700,000 and its net worth amounted to approximately \$6,000,000.

Ballard sold its products with the exception of its refrigerated dough products principally within the Southeast region which is hereinbefore described. Its principal brand of flour was Obelisk which was an all-purpose flour made principally from soft wheat and especially suitable for making biscuits. It shipped its flour, pancake mix and hot roll mix, mill feed, and its bakery flour from its Louisville plants and its formula feed from its Louisville and Nashville, Tennessee, plants. Its cake mixes and pie crust mixes were shipped from its supplier's plant in Chattanooga, Tennessee, and its Oven-Ready biscuits were shipped from its plants in Louisville, Kentucky; Atlanta, Georgia; and Denison, Texas. Most of Ballard's family flour was sold within the principal urban areas of the Southeast. Ballard maintained warehouses or sold to wholesalers in 23 of the 35 principal metropolitan areas in the Southeast. Approximately 90% of Ballard's total deliveries of family flour in the period July 1, 1950, through May 31, 1951, was made from warehouses or through wholesalers located in these 23 areas. Fifteen of these areas, namely, the Birmingham, Memphis, New Orleans, Mobile, Louisville, Atlanta, Jacksonville, Miami, Tampa, Richmond, Norfolk, Winston-Salem, Nashville, Knoxville and Chattanooga markets were recognized as being principal markets for family flour in the Southeast.

During the fiscal year ended June 1, 1950, Ballard produced approximately 1,200,000 hundredweights of flour of which 894,818 hundredweights were Ballard's Obelisk and 342,794 hundredweights were other brands and grades of flour including bakery flour; 32,621 hundredweights of pancake mix; and 10,517 hundredweights of hot roll mix. In addition it had manufactured for it by the Chattanooga Medicine Co. and sold 27,132 hundredweights of cake mixes and 6,576 hundredweights of pie crust mixes. It also manufactured and sold approximately 100,000 tons of formula feeds during this year. In dollar volume Ballard's sales of family flour during the same period of time amounted to approximately \$9,000,000; its sale of formula feeds totaled approximately \$9,400,000; its sale of bakery flour approximately \$1,700,000; its flour-base mixes approximately \$1,300,000; and its sales of other products, including principally Oven-Ready biscuits, amounted to approximately \$8,000,000.

Ballard in 1950 was estimated by Pillsbury officials to have been the third largest seller of family flour in the Southeast and the third largest seller of flour-base mixes in that region. It was also recognized by officials of the respondent that the Obelisk brand of flour had maintained a strong competitive position in the market with all other major brands, and it had pioneered in the packaging of flour in 2- and 5-pound boxes instead of sacks.

3. *The Acquisition of Ballard.* Respondent acquired the assets of Ballard on June 12, 1951, for approximately $5,172,000 and has since operated the business of that company as a part of the Pillsbury organization. The method of acquisition is described as follows:

Under a plan of reorganization in accordance with the provisions of Section 112 of the Internal Revenue Code, and pursuant to a contract dated May 10, 1951, in which the plan was described, Pillsbury Mills, Inc. issued 115,000 shares of its previously unissued common stock to Ballard & Ballard Company on June 12, 1951, in exchange for substantially all of Ballard & Ballard Company's assets, net of its stated liabilities. That company then distributed these shares to its stockholders in exchange for its own shares and is in the process of dissolution.

The balance sheet of Ballard prepared as of May 31, 1951, showed Ballard's total assets as $14,733,108 and its total liabilities as $8,584,-860. For the 11-month period ending May 31, 1951, Ballard's net earnings were reported to be $495,000 before deducting expenses incident to its sale to Pillsbury.

During the 11 months immediately preceding Pillsbury's acquisition of Ballard, July 1, 1950, to May 31, 1951, the hundredweight sales of family flour by Pillsbury and by Ballard in the same urban areas of the Southeast were as follows:

Ballard Warehouse Area	*Pillsbury Sales*	*Ballard Sales*
Atlanta, Ga	6, 435	55, 669
Augusta, Ga	9, 153	27, 478
Birmingham, Ala	13, 510	51, 768
Bluefield, W. Va	39, 531	8, 329
Brookneal, Va	6, 142	1, 775
Charleston, S.C	10, 662	31, 041
Chattanooga, Tenn	1, 800	28, 432
Greenville, S.C	16, 140	8, 583
Gulfport, Miss	3, 871	28, 751
Jackson, Miss	3, 454	10, 812
Jacksonville, Fla	63, 927	53, 474
Louisville, Ky	10, 015	92, 229
Memphis, Tenn	30, 180	19, 742
Mobile, Ala	2, 144	46, 989
Montgomery, Ala	5, 482	30, 235
Nashville, Tenn	1, 543	2, 608
New Orleans, La	7, 025	61, 658
Norfolk, Va	104, 296	44, 114
Orlando, Fla	30, 866	11, 985
Raleigh, N.C	23, 681	17, 041
Richmond, Va	107, 520	6, 420
Savannah, Ga	3, 121	35, 381

Ballard Warehouse Area	*Pillsbury Sales*	*Ballard Sales*
Tampa, Fla	182, 176	24, 517
Thomasville, Ga	5, 731	24, 096
Wilmington, N.C	2, 174	7, 264
Winston-Salem, N.C	11, 563	30, 182
Unallocable	100, 890	---------
Mill Accounts		56, 987
Total	803, 032	[1] 817, 560

[1] RX 153-A.

4. *Duff Baking Mix Division of American Home Foods, Inc.* American Home Foods, Inc., is a New Jersey corporation, a subsidiary of American Home Products Corporation, with offices at 22 East 40th Street, New York, New York. In 1945 it acquired the business of P. Duff & Sons Incorporated which for many years had been engaged in the manufacture and distribution nationwide of certain baking mixes including several varieties of cake mixes, a hot roll mix, a hot muffin mix, a waffle mix, a corn muffin mix and a hot biscuit mix. American Home continued since that date to manufacture and sell these mixes nationwide under its Duff Division. In 1947 American Home built a new mix plant at Hamilton, Ohio, with a capacity for 2,640 hundredweights of cake and hot roll mixes in a 16-hour day. This company also had a mix manufacturing and packaging line at its plant in San Jose, California.

As of November 30, 1951, the fixed assets and inventories of the Duff Division were valued at $2,396,320. This included both the Hamilton, Ohio, plant and the San Jose, California, equipment.

Duff mixes were sold generally throughout the United States, including the Southeast, principally to chains and wholesale accounts by American Home's sales force which at that time consisted of approximately 400 salesmen. American Home maintained stocks of Duff mixes in about 11 public warehouses and 2 warehouses at its own plans. These public warehouses were located in Boston, Massachusetts; New York, New York; Lynchburg, Virginia; Atlanta, Georgia; Birmingham, Alabama; Dallas, Texas; Denver, Colorado; Kansas City, Missouri; Salt Lake City, Utah; Seattle, Washington; and Portland, Oregon. In addition the company maintained its own warehouses at Milton, Pennsylvania, and San Jose, California.

It is estimated by officials of the respondent that during the crop year 1949–50 American Home in the sale of Duff mixes was the fourth largest seller of mixes in the United States and the fifth in the Southeast. During the calendar year 1950 it sold 2,878,868 dozens of packages or 319,236 hundredweights of Duff mixes for

$7,962,202. During the calendar year 1951, the year prior to its acquisition by Pillsbury, it sold 2,325,569 dozens of packages or 261,503 hundredweights of Duff mixes for $6,828,373.[3]

5. *The Acquisition of Duff*. Pillsbury in March 1952, through its subsidiary The 1010 Eaton Avenue Corporation, acquired from American Home Foods, Inc., the Hamilton, Ohio, baking mix plant, goodwill, franchise, etc., of its Duff Baking Mix Division. In addition it purchased the inventories of Duff and some of its mix manufacturing machinery owned by the Duff Division at San Jose, California. The cost to Pillsbury of the Duff plant, business and inventories was $2,226,765 of which $426,765 was paid in cash and the balance in the form of a mortgage note. The cost to Pillsbury of the machinery at San Jose was $51,947. There is a conflict in the testimony on this point. The figures just given are in Respondent's Exhibit 50–C but a vice president of respondent Pillsbury testified that total price for the plant and inventory of Duff was $2,953,599, of which $1.153,599 cash was paid and a mortgage note was given for the remaining $1,800,000, and that the cash portion included an inventory of $714,618.[4] Later he testified that these figures did not include the San Jose machinery which was a separate cash transaction in the amount of $51,946. If that amount is added to $2,953,599, the total cost to Pillsbury of the entire Duff business would amount to $3,005,545.

6. *Pillsbury's Disposition of the Duff Brand*. On or about December 21, 1953, Pillsbury sold and transferred to a corporation known as the Duff Baking Mix Corporation, organized under the laws of the state of New Jersey in December 1953 by Frederick J. Briefer and Edward J. Baker, who had nothing to do with the respondent's business, all of Duff's goodwill, trademarks, copyrights, patents, incidents of business and the formulae, manufacturing methods, processes and techniques used in the manufacture of mixes such as waffle mix, hot muffin mix, hot roll mix, layer cake, devils food mix, spice cake and gingerbread mix. The sale by Pillsbury, however, did not include the physical property and equipment such as the mix plant at Hamilton, Ohio, which as indicated on the books of the respondent had an evaluation at the time it was acquired of $2,226,765. According to the agreement, the purchase price was $750,000 to be paid by a down payment of $50,000 at the closing date and the remainder by a fixed amount per case on all mixes sold by the Duff Corporation and 50% of all net profits of over $75,000 made by the Duff Corporation in each year beginning with the year 1955. In the event Duff defaulted on any amount due

[3] RX 89–A.
[4] Tr. 4,009.

under the agreement, or is declared a bankrupt, Pillsbury may declare the entire unpaid balance due.

Among other things, it was agreed that Pillsbury, the seller, for a period of two years from the date of the closing of the contract would at its plant at Hamilton, Ohio, manufacture, pack in bulk or package and pack in shipping containers, the eight Duff label mixes described in the contract, in sufficient quantities to satisfy the requirements of the purchaser but not in excess of 1,625,000 dozen packages or its equivalent in bulk, of which not more than 600,000 dozen may be gingerbread in any 12-month period.

II. Effect of Ballard Acquisition Upon Competition in the Family Flour Industry in the Southeast

A. *Share of the Market*

1. *Pillsbury Advanced from Fifth Place to First, Displacing General Mills.* The first result of the acquisition of Ballard by Pillsbury was the increase in the volume of sales of family flour under the control of Pillsbury. Prior to the acquisition, General Mills with its Gold Medal, a hard wheat flour, and Red Band, a soft wheat flour, was the leading distributor of family flour in the Southeast. As hereinbefore indicated, Ballard probably was third and Pillsbury fifth prior to the acquisition. Combining the sales of these two brands, Pillsbury's Best and Ballard's Obelisk, in 1952, the first calendar year after the acquisition, Pillsbury moved into second position in the share of the market with 9.39% of total sales in the Southeast of flour mills and blending mills whose total daily capacity was over 400 hundredweights according to a survey made by the Federal Trade Commission. This relative position in the industry was increased to 9.61% in 1954 and 11.02% in 1956. Pillsbury attained the rank of first place in the sale of family flour in the Southeast in 1954 displacing General Mills in that position. General Mills, which occupied first place in 1950, 1951 and 1952 in its share of the total market in the Southeast, declined from 9.57% in 1952 to 9.29% in 1954 and advanced again to 9.86% in 1956. It is significant, however, that although General Mills advanced percentagewise in 1956 over 1952 and 1954 its total sales of family flour in that area declined steadily from 1952 to 1956 and the increase in percentage in 1956 was due to a declining family flour market in that area, since the total sales of the mills in the survey declined from 18,033,181 hundredweights in 1952 to 16,861,163 in 1954 and 14,940,095 in 1956.[5]

[5] CX 478-E.

Comparing the volume of sales of the two brands Pillsbury's Best and Ballard's Obelisk in the Southeast for the three years, 1952, 1954 and 1956, Ballard's Obelisk brand increased percentagewise over Pillsbury's Best, gaining from 46.71% of the total to 46.76% in 1954 and to 48.35% in 1956. The actual sales figures for these three calendar years in hundredweights are set forth below:

	1952	*1954*	*1956*
Pillsbury's Best (cwt.)	889, 075	854, 117	842, 096
Ballard's Obelisk (cwt.)	779, 269	750, 004	[1] 788, 404

[1] CX 431-A.

2. *Colorado Milling & Elevator Company Sales Declined.* Turning now to the third largest seller of flour in the Southeast in 1952, the Colorado Milling & Elevator Company, the record shows that its sales in 1951 of 1,434,844 hundredweights declined in total volume each year thereafter and percentagewise from 7.32% in 1952 to 6.75% in 1954 and 6% in 1956. This company restricts its sales primarily to country or rural territory and does not go into the cities for business because too much advertising and service is required, "the country territory is the territory which gives us our business."[6] This firm did not sell to chains although sometimes its jobber customers might do so. It did not make sales in such cities as Augusta, Savannah, Birmingham, Memphis and Knoxville. "We keep our men out of there."[7] Mr. Craig, the Southern Sales Manager of this company, testified that the sales of family flour in the Southeast had decreased from June 1951 to May 1956 and attributed this decline to the fact that "there has been a declining consumption and then in addition to that there has been new competition that has come into the field, what we consider new competition."[8] He explained further that this new competition came from Pillsbury, General Mills and International in an aggressive effort to go after the large package—25-pound sack—business and that as a result this company lost business and had to close down three mills and consolidate its business in order to give a better running time in fewer mills rather than trying to sustain proper operation in more mills.[9]

3. *Dixie-Portland Flour Co. Sales and Share of Market Declined.* Another flour miller in the Southeast, hereinbefore mentioned as a factor in the family flour market, is the Dixie-Portland Flour Co. that was ranked second in 1950 with 6.25% of the market; dropped to fourth position in 1952 with 5.11%; retained fourth position in

[6] Tr. 26,923.

[7] Tr. 26,930-1.

[8] Tr. 26,925-6.

[9] Tr. 26,927-8.

1954 with a percentage of 5.12% but dropped to fifth position in 1956 with 5.24%. Mr. Stout, Executive Vice President of this company, testified that its sales of family flour had gradually declined since 1948 although sales of bakery flour had gradually increased during that time. He testified that this decline had been greater on the eastern seaboard in 1951 and 1952 than in other areas. This witness said that his firm did very little advertising; sometimes they would go on the local radio station in cooperation with a jobber, splitting the cost of spot announcements.[10]

4. *Other Important Flour Mills Whose Share of Market Declined.* Other important flour mills selling family flour in the Southeast whose share of the market declined during the period from 1952 to 1956 were:

(a) General Foods Corporation declined from sixth position in 1952 to seventh in 1954 and eighth in 1956; from 3.94% in 1952 to 3.73% in 1954 and 2.77% in 1956 percentagewise; and in volume from about 700,000 hundredweights in 1952 to 600,000 in 1954 and 414,000 in 1956;

(b) Nebraska Consolidated Mills Company declined from 10th position in 1952 to 11th in 1954 and 12th in 1956; or a percentage decline from 2.6% in 1952 to 2.36% in 1954 and to 1.94% in 1956; and in volume from about 460,000 hundredweights in 1952 to 400,000 in 1954 and to 290,000 in 1956;

(c) Yukon Mill & Grain Company declined from 9th position in 1952 and 1954 to 13th position in 1956; and from 3.47% share of the market in 1952 to 3.28% in 1954 and 1.86% in 1956 percentagewise; and in volume from about 625,000 hundredweights in 1952, to 550,000 in 1954 and 280,000 in 1956;

(d) Cosby-Hodges Milling Company declined from 12th position in 1952 to 14th in 1954 and to 16th position in 1956; from 1.93% in 1952 to 1.79% in 1954 and 1.46% in 1956 percentagewise; and in volume from about 350,000 hundredweights in 1952 to 300,000 in 1954 and 220,000 in 1956;

(e) Harris Milling Company declined from 15th position in 1952 to 18th in 1954 and to 20th position in 1956; or a percentage decline from 1.71% in 1952 to 1.30% in 1954 and the same percentage in 1956; its decline in volume was from about 300,000 hundredweights in 1952 to 220,000 in 1954 and 195,000 in 1956;

(f) The Abilene Flour Mills Company declined from 21st position in 1952 to 22d in 1954 and to 31st position in 1956 or in percentage from 1.04% in 1952 to 1.00% in 1954 and .80% in 1956; and in volume declined from about 190,000 hundredweights in 1952 to 170,000 in 1954 and to 120,000 in 1956;

[10] Tr. 1,615.

(g) The Western Star Mill Co. from 18th position in 1952 declined to 26th in 1954 and to 35th position in 1956; percentagewise from 1.17% in 1952 to .90% in 1954 and .67% in 1956; and in volume declined from about 211,000 hundredweights in 1952 to 150,000 in 1954 to 100,000 in 1956.

5. *Other Flour Mills Whose Sales Declined but Relative Positions Improved.* With respect to some of the other flour mills, although their volume of sales declined from 1952 to 1956, their percentage of the industry did not decline and their relative positions were improved. This was due to the decline of total sales.

(a) Martha White Mills, Inc. Martha White Mills, Inc., ranked fifth in 1952, dropped to sixth position in 1954, then advanced to fourth position in 1956, and percentagewise from 4.96% in 1952 to 3.96% in 1954 and advanced to 5.38% in 1956. This last increase probably was due to the acquisition of the Puritan Mill in Atlanta, Georgia, in 1955. The latter company blended family flour and sold it under the trade name of My-T-Pure. This is a premium brand of flour sold principally in the city of Atlanta. Also, Martha White acquired the Hammond Grocery Company with a small blending plant located in Laurinburg, North Carolina. In spite of this fact this company's sales declined from approximately 900,000 hundredweights in 1952 to 668,000 in 1954 and increased to approximately 800,000 in 1956 or a decline of approximately 100,000 hundredweights between 1952 and 1956 even though it had acquired two other millers.

(b) J. Allen Smith & Company. Another company in the same category is the J. Allen Smith & Company, hereinbefore mentioned as one of the principal competitors of Ballard in the Southeast, with its White Lily brand which accounted for 67% of its total sales of family flour sold principally to chain stores in Knoxville, Tennessee, and Atlanta, Georgia. In 1952 this company ranked seventh in the Southeast, in 1954 fifth and in 1956 seventh. Its share of the market percentagewise was 3.58% in 1952, 3.98% in 1954 and 4.02% in 1956. However, in actual volume of sales this company in 1952 sold approximately 645,000 hundredweights; in 1954 approximately 670,000 and in 1956 approximately 600,000, so that it can be concluded that its change in share of market was due to the decline in the total volume of family flour sold in the Southeast rather than an increase in its volume of sales. Further figures as to the sales of this company were furnished by its President, Mr. B. L. Driscoll, who testified that in 1948 1,000,000 hundredweights were sold and that the volume had declined since that time.[11] This is one of the few local or regional mills that competes

[11] Tr. 1,399.

actively with the respondent in Atlanta and Knoxville urban markets in the sale of its White Lily brand, a premium flour, with a strong local popularity in Knoxville where it is milled and in Atlanta where it advertised quite extensively.

(c) International Milling Company. Another company that had somewhat similar experience from the standpoint of share of market is International Milling Company which was eighth in 1952 and 1954, advanced to sixth in 1956 or an increase in percentage of sales of 3.56% in 1952 up to 4.31% in 1956. Its increase in volume of sales was not so great as the percentage figures indicated, being from about 642,000 hundredweights in 1952, up to approximately 644,000 in 1956 or an increase of about 2,000 hundredweights in sales from 1952 to 1956. This firm has a history of concentrating on sales in rural territory particularly during recent years as testified by Mr. Craig of the Colorado Milling & Elevator Company.[12] It also does quite extensive advertising with road signs on posts and trees. Its popular brands are Robin Hood and Silver Mist. It began offering free-goods deals such as one free with ten about 1955 in an effort to increase its position in the large sack market in the small towns and rural territory.

(d) The Buhler Mill & Elevator Co. Another firm that would come under this same classification is The Buhler Mill & Elevator Co. which advanced from 13th position in the industry in 1952 and 1954 to 11th in 1956 and percentagewise from 1.91% in 1952 to 1.88% in 1954 and 2.16% in 1956. Its total sales, however, declined from approximately 345,000 hundredweights in 1952 to 316,000 hundredweights in 1954 and 322,000 hundredweights in 1956.

(e) The New Era Milling Company. The New Era Milling Company was 11th in the industry in 1952, 12th in 1954 and 9th in 1956, percentagewise very little change—2.55% in 1952 to 2.18% in 1954 and 2.54% in 1956 or .01% lower in 1956 than 1952. Its total sales, however, in 1952 were approximately 460,000 hundredweights which declined to 380,000 in 1956 or about 80,000 hundredweights less than its sales in 1952. This company does not advertise its family flour extensively but relies upon exclusive jobbers selling in rural areas to compete against advertised brands. In recent years it spent some money on radio advertising on its premium brand flour Polar Bear.

6. *An Important Flour Mill, Shawnee Milling Company, Whose Sales and Percentage Increased in 1954 but Declined in 1956.* One of the larger mills located outside of the Southeast shipping into the Southeast area for a number of years is the Shawnee Milling

[12] Tr. 26,926-7.

Company, Shawnee, Oklahoma, hereinbefore mentioned. This firm sells its principal premium brand Shawnee's Best and its standard brands Mother's Pride and Shawnee Chief, milled from hard wheat, and Golden Crust, a low grade brand, all throughout the Southeast, the different names being used for different jobbers in different territories on an exclusive basis. The brands Shawnee Chief, Southeastern Pride and Silver Spoon are standard grades of flour which are sold at 40 cents a hundred under the price of premium flour. Golden Crust brand is sold from 75 to 80 cents a hundred under the price of the premium flour. The Southeastern Pride brand is distributed principally in southern Alabama; Silver Spoon in southern and eastern Alabama, northern Florida, central and western Georgia. This firm has been selling in the Southeast since approximately 1925 which it was able to do at that time because of favorable freight rates and the volume of business has increased through the years although the same general territory is sold now as was sold in 1940, the sales being principally in rural communities.

The President of the Shawnee Milling Company testified in this case in October 1955 to the effect that the demand for hard wheat flours in the Southeast had increased since 1940 by virtue of the hard wheat being more acceptable to the housewife than soft wheat flours for the type of baking she is now doing. The sales of this firm in the Southeast of family flour have fluctuated since 1951. According to the Commission survey it has shown an overall increase from 1952 but it has declined since 1954; for illustration, the total sales during those years were approximately 321,000 in 1952, 447,000 in 1954 and 353,000 in 1956, or a shifting of percentages from 1.78% in 1952 to 2.65% in 1954 and to 2.36% in 1956. In other words, while its sales in 1956 were higher, both actually and in proportion to the total industry sales when compared with 1952, they had declined substantially since 1954. The sales of Shawnee's Best brand, the premium grade, were about 45% of the total sales of Shawnee brands of family flour in the Southeast; Shawnee Chief 28% and Mother's Pride 12%, and the other brands including Southeastern Pride, Silver Spoon and Golden Crust accounted for the remaining 15%.

7. *A Large Local Flour Miller, Roanoke City Mills, Inc., Increased Sales and Percentage in 1954 Although Sales Declined in 1956 from 1954.* Roanoke City Mills, Inc., in 1952 ranked 17th in the industry in the Southeast having 1.18% of the total. In 1954 it had 1.45% and ranked 16th; and in 1956 1.57% and ranked 15th. The actual sales increased in 1954 over 1952 and declined in 1956. However, the 1956 volume of sales was higher than the 1952 volume. Without giving actual figures the volume in 1952 was approximately

213,000 and increased to 245,000 in 1954 and declined to approximately 235,000 in 1956. This miller sells not only family flour but bakery flour, formula feeds and corn meal. It purchases about 5% to 10% of its wheat requirements locally, the remainder being shipped in from Michigan, Ohio and Indiana. Of its premium brands—Metropolitan, Light White and Michigan Queen—85% of its Metropolitan brand is sold in metropolitan Roanoke which takes in certain adjacent sections. The other two premium brands, as well as the cheaper brands or standard brands, are sold principally on an exclusive basis to jobbers throughout the territory in the states of Virginia and North and South Carolina. Less than 5% of its total volume is sold to chain stores. From the standpoint of total volume of family flour the Metropolitan brand accounts for about 10% of sales and the other two premium brands about 50% of sales. The Metropolitan brand sells about 15 to 25 cents less per hundredweight than the Pillsbury and General Mills brands. The other premium brands are sold about 50 cents less than the Metropolitan brand. This company advertises its premium brands of family flour quite extensively in newspaper, radio and television. It also uses promotions such as special deals and point-of-purchase premiums in Roanoke but depends principally upon its jobbers to promote its flour sales in other areas. It makes some sales of its family flour under private brands to Colonial Stores and Kroger, both well-known chains in that area.

In making its prices this miller usually follows competitors if there is a reduction in price. When asked if it made any difference whether the competitive brand was a local brand or a regional brand or a national brand, Mr. James K. Ring, the President of this miller, stated, "Yes, the more highly advertised and promoted brands would control with us. There is some local, but there again it is just for a local territory." When asked whether his prices are more sensitive in reacting to the prices of the more widely distributed brands, he answered in the affirmative.[13] This witness was quite emphatic in his testimony that there had been an intensity of competition in recent years. He testified in 1956 and referred to the previous time since June 1951. When asked if he could tell the ways in which he had observed or noticed such intensity of competition, he replied, "Well, in advertising, newspaper, radio, television, and in the representation. * * * By Salesmen, missionary men. Missionary as we understand it is doing resale work for the jobber." He defined "specialty work" as deals and couponing.[14]

[13] Tr. 15,494.
[14] Tr. 15,513.

This witness also testified that he had found that competition is stronger in urban areas for family flour than in country or rural areas and he gave as his reasons,

> We are all after business in concentrated areas.
>
> * * * * * * *
>
> More potentional [sic] flour business than in a smaller area—that is, in the cities. Your important larger wholesale grocers or flour jobbers are in the cities. And your advertising media are more concentrated in cities—newspapers, radio. Your better grocery stores are in the cities.

By better grocery stores he said he meant supermarkets and chain stores and that there was an advantage in being able to sell to supermarkets and chains. He was then asked whether the competition he encountered from Pillsbury was stronger in the urban or city areas or in the rural areas. His reply was, "In the city areas." He added that local mills enjoy a better volume of flour business in their territories, usually of standard or low grade flour at a price. He explained that the low price was because they do very little or no promotion.[15]

Mr. Ring testified with respect to the competition from mills smaller than his mill and from mills larger than his mill and in explaining the difference stated, "The smaller mills, probably from the price standpoint, whereas the larger mills are more aggressive in their promotion, as I covered it there, and sales efforts."[16] By promotion the witness had testified, "Resale work, newspapers, radio, television, premiums, deals."[17] It was brought out by this witness that the principal sizes of flour sold in the urban territory were 2-, 5- and 10-pound sacks, and that the larger mills that are in his territory, the Oklahoma and Kansas mills, Pillsbury, General Mills and International, were the most important competitors in the sale of such sizes.[18] He testified further that the General Mills brands and Pillsbury brands had the outstanding volume in chain stores in his territory.[19]

When asked whether there were any mills that were selling flour in 2's, 5's and 10's in his territory other than those he had named, he mentioned Colorado Milling & Elevator and Western Star. He named the following mills who had widened their coverage of sales since 1951: International Milling, Western Star Mills, Harris Milling, J. Allen Smith in Knoxville and Cohen Williams (Martha White) in Nashville. In this connection he testified that both Pillsbury and Ballard continued in that territory and were covering it

[15] Tr. 15,551-2.
[16] Tr. 15,565.
[17] Tr. 15,558.
[18] Tr. 15,570.
[19] Tr. 15,572.

about the same as they had before 1951 and that Pillsbury had been more aggressive since that date.[20]

Reference is made to the testimony of this particular witness because he is typical of a local or regional miller of more than average size, his capacity being approximately 3,500 hundredweights per day, a mill which operated at about 80% of its capacity and competed with Pillsbury and Ballard in both the urban territory and in the country or rural territory. It is significant that although Pillsbury increased its volume of sales in 1956 over 1954, the sales of this local or regional miller, with its natural advantage over Pillsbury by reason of its location and the price it had to pay for its wheat, declined in 1956 when compared with 1954.

8. *Another Local Flour Miller, Statesville Flour Mills Co., Whose Sales Increased in 1954 and Declined in 1956.* One of the important local Southeast flour mills, hereinbefore mentioned, is the Statesville Flour Mills Co. in Statesville, North Carolina. It ranked 16th in 1952, 15th in 1954 and 18th in 1956. Its percentage share of the market was 1.34% in 1952, 1.48% in 1954 and 1.43% in 1956. It would thus appear from the above percentage figures that it had improved its position in the market, however very slightly. This was due, not to increased sales, but to the decline of the total volume of sales of family flour in 1956 as compared with previous years. For instance, its total volume of sales in 1952 was approximately 242,000 hundredweights; in 1954 248,000 hundredweights; and in 1956 approximately 214,000 hundredweights. From an analysis of the business of this firm, it is found that in addition to family flour it sells formula feeds; in fact, approximately 60% of its business is in the sale of formula feeds and only about 20% in the sale of family flour and 20% in the sale of bakery flour. Another way of stating it is that about 55% to 60% of the total output of flour is sold to bakeries. In addition to four premium brands which represent approximately 20% of its total family flour sales, it sells a number of brands of standard grade and some low grade flour. Approximately 40% of its family flour output is sold under private labels and the great bulk of the private label business is with chain stores.[21] Despite this fact, approximately 60% of its family flour is sold to families in rural areas including villages under 2,500 population. It operates 10 warehouses in North and South Carolina from which it sells its family flour, as well as its formula feeds and bakery flour, to jobbers and retailers including some chains.[22] Not more than 3% of its brands of family flour is sold to chains.[23]

[20] Tr. 15,576.
[21] Tr. 13,582.
[22] Tr. 13,506.
[23] Tr. 13,616.

The premium flour of this firm is sold at retail below the Pillsbury's Best and Gold Medal prices. This differential is explained by the Executive Vice President of Statesville, Mr. R. C. Bryson, as follows:

There are possibly two reasons. Our mill has never seen fit to carry on any extensive advertising campaign. Certainly, costs must be reflected—advertising cost must be reflected in the price of the product. There is also too, the possibility of the advantage on wheat markets.

He explained that by advantage on wheat markets he meant shipping costs. When asked whether he considered that with these differentials he would be able to compete with Ballard Obelisk and other brands on a different basis at an advantage or at a disadvantage, he replied, "I would say there are certain disadvantages; certain advantages. They will balance themselves off. Of course, your cost factor there is always a definite advantage." He stated however that in the long run it would equal itself out so that he could compete on an equal basis.[24]

This witness testified further that it was easier to obtain wheat in the North Carolina area due to increased production; that approximately half the wheat he uses in the manufacture of soft wheat flour is purchased locally—that is from North Carolina—and the remainder from outside the state—in the states of Virginia, Maryland and Pennsylvania. His hard wheat, of course, is purchased from the West, principally Kansas.[25] This mill not only competed with the larger mills such as Pillsbury and General Mills but also in local areas with smaller mills, which in his opinion, in the small territory served by such mills, have a competitive advantage over a mill of his size because transportation costs constitute a larger part of the actual flour costs.[26] This witness was asked whether he considered Pillsbury's Best a stronger competitor in urban or rural areas, and he replied, "That would be hard to say. It possibly might be in urban areas for this reason: We cover the rural areas much better than some of the other mills. Much more intensely." [27]

The foregoing companies selling family flour in the Southeast in 1952, 1954 and 1956 are those whose total sales, respectively, amounted to approximately 1% or more of the total volume of sales of family flour in the Southeast as shown by the Federal Trade Commission survey for 1952. They were the principal competitors of Pillsbury-Ballard and when taken together with the Pillsbury-Ballard account, accounted for approximately 70% of the total sales

[24] Tr. 13,551.
[25] Tr. 13,509.
[26] Tr. 13,564.
[27] Tr. 13,608.

of family flour in the Southeast as shown by that survey. Of those sales Pillsbury accounted for approximately 14% of the aggregate deliveries of those companies in 1952 and 16% in 1956.

9. *Tabulation of Certain Data Concerning 21 Major Flour Millers and Blenders in the Southeast.* A comprehensive picture of the competitive position or share of market of the 21 milling and blending companies which account, respectively, for 1% or more of the total reported deliveries of family flour in the Southeast in 1952, as shown by the Federal Trade Commission survey, is set forth in the following table which shows the names of the companies, the number and location of their flour mills, the total capacity of the flour mills, the deliveries of family flour into the Southeast during the years 1952, 1954 and 1956 and the percentage of the total deliveries in the Southeast of each respective miller or blender, together with the names of the principal brands delivered by each and an indication of the class of trade sold and the area in which the principal sales were made. Following the table are footnotes which fully explain the table.

Certain data concerning 21 milling and blending companies which accounted for 1 percent or more of the total reported deliveries of family flour in the Southeast in 1952, as shown by the Federal Trade Commission's survey (these 21 companies accounted for 70.3 percent of such deliveries in 1952)

Company and main office address	Number and location of wheat flour mills [1]	Total capacity of wheat flour mills, basis 24 hr. operation (100 pound sacks) [1]	Deliveries of family flour into the Southeast (c.w.t.) [2]			Percent of survey total [2]			Principal brands family flour sold in Southeast in 1954 [3]	Class of trade to which sold			Area in which principal sales were made [4]	
			1952	1954	1956	1952	1954	1956		Wholesale	Chains	Retailers [3]	Urban	Rural
Pillsbury Mills, Inc., Minneapolis, Minn.	9 [5]	89,300	1,693,000	1,620,000	1,646,000	9.39	9.61	11.02	Pillsbury's Best Ballard Obelisk.	X	X	X	X	X [4a]
General Mills, Inc., Minneapolis, Minn.	17 [6]	135,600	1,726,000	1,566,000	1,473,000	9.57	9.29	9.86	Gold Medal, Red Brand.	X	X	X	X	X [4b]
Colorado Milling & Elevator Co., Denver Colorado,	20 [7]	45,900	1,320,000	1,138,000	896,000	7.32	6.75	6.00	White Goose, Kansas Maid, Pikes Peak.	X	X [3a]	----	----	X [4c]
Dixie-Portland Flour Co., Memphis, Tenn.	3 [8]	[8] 17,000	[9] 922,000	[9] 863,000	[9] 783,000	5.11	5.12	5.24	Silk, White Silk.	X	X	----	X	X [4d]
Martha White Mills, Inc., Nashville, Tenn.	Nashville, Tenn., Lebanon, Tenn. [10]	[10] 4,000	895,000	668,000	804,000	4.96	3.96	5.38	Martha White, Falcon.	X	X	X	X	X [4e]
General Foods Corp., White Plains, N.Y. [11]	Evansville, Ind., 4,000 sacks; Pendleton, Ore., 2,400 sacks.	[11] 6,600	710,000	629,000	414,000	3.94	3.73	2.77	Swansdown, Tenderflake.	X	----	----	X	X [4f]
J. Allen Smith & Co., Knoxville, Tenn.	Knoxville, Tenn.	5,000	645,000	670,000	601,000	3.58	3.98	4.02	White Lily	X	X	X	X	X [4g]
International Milling Co., Minneapolis, Minn.	10 [12]	50,600	642,000	582,000	615,000	3.56	3.45	4.31	Robin Hood, Silver Mist.	X	X	X	X	X [4h]
Yukon Mill & Grain Co., Yukon, Okla.	Yukon, Okla.	4,000	626,000	553,000	278,000	3.47	3.28	1.86	Yukon's Best	X	----	X	X	X [4i]
Nebraska Consolidated Mills Co., Omaha, Nebr.	4 [13]	9,200	461,000	398,000	290,000	2.56	2.36	1.94	Mother's Best	X	X	----	X	X [4j]

See footnotes at end of table.

Certain data concerning 21 milling and blending companies which accounted for 1 percent or more of the total reported deliveries oe family flour in the Southeast in 1952, as shown by the Federal Trade Commissioner's survey (these 21 companies accounted for 70.3 percent of such deliveries in 1952)—Continued

Company and main office address	Number and location of wheat flour mills [1]	Total capacity of wheat flour mills, basis 24 hr. operation (100 pound sacks) [1]	Deliveries of family flour into the Southeast (c.w.t.) [2]			Percent of survey total 2			Principal brands family flour sold in Southeast in 1954 [3]	Class of trade to which sold			Area in which principal sales were made [4]	
			1952	1954	1956	1952	1954	1956		Wholesale	Chains	Retailers [3]	Urban	Rural
The New Era Milling Co., Arkansas City, Kansas.	Arkansas City, Kans.	4,000	459,000	367,000	380,000	2.55	2.18	2.54	Polar Bear	X			X	X [4k]
Cosby-Hodges Milling Co., Birmingham, Ala.	Birmingham, Ala. (blending plant)[14]	[14] 3,600	349,000	302,000	218,000	1.93	1.79	1.46	White Tulip, Mo-Biscuit.	X	X	X	X	X [4l]
Buhler Mills, Inc., Buhler, Kans.[15]	Buhler, Kans., 1,250 sacks; Inman, Kans., 1,000 sacks.	2,250	345,000	317,000	322,000	1.91	1.88	2.16	Dixie Lily	X			X	X [4m]
Shawnee Milling Co., Shawnee, Okla.	Shawnee, Okla., 3,500 sacks; Okeene, Olka., 1,800 sacks.	5,300	321,000	447,000	353,000	1.78	2.65	2.36	Shawnee's Best	X			X	X [4n]
Harris Milling Co., Owasso, Mich.	Owasso, Mich	2,000	308,000	220,000	194,000	1.71	1.30	1.30	Famo Cream	X			X	X [4o]
Statesville Flour Mills Co., Statesville, N.C.	Statesville, N.C.	2,500	242,000	249,000	214,000	1.34	1.48	1.43	Nosoca, Mama's Choice.	X	X	X	X	X [4p]
Roanoke City Mills, Inc., Roanoke, Va.	Roanoke, Va.	3,600	213,000	245,000	235,000	1.18	1.45	1.57	Light White, Metropolitan	X	X	X	X	X [4q]
Western Star Mill Co., Salina, Kans.	Salina, Kans.	3,000	211,000	151,000	100,000	1.17	.90	.67	Kansas Star, Beauty Bake, Fairy Flake.	X			X	X [4r]
Griffin Grocery Co., d/b/a Happyvale Flour Mills, Griffin, Ga.[16]	Griffin, Ga., 400 sacks; Fort Valley, Ga., 270 sacks.	670	230,000	186,000	158,000	1.12	1.11	1.06	Hollyhock, Pure Joy.		X	X	X	X [4s]

See footnotes at end of table.

H. C. Cole Milling Co., Chester, Ill.	Chester, Ill.	3,000	199,000	242,000	215,000	1.10	1.44	1.44	Omega, 45%; White Ring (low price), 48%. Tastee Biscuit, Super White, Lite Flake.	X	X	X	X	X [4t]
Abilene Flour Mills Co., Abilene, Kans.	Abilene, Kans.	3,000	188,000	168,000	119,030	1.04	1.00	.80		X	X	X	X	X [4u]
Total of 21 companies			12,678,000	11,581,000	10,338,000	70.30	68.68	69.20						
Other companies [5]			5,355,181	5,280,163	4,602,095	29.70	31.32	30.80						
Total			[18] 18,033,181	[19] 16,861,163	[20] 14,940,095	100.	100.	100.						

[1] Source: RX-52.

[2] Source: CX-402 A, B, and C (figures rounded to nearest thousand), CX-478.

[3] Source: CX-402 A and B, CX-478.

[3a] Sales to chains not made by company, and only occasionally by jobber upon request (R. 26923-26924).

[4] Source: CX-402 A and B.

[4a] Pillsbury sold its family flour throughout the entire Southeast (CX-402B). Its position in the sale of family flour in the Southeast was better in urban areas than in rural areas (R. 831—Rankin).

[4b] General Mill's family flour was sold generally throughout the entire Southeast (CX-402A). Its sales were principally in the urban areas.

[4c] C. M. & E. distributed its family flour in 10 of the Southeastern States and extreme Northwest part of Florida (R. 26914). Its sales were concentrated in the rural country areas (R. 26923).

[4d] Dixie-Portland sold its family flour throughout the entire Southeast (CX-402A, R. 1699). Its sales were principally in rural areas (R. 1629).

[4e] Martha White distributed about 65% of its family flour in Tennessee (R. 11455). The balance in parts of Kentucky, West Virginia, Mississippi, Alabama, Georgia, and Florida (CX-402B). The majority of this business was in rural areas (R. 11565).

[4f] General Foods family flour was sold in most of Kentucky, Tennessee, and Georgia, and in parts of Alabama, Mississippi, South Carolina, Virginia, North Carolina and Florida, principally in rural areas (CX-402A). See footnote [11] below.

[4g] J. Allen Smith sold its family flour in southeast Kentucky, southwest Virginia, Tennessee, North and South Carolina, Georgia, Florida, Alabama, and in New Orleans (R. 1393); such sales being principally in urban areas (R. 1394).

[4h] International distributed its family flour generally throughout the Southeast, except southern Florida, northeastern Virginia, the western third of Tennessee, and Louisiana (CX-402A, Item 9). Its sales were principally in the rural areas (R. 26858).

[4i] Yukon's family flour was sold in every State in the Southeast, however, its distribution in Virginia and Florida was limited to a small western section of each of these States. It sold little if any flour to chainstores, and its sales were principally in rural areas (CX-402B, R. 16731).

[4j] Nebraska Consolidated, d/b/a Alabama Flour Mills in the Southeast, distributed its family flour in all of Alabama and Mississippi, most of Tennessee, the western part of Georgia, and a part of northwestern Florida. The majority of such distribution being in rural areas (CX-402B, R. 17770).

[4k] New Era sold its family flour in almost every State in the Southeast with the exception of Mississippi, Louisiana, and the southern half of Florida, with more sales being made in the smaller communities and rural areas than in the urban areas (R. 13226, 13230).

[4l] Crosby-Hodges distributed its family flour in Alabama, southeast Mississippi, north Florida and most of Georgia, other than the east central part thereof (CX-402A, R. 2180).

[4m] Buhler's sales of family flour were made in Florida and in scattered areas in Mississippi, Alabama, Tennessee, Georgia, and North Carolina (CX-402A).

[4n] Shawnee distributed its family flour in Mississippi, Alabama, southern Georgia, South Carolina, the southern part of North Carolina and small sections of north Florida (CX-402B). Its sales in the Southeast were made principally in rural areas (R. 13164, 13199).

[4o] Harris sold its family flour in scattered areas of the Southeast, principally in the rural areas, in parts of Alabama, Georgia, Tennessee, and eastern North Carolina (CX-402A, R. 27118).

[4p] Statesville distributed its family flour principally in North and South Carolina (CX-402B, R. 13499-13501). Approximately 60% of such flour was sold in rural areas (R. 13537).

[4q] Roanoke City Mills sold its family flour in parts of Virginia and North and South Carolina. Approximately 80% of such sales were in the Carolinas, principally the eastern part thereof, and 12 to 15 percent in Virginia. Mostly in the metropolitan area of Roanoke, Va. (CX-402B, R. 15548-15550, 15542).

[4r] Western Star's family flour was distributed in northern Mississippi, western Tennessee, southern West Virginia, and western Virginia, principally in the rural areas (CX-402B).

[4s] Griffin sold its family flour in the entire State of Georgia, with the exception of the extreme eastern part of the State, its principal sales being in the rural areas (CX-402A, R. 26716, 26724).

[4t] Cole distributed its family flour in Mississippi, Alabama, Florida, most of Georgia (except the eastern part thereof), and in the extreme western parts of Kentucky and Tennessee (CX-402A).

Footnotes continued on following page.

Footnotes continued.

[4a] Abiline's sales territory for its family flour included the States of Kentucky, Tennessee, Mississippi, Alabama, Georgia, Florida, western West Virginia, and the extreme western part of Virginia (CX-402A).

[5] The location and capacity (100 pound sacks, basis 24 hour operation) of these 9 mills: Minneapolis, Minn., 17,000 sacks; Atchison, Kans., 6,300 sacks; Enid, Okla., 8,800 sacks; Springfield, Ill., 16,500 sacks; Buffalo, N.Y., 23,000 sacks; Louisville, Ky., 5,000 sacks; Ogden, Utah, 4,400 sacks; Astoria, Oreg., 6,000 sacks; Sacramento, Calif., 2,300 sacks; Los Angeles, Calif., capacity not shown.

[6] The location and capacity (100 pound sacks, basis 24 hour operation) of these 17 mills: Buffalo, N.Y., 36,700 sacks; Minneapolis, Minn., 21,500 sacks; Great Falls, Mont., 2,800 sacks; Kansas City, Mo., 13,500 sacks; Wichita, Kans., 5,200 sacks; El Reno, Okla., 2,400 sacks; Wichita Falls, Texas, 6,200 sacks; Amarillo, Texas, 2,400 sacks; Chicago, Ill., 7,900 sacks; Louisville, Ky., 2,800 sacks; Hopkinsville, Ky., 2,700 sacks; Johnson City, Tenn., 2,700 sacks; Takoma, Wash., 8,400 sacks; Spokane, Wash., 4,900 sacks; Ogden, Utah, 4,700 sacks; Vallejo, Calif., 7,000 sacks; Los Angeles, Calif., 3,800 sacks.

[7] The location and capacity (100 pound sacks, basis 24 hour operation) of these mills: Denver, Colo., 3 mill—2,400, 5,400 and 2,400 sacks; Grand Junction, Colo., 700 sacks; Greeley, Colo., (Idle) 2,000 sacks; Lamar, Colo., 2,000 sacks; Monte Vista, Colo., 800 sacks; Pueblo, Colo., 1,400 sacks; Burley, Idaho, 1,450 sacks; Caldwell, Idaho, 800 sacks; St. Anthony, Idaho, 600 sacks; Twin Falls, Idaho, 1,450 sacks; Weiser, Idaho, 900 sacks; Claflin, Kans., 1,500 sacks; Hays City, Kans., 2,650 sacks; Wilson, Kans., 1,450 sacks; Omaha, Nebr., 6,000 sacks; El Reno, Okla., 3,500 sacks; Salt Lake City, Utah, 4,500 sacks.

[8] The location and capacity (100 pound sacks, basis 24 hour operation) of these 3 mills: Higginsville, Mo., 4,000 sacks; Arkansas City, Kans., 8,000 sacks; Chattanooga Tenn., 5,000 sacks. Also operates blending plants at Memphis, Tenn., 2,000 sacks; Mobile, Ala., 2,000 sacks (Idle); Richmond, Va., 1,000 sacks; Jacksonville, Fla., 2,000 sacks (Idle). Total blending capacity: 7,000 sacks.

[9] Source: CX-466F.

[10] RX-52 indicates that company also owns blending plant at Jackson, Tenn., capacity 1,000 sacks. The President of Martha White testified on Sept. 19, 1955 that the company had flour mills in Humbolt (Idle), Jackson and Lebanon, Tenn., with capacity of 1,600 cwt. of a 24-hour daily basis; and flour blending plants at Jackson, Nashville, and Lebanon, Tenn., with 24-hour blending capacity of about 5,000 cwt. daily.

[11] In 1953 also owned mill at Clarksville, Tenn., with capacity of 3,600 sacks (RX-52). This mill was closed in 1957 and General Foods went out of the family flour business in the Southeast (R. 26464).

[12] The location and capacity (100 pound sacks, basis 24 hour operation) of these 10 mills: Davenport, Iowa, 5,200 sacks; Buffalo, N.Y., 15,000 sacks; New Prague, Minn., 5,100 sacks; Greenville, Texas, 4,300 sacks; Ponca City, Okla., 2,400 sacks; Lockport N.Y., 1,800 sacks; Detroit, Mich., 6,600 sacks; Wabasha, Minn., 3,400 sacks; St. Paul, Minn., 4,300 sacks; Baldwinsville, N.Y., 2,500 sacks.

[13] The location and capacity (100 pound sacks, basis 24 hour operation) of these 4 mills: Omaha, Nebr., 3,500 sacks; Freemont, Nebr., 1,500 sacks; Decatur, Ala., 2,400 sacks; Grand Island, Nebr., 1,800 sacks.

[14] Blending operations only.

[15] Formerly "The Buhler Mill & Elevator Co." Deliveries include sales of Postal Elegant and Postal Extra on a royalty basis (CX-402A, CX-478).

[16] Wholesale grocer which mills approximately 35% of flour it sells; buys about 35% to blend with the flour it mills; the balance is purchased and made into self-rising flour (R. 26715-26716).

[17] Other milling and blending companies which accounted for less than 1 percent of the total reported deliveries of family flour in the Southeast in 1952. Almost all of these companies total daily capacity was in excess of 400 cwts. in 1953 (CX-478).

[18] 141,328 cwts. or about 0.8 of 1% of this total includes deliveries which were estimated by the reporting companies (CX-478).

[19] 139,259 cwts. or about 0.8 of 1% of this total includes deliveries which were estimated by the reporting companies (CX-478).

[20] 31,985 cwts. or about 0.2 of 1% of this total includes deliveries which were estimated by the reporting companies (CX-478).

NOTE.—Percents will not add to 100 because of rounding.

10. *Some Small Millers or Blenders in the Southeast Competitive with Pillsbury.* There were a few millers or blenders in the Southeast not mentioned in the foregoing table which sold their family flour in certain metropolitan areas so that they were competitive with Pillsbury-Ballard in those particular areas. The most important were the following:

(a) Valley City Milling Company. The Valley City Milling Company of Portand, Michigan, had for a number of years shipped flour into some of the metropolitan areas in the Southeast, including the city of Birmingham where it sold to the Cosby-Hodges Company. After 1946 it sold through its own sales force on an exclusive basis to several jobbers in the Southeast. In those areas its Roller Champion brand was sold by the jobbers to chains and retailers and, since it was a premium grade flour and sold at approximately the same price as Pillsbury's Best, it was a competitive factor, particularly in the city of Birmingham. In fact, it is one of the few companies which increased its sales from 1952 to 1956.

(b) Atlanta Milling Company. Another company that would fall in this category is the Atlanta Milling Company. Its total sales in 1952 were approximately 89,000 hundredweights and in 1954 approximately 93,000 hundredweights and in 1956 approximately 74,000 hundredweights. This company was a flour blender and sold directly to retailers in Atlanta, Georgia, and in Macon, Georgia. In both cities it ranked high in volume of sales. It also made substantial sales in Columbus, Georgia. It sold its family flour in scattered areas throughout the state of Georgia. Its principal brand, Capitola, accounted for approximately 90% of its sales of family flour and was sold at a price differential of approximately 20 cents to 50 cents per hundredweight under Pillsbury-Ballard regular prices. This brand was sold direct to most of the chains in Atlanta and Macon where it was advertised by radio and other promotional methods. Fifty percent of its total sales of family flour were in the metropolitan Atlanta area and 25% in the Macon area.

The record contains the testimony of a number of small and medium sized local flour millers to the effect that competition has not declined but has become more intense in recent years. The following table sets forth the names of the companies not already named in the previous table on page 36 showing the dates when the testimony was received and the volume of their sales in 1952, 1954 and 1956.

640968—63——84

Deliveries of family flour into the Southeast by certain milling and blending companies[1]

	Date officials testified	Deliveries (cwts.)		
		1952	1954	1956
Interstate Milling Co.	Nov. 1955	159,733	175,395	131,098
Bewley Mills	Oct. 1955	39,638	18,258	(2)
Austin-Heaton Co.	Nov. 1955	147,574	165,520	156,438
Lexington Roller Mills	June 1955	80,273	95,598	95,364
Hammond Grocery Co.	Nov. 1955	8,979	10,215	(3)
Allen Bros. Milling Co.	Feb. 1956	109,587	114,982	139,189
Spartan Grain & Mill Co.	Nov. 1955	78,220	97,616	94,834
Henderson Roller Mills	Nov. 1955	37,662	50,708	79,737
Hopkinsville Milling Co.	Sept. 1955	137,124	147,286	137,106
W. A. Davis Milling Co.	Nov. 1955	90,813	100,683	89,578
Ringgold Milling Co.	Sept. 1955	(4)	(4)	(4)
Columbia Mill & Elevator Co.	Sept. 1955	97,596	159,801	149,782
Rockingham Milling Co.	Jan. 1956	(5)	(5)	(5)
Ashland Roller Mills	Jan. 1956	(6)	(6)	(6)
White Star Mills	Nov. 1955	99,173	96,760	106,582
Total[7]		18,033,181	16,861,163	14,940,095

[1] Small companies whose officials testified that there had been no decrease in competition since June 1951. (See pp. 314-7, Respondent's Proposed Findings of Fact.)
[2] Acquired by Flour Mills of America, Inc., on Aug. 21, 1956. Not surveyed for 1956.
[3] Discontinued its all-purpose flour business on Feb. 18, 1956, when it was sold to Martha White Mills, Inc.
[4] Daily capacity only 150 cwts. Deliveries not available since records reflect deliveries of producers with over 400 cwts. daily capacity.
[5] Daily capacity only 400 cwts. Deliveries not available.
[6] Daily capacity only 200 cwts. Deliveries not available.
[7] Total deliveries of family flour into the Southeast by milling and blending companies whose total daily capacity was over 400 cwts. in 1953, as reflected in CX 478.

Source: CX 478 and Testimony.

It appears from the foregoing table that two of the companies had gone out of the family flour business subsequent to the time their officials testified; and that as to three of the others their capacity was less than 400 hundredweights so no sales figures were obtained in the Commission's surveys. It also appears that some of the smaller mills were able to increase their sales while others were not.

11. *Certain Metropolitan Areas in the Southeast where Pillsbury's Acquisition of Ballard was most Effective.* There are certain metropolitan areas in the Southeast where the impact of the acquisition of Ballard by Pillsbury was felt more than in others.

(a) Jacksonville, Florida. In Jacksonville, Florida, as well as in some other cities, whatever Ballard sold added to the favorable competitive position that Pillsbury occupied in that city prior to the acquisition. During the 11-month period ending May 31, 1951, Pillsbury's deliveries in Jacksonville were approximately 64,000 hundredweights and Ballard's Jacksonville warehouse deliveries were approximately 53,000 hundredweights.[28]

The record contains warehouse movements of the two chain stores located in that area—The Great Atlantic & Pacific Tea Company and Winn & Lovett Grocery Co. (now Winn-Dixie Stores, Inc.). Considering first The Great Atlantic & Pacific Tea Company, the

[28] RX 153.

record shows that it operated 106 stores in the state of Florida, southern and eastern parts of Georgia and as far north as Charleston, South Carolina, and that through its warehouse in Jacksonville, distribution is made of nearly all of the flour sold through those stores. During the fiscal year of 1952, that is, beginning in March 1951 and ending in February 1952, deliveries or shipments of Pillsbury's Best through the Jacksonville A & P warehouse amounted to approximately 29% of the total shipments of family flour through the warehouse; the Ballard Obelisk label represented approximately 15%; Gold Medal 16%; and Sunnyfield, the A & P private label premium brand, 6%. The A & P standard grade flour under the brand Iona was the largest selling single brand of flour delivered through this warehouse representing 33% of the total. Its largest or principal sales were in 25-pound bags whereas most of the premium brands were in smaller packages, 5-pound bags being the most popular. The combined deliveries of Pillsbury's Best and Ballard's Obelisk brands represented approximately 44% of the total sales of flour. The combined sales of the private brands were approximately 40%. However, if only the *premium* brands of flour are considered, the total percentage represented by the Pillsbury and Ballard brands would be increased to 73%.

In the same year Winn & Lovett chain food stores Jacksonville division bought for 73 stores in southern Georgia and northern Florida with 17 in the Jacksonville metropolitan area. It was estimated by a Winn & Lovett official that approximately 5% of the flour handled by the stores had been bought direct and did not go through the warehouse, so that the figures furnished represented about 95% of the total deliveries of flour to the 73 stores. Pillsbury's Best represented about 40% of such deliveries; Ballard Obelisk 20%; and General Mills 15%. About 25% was represented by two private brands—Southern Biscuit and Land of Sunshine, Southern Biscuit being a cheaper grade.

It is concluded from the foregoing facts that Pillsbury by the acquisition of Ballard increased its market share of family flour in the Jacksonville, Florida, market area until it occupied a dominant position in that market.

(b) Atlanta, Georgia. Atlanta, Georgia, is an important market for family flour not only in the metropolitan area of Atlanta, but also in the territory surrounding that city.[29] Ballard's sales through its warehouse in Atlanta which was primarily for the metropolitan area during the 11-month period ending May 31, 1951, were approximately 56,000 hundredweights. The Atlanta sales of Pillsbury during that same period of time were 6,435 hundredweights.

[29] RX 153.

Total deliveries of Pillsbury's Best and Ballard's Obelisk through the Atlanta branch to the retail trade in most of Georgia and all of South Carolina during each of the fiscal years 1951–52 through 1954–55 are shown below:

Fiscal year	Pillsbury's Best	Ballard's Obelisk	Total
	Cwt.	*Cwt.*	
1951–52	72, 303	200, 168	272, 471
1952–53	78, 977	191, 802	270, 779
1953–54	75, 792	204, 970	280, 762
1954–55	69, 667	198, 806	[1] 268, 473

[1] CX 345 A & B.

The importance of the Atlanta market is indicated by the fact that the sales of Pillsbury and Ballard brands after the acquisition represented 16% of the total sales of those brands in the Southeast; and that the sales of Ballard Obelisk alone in 1951–52 and 1952–53 were 25% of the total sales of this brand.

The former Sales Manager of Ballard testified in 1952 that in the metropolitan area of Atlanta, Ballard was the third largest selling family flour and Pillsbury was fifth or sixth. Although the record does not contain any accurate figures with respect to the volume of sales of the other various flour mills selling in the Atlanta metropolitan area, either at the time of the acquisition or in the following years, it seems to be generally conceded that the White Lily brand of J. Allen Smith & Company of Knoxville, Tennessee, was the most popular brand, its sales being the largest. Ballard Obelisk would probably be the second largest selling brand, both at the time of the acquisition and in later years, and the Capitola brand of the local Atlanta Milling Company would be third. Other brands selling in smaller volume were Pillsbury's Best, Omega, My-T-Pure and Gold Medal.

An indication of the relative sales volume in this area of J. Allen Smith's White Lily, Ballard's Obelisk, Pillsbury's Best and General Mills' Gold Medal brands in 1956, is found in the deliveries of family flour through the warehouses of the three large chains located in Atlanta—A & P, Kroger and Colonial. However, these figures do not reflect the sales by the stores in the Atlanta metropolitan area alone, but represent the sales in the trade areas served by their stores which vary both in number of stores and in the areas covered. The A & P deliveries through its warehouse represented 95% of the flour sold in its 94 stores scattered throughout the state of Georgia, except along the Atlantic coast, and in the eastern half of Tennessee, including the city of Knoxville. The premium brand with the largest individual volume of deliveries in 1956 was the White Lily brand with approximately 20,700 hundredweights; the second premium brand was Obelisk with approximately 17,000; Gold Medal was third with approximately 10,765; Pillsbury's Best was fourth with approximately 4,000. The total deliveries of premium brands through the A & P Atlanta warehouse were approximately 53,000 hundredweights. Combining the deliveries of Pillsbury's Best and Obelisk would give Pillsbury the edge over White Lily with a total of approximately 21,400 hundredweights. These same stores, however, sold private brands of A & P, Sunnyfield and Iona, at lower prices and the combined deliveries of both accounted for about 17,500 hundredweights.

In 1956 the Atlanta warehouse of the Kroger stores supplied flour for 52 stores—26 in metropolitan Atlanta and the remainder scattered throughout Georgia and a portion of Alabama and Tennessee. The total deliveries of premium brands in 1956 were approximately 22,500 hundredweights and, in addition, there were about 1,700 hundredweights of a standard brand making a total of 24,200 hundredweights. Of this total amount of premium flour sold, the deliveries of White Lily amounted to approximately 11,000 hundredweights or 49.2%; Ballard approximately 5,350 or 23.8%; Gold Medal 4,340 or 18.8%; and Pillsbury 1,850 or 8.2%.

In 1956 the Colonial stores warehouse in Atlanta serviced 140 stores in approximately the same area as the other chains. The total deliveries of premium flour in 1956 were approximately 91,200 hundredweights. Of this total amount of premium flour sold, the White Lily brand led in deliveries with approximately 42,500 hundredweights or 46.8%; Ballard was second with approximately 30,000 or 33%; Gold Medal was third with approximately 14,300 or 15.7%; and Pillsbury was fourth with approximately 4,400 or 4.8%. The combined volume of Colonial stores' private brands of standard grade flour consisting of Triangle and Big Parade was approximately 21,000 hundredweights.

Combining the volume of deliveries through all three Atlanta warehouses of these chains resulted in a total of 207,300 hundredweights of family flour delivered during 1956. Of this quantity J. Allen Smith & Company led with approximately 80,000 hundredweights; Pillsbury, counting both the Ballard Obelisk and Pillsbury's Best brands, second with approximately 63,000; General Mills third with approximately 30,000; the private brands of these three chains accounting for the balance. Ranked by brand, White Lily placed first with approximately 74,000 hundredweights; Ballard's Obelisk second with approximately 53,000 hundredweights; Gold Medal third with approximately 30,000 hundredweights; Pillsbury's Best fourth with approximately 11,000 hundredweights; standard grades accounting for the remainder. In addition to the brands named, the record shows that all three chains purchased other brands of flour which were delivered direct to the individual stores. The record does not show the quantity of the deliveries of such flour but it is estimated by reliable informed witnesses that with respect to A & P, about 5% of the family flour handled by the individual stores was purchased direct from mills or wholesalers; Kroger about 10%; and Colonial stores about 25%. As a result it is impossible to accurately find the relative position or share of market occupied by Pillsbury in either the Atlanta metropolitan area or in the state of Georgia. The best estimate is that it was in second place in volume of sales in the metropolitan area of Atlanta whereas it was fourth or fifth before the acquisition. It is concluded from the foregoing that Pillsbury, through the acquisition of Ballard, became an important competitive factor in the Atlanta family flour market although it did not attain the largest share of the market.

(c) Birmingham, Alabama. Birmingham, Alabama, was another important family flour market in 1951 at the time Pillsbury acquired Ballard. During the 11-month period ending May 31, 1951, the Ballard warehouse deliveries in Birmingham were approximately 52,000 hundredweights and the Pillsbury deliveries in the same area were approximately 13,500 hundredweights. The record does not contain an accurate statement of the total sales of family flour in the Birmingham area for any period of time. It is estimated, however, by Mr. Gerot, President of Pillsbury, when he testified in 1952, that Pillsbury's Best brand ranked third or fourth in the sale of family flour in the Birmingham area and that Ballard's Obelisk was second or third. Mr. Englehard, former Sales Manager of Ballard, testified that Ballard's Obelisk was the second or third largest selling brand of family flour in the Birmingham area. Other reliable informed witnesses testified generally to the same effect. One wholesale grocer in Birmingham testified that in 1951 his company's best selling brands of family flour were Mother's Best, manufactured by Nebraska Consolidated in its Decatur, Alabama, mill, near Birmingham; Gold Medal; and Kansas Diamond a brand of Arkansas Mill & Elevator, Arkansas City, Kansas, in that order. By 1955 the best selling brands of family flour sold by this firm were first, Mother's Best; Gold Medal and Ballard tied for second; Peacock; Red Lion; and Pillsbury's Best, in that order. Another wholesale grocer in Birmingham testified that in 1951 his best selling brands of family flour were Gold Medal, White Tulip, Ballard's Obelisk, Roller Champion and Mother's Best. By 1955 Mother's Best was first; Ballard's Obelisk second; White Tulip third; other brands following were Roller Champion, Gold Medal and Pillsbury's Best. An executive of a grocery chain with headquarters in Birmingham testified in 1956 that his company's largest selling brands of family flour were either White Tulip, Ballard's Obelisk or Mother's Best. He ranked Pillsbury's Best as fourth.

According to a survey conducted annually by the Birmingham News of the Birmingham metropolitan area from 1948 through 1955 to determine the most popular brands of grocery products, including family flour, in the Birmingham market, Ballard's Obelisk in 1948 enjoyed the highest brand preference; White Tulip second; Roller Champion third; Mother's Best fourth and Pillsbury fifth. By 1951 White Tulip had displaced Ballard by a small percentage 27.8% to 26.9%; Roller Champion had given way to Mother's Best for third position, 10.3%; Roller Champion 9.1% and Pillsbury remaining fifth with a percentage of 8%, which was an increase over the 1948 percentage of 6.7%. From 1951 to 1955 White Tulip and Ballard sales were about the same. In 1955 White Tulip still led with a percentage of 26.5% of the total; Ballard second with 26.1%; Roller Champion third with 10.1%; Mother's Best fourth with 9.9%; and Pillsbury fifth with 7.7%. However, combining Ballard's Obelisk and Pillsbury's Best percentages in this survey, the sale of Pillsbury's brands of flour would exceed any of Pillsbury's competitors in the Birmingham market. Although this survey cannot be relied upon to show the total volume of business done or the market share of each brand, it does show consumer preference and the relative distribution of leading brands in metropolitan Birmingham.

The record contains a consumers survey made by a professor, Michael H. Halbert, under the supervision of Alderson & Sessions, which may be found recorded in Respondent's Exhibit 556 and his methodology in Respondent's Exhibit 557. This survey related to the Birmingham, Alabama, area consisting of 29 counties and the Louisville, Kentucky, area covering 17 counties in Kentucky and 11 counties in Indiana. In addition, Mr. Halbert conducted a survey of retailers and wholesalers in the same areas. Mr. Halbert testified at length in support of these surveys and Dr. Frank J. Kottke representing the Commission also testified quite extensively to show that the surveys had not been made in accordance with recognized statistical standards. Upon a full consideration of the exhibits and the testimony in support and in opposition thereto, it is found that insofar as the consumers surveys are concerned they are without probative value. In the consumer survey made in the Birmingham area, as well as in Louisville, Mr. Halbert did not determine and did not supply a formula for determining the standard error of estimate for any of his findings.[30] With respect to tables B-3, B-4 and B-7 of Respondent's Exhibit 556 it is found that because of the operation of chance in sampling, uncertainty exists with respect to the accuracy of any findings based on a sample; and without the use of the standard error of estimate in describing the extent of this uncertainty and the necessity of such standard error for the evidentiary value of the results of a sample survey, the Halbert consumers survey findings on market shares are incompetent and without probative value.

The consumer survey finding is also without probative value because it is not projectionable. One of the reasons is that the sampling plans assumed that the correctness of statistics from the 1950 census were valid for the year 1954, the time that the survey was made. Another error in the method used was that the design in the sample was such that the so-called random numbers were not selected from a table of random numbers in a systematic way which would guard against the introduction of bias. Also, it appears that a disproportionate number of the selected blocks where the survey was made was in a low-income neighborhood. It is also believed that the findings of the survey are not trustworthy or reliable because many of the informants interviewed relied upon their recollection and often gave incorrect answers due in part to the nature of the questions asked, the length of the questionnaire and the manner of questioning the informants. There is also a grave doubt whether the period of time during which the surveys were made was a representative period or whether the surveys were conducted for a sufficient length of time to be representative of a longer period, the Birmingham period being from April 27 to May 6, 1954.

There are indications in the record that one or both of the consumer surveys may have been made at a time during which or immediately subsequent to intensive promotional campaigns on behalf of certain brands of family flour and/or cake mixes conducted by companies other than Pillsbury, which, of course, would have made the results of the surveys not representative.

However, the most important reason for questioning the use of the survey to determine the share of market in family flour is that the market share tables based on the consumer surveys are at variance with the information collected by the interviewers from wholesalers and from retailers. It appears from Table B-3 of Respondent's Exhibit 556, that in the Birmingham area Pillsbury all-

[30] Tr. 22,381; 22,470.

purpose flour represented only 1% of consumer purchases, yet 28 of the sample of 40 urban retailers and 10 of the sample of 51 rural retailers carried the Pillsbury brand, usually in 2- or 5-pound package sizes.[31] The disparity between the market shares calculated from the consumer survey and the business practice of the sample of urban and rural retailers is particularly significant because these retailer samples were selected from only the retailers from whom the households in the consumer survey had purchased flour.[32] Furthermore, on page 266 of Respondent's Exhibit 556 it appears that the Pillsbury brand was carried by 9 of the 15 wholesalers in the Birmingham area, the only brand of all-purpose flour carried by more wholesalers was the Ballard brand which was carried by 12. Thirty-five of the 48 urban retailers and 19 of the 52 rural retailers carried the Ballard brand. According to the consumer survey Robin Hood all-purpose flour, which is carried by only 11 stores in 100 and by none of the 15 Birmingham wholesalers, was purchased in 4 times the volume of Pillsbury and nearly equaled the volume of Ballard. The findings of these surveys conducted by Mr. Halbert are contrary to other testimony in the record since it has been well established that wholesalers and retailers carry only those brands of family flour that are popular with consumers. Shelf space checks by counsel for the respondent and the Commission show that Pillsbury's Best flour is carried on the shelves of nearly all the retail stores in Birmingham.

From the foregoing analysis of the consumer survey and in view of the manner in which Mr. Halbert revised certain of his testimony in the course of the proceeding, particularly with respect to (a) whether the market share data obtained from the consumer surveys were projectionable with measurable error, (b) that the standard errors of measurement could be readily computed by any competent statistician and (c) that he had not computed them because of the time and effort involved, it must be concluded that Mr. Halbert was either a biased, or at best, a very careless witness, and little, if any, weight can be given to his testimony or the consumer surveys which were prepared under his direction and supervision.[33]

It is therefore concluded from all the evidence reviewed above that Pillsbury, by the acquisition of Ballard, has increased its market share in Birmingham and now occupies a leading position and is a strong competitive factor in that market.

(d) New Orleans, Louisiana. Prior to its acquisition by Pillsbury, Ballard's Obelisk was the largest selling brand of family flour

[31] RX 556, pp. 211-2.
[32] Tr. 22,660-1.
[33] Tr. 22,380-2; 22,464; 22,471; 23,381-95.

in the New Orleans market area according to the testimony of Mr. Englehard, former Sales Manager of Ballard. During the 11-month period ending May 31, 1951, Ballard's Obelisk sales through its New Orleans warehouse were nearly 62,000 hundredweights while those of Pillsbury's Best were approximately 7,000 hundredweights. It was estimated by Mr. Davis, Pillsbury's New Orleans Branch Manager, that Ballard retained its number one position in the New Orleans market, its principal competitors being competitors being General Mills with its Gold Medal brand and Burrus Mills, Dallas, Texas, with its Light Crust brand. One wholesaler in New Orleans testified that approximately 70% of his company's flour sales were of the Ballard Obelisk brand; Gold Medal accounted for about 20%; Pillsbury's Best about 5% and Burrus Mills' Light Crust about 5%. It is concluded, therefore, that by its acquisition of Ballard, Pillsbury obtained a dominant position in the New Orleans market.

In two other smaller cities in the New Orleans area, Mobile, Alabama, and Gulfport, Mississippi, according to the testimony of a New Orleans wholesale grocer, Ballard's Obelisk was the principal brand sold. A comparison of the sales or deliveries in Mobile, Alabama, during the 11-month period ending May 31, 1957, indicates that Ballard's sales were approximately 47,000 hundredweights, whereas Pillsbury's were approximately 2,000. In Gulfport, Missippi, during the same period of time. Ballard's sales amounted to approximately 29,000 hundredweights and Pillsbury approximately 3,900. It is concluded that in those two cities, as well as in New Orleans, Pillsbury gained a dominant position in the family flour market by the acquisition of Ballard.

(e) Memphis, Tennessee. In the Memphis, Tennessee, market, it was testified by Mr. Gerot, President of Pillsbury, that in his opinion Pillsbury ranked second, third or fourth prior to the acquisition of Ballard in the sale of family flour in the Memphis area and that Ballard then ranked fourth or fifth in that area. During the 11-month period ending May 31, 1951, Pillsbury's sales in Memphis were approximately 30,000 hundredweights and Ballard deliveries out of its Memphis warehouse were approximately 20,000. A wholesale grocer testified that the Light Crust brand of Burrus Mills, Inc., was his biggest seller with Ballard second. Another wholesale chain store official testified that in 1952 General Mills' Gold Medal was his biggest selling brand of family flour with Pillsbury's Best second and Ballard's Obelisk fourth. From records produced by this witness, however, it appears that Pillsbury plus Ballard would exceed Gold Medal sales as well as Mother's Best which had been ranked third.

According to the results of a consumer panel survey conducted by the Memphis Commercial Appeal, of brands of flour sold in the Memphis urban market from June 1950 to July 1952, the Omega brand of the H. C. Cole Milling Company was the most popular brand during the entire period ranging from 55.2% of sales during the last six months of 1950 to 50.9% in the first six months of 1952. Pillsbury ranked second with 10.5% during the same periods and Ballard declined from 11.8% in the 1950 period to 8.2% during the 1952 period. Gold Medal advanced from 7.3% in the 1950 period to 9.6% during the 1952 period. Other brands with their percentages in the 1952 period were: Jack Sprat (a private chain store brand) 4.9%; Light Crust 3.4%; Dixie Lily 2.7%; Kroger 2.0%; Mother's Best 1.1%; and all others 6.7%.[34] A combination of the Pillsbury and Ballard brands would place Pillsbury second with 18.7% and Gold Medal third.

The record also contains information with respect to the deliveries or sale of family flour by the Weona Food Stores, a wholesaler which buys for 140 cooperative grocery stores known as Weona and By-Ryt in the Memphis metropolitan market area. It also sells to about 10 other retail stores. The most popular brand distributed by this wholesaler through its retail stores is Dixie Lily, a controlled brand, manufactured for this wholesaler by Buhler Mills, Inc. In 1951 the only other brand of any consequence handled by this wholesaler was Pillsbury's Best. The record contains total deliveries for the years 1952, 1953 and 1954. In 1952 it had added the Gold Medal brand and also during the last six months of the year, the Ballard Obelisk brand. In 1952 the total sales of the Dixie Lily brand were 11,620 hundredweights; Pillsbury's Best 2,293; Gold Medal 1,670; and Ballard Obelisk 515. In 1954 Dixie Lily had declined to 11,287; Gold Medal had increased to 1,910; Pillsbury's Best had declined to 1,580; and Ballard Obelisk had increased to 1,169 so that although the combination of the Ballard Obelisk and Pillsbury's Best deliveries would exceed the Gold Medal deliveries, it was much less than the sales of the Dixie Lily brand.

In the Memphis metropolitan market there were other chain grocers, such as Liberty Cash Grocers, Inc., which bought at wholesale for 68 retail stores in Memphis and the surrounding trade area, including Jackson, Mississippi, and Sheffield, Alabama. In 1952 the most popular brand handled by these stores was the Gold Medal brand which it was estimated represented about 35% of their deliveries: Pillsbury was second with about 30%; Mother's Best third with about 20%; and Ballard fourth with the reaminder or about

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34 CX 179–182.

15%. The record also contains delivery figures for these stores in 1954 when there were 120 stores in the chain. By that time the Gold Medal brand represented about 30.4% of the total sales; Pillsbury's Best 18.5%; Burrus' Light Crust had come into the market with 21.5%; Mother's Best with 18%; and Ballard's Obelisk with 11.8%. A combination of the Pillsbury's Best and Ballard's Obelisk brands would almost equal the volume of sales of Gold Medal. The new brand, Light Crust by Burrus, had taken business from all the other brands operating out of the Memphis branch.

In 1952 there were 77 Kroger stores operating in 5 of the adjoining states, including Kentucky, Arkansas, Missouri, Mississippi and Tennessee. By 1955 there were 73 such stores—6 in Missouri; 12 in Arkansas; 24 in Tennessee; and 31 in Mississippi. The leading brands of these stores were the private label brands, Kroger and Avondale. The Kroger brand was a premium flour whereas Avondale was a standard flour. The Kroger stores also sold Pillsbury's Best, Ballard's Obelisk and Gold Medal in substantial quantities, but much smaller in tonnage. One explanation of this fact is that according to the sales records for 1951 and 1952, which were broken down into package sizes, 70% of the sales of Pillsbury, Ballard and Gold Medal in 1951 were in 5- and 10-pound bags; about 67% in 1952; whereas, 75% of the Kroger brand was in 25- and 50-pound bags, and all of the Avondale brand was in 25- and 50-pound bags. Testimony of officials of the Kroger company is to the effect that very little family flour was purchased in the city in 25- or 50-pound bags; that most of such bags were bought by people in the farm or rural areas. For this reason it is very difficult, if not impossible, to determine from the figures furnished by the Kroger stores, the most popular brand sold in the Memphis metropolitan area. Certainly Gold Medal was the leader in the flour distributed in small packages which would be primarily in the metropolitan area. The combination of the Ballard and Pillsbury deliveries or sales would probably place Pillsbury in second place almost on a par with Gold Medal. It is concluded from the foregoing that Pillsbury, by the acquisition of Ballard, increased its share of the Memphis market enough to make it a strong competitive factor, but not enough to obtain a dominant position in the market.

(f) Louisville, Kentucky. In Louisville, Kentucky, it was estimated by Mr. Gerot of Pillsbury that the volume of sales of Pillsbury's Best in the city of Louisville placed Pillsbury about third or fourth or perhaps fifth prior to the acquisition of Ballard, and that Ballard's Obelisk ranked as a "doubtful number one" in the sale of family flour in the Louisville market. Mr. Englehard, former Sales Manager for Ballard, testified that prior to the acquisition, Ballard probably ranked first or second and that Pillsbury ranked third or fourth in the sale of family flour in Louisville. During the 11-month period prior to May 31, 1951, Pillsbury shipped approximately 10,000 hundredweights of Pillsbury's Best into the Louisville market and Ballard Obelisk sales amounted to approximately 92,000 hundredweights out of its Louisville warehouse.

The record contains the testimony of the manager of a chain store group of Winn & Lovett Grocery Co., known as Steiden Stores, which operates 25 stores out of its Louisville branch—16 of which are located in the city of Louisville. He rated Ballard as his number one brand of flour in point of sales; General Mills second; Pillsbury third with Lexington Cream, a standard grade, lower priced flour manufactured in Lexington, Kentucky, fourth, the Lexington Cream brand of flour was sold only in the stores located in the city of Lexington and in two nearby cities—Frankfort and Shelbyville. He testified that the Ballard Obelisk brand had shown a steady growth for a number of years.

Another witness who testified with respect to the sale of family flour in the Louisville market was a Mr. Cambron, operator of a supermarket in Louisville, who in 1955 rated Ballard first; General Mills second; Robin Hood, which was added in 1952, third; and Pillsbury fourth. This same witness had been an employee of The Great Atlantic & Pacific Tea Company prior to 1955 and testified with respect to the A & P store of which he had been manager for the years 1950, 1951, 1952, 1953 and 1954. He said that in all five years Ballard was the leading brand with General Mills second; Pillsbury had dropped from third to fourth—it was third in 1950–51 and fourth in the succeeding years; Robin Hood was taken on in 1952 and dipslaced Pillsbury as third.

It is concluded, from the foregoing that Pillsbury by the acquisition of Ballard, advanced in the sale of family flour in the Louisville market area from third or fourth to first place, and now occupies a dominant position in that market.

B. *Concentration in the Family Flour Industry*

1. *In the United States.* In about 1947 the four largest milling companies in the United States had about 23% of the total United States flour milling capacity. The eight largest milling companies then controlled about 33% of that capacity.[35] In about 1952 the four largest milling companies had about 28% of the total United States capacity and the eight largest about 41% of that total.[36] The

[35] CX 105.
[36] RX 52.

two largest milling companies in terms of capacity in 1947 (General Mills and Pillsbury) had about 16% of the United States total flour milling capacity. In 1952 these two companies had about 19.5% of the United States total.

United States Census statistics show that there has been a decline in the number of establishments engaged in the milling of flour and meal since 1909. In that year 11,691 establishments were so classified and in 1954 there were 803 such establishments.[37] Save for minor exceptions in 1935 and 1937 this decline as shown by census figures has been continuous. The 1947 census found that there were 1,243 establishments in the flour and meal industry represented by 1,084 companies. During 1954 the Bureau of the Census found that 803 were so classified, represented by 692 companies.[38]

In 1947 the four largest companies accounted for about 29% of the total value of shipments of flour and meal; in 1954 the shipments of the four largest companies represented approximately 40% of the industry total. Similarly, in 1947, the eight largest companies accounted for about 41% of the industry total, while in 1954 the eight largest companies accounted for about 52% of the total. In 1947 the 20 largest companies accounted for about 57% of the industry total, and in 1954 the 20 largest companies accounted for approximately 68% of the industry total. Pillsbury, being second in the industry, of course, has been included in the four largest companies as well as the eight largest companies in the industry.

In the 1954 Census of Manufacturers there is a product class called "Wheat flour, except blended or prepared," showing a total value of shipments of about $1.27 billion. The four largest companies producing this product in that year accounted for about 43% of the total value of shipments of such product; the eight largest companies accounted for about 58% of the total; and the 20 largest companies accounted for about 74% of the total.[39]

In June 1954, Pillsbury's Director of Sales Operations, Grocery Products Division, in writing to the regional managers made the following statement with respect to the family flour industry:

> * * * ACTUALLY. THERE ARE ONLY TWO MAJOR AND NATIONAL BRANDS OF FLOUR IN THE COUNTRY AND OF THE TWO BIG BRANDS. WE ARE MAKING THE FASTER PROGRESS AND WE ARE GOING PLACES FAST! [40]

2. *In the Southeast.* According to the Commission survey, hereinbefore mentioned, conducted in 1956 and based upon a list of flour

[37] RX 601, p. 20-D-3.
[38] CX 417.
[39] CX 417, p.74.
[40] CX 447-A.

mills in 1952, the family flour business in the Southeast is concentrated among a few companies. For example, during the year 1952 about 31% of all deliveries of family flour into the Southeast, made by the commercial milling companies, with daily milling capacities of over 400 hundredweights, was made by the four largest companies. In 1956 the four largest companies accounted for about 32% of all such deliveries in the Southeast. The eight largest companies making deliveries of family flour in the Southeast accounted for about 47.4% of the total deliveries by commercial milling companies in 1952 and about 48.6% in 1956.

C. *Entries and Exits—Family Flour Millers in the Southeast*

The last flour mill built in the Southeast was erected by the Nebraska Consolidated Mills Company of Omaha, Nebraska, at Decatur, Alabama, in 1942. It is operated under the trade name of Alabama Flour Mills and has a capacity of 2,400 hundredweights per 24-hour day. As hereinbefore mentioned, it manufactures hard wheat flour which is sold principally to bakeries in the Southeast, although about 45% of its output is sold to wholesale and retail trade in northern Alabama and the surrounding territory.

From January 1, 1952, to December 31, 1956, according to the survey made by the Federal Trade Commission, 33 companies that had been selling family flour in the Southeast, and some of these continued to sell as late as January 1956, had discontinued the milling, blending or selling of family flour in the Southeast.[41]

Of these 33 mills, 7 were located in Kansas; 3 each in Texas, Tennessee and Michigan; 2 each in Illinois, Minnesota, Nebraska and Mississippi; 1 each in Oklahoma, Pennsylvania, Kentucky, Georgia, Ohio and Oregon.

One of these, a blending company with a capacity of 1,700 hundredweights per day and which sold approximately 76,000 hundredweights of family flour in and around Atlanta, Georgia, in 1952 and approximately 73,000 in 1954, discontinued blending family flour in May 1955 and sold its blending facilities and brands to the Martha White Mills of Nashville, Tennessee.

Another one, a milling company in Illinois with a capacity of 1,000 hundredweights per day and which sold approximately 65,000 hundredweights of family flour in the Southeast in 1952 and 34,000 in 1954, discontinued shipping family flour into the Southeast in December 1955.

In June 1957, one of the larger companies, General Foods Corporation, which ranked sixth in sales in the Southeast in 1952, and

[41] CX 446 A & B.

eighth in 1956, with sales of approximately 700,000 hundredweights in 1952 and approximately 400,000 in 1956, closed its Clarksville, Tennessee, flour mill having a capacity of 4,200 hundredweights per day and discontinued the sale of family flour in the Southeast.[42]

The testimony in the record indicates that no new flour milling companies have entered the Southeast family flour market since 1950.

The Commission survey included only those mills having 400 hundredweights or more capacity so that it would not include the small country mills which had gone out of business during that period of time. According to the testimony of numerous small millers who were called in this case, there was a substantial number of small mills that had gone out of business throughout the southeastern area, particularly in the states of Virginia, North Carolina and South Carolina. One of the principal reasons for small millers going out of business is the expense of meeting the sanitation requirements of the Federal Food and Drug Administration which often requires expensive renovation and purchase of new machinery. In discussing the matter of closing flour mills in the Southeast, Mr. James K. Ring, President of the Roanoke City Mills, was asked what factors peculiar to the flour milling industry, other than the decline in consumption and sanitation requirements of the Federal Food and Drug Administration, had been material factors in the closing of flour mills in the Southeast during the past 10 or 12 years. He testified that the loss of farm markets or export outlets of our American flour has brought about overcapacity of flour milling in the United States, which has brought on a more highly competitive situation in the Southeast. He also said that it may be brought about by lack of proper equipment as well as the sanitation rules. When asked whether those were the principal factors, this witness replied, "The small mills who are back on streams or whatnot, off railroads—he just can't enter the competitive situation."[43] This witness was also asked what is the smallest size flour mill that could be operated efficiently and profitably and compete effectively in his market area and he replied, "Five to six hundred hundredweights. * * * Per twenty-four hour day."

One small miller, Mr. O. B. Jones, in Rapidan, a small town in Virginia, rebuilt a flour mill that was destroyed by fire in 1950. It had a capacity of about 250 hundredweights per day. He was asked whether he knew of any other instances in the area in which he was located where mills had been destroyed by fire or water and had been rebuilt and he stated that he knew of none, and when he was asked to account for that fact, he said,

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[42] Tr. 26,464.
[43] Tr. 15,522.

Because the cost of replacement is six to seven times as much as it was to build six years ago. A mill that cost twenty thousand some years ago would cost one hundred to one hundred fifty thousand dollars to replace it. It cost us a quarter of a million dollars to replace ours, and I might say the book value was twenty thousand dollars.[44]

This witness was also asked whether he had observed any lessening of competition in the flour business in his marketing area since 1951 and he replied, "To some extent, because more local mills have gone out of business, by fire or otherwise." [45]

D. *Competitive Practices Subsequent to 1951 by Pillsbury in the Family Flour Industry in the Southeast*

Nearly all of the trade witnesses—that is, competitors of Pillsbury—as well as the wholesalers and chain store operators, testified that competition in the sale of family flour had become keener after 1951 than it had been before that time. Some of the competitors placed the responsibility for the keenness of this competition upon the respondent. For instance, Mr. Dannals, President of the Atlanta Milling Company, stated that the most difficult competition that he has had to face prior to June 1956 has been the "price and free goods of Pillsbury-Ballard." [46] He further described "free goods" as "one free with ten, and in some cases two free with ten." [47] He insisted that this competitive situation did not occur immediately after the acquisition in 1951 but began to occur a year or two later. He explained that about three and one-half years prior to the date of his giving of testimony in 1957, he had even considered merging with Puritan Mills, the other local Atlanta milling company, because of the loss of volume which both mills had begun to suffer due—

To the terrific competition which entered this market * * * I will say, that Pillsbury-Ballard began such a vicious price cutting, the like of which we had not seen. It is true that others did follow, and we did ourselves do something that we hadn't done before, but largely that was it. They were always in the picture.[48]

He then detailed the competitive situation by stating that Ballard's Obelisk flour had been selling at retail from time to time in his territory at 79 cents (in Atlanta in June 1956) and 69 cents (in Macon about a year earlier) per 10-pound sack of self-rising flour and that he was not able to meet these prices. The normal price to the consumer of this particular brand and size of sack at that

[44] Tr. 15,687.
[45] Tr. 15,689.
[46] Tr. 26,758.
[47] Tr. 26,751.
[48] Tr. 26,761.

time was $1.10.[49] At the time that Pillsbury-Ballard was selling this sack of flour for $1.10, his Capitola price to the retailer was 95 cents. Mr. Dannals said he could not lower his price to meet the Pillsbury-Ballard price because "We were not able to and stay in business." [50] He testified further that the free goods offered by Pillsbury-Ballard were the most difficult competition he had to face beginning about a year or two after the acquisition.

Another competitor that complained of the Pillsbury-Ballard type of competition was Mr. Craig of the Colorado Milling & Elevator Company who testified that in his opinion there was no competitive situation to justify Pillsbury making such drastic free-goods deals. He pointed out that when Pillsbury-Ballard put its price down approximately $3 per barrel from its basic price, it was pricing "way down below anybody in the field." [51] He pointed out that Pillsbury, General Mills and International had usually been more aggressive in the small package business in chain stores but recently they have made an aggressive bid for larger package business "which was getting into our field, and I think that is mainly the reason for our particular loss in our business, more than any other factor." [52] In further discussing the new competition, Mr. Craig referred to complaints that he had received from jobbers handling their flour that—

> * * * competition was so rough in the way of promotions that we suffered keenly because we could not and would not meet the proposition, because if we did it with one we knew we had to do it for the others, and we couldn't see where we could afford to do that.[53]

This witness gave illustrations and instances of where he had lost business because of the competitive activities of Pillsbury and the other two manufacturers named. The witness referred in his testimony principally to what is known as free goods deals where a manufacturer will allow one bag of flour free with five or ten or an equivalent allowance in certain areas.

Another competitor complaining of the Pillsbury-Ballard promotional programs which had been felt since the beginning of 1953 was Mr. Charles Girtman of Martha White Mills who testified that he could not recall any other company other than Pillsbury-Ballard that had offered similar deals. Within his knowledge he stated that he had never received any other report from his salesmen on deals such as those offered by Pillsbury.[54]

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49 Tr. 27,201.
50 Tr. 26,748-51.
51 Tr. 26,976-7.
52 Tr. 26,926.
53 Tr. 26,936.
54 Tr. 26,670; 26,666.

The principal deals that have been offered by Pillsbury-Ballard over a period of the last two or three years included particularly—one free bag with five at the invoice price; also, one free with ten; also, a free pillow case with the purchase of a 25-pound bag; and in some instances one free with ten in the purchase of the pillow-case sacks; also, coupons valued at 45 cents were given away with a 25-pound bag redeemable in Pillsbury grocery products. In some instances in making sales to wholesalers and jobbers, Pillsbury in 1956 gave away 21-inch TV sets to salesmen of the jobbers to get them to push Pillsbury brands. The Big Apple chain of supermarkets in Atlanta was offered various premiums such as television sets, upright freezers, and refrigerators by Pillsbury-Ballard in connection with their purchase of family flour from time to time. For instance, if the company purchased a carload of flour it would be entitled ot one 21-inch TV set or some other premium which it could pick out of a list of premiums. There were no conditions attached to the premiums and there was no performance required on the part of the Big Apple.[55] This chain in Atlanta purchased Ballard Obelisk self-rising flour in 10-pound bags in January 1956 for $8.62 per hundred, one free with five; also the same size with a lipstick pack, either in the bag or a coupon, for $8.72 and $8.92 per hundred, one free with five at both prices.[56]

A similar situation existed in the Colonial Stores, with headquarters in Atlanta, in 1953, 1954 and 1955. The premiums there were refrigerators, toy cook sets, General Electric air conditioners, electric phonographs, mink stoles and Crosley freezers.[57] The foregoing are typical of the testimony of jobbers and chain store operators in the Southeast area.

The above testimony as to free goods in confirmed by a copy of a letter from respondent dated December 28, 1955, to The Great Atlantic & Pacific Tea Company announcing effective Tuesday, January 3, 1956,

> * * * we will begin selling a shipping directions allowance of one free with ten on 25, 50 and 100 lb. Ballard Obelisk flour. This will affect A&P units in Richmond, Charlotte, Jacksonville, Birmingham, Louisville and New Orleans.

The announcement further stated that in the states of South Carolina, North Carolina and in the cities of Athens, Gainesville and Augusta, Georgia, the program would be on *all sizes* of Ballard Obelisk flour and would affect the Atlanta units plus any others having stores in that area and would be in effect until February 4, 1956.[58]

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[55] Tr. 27,094.
[56] Tr. 27,071.
[57] Tr. 26,882.
[58] CX 393-A.

Mr. Leslie Ford, President of the Shawnee Milling Company, when asked what were the principal competitive factors he had to compete with in the Southeast at the time he testified in October 1955, stated, "At the present time, coupons, free deals and the like." And, answering the question further as to coupons, "Cash rebate, allowance on purchase of companion items, advertising allowances, allowances to jobber salesmen, including cash and merchandise, that is, premium merchandise." [59] When he was asked whether he could meet these coupons and deals he replied in the negative—"We are not financially able to do so." When asked who were his principal competitors engaged in couponing, he replied,

> I would say that couponing and free goods and such deals as that, is practiced by the majority of our competition, including all of the national flour mills and some who operate in sectional areas.[60]

When asked which one of the national advertisers, he testified, "General Mills, Pillsbury, International, Quaker Oats." [61] He also testified further that this dealing and couponing had become more prevalent and a more important factor in the Southeast since June 1951 than it had before, and that the amount of cash refunds and discounts offered to jobbers and consumers had been substantially greater since 1951 in the Southeast. Mr. Ford gave an explanation of why he was not selling chain stores in the Southeast—

> * * * I presume we would if we felt that we could competitively, and that the sales wouldn't interfere with our established jobber trade. * * * If we sold our own mill labels, the chain stores might readily use it as a loss leader, which would automatically ruin our jobber trade.[62]

He testified further that he had used the method of couponing in order to compete in the family flour business for the first time the week before he testified.[63]

There is also evidence in the record that Pillsbury-Ballard offered one free with five on its family flour in the Meridian, Mississippi, area, although no competitor was making a similar offer in that area at that time.[64]

Similar activities were also found to be prevalent in Kentucky, Tennessee, Alabama and Florida.

It is therefore found that as a result of the acquisition of Ballard, respondent since 1952, and particularly during fiscal year 1955–56, has been engaged in predatory competitive practices in the sale of family flour in the Southeast.

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[59] Tr. 13,207.
[60] Tr. 13,208.
[61] Tr. 13,209.
[62] Tr. 13,212.
[63] Tr. 13,213.
[64] Tr. 26,979.

III. Effect of Acquisition of Duff Upon Competition in the Flour-Base Home Mix Industry in the United States and the Southeast

A. *Share of the Market*

1. *In the United States.* In fiscal year 1949–50, prior to the Ballard acquisition, Pillsbury sold approximately 1,220,000 hundredweights of mixes, and it was estimated at that time by Pillsbury officials that it ranked second in the sale of mixes, accounting for about 16% of the total volume of sales of mixes nationally. At the time of the acquisition of Duff during fiscal year 1951–52, the total mix deliveries of brands controlled by Pillsbury were approximately 1,760,000 hundredweights, and the total volume of the combined sales of Pillsbury, Ballard and Duff brands of mixes was approximately 1,840,000 hundredweights.[65]

The first result of the acquisition by Pillsbury of Duff's Baking Mix Division of American Home, sometimes herein referred to as Duff, was the increase in its capacity to manufacture mixes; the second was the increase in the volume of sales of mixes throughout the United States under the control of Pillsbury.

At the time that Pillsbury acquired the Duff plant and business from American Home, Duff was manufacturing mixes at San Jose, California, and at a large modern mix manufacturing plant at Hamilton, Ohio, which it had built in 1947. At that time it had a capacity of 2,640 hundredweights per day based on two shifts of eight hours each. American Home was in the process of adding new high-speed machinery in the Hamilton plant at the time of the acquisition. The actual daily capacity of the plant had declined from 2,640 hundredweights in 1950 to 2,150 in 1951 and 1,920 in 1952. The reason for such decline was that some of the old equipment had been retired and new equipment installed, and during the process the capacity had declined, but there was still ample capacity to manufacture the Duff line at that time. There were five production lines in operation at the time of the acquisition, three of them being modern high-speed lines and two of them semi-automatic hand-operated lines. However, the record shows that at least 7 or 8 lines could have been operated and, as a matter of fact, Pillsbury increased the number of lines after the acquisition until in 1954 it was operating 10 lines, and the capacity of the Hamilton plant had been increased at least 100%. Construction at the Hamilton plant enabled Pillsbury to increase its number of lines to 13 or 14. In 1952, before the acquisition, Pillsbury had a capacity for the production of about 3,555 hundredweights of cake and hot roll

[65] RX 151 D–J.

mixes at its plants located in Springfield, Illinois; Los Angeles, California; and Louisville, Kentucky, having acquired the Ballard mix plant in 1951. As of June 1, 1952, after Pillsbury had acquired the Duff plant and facilities, Pillsbury had a total capacity of 5,966 hundredweights per day for the production of cake and hot roll mixes. At least 50% of the increase can be attributed to the added facilities of Duff's Hamilton plant. Pillsbury's capacity for the production of cake and hot roll mixes as of June 1, 1952, was approximately 110% greater than it had been on June 1, 1951. Comparing the production at the Hamilton, Ohio, plant for the 12 months ending December 31, 1951, with the first year that the plant was owned by Pillsbury, there was an increase from 205,460 hundredweights to 461,621 hundredweights, and, in the following year, the production was increased to 752,874 hundredweights. With the exception of the Ballard plant at Louisville, Pillsbury did not show nearly as much of an increase in production at any of its other plants, so that it may be concluded that the acquisition of the Hamilton plant enabled respondent Pillsbury to increase its production of mixes substantially during the years succeeding the acquisition, which, in turn enabled it to increase its sales of mixes, which it could not have done if it had not made the acquisition. In December 1953, at the time Pillsbury sold the Duff business, the Pillsbury Grocery Products Regional Managers were advised by Vice President Rankin,

> When Pillsbury purchased Duff a year and a half ago, the primary factor was the acquisition of the new modern mix plant at Hamilton, Ohio. You have seen pictures of this plant and you know the vital role it has played in enabling us to manufacture and introduce new products, as well as supporting us on products in existence at the time of the purchase.[66]

As hereinbefore indicated, prior to the date of acquisition, Duff was the fourth largest selling brand of mixes in the United States. In addition to white, chocolate fudge and yellow cake mix, Pillsbury manufactured and sold a hot roll mix, pie crust mix and pancake mix at the time it acquired Ballard in 1951. Ballard at that time was having manufactured for it, and selling in the Southeast area only, white cake mix, devils food cake mix, yellow layer cake mix, hot roll mix, pie crust mix and a pancake mix. All of these products were being distributed by the Pillsbury organization at the time it acquired Duff in March 1952. In addition, Pillsbury had added an angel food cake mix. The Duff label included white layer cake, devils food cake, spice cake, gingerbread, hot roll, hot muffin and a waffle mix. The total volume of sales of mixes by Pillsbury during fiscal year 1952–53 was approximately 2,300,000 hundredweights.

[66] RX 145.

As hereinbefore indicated, prior to its acquisition by Pillsbury in March 1952, the Duff Division of American Home was manufacturing and selling principally a gingerbread mix, a spice cake mix and a waffle mix. At that time Pillsbury was not manufacturing or selling such mixes, although it was selling a pancake mix which could be used as a waffle mix. In April 1953, a few months prior to the date of selling the Duff mix business, Pillsbury brought out a gingerbread mix, a spice cake and, in July 1953, a waffle mix.[67] At the time it launched its spice cake and gingerbread mix, Pillsbury made the following announcement to its merchandisers or salesmen in July 1953:

> * * * as part of our offensive in the Cake Mix business, we are today ready to launch two new mixes, Pillsbury Spice Cake Mix and Pillsbury Gingerbread Mix. Much of the tremendous increase in baking mix popularity is due to new products. They are steadily increasing the mix business month after month, and *Pillsbury sets the pace.* Starting immediately, we are ready to assume leadership in both the Spice Cake Mix and Gingerbread Cake Mix fields.[68]

During the fiscal year 1952–53, the last year that Pillsbury handled the Duff line of mixes and had just begun to sell spice cake, gingerbread and waffle mixes, the deliveries of these items under the Duff labels by Pillsbury were as follows: Spice cake, 23,178 hundredweights; gingerbread, 57,511 hundredweights; and waffle mix, 29,464 hundredweights.[69] In a memorandum to regional branch managers and supervisors in March 1955, H. R. Galbraith, Director of Sales, Grocery Products Division of Pillsbury, reviewed the history of the cake mix business, which he referred to as "our number one specialty product." He referred to the early days of the cake mix market, when there were numerous brands in leadership positions, such as Cinch, Dromedary and others.

> * * * At that point we introduced our White and Chocolate Cake Mixes and were in opposition with various cats and dogs in the market as well as Swans Down. From that point on our White and Chocolate product moved into competition versus all purpose mixes of Swans Down, Betty Crocker and others.
>
> The next step in the cake mix development was a flavor fight which then had in the market in addition to Betty Crocker and Swans Down, Duncan Hines, Aunt Jemima and others. The two main flavors were white and chocolate. Then in 1951 we introduced our Yellow Cake Mix and skyrocketed to new highs in the cake mix market.
>
> In 1952 our major competitor, Betty Crocker, and later Duncan Hines, met us with a yellow cake mix.
>
> Then we stepped out ahead again in 1952 with our Angel Food Cake Mix, and again to a new high in share of market in the cake mix business. We

[67] RX 144.
[68] CX 455–B.
[69] RX 151 D–J.

considered Angel Food Cake Mix more important and representing a greater share of market and total market opportunity than other new flavors such as Spice. Betty Crocker chose differently and they in 1952 introduced Spice Cake Mix and they also had gains although not at all as substantial gains as we enjoyed with our Angel Food.

All through this period since we first overtook Swans Down in the early days of the cake mix business we had total leadership in the cake mix market as well as flavor by flavor leadership.

So up to this time we have seen the importance of the very rapidly growing cake mix market which grew from about one million some six years ago to five million to a current annual rate of about seventeen million cases. This market growth has been done by new brands coming into the market and by new flavors coming into the market, both of which are extremely important.

Up until about a year ago of the cake mix market on a national basis we had a substantial lead in the total market. In terms of actual percentage figures we enjoyed about 35% of the market whereas our nearest competitor, Betty Crocker, had about 22% of the market. * * *

So again we have to look at the total cake mix market in terms of leadership flavor by flavor as well as total leadership. We saw when Betty Crocker introduced Spice ahead of us that it's been a market that's been difficult to overcome because of their advanced leadership. They have found that same thing true with our Angel Food; we probably will find that true with their Marble Cake if and when we choose to come out with a Marble Cake Mix. In any event today we still have a very respectable share of market flavor by flavor, but Crocker has made its gains by the introduction of new flavors, mainly its Angel Food and more recently its Marble Cake. As a result they have gained more rapidly than have we.

In terms of actual gains we are today at our highest point in our cake mix history in terms of share of market. We are selling more total cases than we have ever sold before and as a result, between Betty Crocker and ourselves, we account for close to three fourths of the total cake mix market. As a result Swans Down and the other competitors have dropped into a very unimportant competitive position.[70]

The record also contains a survey made by the Commission of deliveries by all manufacturers in the United States of cake mixes, which account for most of the mix business during the calendar years 1952 and 1954. According to this survey, Pillsbury's total deliveries of *cake* mixes during calendar year 1952 were approximately 1,023,000 hundredweights, which was approximately 31.06% of the total deliveries of *cake* mixes in the United States that year and more than any other *cake* mix manufacturer, including General Mills, whose sales of cake mixes were less than 700,000 hundredweights, or approximately 21% of the total; the third largest distributor of cake mixes was General Foods Corporation with its Swans Down brand, which accounted for approximately 14% of the total deliveries. The fourth ranking manufacturer during that year was Hills Brothers Company with its Dromedary brand, which accounted for approximately 8% of the total deliveries. Nebraska

[70] CX 450 A–B.

Consolidated Mills Company was fifth with its new brand of Duncan Hines, representing approximately 7% of the total. Cinch Products, Inc., with approximately 4% of the industry, ranked sixth—this is a Los Angeles firm selling most of its products on the Pacific coast. Quaker Oats, manufacturer of Aunt Jemima pancake flour and cake mixes, ranked next, with a little less than 4% of the total. The next in rank was Kitchen Art Foods, Inc., with its Jiffy brand, which accounted for approximately 2½% of the total. Other manufacturers with less than 2%, but more than 1%, were Jewel Tea Company, Flako Products, Incorporated, Russell-Miller Milling Company, Colorado Milling & Elevator Company and Modern Foods, Incorporated.

According to the Commission survey during the year 1954, although Pillsbury maintained approximately the same relative position percentagewise (31.26%) of the cake mix industry in volume of deliveries, General Mills was able to surpass Pillsbury in total volume of deliveries and assumed its former leading position with a percentage of 34.94%. The Nebraska Consolidated Mills Company advanced from fifth position to third, and percentagewise from approximately 7% to 12% in 1954. On the other hand, the General Foods Corporation dropped in rank from third to fourth and percentagewise from approximately 14% to 10%. Also Hills Brothers declined in rank from fourth to fifth and from approximately 8% of the total in 1952 to 4% in 1954. All of the other mix manufacturers sustained a decline in volume of deliveries, as well as in percentage position, with the exception of Jewel Tea Company, which slightly increased its total volume but declined in its percentage of the total deliveries. The total deliveries of cake mixes advanced from approximately 3,300,000 hundredweights in 1952 to approximately 4,590,000 hundredweights in 1954.

As hereinbefore indicated, gingerbread mix was an important flavor of cake mix which had been developed by Dromedary and Duff in the early days of the industry, and, at the time Pillsbury acquired Duff, it was one of the principal mixes sold by that company. By 1952, however, according to the survey made by the Commission, Betty Crocker had passed Duff in total sales of gingerbread, Dromedary still being in the lead. The total sales of gingerbread in the United States were 216,732 hundredweights. Of this total, Dromedary ranked first with total sales of 104,025 hundredweights; Betty Crocker was second with a total of 58,617 hundredweights; and Pillsbury, with the Duff brand, was third with 42,046 hundredweights. Pillsbury's share of the total gingerbread mix sales was 19.4%. In 1954, after Pillsbury had disposed of the Duff brand but had begun to market a gingerbread mix under its own brand, the total gingerbread sales were 288,631 hundredweights. Of this amount Pillsbury sold 80,477 hundredweights, or 27.88% of the total; and Betty Crocker gained first place with 104,614 hundredweights. The sales of the Dromedary brand declined to 87,662 hundredweights, which ranked it in second place just ahead of Pillsbury.

The record contains a consolidated research analysis of consumer preference conducted by newspapers in 1951 and 1952 showing brand preference of certain food products including cake mixes in representative cities throughout the United States including, Milwaukee, Wisconsin; Indianapolis, Indiana; St. Paul, Minnesota; Duluth, Minnesota; Columbus, Ohio; Omaha, Nebraska; Birmingham, Alabama (in 1951); Washington, D.C.; Salt Lake City, Utah; Fresno, California; Modesto, California; Sacramento, California; San Jose, California; Seattle, Washington; Spokane, Washington; and Portland, Maine (in 1952).[71] The popularity of the Pillsbury and Duff brands, as well as Betty Crocker, is set forth in this survey. Pillsbury was first choice in six cities in 1951; namely:

Milwaukee, Wisconsin	34.2%
Indianapolis, Indiana	30.5%
Duluth, Minnesota	31.2%
Columbus, Ohio	29.4%
Washington, D.C.	27.8%
Salt Lake City, Utah	32.8%

Betty Crocker had the highest preference in seven cities as follows: Omaha, Nebraska; Fresno, California; Modesto, California; Sacramento, California; San Jose, California; Seattle, Washington; and Spokane, Washington. Although Duff was not first in any of the cities, it was second in Spokane and Seattle. Combining the percentages of Pillsbury and Duff in Omaha would place the Pillsbury controlled brands ahead of Betty Crocker with 25.0% against 22.4%. In Birmingham, Alabama, although Pillsbury's percentage 19.4 was more than Betty Crocker's 3.5%, it was not as large as Swans Down's 25.8%. However, a combination of the Pillsbury and Duff percentages for that city would rank the Pillsbury controlled brands in first place with 28.5%. A local brand, Occident, manufactured by Russell-Miller Milling Company was first in St. Paul, Minnesota, with 24.6% which was just slightly higher than the Pillsbury percentage of 23%. Also, in Birmingham, Ballard was second to Swans Down, being more popular than either Betty Crocker or Pillsbury.

In 1952 Pillsbury was first in eight cities, Betty Crocker first in six cities and the combination of Pillsbury and Duff was first in

[71] CX 150–151.

nine cities. Detailed percentages of the combined Pillsbury and Duff brands in 1952 are as follows: Milwaukee, Wisconsin, 44.2%; Indianapolis, Indiana, 44.9%; St. Paul, Minnesota, 26.6%; Duluth, Minnesota, 35.6%; Columbus, Ohio, 45.8%; Washington, D.C., 40.5%; Salt Lake City, Utah, 43.6%; Sacramento, California, 35.7%; Portland, Maine, a new city on the list, 52.4%. The six cities in which Betty Crocker was first choice were the same as in 1951 with the exception of Omaha, as follows: Sacramento, Modesto, San Jose and Fresno, California; and Seattle and Spokane, Washington.

A study was made by This Week magazine of sales of mixes by 22 grocery chains and 15 wholesale grocers in various sections of the United States and covering approximately 7,762,000 dozens of packages of mixes in 1950 and approximately 8,690,000 dozens of packages in 1951. Although this study does not reduce the packages to pounds or hundredweights, it has some probative value in corroborating the other studies that have been made with respect to share of market in the mix industry. According to this survey, Pillsbury brands of mixes accounted for about 1,584,000 dozens of packages in 1950 and 1,868,639 dozens of packages in 1951, and accounted for 20.41% of the total in 1950 and 21.5% in 1951. In 1950 Pillsbury ranked second behind General Mills which had a percentage of 20.98; and in 1951 General Mills had dropped to 19.05% when Pillsbury became the leading brand.

This study also shows that cake mixes accounted for 43.5% of the total volume of mixes in 1950 and the same percentage in 1951. Considering cake mixes alone, the study shows that Pillsbury ranked second in 1950 with 16.65% of the total but had risen to first position in 1951 with 18.84% of the total. Duff ranked fifth each year. The five leading brands of cake mixes included in this study in 1950 were as follows with their respective percentages of the total: Betty Crocker first, 19.9%; Pillsbury second, 16.65%; Swans Down third, 13.8%; Dromedary fourth, 12.99% and Duff fifth, 11.05%. The five leading brands in 1951 were as follows with their respective percentages of the total: Pillsbury first with 18.84%; Betty Crocker second with 16.56%; Swans Down third with 16.19%; Dromedary fourth with 12.91%; and Duff fifth with 9.15%. A total of these five brands represented 73.65% of the total volume of mixes covered in the study in 1952.[72]

The record also contains a survey by the Good Housekeeping Consumer Panel of a representative group of subscribers of the Good Housekeeping Magazine on cake mixes in 1949 which, although two years prior to the acquisition of Ballard and nearly three years prior

[72] CX 220, pp. 29-51.

to the acquisition of Duff, has some probative value. According to this survey, Pillsbury ranked first with 22.5%; Betty Crocker second with 21.3%; Swans Down third with 18.3%; Duff fourth with 11.7%; and Dromedary fifth with 9.4%.[73]

Another brand preference survey was conducted by the Progressive Farmer of about 3,000 southern farm families in 14 states in the fall of 1951. Among the subscribers of this magazine reporting on cake mixes, Swans Down was the favorite with 23.5%; Pillsbury was second with 22.2%; Betty Crocker third with 13.8%; Duff fourth with 6.1%; Ballard fifth with 6%; and Dromedary sixth with 3.1%.[74]

The record also contains a survey of Loblow, Inc., a chain store organization, with its principal office at Buffalo, New York, and warehouses in Buffalo and Syracuse, New York, and Youngstown, Ohio. These warehouses served about 90 retail grocery stores in the Buffalo area; 42 in the Syracuse area; and 9 or 10 in the Youngstown area. The period covered by the study was from April 1, 1953, through March 31, 1954. The total volume of mixes handled during that period of time by this firm in the area served by it was 32,401 hundredweights of which Pillsbury brands amounted to 14,741 or 45.5% of the total. Betty Crocker was second with 8,882 hundredweights; Swans Down third with 2,764; Dromedary fourth with 2,544. Other brands represented were Py-O-My with 1,187 hundredweights; Aunt Jemima 921; X-Port 595; Occident 385; and Duff 383.[75]

2. *In the Southeast.* Prior to the acquisition of Ballard, Pillsbury, it was estimated by respondent in the Mintener letters, had 22.7% of the mix market in the *Southeast;* Ballard had 12%; and Duff 10.2%.

The record contains market studies made in the following cities of the Southeast to determine the share of market Pillsbury occupied in the sale of mixes by chain stores: Jacksonville, Florida; Atlanta, Georgia; Birmingham, Alabama; New Orleans, Louisiana; and Memphis, Tennessee.

In Jacksonville, Florida, figures were obtained from the two principal chain stores—Winn & Lovett and A & P—for the movement of mixes for the years 1950 and 1951 through their warehouses. Thirteen brands of mixes appear to have been handled, the total volume in 1950 being 14,277 hundredweights and in 1951, 18,531. Of these amounts, in 1950, Pillsbury accounted for 5,427 hundredweights or 38.02% of the total; and in 1951, 6,817 or 36.79% of the

[73] CX 224, p. 41.
[74] CX 206.
[75] CX 269.

total. Duff's and Ballard's mixes were handled during the year 1951 and combining their sales with Pillsbury, the total would have been 44% of the total volume sold.

In Atlanta, Georgia, three chain stores furnished their records of movement of mixes during the years 1950, 1951 and 1956. The Great Atlantic & Pacific Tea Company totals were: In 1950, 6,673 hundredweights; in 1951, 9,304; and in 1956, 14,885. The Kroger Company totals were: In 1950 2,024 hundredweights; in 1951, 3,193; and in 1956, 6,920. The Colonial stores totals were: In 1950, 31,986 hundredweights; in 1951, 34,920; and in 1956, 16,574.

The totals of the three stores during those three years were as follows: In 1950, 40,683 hundredweights; in 1951, 47,417; and in 1956, 38,379. Of these combined totals, Pillsbury brands of mixes handled were as follows: In 1950, 14,519 hundredweights or 35.69% of the total; in 1951, 16,286 or 34.35% of the total; and in 1956, 13,068 or 34.05% of the total. These stores did not handle Duff or Ballard in 1950, nor are there any figures for 1956 since they were included in the Pillsbury brands. In 1951 the total of Duff and Ballard brands handled by all three stores amounted to 24,961 hundredweights. Apparently Ballard sales through the Colonial stores accounted for this large quantity.

The A & P warehouse in Birmingham, Alabama, was the only chain store furnishing information as to the movement of mixes in Birmingham. The period covered was from March 1, 1951, through August 23, 1952. The total of the A & P warehouse movement of mixes in Birmingham during this period was 10,348 hundredweights. Of this amount Pillsbury accounted for 2,560 hundredweights or 24.74% of the total. The second largest movement was the Swans Down brand with 1,524 hundredweights. The next was Ballard with 1,184 hundredweights; the fourth was Betty Crocker with 1,030; and Duff was next with 1,007.

The warehouse of the Hill Grocery Company, a wholesaler in Birmingham, Alabama, handled eight brands of mixes during the first six months of 1951 and the first six months of 1952. A comparison of the movement of these mixes during those two periods of time shows that the total for the 1951 period was 2,275 hundredweights and for 1952, 2,397 hundredweights. Of these amounts Pillsbury brands accounted for 388 hundredweights in 1951 and 821 in 1952 or 17.04% in 1951 and 34.27% in 1952. The Duff movement amounted to 360 hundredweights in 1951 and 230 in 1952. Of the other brands distributed through the Hill Grocery Company warehouse, Duff ranked next to Pillsbury in 1951 with 360 hundredweights and Swans Down next with 348. In 1952 Swans Down was second with 339 hundredweights; and Duff third with 230.

The Birmingham News conducted a survey of the cake mix market in the Birmingham area for each of the years 1948 through 1955.[76] Although the survey does not furnish evidence of share of market, it gives the name of the brand having the first and second choice each year for the different varieties of cake mixes, and reference is made to this survey for the reason that it gives an indication of the popularity of certain brands and varieties of cake mixes in the Birmingham market. For instance, on the white cake mix, Swans Down was the most popular brand in 1951 with 29.2% of first choice; Pillsbury second with 23.9%; and Ballard third with 20.7%. In 1952 Pillsbury was first choice with 26.3%; Duncan Hines second with 22.8%; and Swans Down third with 17.8%. Ballard had dropped in popularity to fifth place with 11.7%. Pillsbury continued to be the most popular white cake mix during the years 1953, 1954 and 1955. The popularity of Duncan Hines declined from a high point in 1953 and 1954 of 23.8% of first choice to 20.9% of first choice in 1955.

With respect to chocolate cake mix Pillsbury was first choice with 26% in 1951; Swans Down second with 23.9%; and Betty Crocker third with 16.3%. Pillsbury advanced in popularity each year so that it reached a peak of 46.9% in 1954 at which time Duncan Hines was second with 25.6% and Betty Crocker third with 16.1%. However, in 1955 Pillsbury's popularity declined to 34.5%; Duncan Hines dropped to 24%; and Betty Crocker advanced to 24%.

On yellow cake mix Pillsbury was first choice in 1952, the first year it came out with a yellow cake mix and although it retained its first place preference during the succeeding years, its popularity declined to 34.2% in 1955; Betty Crocker had 26.3%; and Duncan Hines 25.3%. It is interesting to note that while Betty Crocker was improving its popularity over the years, attaining its peak in 1955, Duncan Hines declined from a peak of popularity in 1954 of 26.7% to 25.3% in 1955.

With respect to angel food cake mix in which Pillsbury was the pioneer, it has maintained first choice during the entire period of time from 1952 to 1955; however, its popularity has declined from 73% in 1952 to 53.8% in 1955. Betty Crocker was second in 1955 with 22% and Duncan Hines third with 15.9%. Here again Duncan Hines' popularity has declined from 19.6% in 1954 to 15.9% of first choice in 1955.

As to spice cake mix, Betty Crocker was in first place in both 1954 and 1955 with 47.3% in 1954 and 41% in 1955. Pillsbury was second in both years and increased its popularity from 29.1% in

[76] CX 200; 201; 383.

1954 to 30.3% in 1955. Duncan Hines was third and also increased its popularity from 19.4% in 1954 to 25% in 1955. In 1951, Duff was the first choice with 45.9% families and Dromedary was second with 16.4%; Betty Crocker was third with 9.8%. By 1955 Duff had dropped to 1.4%.

In New Orleans, Louisiana, the warehouse records of two chain stores, A & P and Consolidated Grocery Company, for the first six months of 1951 and the first six months of 1952, show that a total volume of mixes of all brands in the first six months of 1951 was 5,465 hundredweights and in 1952, 6,650.[77] Of this quantity Pillsbury brands accounted for the largest distribution of 1,101 hundredweights in 1951 and 1,734 in 1952 or respective percentages of the total of 20.14% in 1951 and 26.07% in 1952. During 1951 the total Ballard movement was 231 hundredweights in the two warehouses and the Duff movement was 120 hundredweights. In 1952 the Ballard movement accounted for 435 hundredweights and Duff 114 hundredweights. If these quantities were combined with Pillsbury, there would have been a total of 2,283 hundredweights or 34.33% of the total warehouse movement of mixes.

In Memphis, Tennessee, a consumer survey was conducted by the Memphis Commercial Appeal and the Memphis Press-Scimitar, local newspapers, in certain periods in 1950–52. It included data on purchases of mixes by its panel members. For the last six months of the year 1950 the Pillsbury brand alone accounted for 29.3% of the total of such purchases. For the last six months of 1951, however, the Pillsbury and Ballard brands together accounted for about 39.7% of the total.[78] In the first three of the periods covered by the survey in evidence, Pillsbury and Ballard ranked as number one and number two, respectively. In the fourth period, that is, the first six months of 1952, Pillsbury was still number one, but Ballard was third, just behind General Mills which was in second place.

The record also contains evidence of the movement of mixes by chain store warehouses in Memphis for the years 1950, 1951 and 1952. These warehouses included those of the Kroger Company, Weona Food Stores, Inc., Malone & Hyde and Liberty Cash Grocers. The total volume of mixes handled by the Liberty Cash Grocers during the calendar year 1951 was 6,721 hundredweights of which Pillsbury brands amounted to 2,684 hundredweights; Ballard 147; and Duff 138. Pillsbury's percentage of the total shipments was 39.93%. During 10 months of 1952, the record not covering the whole year, the total volume of mixes handled was 6,737 hundred-

[77] CX 187: 199.
[78] CX 179–182.

weights of which amount Pillsbury's brands accounted for 2,970; Ballard 180; and Duff 62. The percentage of the total by Pillsbury alone was 44.09%. Next to Pillsbury in 1951, which had the largest volume of shipments, was Swans Down with 1,524 hundredweights. The next brands in point of volume were Aunt Jemima with its pancake and buckwheat flour; Betty Crocker and Dromedary. In 1952 Swans Down was again second with 1,089 hundredweights with Aunt Jemima, Betty Crocker and Duncan Hines following in that order.

In the Malone & Hyde warehouse, the total volume of movements of mixes for 1951 was 8,135 hundredweights and in 1952, 6,860 hundredweights. Of these amounts Pillsbury accounted for the largest share with 3,205 hundredweights in 1951 and 3,762 hundredweights in 1952 or 39.40% of the total in 1951 and 54.84% in 1952. Next to Pillsbury in second place in 1951, was Swans Down; followed by Aunt Jemima with its pancake and buckwheat mixes in third place; and Betty Crocker fourth. In 1952 next to Pillsbury was Aunt Jemima with its pancake and buckwheat mixes; Swans Down third; and Betty Crocker fourth.

The total shipments of mixes through the Kroger warehouse in Memphis in 1951 were 4,237 hundredweights and during the 10 months of 1952, 5,041. Of these totals, the Pillsbury brand accounted for 1,496 hundredweights in 1951 or 35.3% of the total and 1,769 hundredweights in 1952 or 35.1% of the total. This chain store did not handle the Duff line of mixes during those two years but did handle Ballard during 1951, the total being 26 hundredweights and which if added to the Pillsbury total, would make it 1,522 hundredweights or 35.92% of the total. Next to Pillsbury in 1951 was Aunt Jemima with its pancake and buckwheat mixes with 721 hundredweights; Dromedary was third and Betty Crocker fourth. In 1952 Dromedary was in second place next to Pillsbury with a total of 625 hundredweights; Swans Down was third and Betty Crocker fourth.

In the Weona Food Stores warehouse in Memphis in 1951, there being no 1952 figures available, the total volume of mixes handled was 1,967 hundredweights of which Pillsbury brands accounted for 786 hundredweights or 39.96% of the total volume. Next to Pillsbury in volume was Swans Down with 394 hundredweights, followed by Aunt Jemima and Betty Crocker in that order.

In Knoxville, Tennessee, a survey of certain consumer purchases, including mixes, was conducted by the Knoxville News Sentinel. The period of time covered was the fourth quarter of 1949, the first quarter of 1950 and 12 months ending March 31, 1950. It appears that the Duff brand of mixes was an important brand in Knoxville during that period of time. Its cake mixes ranked first during the 12 months ending March 31, 1950, and the Duff brand of gingerbread was the leading brand in all three periods.

Although there were no figures obtained from chain store warehouses in the Knoxville area, the buyer for one of the chains with headquarters in Knoxville, which operated about 41 retail stores—20 in the area surrounding Knoxville, testified that in 1953 in those stores Pillsbury was the largest selling brand of mixes; Betty Crocker was second; Swans Down third; Duff fourth and Dromedary fifth; that in 1954 Betty Crocker had become the largest selling brand of mixes with Pillsbury second and Duff fifth; and in 1955 Betty Crocker was still the leading brand, Pillsbury second, Swans Down third, Dromedary fourth and Duff still fifth.

Although there are no reliable figures from chain store warehouses in the Southeast with respect to any other areas than those hereinbefore mentioned, there is testimony that Pillsbury was in the number one position in the sales of mixes in Norfolk in 1952 with Swans Down ranking second, General Mills third, Ballard ranking fourth or fifth and Duff fifth or sixth.

B. *Concentration*

From the time that Pillsbury began to take an interest in the mix market as an outlet for flour manufactured by it, other flour millers such as General Mills and Russell-Miller Milling Company and later the Nebraska Consolidated Mills were in competition for leadership in the mix market. As hereinbefore indicated, at that time Hills Brothers of California and Duff and Cinch also of California were the leading manufacturers in flour-base home mixes with a limited number of items or varieties. Gingerbread was one of the earliest varieties and Dromedary and Duff had been quite successful in the sale of their prepared gingerbread mixes for home use. From 1946 until 1949 or 1950, new varieties of mixes were introduced into the market not only by Pillsbury and General Mills but by the other companies in the business, but it appeared that the bulk of the business would be in the hands of those flour companies that were willing to spend money for promotion. In the fiscal year 1949–50 three companies including Pillsbury had 51% of the mix business. Seven companies including Pillsbury and Duff had 70% of the mix business in the United States as estimated by the officials of Pillsbury in this proceeding. According to the President of Hills Brothers, Pillsbury, General Mills (Betty Crocker) and General Foods (Swans Down) had 60% of the mix business in the United States in 1952.

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The concentration of the *cake* mix market is even more significant. Pillsbury and General Mills share the bulk of the market. In 1952, out of a total of approximately 28 manufacturers, the 5 largest companies had approximately 80% of the total United States *cake* mix business.[79] By 1954 the 5 largest companies accounted for nearly 92% of the total *cake* mix business. In each of these years Pillsbury accounted for nearly one-third of the total *cake* mix business in the United States (31.06% in 1952 and 31.26% in 1954). The Pillsbury, Betty Crocker and Duncan Hines brands accounted for approximately 57% of the total volume for all brands of *cake* mixes sold in 1952 and 78% in 1954. In the latter year the 8 top brands accounted for approximately 96% of the total brands of *cake* mixes sold.[80]

In June 1953 the Market Research Corporation of America reported to Pillsbury for June 1953 covering, among other things, flour-base home mixes by its panel of family members, that Pillsbury ranked first in the sale of *cake* mixes with 31.1% of the total *cake* mix sales; and Betty Crocker ranked second with 24.1%. The five leading brands then according to this report were Pillsbury, Betty Crocker, Swans Down, Duncan Hines and Duff with a total of 84.6% of the industry.

The *cake* mix business in the Southeast is about the same as in the entire United States so far as concentration is concerned. The five leading manufacturers, including Pillsbury, General Mills, General Foods, Hills Brothers and Nebraska Consolidated Mills Company, accounted for approximately 88% of the total sales of *cake* mixes in that area in 1952 and nearly the same percentage in 1954.[81]

It may fairly be concluded, therefore, that throughout the entire United States, including the Southeast, the bulk of the *cake* mix business is concentrated in the hands of the respondent and General Mills. The percentage of the total business under the brands controlled by these two companies advanced from 37.26% in 1950 to 51% in 1952 and approximately 65% in 1954; and so far as the respondent Pillsbury is concerned, as a direct result of the acquisition involved in this proceeding, it advanced from approximately 16% of the total industry in 1950 to 31.06% in 1952 and 31.26% in 1954.

The following table sets forth the names of the principal manufacturers of *cake* mixes in the United States and shows their brand names and the volume of deliveries of *cake* mixes by each in the United States and in the Southeast for the years 1952 and 1954 according to the survey made by the Commission.

79 CX 479 A & B.
80 CX 407 A & B.
81 CX 476.

Certain data concerning deliveries of cake mixes (a) in the United States and (b) in the Southeast, as reported by manufacturers (and distributors) which accounted for 1 percent or more of total U.S. deliveries in 1952

Company and main office address	Principal brands of cake mixes	U.S. deliveries of cake mixes (cwts.)		Percent of U.S. total deliveries		Deliveries of certain brands of cake mixes in the Southeast (cwts.)[1]		Percent of companies' total deliveries in the Southeast[1]		U.S. deliveries of cake mixes by flavor and variety															
										1952								1954							
		1952	1954	1952	1954	1852	1954	1952	1954	White cake	Yellow cake	Chocolate cake	Angel food cake	Spice cake	Ginger-bread	Cup cake	Other	White cake	Yellow cake	Chocolate cake	Angel food cake	Spice cake	Ginger-bread	Cup cake	Other
Pillsbury Mills, Inc., Minneapolis, Minn.	Pillsbury, Ballard, Duff.[2]	1,022,920	1,436,263	31.06	31.26	145,390	186,710	35.43	32.31	X	X	X	X	X	X	X[9]	----	X	X	X	X	X	X	----	X
General Mills, Inc., Minneapolis, Minn.	Betty Crocker.	683,244	1,605,349	20.74	34.94	64,220	187,180	15.65	32.39	X	X	X	----	X	X	----	X	X	X	X	X	X	X	----	X
General Foods Corp., White Plains, N.Y.	Swansdown.	451,000	451,400	13.69	9.82	67,650	67,710	16.48	11.72	X	X	X	X	----	----	----	----	X	X	X	X	----	----	----	
Hills Bros. Co., New York, N.Y.[3]	Dromedary	253,355	163,097	7.69	3.57	64,100	23,290	15.62	4.03	X	----	X	----	----	X	X	X	X	X	X	----	----	X	X	X
Nebraska Consolidated Mills Co., Omaha, Neb.	Duncan Hines.	223,134	567,196	6.77	12.34	20,790	41,970	5.07	7.26	X	X	X	----	----	----	----	----	X	X	X	X	X	----	----	
Cinch Products, Inc., Los Angeles, Calif.	Cinch	123,187	63,804	3.89	1.39	12,820	31,900	3.12	5.52	X	X	X	----	X	----	----	----	X	X	X	----	----	----	----	
Quaker Oats Co., Chicago, Ill.	Aunt Jemima	125,811	31,731	3.82	.69	6,290	4,440	1.53	.77	X	----	X	----	----	X	----	----	X	X	X	----	----	X	----	
Kitchen Art Foods, Inc., Chicago, Ill.	Py-O-My	79,476	56,038	2.41	1.22	8,840	5,550	2.15	.96	X	----	X	X	X	----	----	X[9]	X	----	X	X	X	----	----	X[9]
Jewel Tea Co., Inc., Melrose Park, Ill.	Jewel, Mary Dunbar.[4]	64,514	69,178	1.96	1.51	7,400	11,930	1.80	2.06	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Colo. Milling & Elevator Co., Denver, Colo.	([5])	53,636	17,083	1.63	.37	None	None	----	----	X	----	X	----	----	----	----	----	X	X	X	----	----	----	----	----

See footnotes at end of table.

Certain data concerning deliveries of cake mixes (a) in the United States and (b) in the Southeast, as reported by manufacturers (and distributors) which accounted for 1 percent or more of total U.S. deliveries in 1952—Continued

Company and main office address	Principal brands of cake mixes	U.S. deliveries of cake mixes (cwts.)		Percent of U.S. total deliveries		Deliveries of certain brands of cake mixes in the Southeast (cwts.)[1]		Percent of companies' total deliveries in the Southeast[1]		U.S. deliveries of cake mixes by flavor and variety															
										1952								1954							
		1952	1954	1952	1954	1952	1954	1952	1954	White cake	Yellow cake	Chocolate cake	Angel food cake	Spice cake	Ginger-bread	Cup cake	Other	White cake	Yellow cake	Chocolate cake	Angel food cake	Spice cake	Ginger-bread	Cup cake	Other
Russell-Miller Milling Co., Minneapolis, Minn.	Occident	43,316	24,857	1.32	.54	None	None			X		X		X[10]	X[10]		X[10]	X		X	X	X[10]	X[10]		X[10]
Modern Foods, Inc., Paterson, N.J.[11]	X-Pert	37,029	12,812	1.12	.28	5,180	1,410	1.26	.24	X	X	X		X	X			X	X	X		X	X		
Flako Products Corp., New Brunswick, N.J.[6]	Cuplets (cup cake mix).	34,658	29,900	1.05	.65	1,730	1,499	.42	.26							X								X	
Other[7]		93,327	65,337	2.83	1.42	6,000	14,319	1.47	2.48	X	X	X	X	X	X		X	X	X	X	X	X	X		X
Totals		3,293,607	4,594,945	100.0	100.0	410,410	577,920	100.0	100.0																

[1] Estimates.
[2] Duff brand owned by Pillsbury in 1952 but not in 1954.
[3] Since March 1954 a division of National Biscuit Co. Named later changed to the Dromedary Co.
[4] The "Jewel" brand which accounted for a very large percentage of this company's total U.S. deliveries of cake mixes in 1952 and 1954 was distributed through its home-shopping routes which operated in those years in all of the States except 6. The Martha Dunbar brand was distributed through Jewel's own retail stores in Illinois and northern Indiana.
[5] Practically all of the cake mixes manufactured by this company were for others, under brands not owned by it.
[6] This corporation was acquired by the Quaker Oats Co. on June 20, 1955.
[7] None of these other companies accounted for as much as 1 percent of U.S. deliveries of cake mixes in 1952 or 1954.
[8] Deliveries of spice cake, gingerbread, and cup cake in 1952 were of the Duff brand only. Pillsbury did not own the Duff brand in 1954.
[9] The largest percentage of this company's cake mix deliveries in 1952 and 1954 were in blueberry muffins, brownie, pineapple upside down cake, and coffee cake mixes.
[10] Deliveries of spice cake, gingerbread, and other (Chiffon) in 1952 and 1954 were for others under brand names not owned by Russell-Miller.
[11] This company discontinued its cake mix business on Sept. 1, 1955.

Source: CX 403, CX 476 and CX 479A–B

C. *Exits and Entries—Mixes*

It is estimated that about the time of the acquisition of Ballard and Duff by respondent Pillsbury, there were 50 manufacturers of cake mixes in the United States.[82] As shown by the Commission's cake mix survey,[83] a total of 28 manufacturers of cake mixes were in that market in 1952. In that survey, 8 companies which did not make deliveries of cake mixes in 1952 were reported making deliveries of cake mixes in 1954. Of the 8 companies only 3 were manufacturers of such mixes. One of these 3 manufacturers was the Chelsea Milling Company which had been manufacturing a biscuit mix for many years when it began the manufacture of a cake mix. It started to sell the new cake mix in 1954 packed in half-size packages designed to be promoted at a special price of 10 cents a package as compared with a normal price of around 35 cents per package containing about 16 or 17 ounces. It appears from testimony in the record that this product known as Jiffy mix is sold only intermittently by the chain stores, supermarkets and other retailers, usually when the 10-cent special sales are in progress. Some chain store witnesses testified that the special price sales promotion is the only reason for handling them.

The second of these three new manufacturers in 1954 was the B. Manischewitz Company, which manufactures only one mix, a sponge cake, and its deliveries are de minimis. The third new manufacturer was the Trenton Milling Company, the principal mix business of which is the manufacture of a private brand mix for Red Owl chain stores.[84] The Duff brand is still being sold by the new selling corporation which bought the trademark and goodwill from Pillsbury in 1953. It, however, has not met with much success.[85] Of the remaining new mix marketers in 1954, two were local firms with house-to-house delivery routes and the third was a chain store with its own private brand.

The record also shows that some cake mix manufacturers have disappeared from the market. For instance, J. Allen Smith & Company started selling mixes in 1951 in an attempt to increase its family flour sales but it was not successful, and finally on November 30, 1954, discontinued its sale of mixes. Another company, Modern Foods Corporation, one of the earlier manufacturers of flour-base home mixes and who at one time had a wide distribution of its brand X-pert, went out of the mix business in September

[82] RX 141 D & E.
[83] CX 479-A.
[84] CX 403
[85] CX 403; RX 416-C.

1955.[86] The sales of this firm declined from 37,029 hundredweights in 1952 to 12,812 in 1954, or from 1.12% to .28% of the total.

The Flako Products Corporation, one of the earliest and most important manufacturers of pie crust mix, sold its business to the Quaker Oats Company on June 20, 1955. It is now the Flako Products Division of the Quaker Oats Company.[87] It was estimated by respondent that the sales of Flako Products Corporation amounted to approximately 2.41% of the total sales of mixes in the United States during the fiscal year 1949–50, its volume of sales being approximately 184,000 hundredweights.[88] Pillsbury came out with a pie crust mix in 1950 and soon became a factor in that market. A special promotional campaign of an allowance of 36 cents per case was inaugurated by Pillsbury in 1954. According to information furnished its regional managers, Pillsbury had 50% of the pie crust mix market that year.[89]

The Quaker Oats Company, a long-time manufacturer of pancake mix and for many years a leader in the sale of that product, entered the cake mix business prior to 1951 and at one time had a wide distribution of its cake mixes. Its sales of cake mixes declined from 125,811 hundredweights in 1952 to 31,731 hundredweights in 1954 or a decline percentagewise from 3.82% in 1952 to .69% in 1954.[90]

Hills Brothers Company, well-known manufacturers of the Dromedary brand of mixes prior to the acquisition involved in this proceeding, sold its business to the National Biscuit Company in 1954.[91] Its sales had declined from 253,355 hundredweights in 1952 to 163,997 hundredweights in 1954 or from 7.69% of the total deliveries in 1952 to 3.57% in 1954.

Russell-Miller Milling Company, a large flour miller in Minneapolis, Minnesota, entered the cake mix business with two brands, Occident and American Beauty, and although it appears to have made substantial sales in Minnesota, where it is located, it did not become a factor nationally; in fact its national sales were almost de minimis, declining from 43,316 hundredweights in 1952 to 24,857 in 1954. It finally discontinued its cake mix business May 31, 1955.[92]

The Martha White Mills, which sells four varieties of cake mixes—white, yellow, spice and devils food—in the Atlanta, Georgia, area, has found is almost impossible to distribute them in that area because it

[86] CX 403; Tr. 20, 834.
[87] CX 403.
[88] CX 85–D.
[89] CX 449–A.
[90] CX 403.
[91] CX 403.
[92] CX 403.

does not have sufficient advertising to get onto the shelves of the retail stores. Merchants will not give shelf space to an unknown mix.

The Kitchen Art Foods, Inc., manufactures a line of specialty mixes under the brand Py-O-My, the principal items being blueberry muffin mix and pineapple upside-down cake mix; others are pudding cake mix, ice box pie mix, brownie mix and coffee cake mix. In addition, it manufactures a limited quantity of pie crust mix and hot roll mix, which, however, do not have nationwide distribution. This company also does some private label business. Its sales declined from 79,476 hundredweights in 1952 to 56,038 hundredweights in 1954 or from 2.41% in 1952 to 1.22% in 1954. Mr. Weinberg, an official of that firm, testified that the primary difficulty of his company was getting space on the retailers' shelves. For, as he stated, "* * * there is a limited amount of shelf space and a limited amount of inventory that even the biggest accounts will carry * * *." [93] Mr. Weinberg further explained that he was able to exist by being a specialist in the field and by being creative and that he had not gone into the more popular cake mix flavors, such as white cake mix.

Mr. Yost, of the Hopkinsville, Kentucky, Flour Milling Company, testifying on behalf of the respondent, indicated that he did not produce any flour-base home mixes because it would require elaborate packing machinery which is very expensive, particularly if it is not operated full time. It would also require very extensive promotion back of it. He concluded that he would not be interested in putting in advertising because he could not hope to compete in this respect with Pillsbury, General Mills and General Foods. He said, "What would be a small advertising proration to General Foods and General Mills, Pillsbury and some of those people, would be enough that if we tried it and didn't succeed, it might break us." [94] In this connection it has been estimated by an official of respondent that it would cost approximately $350,000 to provide for sufficient machinery and equipment to operate a cake mix business or flour-base home mix business on a minimum basis, which figure did not include cost of the building.[95] This cost, of course, does not include the expense of establishing goodwill by advertising and promotion or the building up of a sales organization.

It is concluded from the foregoing facts that there have been some exits of substantial manufacturers from the mix market and very few entries of any consequence since 1952 principally due to the difficulty of getting shelf space in retail establishments without expenditures of sums of money in advertising and promotions pro-

[93] Tr. 20,195.
[94] Tr. 12,224.
[95] Tr. 5,079.

hibitive to the average flour miller or blender or anyone else who would naturally be interested in such a market.

D. *Competitive Practices of Pillsbury in the Mix Market Since 1952*

Advertising and Promotion. One of the reasons, and probably the principal reason, new brands of mixes are not being introduced into the market is the expense of creating consumer demand and shelf space so intimately related in connection with the movement of grocery products in the supermarkets and chain stores. As hereinbefore indicated, the primary problem of a mix manufacturer is creating consumer demand that will move his mixes in sufficient quantities to make it necessary for the supermarket or chain store to stock his line of mixes and give it shelf space. As pointed out by Mr. Rankin, Vice President of respondent, shelf space in grocery stores is very limited, and as mixes have come into being with the introduction of the new varieties of mixes by all the companies who make mixes, the grocer's problem is where he is going to put these new varieties as they come out. He has just so much space in his store which he can allot to mixes so it is necessary that he restrict the shelf space to those products that are nationally advertised and otherwise promoted. Pillsbury early learned this fact and as it introduced new varieties of cake mixes such as spice cake and gingerbread and promoted them by extensive national advertising programs, it thereby created a substantial consumer demand for these products which forced the chains and wholesalers to handle them. As the stores added the new lines they required Pillsbury to give consideration to the removal of slower moving items. Consequently, the Ballard and Duff brands, being owned by Pillsbury, were the logical brands for the retailer and wholesaler to drop in order to make space for Pillsbury's new varieties. They could and did drop Duff gingerbread after it was sold by Pillsbury and took on Pillsbury's brand of gingerbread. This was a convenient way for Pillsbury salesmen to be assured of valuable shelf space and achieve the full advantage of Pillsbury's advertising of its own label. Mr. Rankin frankly admitted, "Insofar as the trade was concerned, I believe our job at keeping Duff's gingerbread in distribution became more difficult after the introduction of Pillsbury than before. I am sure that was the fact." [96]

Numerous retail dealer witnesses testified in this case that they were not interested in carrying mixes that had not been nationally advertised. Mr. George Berg, Memphis Branch Manager of the

[96] Tr. 7,298.

Kroger Company, a large grocery chain in the Southeast, in explaining why he had taken on Aunt Jemima family flour, testified:

We were influenced to take it on because they were entering the market, they were going to do considerable advertising. It being a premium flour at half price would certainly be a value, and we believe they would create enough customer demand for the flour that it would be to our advantage to have it available for them in our stores.[97]

He was then asked whether these introductory offers would take business from other brands he was handling and he replied: "That would vary with the type product, the type company, the kind of a company that is sponsoring and introducing it, and the extent to which they create this consumer demand."[98] When he was asked what he meant by type of company, the type of brand and product, Mr. Berg testified further:

I was not referring to flour particularly on that, but I had in mind a relatively small, poorly financed company introducing a product which just does not have an acceptance in a particular area. I think that would be a temporary thing, and those are decisions that we as merchants have to decide, are we going to take on this deal or this product, or are we going to turn it down, and we do turn down many of them, because we just don't think our customers are interested, and that it is going to do our business any good.

Q Unless you think it is going to be more or less of a permanent product in the market?

A That is right, and if it is introduced by a large company then we just have to assume that because of their research facilities, their testing facilities, and what have you, that they will have a better chance of making it a permanent item than a smaller, individual company.[99]

An advertising program behind a line of mixes is not only an important method of persuading a wholesaler or retailer to stock those mixes but it is an expensive program. Mr. Weinberg, representing the Py-O-My brands, testified that to nationally advertise over the radio or television, the cost would cripple him and would take too large a share of his promotional dollar. The President of the Trenton Milling Company, who also had brought out a line of mixes, testified that his firm does not advertise on radio and television for the same reason. When asked what tactics or methods of his competitors he found most difficult to meet in selling cake mixes, Mr. Holmes, President of the Chelsea Milling Company, the manufacturer of mixes sold under the Jiffy brand, testified:

I think their national advertising, which we can not match, is a difficult thing for us to overcome, which has resulted in their becoming, in the case of Pillsbury and Betty Crocker particularly, household words.[1]

[97] Tr. 12,735.
[98] Tr. 12,736.
[99] Tr. 12,737.
[1] Tr. 20,850.

Mr. Redfield, President of Hills Brothers Company, former manufacturers of mixes under the Dromedary brand, has summed up the situation in the following statement:

Well, advertising is tremendously important, because the purpose of it is to send customers into a store pre-sold on a particular brand, and if you have enough customers sent into a store pre-sold on a particular brand, that brand is the one that is apt to end up with the greatest shelf space, the greatest demand, and the greatest sales from that store.[2]

The Director of Sales, Grocery Products Division of Pillsbury, in July 1953, reported in a memorandum to its merchandisers that: "The trade and even competition, to say nothing of ourselves, must admit the brand of print advertising on Pillsbury Cake Mixes knows no equal in the food business!" With regard to its promotions, it was reported in the same document:

Here again we have led the entire food field not only in the designing and selling of programs but of equal or more importance, the execution of them! Who else has had Umbrella programs, Card Tables, Lamp Posts, Fans and Teeter Totters merchandising elements with which to front retailers and consumers alike in such manner as to move Cake Mixes in greater quantities? We are often copied but never exceeded in this field and that is as it should be.[3]

In another report to its sales force in March 1956, Pillsbury sales officials described the advertising program that was behind the introduction of a new cake mix in the following language:

* * * four color advertising throughout the country with a double spread in LIFE magazine and full page four color advertisements in local newspapers throughout the country as noted on the list attached to this memorandum with these markets, carrying this advertising through [sic] the pages of This Week magazine, Parade, American Weekly, or the Independent Supplements, but in any event this is local advertising geared right to the market specified and features and tie-ups can be arranged on the basis that this is truly local advertising in a local newspaper.

In addition to these two maypoles around the dates of April 14 and the first week in May we have our continuing support of radio and television through Linkletter simulcast on both cake mixes and frosting mixes, and Arthur Godfrey's Wednesday night television. Again on March 23 Godfrey will be selling four flavors of cake mixes and two flavors of frosting mixes and Godfrey's first big commercial on Orange Cake Mix will come on April 6.[4]

The estimated annual cost of the advertising done by Pillsbury over net work television, network radio and magazines, including newspaper supplements such as This Week, advanced from about $5,600,000 for 1950 to about $8,900,000 in 1956. (The 1956 figures do not include radio advertising.)[5] In each of the years 1954

[2] Tr. 2,965.
[3] CX 455 A & B.
[4] CX 450 A-F.
[5] CX 435-G; 437-D.

through 1956, most of such advertising expenditures were made to advertise Pillsbury's mixes and Pillsbury's Best family flour. Pillsbury's principal competitors in the flour-base home mix business, General Mills and General Foods, use these same media to advertise their mixes. The estimated advertising expenditures made by General Mills on these media to advertise its family flour and mixes in 1956 were approximately $6,403,000. A table setting forth national advertising expenditures in magazines, Sunday magazine sections, and network television in 1954 and 1956 follows: [6]

National advertising expenditures in magazines, Sunday magazine sections and network television

[1954 amounts also include network radio expenditures]

Rank*	Company	Grand total	Family flour and flour-base home mixes			
			Magazines	Sunday magazine sections	Network television	Total for flour and mixes
		1954				
		Millions	*Thousands*	*Thousands*	*Thousands*	*Thousands*
4	General Foods Corp	$25.257	$1,140	-----	-----	$1,140
10	General Mills, Inc	16.120	2,418	$684	$1,398	4,500
21	Pillsbury Mills, Inc	7.882	994	305	5,929	7,228
22	Quaker Oats Co	7.725	716	63	-----	779
50	National Biscuit Co	3.532	21	5	-----	26
		1956				
4	General Foods Corp	$27.646	$116	$628	-----	$744
9	General Mills, Inc	17.930	4,105	1,093	$1,205	6,403
20	Pillsbury Mills, Inc	8.871	1,849	867	4,898	7,614
30	Quaker Oats Co	6.574	384	-----	-----	384
42	National Biscuit Co	5,415	618	394	-----	1.012

*Ranking by national advertising expenditures in above named media.

Note: Each of the above named companies, with the exception of National Biscuit Co., made additional national advertising expenditures in 1954 and 1956 to advertise family flour and/or flour-base home mixes in the media named above, which are not included in the above figures, since such expenditures are shown in combination with other products, i.e.: "Swans Down Cake Mixes, Instant Sanka Coffee and Birds Eye Frozen Foods", etc.

IV. The Effect of the Acquisition of Ballard Upon Competition in the Bakery Flour Industry in the Southeast

Bakery flour, as the name indicates, is a flour milled and packed primarily for use by bakers. It is sold principally to industrial users, that is, bakeries. It is made from hard spring wheat and hard winter wheat or soft wheat or a blending of two or more of these wheats or flours. Generally, bakery flours made from the hard wheat are used for making bread, rolls and other yeast-raised products. Bakery flours made from soft wheat are usually used to make

[6] CX 435; CX 437.

cakes, cookies and crackers. Such flours have customarily been packed in 100-pound sacks although much bakery flour is now being shipped in bulk in car-load or truck-load lots. Bakery flour is not sold under brand names, price, service and uniformity of quality being the principal competitive factors in selling bakery flour.

According to information furnished by respondent to the Commission in the Mintener letters, the total sales of bakery flour in the Southeast during the fiscal year 1940–50 were estimated to be 13,800,000 hundredweights. Pillsbury, with sales of 680,000 hundredweights, ranked third among all companies selling bakery flour in the Southeast, its share of the total being 4.93%. It was outranked by General Mills and International Milling Company. It was estimated that Ballard, with sales of approximately 500,000 hundredweights that year, ranked ninth in the sales of bakery flour in the Southeast, its share being 3.62%.

The record does not contain figures showing the volume of business done for the 11 months next prior to the acquisition, that is, 1950 to 1951. In fiscal 1949–50, although there are no sales records, there is a record of production of all types of flour by Ballard which record shows that during that particular period of time, 22,566 hundredweights of bakery flour were manufactured by the Ballard company and 320,228 hundredweights of "other flour" were manufactured.[7] In Respondent's Exhibit 83–B this "other flour" figure is described as "C" grade flour. Respondent's Exhibit 83–A indicates that during the fiscal year ending June 30, 1950, there were purchased from other sources and "fed in" to the Ballard production 65,917 hundredweights. Rogers Morton, President of the Ballard company, testified in this case with respect to the total quantity of bakery flour manufactured and sold by the Ballard company prior to the acquisition. Mr. Morton testified that the "C" grade flour mentioned in Respondent's Exhibit 83–B was a flour that is left as a byproduct from the manufacture of a patent flour. The Obelisk family flour was a 70% patent flour. The remainder of that flour is what is known as "C" grade or clear flour which is sold in the open flour market; most of it in Cuba, very little of it being sold to the bakers through normal channels, most of it going for export purposes. He testified further that when Ballard salesmen called on a baker he usually sold what is known as Ballard 140 cake flour, but he also offered to the baker a spring wheat flour, a bread wheat flour manufactured in Kansas, purchased from a Kansas mill, and the Ballard salesmen would offer both types to the baker; that it would be rare for a baker that would buy a cake flour

[7] RX 83.

to also be in the market for any "C" grade flour. Some of such flour might be sold to a cracker manufacturer or to bakers who might want to use it as a dusting flour—a small amount of it—and some of it might go to glue factories. When Mr. Morton was asked the direct question as to the quantity of bakery flour which his firm sold annually in the Southeast, he estimated the volume between 125,000 and 150,000 hundredweights maximum.[8] His attention was then directed to the Mintener letter estimate made by respondent to the Commission [9] that the volume of bakery flour sold by Ballard was 500,000 hundredweights for its fiscal year ending 1950. He stated that that was not a correct estimate because it included the "C" grade flour as well as the bakery flour.[10] Mr. Morton further testified that most of the Ballard bakery sales were made to small bakeries; that his firm was not in a position to serve the large bakeries because he could not buy the bakery flour from a Kansas mill any cheaper than the baker could buy it direct.[11]

It was estimated by the respondent in its proposed findings based upon production records and an estimate as to the volume of outside flour purchased, that the Ballard sales of bakery flour in fiscal 1949–50 were approximately 57,652 hundredweights. It is admitted by respondent that Pillsbury's southeastern bakery flour sales were 837,033 hundredweights for fiscal year ending 1950 and 782,984 hundredweights fiscal year 1950–51 just prior to the acquisition. It is also conceded that Pillsbury's and Ballard's combined shares of market before the acquisition, therefore, were 6.2% in 1949–50 and 5.9% in 1950–51. Ballard's share of the market was estimated at 0.4%. In view of the foregoing evidence in the record with respect to the production and sale of bakery flour by Ballard at the time of the acquisition and the small share of the market occupied by Ballard at the time of the acquisition, it is found that the effect of the acquisition of Ballard insofar as the bakery flour market is concerned was de minimis.

V. The Effect of the Acquisition of Ballard on the Formula Feed Market in the Southeast

Formula feeds are relatively new products. Following World War II the sales of formula feeds grew at a remarkable rate and the production of such feeds in 1952 reached an all time high of approximately 34.6 million tons. Many farmers in the Southeast turned to raising animals for meat, poultry and dairy products

[8] Tr. 5,855.
[9] CX 95.
[10] Tr. 5,856.
[11] Tr. 5,857.

which resulted in a substantial increase in the demand in that region of formula feeds to feed livestock and poultry, the greatest increase being of poultry feeds.

In 1951 this class of formula feed accounted for approximately 61% of the industry total output. The bulk of the formula feed business at the time testimony was taken in the southeastern area was done through franchised retail feed dealers and by making sales direct to feeders.

It appears that milling-in-transit freight rates are not so beneficial to feed manufacturers with mills located outside the Southeast as they are to the flour miller because much of the grain on which these rates apply used in formula feed is available locally to the feed plants in the Southeast. At the time of the acquisition, it was necessary for a feed manufacturer who wanted to capitalize on the growing business in the Southeast to have manufacturing facilities located in that area.

Ballard had been in the formula feed business for many years. It had converted a part of the Snell milling facilities at Nashville, Tennessee, to a formula feed mill with a daily capacity of 190 tons. It also had recently constructed a large modern formula feed mill in Louisville, Kentucky, with a daily capacity of 720 tons. At the time of its acquisition, Ballard was selling formula feeds to what was generally accepted as the largest single feed account in the Southeast. It was actively engaged in soliciting business from franchised dealers, growers and feeders in all the southeastern states. Ballard's total deliveries of formula feed during the 11-month period July 1, 1950, to May 31, 1951, were about 131,000 tons.

Although Pillsbury is a substantial manufacturer and distributor of formula feeds in other states, its total sales of formula feeds in fiscal year 1950–51 in the Southeast amounted to about 11,940 tons, principally to customers in north Georgia, eastern Tennessee and Tampa, Florida, areas. The first full year during which it operated the Ballard property its total sales of formula feeds in the Southeast were 198,104 tons. The total volume of feed sold in the Southeast during the calendar years 1950 and 1951 amounted to approximately 6,200,000 and 6,700,000 tons, respectively, as estimated by Pillsbury's Vice President in charge of its Feed Division. Assuming this estimate to be correct, Pillsbury's share of the formula feed market at the time of its acquisition of Ballard was 0.2% and Ballard's was 2.30% or a combined total of 2.50%. The volume of the first year's sales after the acquisition by Pillsbury was 2.95% of the total estimated sales in 1951.

The new Ballard mill was constructed as a continuous mix plant to produce large volumes of feed in long production runs. Due to changes which occurred in the method of distribution of formula feeds and the construction of many new feed mills throughout the Southeast nearer the poultry growing areas, Ballard did not operate the Louisville mill at capacity. Pillsbury had no feed manufacturing facilities in the Southeast at the time of acquisition and since its nearest feed mill was more than 500 miles away from its customers in the Southeast it was at a competitive disadvantage. After the acquisition Pillsbury was unable to develop a feed business of the type and volume necessary for the efficient operation of the Ballard Louisville mill, even though it spent substantial sums of money to improve the mill's efficiency and exerted greater sales effort than Ballard. Notwithstanding this, Pillsbury's sales of formula feeds declined from 198,104 tons in fiscal 1951–52 to 162,830 tons in fiscal 1952–53; to 103,460 tons in fiscal 1953–54 and approximately 94,900 tons in fiscal 1954–55. Pillsbury finally closed the Louisville mill in May 1955.

During this period of time, from 1951 to 1955, consumption of formula feed increased substantially in the Southeast. A large number of new feed mills was constructed in the Southeast and many older mills were enlarged and modernized; also many flour mills have been converted to feed mills.

In view of the foregoing facts, it is found that the effect of the acquisition of Ballard by Pillsbury has not substantially affected the formula feed market in the Southeast. Pillsbury, it is true, has a formula feed mill nearer the consumers and is in a better position to compete but it has not been able to substantially increase its share of the market, due to the activities of other formula feed manufacturers, as it has been able to do in the family flour market in the Southeast.

VI. The Effect of the Acquisition of Ballard on the Mix Market in the Southeast

As hereinbefore indicated, the Mintener letters show that it was estimated by Pillsbury that Ballard had mix sales of approximately 80,000 hundredweights amounting to 12% of the total mix sales of 666,000 hundredweights in the Southeast for the fiscal year 1949–50. It was estimated that Pillsbury's mix sales for that same fiscal year in the Southeast were approximately 151,000 hundredweights or 22.7% of the total. It was also estimated that approximately 25.5% of Pillsbury's deliveries of mixes in the Southeast were cake mixes; and that about 35% of Ballard's production was cake mixes. Ballard manufactured its own pancake mix at its plant in Louisville but had its line of cake mixes including white, chocolate and yellow, manufactured for it by the Patten Food Products Division of the Chattanooga Medicine Company, Chattanooga, Tennessee. Ballard also sold a pie crust mix and a hot roll mix. The total value of mixes manufactured by the Patten company for Ballard in the calendar year 1949 amounted to $64,629 and in fiscal 1950–51 the charge amounted to $62,097. A direct comparison for fiscal 1951 cannot be made because Ballard's records are available only for 11 months ending May 31, 1951. The record also shows that Pillsbury's *deliveries* of cake mixes in the Southeast in fiscal 1950–51 were 49,924 hundredweights. Ballard's *production* of cake mixes during the 11 months ending May 31, 1951, was 26,000 hundredweights. (There are no delivery figures for Ballard during that period.) Pillsbury's deliveries for fiscal 1951 in the Southeast of mixes were 168,070 hundredweights. Ballard *produced* or had produced for it approximately 67,000 hundredweights of mixes for the 11 months ending May 31, 1951.

During its fiscal year ending May 31, 1952, the first full year after it acquired Ballard, Pillsbury's deliveries of mixes into the Southeast totaled 286,535 hundredweights, of which 231,400 hundredweights were sold under the Pillsbury label and 47,004 under the Ballard label. Pillsbury's deliveries of cake mixes under its own label in the Southeast amounted to approximately 94,000 hundredweights or 40.6% of its total mix deliveries. Deliveries of the Ballard labeled cake mixes in fiscal 1951–52 in the Southeast were approximately 21,480 hundredweights. During the succeeding years the sales of Ballard mixes declined rapidly. Its corn bread mix was the only mix that survived in substantial quantities. No new flavors of Ballard mixes have been added to the Ballard line since Pillsbury acquired it in June 1951. By 1956 Pillsbury had practically discontinued the Ballard line of mixes. In that year it sold only about 157 hundredweights of cake mixes under the Ballard label.

The record shows that Ballard was a substantial factor in the sale of flour-base home mixes in the Southeast prior to its acquisition by Pillsbury even though the volume of its sales was declining. It was the only southeastern flour miller with a full line of mixes that was effectively competing with Pillsbury throughout that area. In acquiring Ballard's mix business, Pillsbury not only eliminated a substantial competitor and thus lessened competition in the sale of mixes in the Southeast; its acquisition also increased Pillsbury's share of the mix market in the Southeast and provided Pillsbury with facilities for expanding its share of the available shelf space. Furthermore, after acquiring Ballard, Pillsbury used the two mix manufacturing lines at Louisville for the manufacture of Pillsbury angel food mix. This has provided Pillsbury with additional mix capacity which it sorely needed in expanding its varieties of cake mixes.

VII. The Effect of the Acquisition of Ballard by Pillsbury Upon the Refrigerated Dough Products Industry

At the time of its acquisition, Ballard was engaged in the manufacture of refrigerated biscuits and operated refrigerated dough plants at Louisville, Kentucky; Denison, Texas; and Atlanta, Georgia. Ballard's refrigerated biscuits, otherwise described as Oven-Ready, were distributed by the Kraft Foods Division of the National Dairy Products Corporation under a long-term contract. The biscuits were delivered to Kraft branch warehouses by Ballard from where they were delivered by Kraft to retail stores. The sales of Oven-Ready biscuits in fiscal 1949–50 amounted to approximately $8,000,000 and accounted for approximately 28% of Ballard's dollar sales volume in that year. It appears that Ballard pioneered in this industry through the invention of a Mr. Willoughby and owned certain package patents on refrigerated dough products. The record shows that this product is not duplicated nor was there a similar product in the Pillsbury lines at the time of the acquisition. Subsequent to the date of acquisition, Pillsbury not only continued to sell the Oven-Ready biscuit business, developed and owned by Ballard, but also put out a refrigerated biscuit dough product similar to that of Ballard which it sells to the grocery trade under its own label. Early in the case, the examiner granted respondent's motion to strike all testimony relating to Ballard's Oven-Ready biscuits. This ruling was appealed to the Commission and the Commission upheld the hearing examiner in his opinion that Pillsbury "did not compete in the biscuit market." The examiner, however, did not grant a motion to dismiss as to the purchase of the Oven-Ready assets. There does not appear to be any reason for changing the rulings heretofore made. No finding will be made as to the effect upon the refrigerated dough market as a result of the acquisition of Ballard by Pillsbury as in the opinion of the hearing examiner, the complaint did not, by its terms, include an allegation with respect to the refrigerated dough products.

VIII. Respondent's Proposed Findings

A. *As to Testimony of Mr. Wroe Alderson*

Since a substantial portion of respondent's proposed findings is based upon the testimony and theory of Mr. Wroe Alderson who was called by Pillsbury as an expert witness in the fields of economics and marketing, mention of him having been made in Paragraphs 70, 228, 256, 284, 286, 287, 298, 306 and a number of succeeding paragraphs, and, since in the opinion of the examiner, this testimony is of little, if any, probative value, a finding is made at this place in the decision with respect thereto. In the first place Mr. Alderson's training and experience as a marketing economist does not qualify him to interpret and apply the theory of competition in merger cases. The criteria which he set up in his testimony for the selection and evaluation of evidence for use in Section 7 cases, and upon which, apparently, a majority of the testimony adduced in defense in this case was based, is not accepted generally by economists who specialize in competition and antitrust problems. He set up six groups which may be found listed in Respondent's Exhibit 39–A as follows: (1) entry and allocation of resources, (2) survival and exit, (3) growth and profits, (4) concentration and market organization, (5) price competition and cost reduction, and (6) product competition and consumer choice.

According to Dr. Kreps, who is a recognized expert on competition from an economic standpoint and is an authority in antitrust cases, such criteria are recognized as a regrouping of structural and performance tests but not recognized or used by economists in the analysis of competition in antitrust problems,[12] one reason given being that these tests cannot be regarded as equal in weight or of equal importance. An economist prefers to group criteria by structural tests and performance tests. Furthermore, these tests do not provide any useful framework or technique for the economic theorist who is interested in the economics of fair competition or interested in problems of substantial lessening of competition and the economic aspects thereof.[13]

According to Dr. Kreps the structural tests which should be taken into consideration and applied in determining the effect of an acquisition under Section 7 of the Clayton Act are (1) number of firms; (2) market structure and percent of market; (3) freedom of entry and freedom of exit; (4) concentration of production or sales or of earnings, etc.; (5) freedom of access to credit and raw materials, know-how and market; and (6) choice of competitive strategies.[14] Probably the most important test is that of freedom of entry and freedom of exit. By freedom of entry is meant not only that it is theoretically possible but that it is effectively possible for new firms to come into a given industry.

[12] Tr. 28,326.
[13] Tr. 28,328.
[14] Tr. 28,335.

As hereinbefore indicated, Mr. Alderson had made a study of the evidence in this case and had prepared his opinion as to whether or not Section 7 of the Clayton Act had been violated as a result of the acquisitions based upon the evidence which he had found in the record. These exhibits were rejected. Thereupon Mr. Alderson was examined by counsel for the respondent by giving responses to a number of hypothetical questions, however, the nature of the questions asked and the answers given indicated that in many, if not most, of the answers the witness took into consideration facts that were not within the question and which included his interpretation of facts developed in the record.

It is also quite apparent that Mr. Alderson, after he had made his study of the record, had come to a conclusion and an opinion that the acquisition did not violate Section 7 of the Clayton Act and that he had difficulty in applying the concept of probability of lessening competition rather than actual lessening resulting from the acquisition. The following quotation from his testimony so indicates:

> * * * as I went along in the very course of these hypothetical questions the conception of probability was moderated in my own mind because it seemed more and more impossible that there should be a substantial lessening of competition resulting from the acquisition.[15]

Mr. Alderson constantly gave replies containing an opinion as to the economic significance of facts that were propounded to him in the hypothetical question which, according to Dr. Kreps, were inadequate upon which to base any economic conclusion.[16]

Probably the most unsound economic theory advanced by Mr. Alderson was when he testified that because of the existence of 900 brands of family flour sold in the Southeast they were all in competition with each other directly or indirectly; that it did not have to be true that all of them are sold in every market in order for them to be competitively linked. Upon being questioned with respect to this statement he was asked directly whether or not, in his opinion, a local brand that is sold in Memphis, Tennessee, would be in competition with another local mill located in Jacksonville, Florida, or Richmond, Virginia. His reply was "They are competitively linked, which is a phrase I used, because they are all in competition with Gold Medal, Pillsbury's Best, or a number of other

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[15] Tr. 25,987.

[16] Tr. 24,965 and 28,527; 24,996 and 28,529; 24,999 and 28,531; 25,018 and 28,533; 25,025 and 28,533; 25,045 and 28,534; 25,085 and 28,538–42; 25,118 and 28,543; 25,123 and 28,545; 25,126 and 28,547; 25,127 and 28,551; 25,191 and 28,555; 25,201 and 28,557; 25,255 and 28,559; 25,262 and 28,566; 24,872 and 28,623; 24,876 and 28,627; 24,892 and 28,654; 25,425 and 28,667; 25,387 and 28,568; 25,449 and 28,582; 25,476 and 28,586; 25,495 and 28,587; 25,502 and 28,599; 25,521 and 28,606; 25,670 and 28,610; 25,686 and 28,617; 25,428 and 28,691.

brands that have been mentioned here."[17] He further testified that "The fact that so many brands can find a place in the market further indicates that geographic advantage still has a preponderant weight in competition in this field."[18]

Furthermore, Mr. Alderson in arriving at his conclusion that Pillsbury was at a disadvantage in price competition as compared to local mills in the Southeast,[19] either disregarded deliberately, or was not sufficiently informed with respect to, the record in this case of the fact that this local competition existed at the time Pillsbury entered the market in the Southeast and all of the increase in business that Pillsbury had attained had been in spite of that disadvantage; that as a matter of fact the local low-priced flour did not actively compete with Pillsbury's Best, certainly not in the urban markets; and that there is no evidence in the record to indicate that Pillsbury had ever responded to these lower prices on lower grades of flour by reducing the price of Pillsbury's Best.

It also appears that the definition given by Mr. Alderson of monopolistic competition and his testimony that such competition did not imply an absence of active and vigorous competition, is not generally accepted by economists. Dr. Kreps in his testimony stated that he was not of the opinion that monopolistic competition was natural and inevitable and normal.[20] Likewise, Mr. Alderson's testimony that the existence of an oligopoly did not imply the absence of competition[21] is not accepted by economists. Also his definition of oligopolistic competition and his testimony that the members of an oligopoly may compete very hard in such mass production fields as major appliances, and that the term oligopolistic competition does not mean the lack of competition or an absence of competition is not accepted by economists.[22]

It would appear that even if Mr. Alderson's interpretation of the theory and application of monopolistic competition were correct, which appears questionable, such theory is not presently accepted by some of the recognized authorities on economic theory. At best, it would seem that his testimony could be more appropriately presented before Congress with the view of attempting to have the Clayton Act amended or repealed rather than using this economic theory as a justification for a possible violation of such Act.

The foregoing analysis of Mr. Alderson's testimony indicates some of the reasons it is not relied upon and is not considered to be determinative of any of the issues involved in this case. There are

[17] Tr. 25,195-7.
[18] Tr. 25,197.
[19] Tr. 25,053; 26,037-9.
[20] Tr. 3,410-11; 28,404.
[21] Tr. 3,401.
[22] Tr. 3,406-7.

many more but these are considered sufficient to disqualify Mr. Alderson as an expert in this case.

B. *As to Testimony of Mr. G. R. Detlefsen*

With respect to Respondent's Proposed Findings 170 through 177, insofar as these findings relate to the preparation and submission of Respondent's Exhibits 211 through 237–D; 240 through 245; and 248, they are rejected. In this connection, it is found that Mr. Detlefsen's estimates of Pillsbury's and Ballard's respective shares of the market for family flour, bakery flour and flour-base home mixes in the Southeast and in the United States for the period 1945–46 through 1952–53 are invalid and unreliable. There is no question raised in this case as to Mr. Detlefsen's qualifications to carry out the duties placed upon him in the Pillsbury organization in charge of consumer research to determine trends in the market based upon information furnished him, either by his own staff or by consumer research organizations, but there is grave doubt as to the methods he has used as a statistician and an economist to perform the task which he assumed in attempting to determine a valid estimate of the share of market of Pillsbury and Ballard in the Southeast in the family flour industry or the flour-base home mix industry. For example, it is found that the methods which he used in developing household and per capita consumption rates of family flour and flour-base home mixes for the United States and the Southeast for Pillsbury's two fiscal years, 1945–46, and 1951–52, are not reliable because the random surveys upon which they were based were not intended to be, and were not, in fact, projectionable.

The principal reason the surveys are not projectionable as to quantities or as to market shares is that they were not designed and, in fact, were not conducted for that purpose. Mr. Detlefsen, himself so testified.[23] Both surveys were designed "to reflect the behavior pattern of consumers in relation to various food products and advertising media."[24] In addition, it appears evident that the use to which these surveys have been put is not based on statistics but upon the judgment of Mr. Detlefsen. The fact that so many judgment decisions were required appears to prove that the surveys were not designed for the purpose for which they were used in making estimates as to quantities and market shares.

The record also indicates that Mr. Detlefsen was inconsistent in many instances in the procedure followed in developing the 1945–46 formation obtained from questionnaires used in the Pillsbury con-

[23] Tr. 9,866–7.
[24] Tr. 8,496–7.

and the 1951–52 benchmark estimates of consumption of all-purpose flour and flour-base home mixes, in the United States as a whole, and in the Southeast. These estimates were based, in part, on information obtained from questionnaires used in the Pillsbury consumer research surveys for these years.

Although Mr. Detlefsen testified that "The 1951–52 survey thus specifically was geared to yield comparable information to the 1945–46 survey, and we have so used both surveys in the course of our business," [25] he altered or adjusted the data developed from the questionnaires in an apparently inconsistent and illogical manner in many instances.

For example, in estimating the rates of consumption of all-purpose flour from the 1945–46 survey Mr. Detlefsen altered the number of sacks per year which the interviewees indicated that they used. For instance, if the interviewee indicated they used 52 sacks of flour per year he reduced the figure to 48 sacks, likewise, if they indicated they used 26 sacks per year he reduced the figure to 23 sacks. The reason given for this reduction was that his experience had taught him that "you have to make allowances for people saying they generally do something." [26] However, in developing the estimates of consumption of all-purpose flour from the 1951–52 survey, Mr. Detlefsen made no such allowances.[27]

Mr. Detlefsen also was inconsistent in making adjustments in the data obtained by the 1945–46 consumer survey with respect to the consumption of all-purpose flour in the Southeast, although making no such adjustments in this territory for users of flour-base home mixes.[28]

Another example of the inconsistent procedures followed by Mr. Detlefsen was the alterations made by him of the data obtained in the 1951–52 survey with respect to the consumption of all-purpose flour, as between the Southeast and the United States as a whole. While he adjusted the indicated rate of consumption *down* for one class of purchasers in the United States as a whole, he adjusted the indicated rate of consumption *up* substantially for this same class of purchasers in the Southeast. For certain other classes of purchasers in the Southeast he adjusted the indicated rate of consumption up materially but made no such adjustment for the rest of the country.[29]

While Mr. Detlefsen made the upward revisions discussed immediately above with respect to the consumption of all-purpose flour in

[25] Tr. 8,861.
[26] Tr. 8,860.
[27] CX 306; 286-Z-39.
[28] CX 320.
[29] CX 286-Z-41; Tr. 9,488-90; 9,503-10.

the Southeast in the 1951–52 survey, he made no such revisions in the responses to the 1945–46 survey.

Mr. Detlefsen was questioned at length, both by counsel for the complaint and by the hearing examiner, as to his reasons for the apparent inconsistencies in his evaluation of the information furnished in the two surveys, with respect to the indicated consumption of the products covered by the surveys. He admitted that for the most part the revisions and adjustments that he made were largely a matter of judgment. The other reasons that he gave, such as the difference in income of families in the Southeast and the difference in the questions asked in the 1945–46 and the 1951–52 questionnaires did not impress the hearing examiner as being of sufficient merit to warrant the liberties Mr. Detlefsen took in making the revisions and adjustments that he did in the information furnished in the surveys. An example of the "different" questions asked in the two surveys to which Mr. Detlefsen referred was that in the 1945–46 survey the question pertaining to the sack size purchased was "What size sack *did you buy last time?*" and in the 1951–52 survey the question was "What sack size of regular all-purpose flour *do you usually buy?*" (emphasis supplied).[30]

The net result of this operation and this different treatment of the information contained in the two surveys was that Mr. Detlefsen showed a larger figure for consumption of family flour in 1951–52 in the Southeast than would be justified, or would have been found, if the same multiplier had been used in that area to determine the consumption of family flour as was used in the rest of the country. This in turn, of course, had the effect of increasing the estimate of consumption of family flour in the Southeast and in reducing the percentage that Pillsbury and Ballard had in the total family flour market in the Southeast.

Mr. Detlefsen's estimate of the family flour consumption in the Southeast shows an increase from 21,787,263 hundredweights for the fiscal year 1945–46 to 27,093,211 hundredweights for the fiscal year 1949–50.[31] The latter figure exceeds by about 7,000,000 hundredweights the estimate furnished the Commission in the Mintener letters for 1949–50. Based on the Detlefsen estimates the Pillsbury percentage share of the family flour market in the Southeast in 1949–50 was 2.7% and Ballard's was 3.6% or a combined percentage of 6.3%. According to the figures furnished in the Mintener letters the 1949–50 Pillsbury share of the market for the Southeast was estimated at 3.66% and Ballard 4.65% or a total of the two of 8.31%.

[30] Tr. 9,678–9.
[31] RX 221–D.

Mr. Detlefsen's estimated consumption of family flour in the United States increased from 64,148,000 hundredweights in 1945–46 to 74,984,323 hundredweights in 1949–50;[32] whereas, the estimated total consumption of family flour in the United States furnished in the Mintener letters for 1949–50 was approximately 50,000,000 hundredweights.

Mr. Detlefsen estimated total United States consumption of bakery flour for the four crop years ending 1952–53 as follows:

	Hundredweight
1949–50	[1] 112,229,471
1950–51	108,585,197
1951–52	106,866,926
1952–53	[2] 107,493,335

[1] The 1949–50 bakery flour estimate for the entire United States in the Mintener letters was 120,000,000 hundredweights.
[2] RX 218–C.

He arrived at these estimates by subtracting his estimates of the total consumption of (1) all-purpose flour and (2) his estimate of the flour content of flour-base home mixes, from the United States Department of Agriculture figures on total United States civilian flour consumption, excluding durum.[33] His estimate of Southeast bakery flour consumption, hereinafter set forth, was estimated as a percent of his estimate of the United States bakery flour consumption.[34]

The record contains a bulletin of the Bureau of the Census which reported the consumption of wheat flour during 1954 by (1) the "biscuit, crackers and pretzels" industry as 17,231,610 hundredweights and (2) the "bread and other bakery products" industry and "retail bakeries with baking on the premises," excepting bakeries with no paid employees, as 98,515,680 hundredweights.[35] The sum of these two figures, 115,747,290 hundredweights, (even though it excludes flour consumed by bakeries with no paid employees) is approximately 8,254,000 hundredweights higher than Mr. Detlefsen's estimate of the consumption of bakery flour by all bakeries in the crop year 1952–53.

Since there is no reason to believe that the total United States consumption of bakery flour showed an abrupt increase between

[32] RX 220–D.
[33] Tr. 8,477–8; 8,515–6.
[34] Tr. 8,516–9.
[35] CX 418; 419 A–B.

1952 and 1954, but instead may have shown a slight decrease,[36] it is evident that Mr. Detlefsen underestimated the consumption of bakery flour for the years indicated by a rather substantial amount. Such an underestimation of bakery flour consumption is very significant, since it would indicate that due to the method used in arriving at these estimates, as described above, Mr. Detlefsen had overestimated the total consumption of all-purpose flour and/or flour-base home mixes in both the United States and the Southeast, which in turn, would strongly indicate that Pillsbury's and Ballard's market shares of these latter named products were substantially larger than are shown in Mr. Detlefsen's estimates of such market shares.

Mr. Detlefsen's estimates of bakery flour for the Southeast shows a slight increase from 14,220,868 hundredweights for 1945–46 to 14,418,120 in 1949–50 and to 14,889,977 in 1952–53. Based on this Detlefsen estimate the percentage of the total bakery flour consumption in the Southeast sold by Pillsbury was 10.9% in 1945–46 and 9.1% in 1949–50, which latter percentage is much larger than the estimate given in the Mintener letters of slightly less than 5%. The unrealistic estimate of the high percentage of Pillsbury's sales of bakery flour in the Southeast is further evidence that Mr. Detlefsen's total estimate of bakery flour in the Southeast was also too low.

C. *As to Ballard's Financial Condition at Time of Acquisition by Pillsbury*

Proposed Findings 547 through 647 of the proposed findings submitted by counsel for the respondent deals generally with the financial condition of Ballard and linked with this proposal is another contention of the respondent that the effect of the acquisition requires an appraisal of Ballard's competitive potential, its probable future prospect and its ability to continue in business. Pillsbury introduced a considerable quantity of evidence bearing on these points including evidence relating to the trend in Ballard's financial affairs and on motion of counsel for the Commission after cross-examination much of this evidence was stricken. Counsel for the respondent, however, has asked the hearing examiner to reinstate this evidence as being responsive to the allegations of Paragraph 2 of the Commission's complaint and as a matter on which the Com-

[36] A decrease is indicated for the reason that the 1954 Census of Manufacturers, Bulletin MC-20E, shows a decrease in the number of production workers in the bakery business of approximately 9.4% and an increase in the value of shipments of bakery products of only 0.4%, from 1952 to 1954 [CX 418]. This slight increase in the value of shipments was apparently more than accounted for by the increase in price of bakery products between these years. For example, data published by the Bureau of Labor Statistics indicates an increase in the retail price of white bread of about 14% during this period.

mission itself introduced evidence and to which it referred in its December 21, 1953, opinion. This, however, the hearing examiner is unwilling to do and he reaffirms the original rulings at the time the testimony was taken. There is evidence in the record, however, and a finding is made, with respect to the financial condition of the Ballard company at the time of its acquisition, not only as indicated by the balance sheet that was put in evidence by counsel supporting complaint, but also the testimony of Mr. Hanold, a Vice President of Pillsbury and of counsel in this case, in which he gave an analysis of this consolidated balance sheet and concluded therefrom that Ballard was in a critical condition for the reasons quoted below from his testimony.[37]

> Its working capital items were altogether inadequate for the business it was involved in; its ratio of debt to capital was unattractive.
>
> It was an extremely adverse thing—it was a perilous thing for it to go forward in this condition.
>
> Its problem at this point was to remedy it—
>
> * * * * * * *
>
> * * * I am speaking here strictly to the facts that these exhibits show.
>
> You will recall that Ballard had issued preferred stock which had certain prior rights to income in fiscal 1948.
>
> It had issued a mortgage secured by lien on its principal valuable assets.
>
> It was therefore, in my judgment, unable to raise any significant further amount of equity capital in the form of common or preferred stock and it had no other assets of value and interest on which it could issue further mortgage bonds or debts, secured money credit.

During the course of his testimony Mr. Hanold stated that one of the tests to determine the financial health of a corporation, such as Ballard, would be a determination of the ratio of the current assets to current liabilities, because that demonstrates whether there is a reasonable certainty that this company can pay its current liabilities as they fall due, and its ability to do that with certainty is, of course, a prime indicia of credit for that company. He indicated that this ratio should be 2 to 1, whereas as of May 31, 1951, according to Respondent's Exhibit 128, Item 43, Ballard's ratio was 1.44 to 1.[38]

Another test that he applied was the ratio of working capital to total assets of the corporation, taken from Item 27 of Respondent's Exhibit 128, and he computed the ratio of 19 cents of working capital per dollar of total assets. He indicated that in his opinion, such ratio was too low and that it should be approximately 30% of total assets in order to place Ballard in an acceptable position.[39]

[37] Tr. 7,234-5.
[38] Tr. 7,200.
[39] Tr. 7,214-5.

Another test that was applied by Mr. Hanold was that Ballard had notes payable to banks in the spring of 1951 amounting to $4,500,000 in relation to its working capital of $2,869,000 or approximately 150% more than its working capital. He indicated that such percentage was entirely too high.[40]

Another point of reference that appears from an examination of Ballard's balance sheet, as of May 31, 1951, was the comparison of equity to debt, the ratio being .72 to 1, in other words, 72 cents of equity or total capital for every dollar of debt. Mr. Hanold testified that any ratio less than 1 to 1 "is regarded as a distinctly unfavorable asset on its financial statement." [41]

Mr. Hanold's testimony on this point follows:

> Now, as we go down here, you will notice that this ratio of total capital to total debt, we find rather consistently it is 1.41 to 1—at June 30, 1948, 1.46, June 30, 1949, it took a little jump there, it dropped to 1.07 in June 30, 1950, again reflecting in part the fact that their reliance, their dependence upon bank credit, this $2,000,000 for which they were indebted to the bank on June 30, 1950, is one of the contributing reasons for this substantial decline in this ratio in this year.
>
> This declining ratio continued and on May 31, 1951, you have the adverse situation of only 72 cents of equity to each dollar of debt.
>
> Coupled with that you have the extremely adverse ratios of current assets to current liabilities and of working capital to total assets, and the total effect of these trends, the effect of each one of these trends singly and their total effect multiplied, is that this corporation is congealing, it is losing liquidity every year, it is losing financial position every year, the equity of stockholders is more subject to question every year, and the security for the creditors as a whole is becoming more and more suspect.[42]

Mr. Hanold then commented on the trend of Ballard's net earnings or profits in comparison with its investment in fixed assets beginning in 1947, in which year it had an investment of $1,733,000 and net earnings of $787,000. Thereafter, its financial statements showed an increase in investment in land, buildings and equipment each year with reduced net earnings, until in 1951, with a $5,000,000 investment, their 11-months earnings of $357,000, if projected on the same basis, would have been approximately $400,000. The point was made that this was substantially below the beginning experience and below 1949, the year the new plant was completed. Mr. Hanold admitted, however, that the year ending May 31, 1951, showed an improvement in earnings over the preceding year of about $25,000. His attention at this time was called by the examiner to the fact that what he had said indicated that there was an uptrend in the

[40] Tr. 7,207–8.
[41] Tr. 7,210.
[42] Tr. 7,222–3.

net return as a result of the additional investment that had been made.

Mr. Hanold then referred to the construction of the feed mill and the volume of the business before and after, an increase from 80,000 tons to 145,000 tons per year. He then admitted that there had been an increase in the feed business of 45% and an increase of $30,000 in net earnings in 1951 which is a little less than a 10% increase.[43]

Mr. Hanold also testified that one of the reasons that the Ballard company had been unable to increase its working capital out of earnings was because of its obligations to devote a certain percentage of its net income to the retirement of its preferred stock and retirement of its bonds. He admitted, however, that in doing this Ballard had improved its net worth.[44]

The examiner declined to make a ruling with respect to the "precarious" financial condition of Ballard as testified by Mr. Hanold for the reason that the sum and substance of this testimony did not, in his judgment, support the contention of counsel for the respondent that Ballard was in sufficiently "failing" condition to bring it within the ruling of the United States Supreme Court in the International Shoe case or of tests mentioned in the reports of the Senate and House Committees. When Mr. Smith, also of counsel for the respondent, was asked by the hearing examiner whether it was his contention that as the result of Mr. Hanold's analysis of these balance sheets and testimony, that the Ballard company was in a failing position, he replied, "I don't think that I can honestly make that representation to you." [45]

Reference to the facts in the International Shoe case as disclosed in the United States Supreme Court decision [46] indicates that the W. H. McElwain Company, the acquired company, was faced with immediate financial ruin which required liquidation. The Court found that McElwain had

> * * * because of excessive commitments which the McElwain Company had made for the purchase of hides as well as the possession of large stocks of shoes and an inability to meet its indebtedness for large sums of borrowed money, the financial condition of the company became such that its officers, after long and careful consideration of the situation, concluded that the company was faced with financial ruin, and that the only alternatives presented were liquidation through a receiver or an outright sale. New orders were not coming in; losses during 1920 amounted to over $6,000,000; a surplus in May, 1920, of about $4,000,000 not only was exhausted, but within a year had been turned into a deficit of $4,382,136.70. In the spring of 1921 the company

[43] Tr. 7,226–7.
[44] Tr. 7,229–30.
[45] Tr. 7,162.
[46] 280 U.S. 291, 299–300.

owed approximately $15,000,000 to some 60 or 70 banks and trust companies, and, in addition, nearly $2,000,000 on current account. Its factories, which had a capacity of 38,000 to 40,000 pairs of shoes per day, in 1921 were producing only 6,000 or 7,000 pairs. An examination of its balance sheets and statements and the testimony of its officers and others conversant with the situation, clearly shows that the company had reached the point where it could no longer pay its debts as they became due. In the face of these adverse circumstances it became necessary, under the laws of Massachusetts, to make up its annual financial statement, which, when filed, would disclose a condition of insolvency, as that term is defined by the statute and decisions of the State, General Laws 1921, c. 106, § 65(3); *Holbrook v. International Trust Co.*, 220 Mass. 150, 155; *Steele v. Commissioner of Banks*, 240 Mass. 394, 397, and thus bring the company to the point of involuntary liquidation. In this situation, dividends on second preferred and common stock were discontinued, and the first preferred stockholders were notified that the company was confronted with the necessity of discontinuing dividends on that class of stock as well.

Although it may be conceded that at the time of acquisition, Ballard was not in the most robust health financially, it certainly was not "in failing condition" or on the verge of bankruptcy as was the McElwain Company in the International Shoe case. In fact, it was still enjoying net profits from its operations, albeit somewhat small considering its capitalization, and it had continued to pay dividends on its preferred stock right up to the date of acquisition, and to pay a dividend on its common stock in the amount of $59,273 in July 1950. It is worth noting, that many companies have gone through much more stringent periods than Ballard during the course of their corporate existence, even losing large amounts of money from their operations for many years and then reversing the trend and becoming a prosperous, money making corporation again.

The fact that Ballard enjoyed credit lines totaling approximately $8.5 million with 27 banks which lent funds to Ballard on its *unsecured notes* bearing interest *at the prime rate* (the lowest interest rate available to borrowers with the highest credit rating) is certainly strong evidence that at least these banks did not consider Ballard to be in the "serious financial difficulty" that counsel for the respondent would have us believe.[47]

While it appears evident that Ballard was in need of additional working capital in order to finance its increasing sales in the years immediately prior to its acquisition, this condition was caused by several unusual circumstances, some of which, it may be assumed, were of a temporary nature. The principal circumstances being (1) its extensive expansion program, including the construction of a new feed mill and flour storage and packaging plant at a cost of more than $3,700,000. This construction program was begun in 1947 and

[47] RX 339-B; Tr. 1,150-2; 5,883; 14,843; 15,256; 22,035.

the feed mill was not substantially completed until September 1949 and the flour storage and packaging plant was not in full production until the fall of 1950.[48] The expenditure of this large amount of money necessitated the use of funds which normally would have been used for working capital and which could not be expected to be returned to the company's treasury until the new plants were in operation and increased earnings could be generated. And (2) Ballard's increased sales from $27,083,609 in 1947 to $32,889,337 in the first 11 months of its 1951 fiscal year, with an attendant increase in inventories from approximately $2,375,000 to $3,610,000 and an increase in trade receivables from less than $1.4 million to more than $3.7 million during the same period was also a drain on working capital.[49]

Another circumstance that was indirectly a drain on working capital was Ballard's branch warehouse system of distribution which, it was testified, added substantially to its working capital requirements and was a money losing proposition as far as Ballard was concerned.[50] However, since Ballard had begun to abandon its branch warehouse system, having closed a number of these branches prior to the acquisition, it would seem logical to assume that in time this would have tended to enable Ballard to show increased earnings from its over-all operations and to alleviate, at least to some extent, any lack of adequate working capital.[51]

It is of interest to note that in no year from June 30, 1947, to May 31, 1951, the approximate date of acquisition, did Ballard earn less than $316,000 according to its reports filed with the Securities and Exchange Commission, and in the 11 months ended May 31, 1951, it earned almost $10,000 more than it did in the entire fiscal year immediately preceding.[52] During this same period, Ballard's earned surplus increased from $1,874,172 on June 30, 1947, to $3,192,-288 on May 31, 1951.[53]

Although there is quite a bit of testimony in the record to the effect that it would have been very difficult for Ballard to effect any equity financing in order to replenish its working capital, the record is not conclusive in this regard. In fact, certain of Mr. Rogers Morton's testimony appears significant with respect to this question. The hearing examiner had asked the question "Don't business organizations often float stocks to provide more working capi-

[48] Tr. 15,046; 15,041-2; 14,753.
[49] RX 253; 254.
[50] Tr. 5,875.
[51] Tr. 15,028; 15,031-2; 1,144; 15,020; 1,260; 5,872; 14,765; 14,769.
[52] CX 18.
[53] RX 253.

tal?"[54] Mr. Morton in coming back to this question indicated that they had

> * * * considered every avenue, a package deal, a package deal with bonds and stock, a package deal of *convertible* preferred stock and common stock, to sell it. And the only way we could have raised additional working capital or additional equity money through the sale of stock was by selling stock at such a price and in such a manner that the present stockholders would have been very badly *diluted*. [Emphasis supplied.][55]

In this connection, it will be remembered that the Morton family were the principal stockholders of Ballard and that it was they who did not want their equity diluted. In other words the record would appear to indicate that what was good for the Mortons was good for the company regardless of whether or not it meant a violation of Section 7 of the Clayton Act.

It also appears from the record that since the fall of 1946, Ballard had several offers to acquire its business other than the offer from Pillsbury. Acme-Evans Flour Company of Indianapolis, Indiana, made an offer in the fall of 1946 which was declined since the value placed on Ballard was considered unacceptable to Mr. Rogers Morton and his brother Thruston Morton who was President of Ballard at that time.[56] In 1948 the Dixie-Portland Flour Company made Ballard an offer to merge, however, the negotiations broke down, according to the testimony of Mr. Rogers Morton, "because we found that we would have a minority position * * * in the new company, rather than a majority position."[57] Early in 1951, Ballard had a cash offer from International Milling Company to purchase its business for approximately $3 million to $3.25 million, which offer was still pending at the time Ballard accepted Pillsbury's offer to acquire its business.[58]

It is found, therefore, that the Ballard company at the time of its acquisition was in a solvent condition and was not "a failing firm" as that term is used in Section 7, Clayton Act cases. The proposed finding, submitted by counsel for respondent, that the assessment of the probable effect of the acquisition requires an appraisal of Ballard's competitive potential, its probable future prospects and its ability to continue in business, is rejected because the evidence upon which the finding was based had been stricken by the hearing examiner at the time it was taken, upon motion of counsel in support of the complaint, for the reason that it was not

[54] Tr. 5,878.
[55] Tr. 5,882.
[56] Tr. 5,910.
[57] Tr. 5,911.
[58] Tr. 1,159; 5,913-6.

believed that such testimony was relevant to the issues in the case since there was no evidence to show that the corporation was actually in a failing condition. The evidence upon which the proposed finding is based consisted, for the most part, of the testimony of bankers with whom Ballard had dealings, purporting to show that the Ballard company was in such financial condition that it could not successfully compete with the respondent and others, if its business had not been sold to the respondent. Ballard's probable future prospects, if it had not sold its assets to Pillsbury, could only, at best, be a guess and it is not believed that either the examiner or the Commission should be required to gaze into a crystal ball to determine the issues in this case.

D. *As to the Disqualification of the Commission*

Another proposed finding of the respondent is that the Commission had become disqualified to hear and decide this case and respondent could not receive a full, fair and impartial hearing guaranteed to it by the due process clause of the Fifth Amendment to the Constitution and Section 7(a) of the Administrative Procedure Act, as the result of hearings held on June 1, 1955, before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate and June 15, 1955, before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives. A motion filed on April 20, 1956, before the hearing examiner to dismiss the complaint on this ground was denied by order entered by the hearing examiner on July 25, 1956. An appeal was taken from that order on August 14, 1956, to the Commission and the Commission on September 26, 1956, denied the appeal.

Counsel for respondent have renewed this motion on the ground that the Senate Subcommittee on Antitrust and Monopoly has continued to question witnesses with regard to this proceeding, including the present Chairman of the Commission who was interrogated by the Subcommittee as recently as April 1, 1958; and has asked the hearing examiner to make a finding that respondent's position with respect to the actions of these Subcommittees is correct and that the Subcommittees' interrogation of members of the Commission and others with regard to this pending litigation constitutes an invasion of the Commission's judicial functions so as to disqualify the Commission from proceeding further in this case. This proposed finding is hereby rejected.

CONCLUSIONS

I. The Acquisition of Ballard Violated Section 7 of the Clayton Act

It is concluded that the acquisition of the Ballard company by Pillsbury in 1951, as hereinbefore described and found, violated Section 7 of the Clayton Act, in that the effect of the acquisition may be to suppress competition in the family flour industry and in the flour-base home mix industry in the principal towns and cities located in that part of the United States generally lying east of the Mississippi River and south of the Ohio and Potomac Rivers, herein referred to as the Southeast, and for the further reason that this acquisition may tend to create a monopoly in Pillsbury in these two industries in that area.

Section 7 of the Clayton Act, as amended December 29, 1950, provides in relevant 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.[59]

Without giving a detailed summary of the history of Section 7 of the Clayton Act as it was originally enacted in 1914, it might be well to point out that Congress in passing this act intended it to be a preventive to check anticompetitive acts such as the acquisition of competitors in their incipiency before they reached the dimensions of Sherman Act violations. As stated in the Senate Report on the original bill:

> Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by [the Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation.[60]

As recognized by the Supreme Court of the United States, in a recent decision,[61] the purpose and objectives of the original Section 7 of the Clayton Act have never been fully realized for the following reasons: (1) the statute applied only to acquisitions of stock and did not apply to acquisitions of assets, even where this stock was used to acquire assets, and (2) it was generally assumed

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[59] 64 Stat. 1125, 15 U.S.C. Sec. 18.
[60] Senate Rep. No. 698, 63d Congress, 2d Session 1 (1914).
[61] *U.S. v. E. I. duPont de Nemours & Co.* 353 U.S. 586, 589 (1957).

that the original Section 7 did not apply to vertical mergers. For many years the Federal Trade Commission recommended to Congress that Section 7 be amended because of the Commission's inability to attain the objectives of the original act.

As pointed out in a recent decision of the United States District Court for the Southern District of New York in the case United States v. Bethlehem Steel Corporation, et al.,[62] involving the Bethlehem Steel Corporation's acquisition of The Youngstown Sheet and Tube Company, the 1950 amendment to Section 7 expanded its scope as follows:

> * * * (1) to prohibit the acquisition of assets as well as stock; (2) to broaden the area in which competition may be adversely affected by eliminating the test of whether the effect of the acquisition may be substantially to lessen competition *between the acquiring corporation and the acquired corporation;* (3) to eliminate the prior tests of whether the acquisition might restrain commerce 'in any community' and instead, to make the test whether 'in any line of commerce in any section of the country' the acquisition may substantially lessen competition, or tend to create a monopoly; and (4) to cover vertical as well as horizontal mergers.

This Court also held that according to Congressional Committee Reports the major objectives of Section 7 as amended are:

> * * * (1) to limit future increase in the level of economic concentration resulting from corporate mergers and acquisitions; (2) to meet the threat posed by the merger movement to small business fields and thereby aid in preserving small business as an important competitive factor in the American economy; (3) to cope with monopolistic tendencies in their incipiency and before they attain Sherman Act proportions; and (4) to avoid a Sherman Act test in deciding the effects of a merger.

The United States Court of Appeals for the Second Circuit in the American Sugar Company v. The Cuban-American Sugar Company,[63] held that Section 7 of the Clayton Act was designed "to halt in their incipiency undue concentrations of economic power or monopoly". The essential issues which the Commission is called upon to determine in this case, and to which the attorneys in support of the complaint have the burden of proof, are (1) the line or lines of commerce, (2) the section or sections of the country in which the effects of the merger may be felt—in other words the relevant market with respect to both products and geographic areas —and (3) whether there is a reasonable probability that the effect of the merger may be substantially to lessen competition or to tend to create a monopoly within the relevant markets by undue concentration of economic power, or the use of methods tending to prevent or lessen competition of smaller units in the industry.

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[62] Not reported.
[63] 259 Fed. 2d 524.

A. *Relevant Markets*

1. *Line of Commerce or Product Market.* As set forth in the foregoing findings of fact it has been established in this case that there are four lines of commerce involved: (1) family flour, particularly the premium grades, (2) bakery flour, (3) flour-base home mixes and (4) formula feeds.

2. *The Section of the Country—the Geographic Market.* The evidence in the record also indicates that as to the Ballard acquisition, the section of the country, or the geographic market, is the Southeast insofar as family flour, bakery flour, flour-base home mixes and formula feeds are concerned, all four products being involved in the Ballard acquisition. However, the evidence also indicates that although Pillsbury and Ballard both sold family flour and all of the other products involved in the acquisition in that geographic section of the country, there were certain subdivisions thereof, such as metropolitan areas, where competition between Pillsbury and Ballard in family flour and mixes was more pronounced, and as a result, the competitive effect of the acquisition was more pronounced.

B. *The Effect of the Acquisition*

In determining the effect of the acquisition of Ballard in the family flour and mix markets in the Southeast, it is important to consider the opinion of the House Committee at the time it reported out this amended Section 7 when it stated the purpose of the amendment as follows:

> [Section 7] is intended [to apply] when the effect of an acquisition may be a significant reduction in the vigor of competition, even though its effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize.[64]

The United States District Court in the Bethlehem Steel case, supra, in interpreting the amended Section 7 in this respect stated:

> A horizontal merger can affect competition in at least two ways. It can have an impact not only on the competitors of the merged companies but also on the buyers who must rely upon the merged companies and their competitors as sources of supply. The purpose of section 7 is to guard against either or both effects of a merger—if the likely consequence is substantially to lessen competition or to tend to create a monopoly. The section 7 market must therefore be considered with reference to the two groups: (1) the competitors of the merged companies and (2) the buyers who would be dependent upon the merged companies and their competitors as sources of supply.

The Court then referred to the House Committee Report as follows:

[64] H.R. Rep. No. 1191, p. 8.

[The proscribed] effect may arise in various ways: [1] such as elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, [2] increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive, [3] undue reduction in the number of competing enterprises, or [4] establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete.[65]

In the present case, to determine the full effect of the acquisition the relevant markets involved are subdivided as follows:

(a) The family flour market, particularly premium grades, in the Southeast into two areas, (1) urban metropolitan trading areas and (2) country or rural trading areas and

(b) The flour-base home mix market (1) throughout the United States insofar as it applies to the Duff acquisition and (2) in the Southeast insofar as it applies to the Ballard acquisition.

1. *Family Flour in Urban Markets.*

(a) Removal of a substantial competitor. Taking up first the impact of the acquisition upon the family flour market in the urban trading areas, the facts in the record indicate that by the acquisition of Ballard, the third largest distributor of family flour in the Southeast, Pillsbury removed one of its principal competitors having a popular brand of soft wheat flour with excellent consumer acceptance, and that chain stores and supermarkets in these urban market areas, and the consuming public buying through them, were deprived of the benefit of the preexisting competition. The two companies followed the same general methods in advertising and promoting their respective brands of flour, both of which were premium grade, aiming their sales efforts at the housewife who was willing to pay a high price for premium quality and who shopped in chains and supermarkets in the urban centers. Ballard and General Mills were the only sellers of family flour that were directly competitive with Pillsbury in the sale of premium grades *throughout* the Southeast. Ballard's Obelisk was probably the most popular single brand in the Southeast with the possible exception of Gold Medal and was at the time of the acquisition more popular than Pillsbury's Best. In eliminating Ballard from the family flour market in the Southeast, a very substantial competitor was removed from that market.

(b) Increased Pillsbury share of market. Not only did the acquisition result in the removal of a substantial competitor, but it also enabled Pillsbury immediately to double its competitive volume of family flour sales in the Southeast and has been a major factor in Pillsbury's advance from fifth position to first position in

[65] H.R. Rep. No. 1191, p. 8.

the volume of sales of family flour in that area. By virtue of the competitive advantage resulting from the acquisition of the flour mill in Louisville, Kentucky, at a strategic location to take advantage of milling-in-transit rates, and the popularity of the Obelisk brand, coupled with its financial ability to advertise and promote these two brands of flour, Pillsbury has been enabled to increase its share of the market in family flour in that area from the time of the acquisition until 1956, when the last testimony was taken. In the more than five years that has expired since the acquisition in a declining flour market, no other competitor in the Southeast, either local or regional, has been able to replace the Ballard company in the chain and supermarket stores in the urban areas.

At the time of the acquisition of Ballard, both Pillsbury and Ballard were important factors in certain metropolitan areas in the Southeast; in some cities Pillsbury was more of a factor and in other cities Ballard was more of a factor. As hereinbefore indicated, Pillsbury and Ballard as well as General Mills confined their sales primarily to chain stores and supermarkets in the metropolitan areas of the Southeast.

The record shows that in the two principal chain stores of the city of Jacksonville, Florida, as a result of the acquisition, the combined deliveries of Pillsbury's Best and Ballard's Obelisk in the Jacksonville and surrounding marketing area, represented approximately 44% of the total sales of flour, that is, all brands, standard or low-priced brands as well as premium brands; and 73% of the sales of premium brands only.

Also in the New Orleans metropolitan area, as a result of the acquisition, the bulk of the sales of family flour was concentrated in the Obelisk and Pillsbury's Best brands. The same is true of Mobile, Alabama.

Another metropolitan marketing area, in which, as a result of the acquisition, the sales of family flour were concentrated in Ballard's Obelisk and Pillsbury's Best, is Louisville, Kentucky, where the Ballard plant was located. In other cities, although the combined sales of Ballard and Pillsbury did not place Pillsbury first in popularity, there was a definite advance in percentage of sales through chain stores and supermarkets as a result of the acquisition. That is true in such cities as Atlanta, where a local mill had the most popular brand, and also in Birmingham. The record shows that Pillsbury benefited most in the way of the added volume of sales of the Ballard Obelisk brand and in an increase in share of market in the metropolitan areas surrounding and including the following cities: Atlanta, Georgia; Augusta, Georgia; Birmingham, Alabama; Charleston, South Carolina; Jacksonville, Florida; Louisville, Kentucky; Mobile, Alabama; Montgomery, Alabama; New Orleans, Louisiana; Raleigh, North Carolina; Savannah, Georgia; Thomasville, Georgia; and Winston-Salem, North Carolina. The acquisition also increased the relative position of Pillsbury in the Norfolk, Virginia, market.

(c) No new entries in the market. While local mills have gradually been disappearing from the market, no new mills have taken their place and the family flour sales of the regional mills that are still in business have, for the most part, declined substantially, partly because of the aggressive competitive practices employed by the respondent Pillsbury in that area since the date of the acquisition.

(d) Competition has been lessened. While there are quite a large number of small flour mills selling family flour in the Southeast, they do not furnish the competition to Pillsbury that Ballard did prior to the acquisition, for the reason that the sales of the small local mills in the Southeast are principally in standard or lower grades, and are in the country territory where Pillsbury has never been a strong competitive factor until recently. Very few of the local millers sell substantial quantities of premium grades of family flour in the urban areas. It is the policy of the chain stores and supermarkets to carry the two leading national brands, Gold Medal and Pillsbury's Best, and also Obelisk, the most popular regional brand now owned by Pillsbury, and one or two local brands, that is, brands of local mills located in the immediate area, and one or two lower-priced brands of standard or inferior grades of family flour, including usually a private brand of the chain store.

Since the acquisition, Pillsbury has continued its national advertising by television, radio, regional magazines and newspapers and by other similar media, designed to keep the Pillsbury name before the public, and to make Pillsbury-owned brands a common household word for commodities to which they are attached. It has thus been enabled to build up a consumer demand, not only for the Pillsbury Best brand, but also for Obelisk, the Ballard brand.

Because of the size of the organizations and the far-reaching effects of the acquisition, it is difficult to measure the full effect, but one definite fact is established—the number of independent competing brands of premium flour being offered for sale by the chain stores and supermarkets has been reduced, and the principal brands now on the shelves of such retail outlets throughout the Southeast in the urban market areas consist of brands owned by Pillsbury and General Mills, who are in a position financially through substantial expenditures for advertising and promotion to prevent other manufacturers of family flour from successfully competing for the preference of the consumers being served by these chain stores and supermarkets, with the possible exception of a few local mills in the immediate areas surrounding some of the urban centers that have built up a local prestige over the years.

(e) Oligopolistic competition developed. As a result of the acquisition of Ballard, Pillsbury has assisted in the development of oligopolistic competition in the Southeast family flour market, which is competition among a few sellers, and consists in this industry primarily of General Mills and Pillsbury, the two largest units in the industry who are enabled, by virtue of their national advertising and promotional schemes, to lead the industry into competitive practices which make it difficult for small competitors to compete and which gradually force the small competitors out of the market. In some of the larger metropolitan markets the oligopoly also includes one or more regional mills who because of their location are factors in the market. Prior to the acquisition of Ballard, Pillsbury was unable to exert its influence in the market, since it did not have a soft wheat flour to meet the competition of Ballard or General Mills. Now, according to evidence in the record, it is enabled to carry on aggressive competitive methods, such as offering one bag free with ten and one bag free with five deals and other discounts which have resulted in the sale of Pillsbury's Best and Ballard's Obelisk at prices which are, in some instances, below its small competitors' costs; and has used promotion practices of gifts of aprons, pillow slips, appliances and similar devices, which has enabled it to secure more favorable treatment in the chain stores and supermarkets with respect to shelf space. Such methods are sometimes termed by economists as "predatory" or "guerilla" competition, and are characteristic of oligopolistic competition when indulged in by a few large units in an industry.[66] The record contains the testimony of many small competitors who have been unable to meet these competitive tactics and have sustained substantial losses of volume of sales in family flour. Thus the acquisition of Ballard in this case has hastened the development of oligopolistic competition in the urban areas with the adverse competitive results Congress had in mind when the amendment to Section 7 was enacted, and which the Commission was fearful of when it previously considered this case.

2. *Family Flour in Country or Rural Markets.* In the country or rural areas a different situation exists; there was at the time of the acquisition, and even five years later there appears to be, a substantial number of local mills manufacturing soft wheat flour for the most part, catering to the country trade within a radius of

[66] Tr. 28,551-4.

75 to 100 miles from the mill, and a number of western flour mills manufacturing hard wheat flour and shipping into the Southeast and selling their product through jobbers to the rural trade. It is rather significant that this larger group of mills, smaller in size for the most part than the Ballard mill, with few exceptions has been unable to break into the urban chain stores or supermarkets because of their financial inability to compete with Pillsbury and General Mills in advertising and promotion. It is significant, also, that during the period of time subsequent to the merger until as late as 1956, in some instances these other mills, the smaller mills and the western mills, have been unable to keep their share of the market in the country or rural areas. There have been complaints, and evidence has been received, of recent attempts by Pillsbury to increase its market share in the rural areas by utilizing the same methods of advertising and promotion it had been using in the urban areas. It is quite apparent from these facts that the respondent is now in a position, not only to prevent further competition in the urban areas, where that market is under the control of an oligopoly consisting of itself, General Mills and one or two other large regional mills, in certain metropolitan areas, but also by virtue of its favorable position with the Ballard mill at Louisville manufacturing a soft wheat flour and selling this flour under the popular trade name, Obelisk, along with Pillsbury's Best, through wholesalers in the country areas, to create a competitive situation there on premium grades of family flour similar to the one now existing in the urban areas. It will just be a matter of time.

It is contended by counsel for respondent in their brief in support of their proposed findings, that there is no proof in the record showing that there was a probable lessening of competition or tendency to monopoly caused by the acquisition with respect to family flour. It is to be remembered in this connection, that the ultimate question under Section 7 is whether the acquisition *may be* substantially to lessen competition or tend to create a monopoly within the relevant market. The Commission is not required to establish with a *certainty* whether competition in fact has been substantially lessened. "Its burden is met if it establishes a reasonable probability that the proposed merger will substantially lessen competition or tend to create a monopoly." [67] As pointed out in the Senate Committee Report:

> A requirement of certainty and actuality of injury to competition is incompatible with an effort to supplement the Sherman Act by reaching incipient restraints.

[67] Senate Rep. No. 1775, p. 6; *U.S. v. duPont de Nemours & Co.*, supra; *American Sugar Company v. The Cuban-American Sugar Company*, supra; *U.S. v. Bethlehem Steel Corporation*, supra.

The United States District Court in the Bethlehem Steel case, supra, held

> There may be a substantial lessening of competition or tendency to monopoly when a merger substantially increases concentration, eliminates a substantial factor in competition, eliminates a substantial source of supply, or results in establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete.[68]

3. *Increase in Economic Concentration Generally.* It was also held by the Court in the Bethlehem Steel case, supra, that "A major purpose of section 7 is to ward off the anti-competitive effects of increases 'in the level of economic concentration resulting from corporate mergers and acquisitions'."[69] That decision further held "Both the Senate and House Committee Reports emphasize the deep concern of the Congress with the continued trend towards concentration of economic power through mergers and acquisitions." In the present case there is a definite tdency toward concentration in the family flour market in the Southeast, for in 1956, as a direct result of the acquisition of Ballard by Pillsbury, the percentage of the total sales controlled by Pillsbury and General Mills, the next largest distributor in the Southeast in that year, is over 20%; and if the sales of the Colorado Milling & Elevator Company and Dixie-Portland Flour Co. are included, more than 32% of the family flour business is concentrated in these four millers. The significant fact in this particular phase of the situation is, however, that the combined percentage of Pillsbury and General Mills of the total industry, including both urban and country territory, has increased from slightly over 19% in 1952 to nearly 21% in 1956, whereas the percentage of the Colorado Milling & Elevator Company, the other western miller in this group, has declined from 7.32% in 1952 to 6% in 1956; and that the Dixie-Portland company, the only regional mill in the group, made a smaller gain in percentage than either Pillsbury or General Mills.

4. *As to Bakery Flour.* As hereinbefore indicated, it is not believed that the effect of the acquisition of Ballard in the bakery flour industry is sufficient to warrant the conclusion that Section 7 of the Clayton Act has been violated in those market areas. Ballard was virtually out of the bakery flour business, whereas Pillsbury was quite a strong factor throughout the United States in that industry. However, it catered primarily to the larger bakeries and Ballard to the smaller bakeries and since Ballard was gradually changing its system of distribution from its own warehouse to wholesalers, it did not have, and would not have in the future, the salesmen to call on the small bakeries.

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[68] H.R. Rep. No. 1191, p. 8.

[69] Senate Rep. No. 1775, p. 3.

5. *As to Formula Feeds.* In the formula feed industry Pillsbury had never been a factor prior to the acquisition, while Ballard had been in certain areas. Ballard had built a large feed mill in Louisville, had converted another mill in Nashville and had elaborate plans in the formula feed industry. However, even before the acquisition it was found that the new feed mill which had been built at Louisville was not adapted to the formula feed business that Ballard was able to get. Likewise, after the acquisition Pillsbury found the same condition to exist; the feed mill was built to handle large orders where they could run a large order through without interference, whereas the business both Ballard and Pillsbury were able to get, in view of the competition they had to meet, were small orders. As a result, Pillsbury has shut down the Ballard feed mill at Louisville and has continued to operate from the smaller mill in Nashville. It never has been a factor in the formula feed business in the Southeast, since the volume of its sales has gradually declined since the date of its acquisition.

II. The Acquisition of Duff Also Violated Section 7 of the Clayton Act

It is also concluded that the acquisition of the Duff plant at Hamilton, Ohio, and the business theretofore conducted under the Duff label by the American Home Foods, Inc., as disclosed in the foregoing findings, was in violation of Section 7 of the Clayton Act. At the time Pillsbury acquired the Duff assets in 1952, it was operating its mix plants, including the Ballard plant in Louisville, to full capacity and its sales were increasing very rapidly.

Duff had built a new plant in Hamilton, Ohio, in 1947, but it had never been able to operate it to full capacity, although it had nationwide distribution. Pillsbury and General Mills had been the two leading factors in the industry for two or three years, although Duff at one time was one of the two largest manufacturers and distributors of cake mixes. The primary result of the acquisition of the Duff plant by Pillsbury was the immediate increase in its share of the mix market throughout the United States as well as in the Southeast. By virtue of the acquisition of Duff, respondent not only eliminated the competition of Duff, it also was able, through the added manufacturing facilities and new formulae, to increase the volume of sales of Pillsbury-owned brands of mixes, until it displaced General Mills as the leader in the cake mix industry in the United States, advancing from 16% of the market in 1949–50 to 31% in 1952.

The mix business in the United States in 1952, after the acquisition of Duff, was concentrated in Pillsbury, General Mills and

General Foods. At that time it is estimated these three companies controlled 60% of the mix business. The concentration was even more pronounced in the cake mix business, which represented nearly half of the sales of flour-base home mixes.

From the standpoint of exits and entries in the mix industry, more manufacturers have disappeared from the market than new ones have entered since the acquisition.

There is an abundance of evidence of aggressive competitive practices on the part of Pillsbury which are indicative of the power of Pillsbury, after the acquisition, to engage in an aggressive campaign of advertising and promotion to popularize its brand of mixes with the public, and thus obtain more shelf space in the chain stores and supermarkets, resulting in an increase in its sales of mixes, which could not be equaled by any other mix manufacturer with the exception of General Mills and possibly General Foods and the present owner of the Duncan Hines brand—Procter & Gamble. The necessary tendency of such activities is to prevent the smaller mix manufacturers from selling their products to chain stores and supermarkets.

III. Remedial Action To Be Taken

The only legal remedy for the competitive situation now existing in the family flour market in the Southeast and flour-base home mix market throughout the United States, as developed in the record in this case, and set forth in the foregoing findings, is a complete and bona fide divestiture of the assets illegally acquired by the respondent. Section 11 of the Clayton Act provides:

> * * * If upon such hearing the Commission * * * shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and *divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order.* [Emphasis supplied.]

Such sale of assets should, of course, be made only to smaller units than Pillsbury in the family flour and mix industries.

In this connection, it is not believed that the sale of goodwill, trade-marks, patents, formulae, etc., of the Duff products by respondent to the new Duff Baking Mix Corporation in December 1953 satisfies the requirements of the statute. It is quite apparent from the terms of the conditional sale to the new Duff corporation, that respondent intended to maintain effective control of competition with the new Duff corporation, since the provisions of the original agreement in 1953, and the amended agreement in 1956, between Pillsbury and the new Duff corporation, are such that in the event that the new Duff corporation does not conform to the provisions of the agreements and make payments as required, Pillsbury could declare the entire unpaid balance due and thereby recover the business of the new Duff corporation. Furthermore, Pillsbury retained the right to use any Duff formulae in the manufacture of Pillsbury label mixes.

Based upon the foregoing Findings of Fact and Conclusions and pursuant to and in accordance with the provisions of Section 11 of the Clayton Act, the following Order of Divestiture is issued

ORDER OF DIVESTITURE

It is ordered, That respondent The Pillsbury Company (formerly Pillsbury Mills, Inc.), a corporation, and its subsidiaries, officers, directors, agents, representatives and employees shall cease and desist from violating Section 7 of the Clayton Act, as hereinbefore set forth in the findings hereof, and shall divest itself of all assets, properties, rights or privileges, tangible or intangible, including but not limited to all plants, machinery, equipment, trade names, trademarks and goodwill acquired by said respondent as a result of the acquisition of the assets of the Ballard and Ballard Company, together with the plant, machinery, buildings, improvements, equipment and other property of whatever description that has been added to them, in such a manner as to restore it as a going concern in the manufacture and sale of family flour and flour-base home mixes in which the former Ballard and Ballard Company was engaged. Provided, however, that nothing in this order shall require the divestiture of assets, properties, rights or privileges, tangible or intangible, including plants, machinery, equipment, trade names, trade-marks and goodwill of the said Ballard and Ballard Company pertaining to the manufacture and sale of formula feeds, or the manufacture and sale of Oven-Ready biscuits.

It is further ordered, That respondent The Pillsbury Company, a corporation, and its subsidiaries, officers, directors, agents, representatives and employees shall divest itself absolutely in good faith of all assets, properties, rights or privileges, tangible or intangible, including but not limited to all plants, machinery, equipment, trade names, trade-marks and goodwill acquired by said Pillsbury as a result of the acquisition of the assets of the Duff Baking Mix Division of American Home Foods, Inc. (a subsidiary of American Home Products Corporation), together with the plants, machinery, buildings, improvements, equipment and other property of whatever description that has been added to them, in such a manner as to restore it as a going concern in all the lines of commerce in which the former said Duff Baking Mix Division was engaged.

It is further ordered, That in such divestitures hereinbefore mentioned, none of the said assets, properties, rights or privileges, tangible or intangible, shall be sold or transferred, directly or indirectly, to anyone, who at the time of the divestiture or within a year prior thereto, was a stockholder, officer, director, employee or agent of, or otherwise, directly or indirectly, connected with, or under the control of, respondent or any of respondent's subsidiaries or affiliated companies.

It is further ordered, That in such divestitures hereinbefore mentioned, none of said assets, properties, rights or privileges, tangible or intangible, shall be sold or transferred, directly or indirectly, to any corporation, or to anyone, who at the time of the divestitures, is an officer, director, employee or agent of such corporation, which, at the time of such sale or transfer is a substantial factor in either the family flour industry or the flour-base home mix industry, so that the effect of such divestiture might be to substantially lessen competition or tend to create a monopoly in the family flour or the flour-base home mix industry in any section of the country.

It is further ordered, That respondent The Pillsbury Company, shall, within six months from the date of the service upon it of this order, submit in writing for the consideration and approval of the Federal Trade Commission, its plan for carrying out the provisions of this order, such plan to include the date within which compliance may be effected, the time for such compliance to be hereafter fixed by order of the Commission.

OPINION OF THE COMMISSION

By KINTNER, *Chairman:*

Pillsbury Mills, Inc. (now the Pillsbury Company) acquired the assets of the Ballard and Ballard Company in 1951 and the Duff Baking Mix Division of American Home Foods, Inc., in 1952. The issue now ripe for decision is whether these acquisitions violated Section 7 of the amended Clayton Act. 38 Stat. 731 (1914), as amended by 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958). The hearing examiner has so held, and his initial decision contains an order of divestiture.

Both respondent and counsel supporting the complaint appeal from the examiner's decision. The major thrust of respondent's appeal is directed at matters of procedure and the weight of the evidence. It broadly assails the initial decision and the order, and contends generally that the findings are not supported by reliable, probative and substantial evidence.[70] The major contention of counsel supporting the complaint is that the order is too narrow in scope.

The Companies

Pillsbury is a Delaware Corporation having its principal place of business in Minneapolis, Minnesota. It is the second largest flour milling company in the United States. Pillsbury is broadly engaged in commerce in the production and sale of a variety of products including family and bakery flour, formula feeds and flour-base packaged mixes. It is also engaged in the purchase, sale and storage of grain. Its premium brand of family flour is "Pillsbury's Best".

During the fiscal year ending May 31, 1950, Pillsbury's sales of family flour in the United States amounted to approximately \$38,000,000, its sales of bakery flour to about \$62,000,000, and its sales of flour-base mixes to approximately \$26,000,000. In the ten-year period from May 31, 1940, to May 31, 1950, Pillsbury's net sales of all products increased from approximately \$47,000,000 to about \$201,000,000 and its total assets increased from approximately \$30,000,000 to about \$62,000,000.

On June 1, 1951, just prior to the acquisition of Ballard and Ballard Company, Pillsbury owned or operated eight flour mills located in the states of Oregon, Kansas, New York, Oklahoma, Minnesota, Utah, California and Illinois; three flour-base mix plants located in the states of California, Utah and Illinois; and ten formula feed plants located in the states of Kansas, Iowa, California, Minnesota and Utah.

[70] In one of its arguments concerning an asserted denial of due process, respondent urges that the Commission is disqualified from hearing this case because of alleged interference by Committees of the Congress. The same issue was previously raised and disposed of in our order of September 26, 1956. No additional facts are cited, but it appears that some further comment is appropriate. Respondent does not request disqualification because of any alleged personal bias on the part of individual Commissioners, nor does it appear that respondent contends that the Commission as a body corporate is biased. Rather, it seems to be suggesting a possibility of prejudice because the Commission must look to Congress for funds and to the Senate for confirmation of the appointments of its members. The objection is not to anything the Commission has done; rather it is to the inquiries of Committees of Congress over which the Commission has no control. We do not believe that such is a basis for disqualification. The relationship between the events alleged and this case are distant and remote. The events occurred many years in the past and mainly concerned Commission members who have since departed from the Commission. Several of the present Commissioners were in attendance at the Congressional hearings, but they were involved only in a very minor way. There is no indication that these members or any present members of the Commission have expressed opinions or prejudgments on issues in this case. Moreover, it has been held that even a previously formed opinion by the Commission on the general subject matter of a case is not such a factor as to disqualify it in the proceedings. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948). Respondent's contentions on this question are therefore rejected.

Respondent has increased its size partly through acquisition of the stock or assets of other companies. In the eleven years immediately prior to the mergers under scrutiny here, Pillsbury acquired a number of grain elevators, a formula feed plant, a soy bean processing plant and other properties in addition to all the assets of the Globe Grain and Milling Co., of Los Angeles, California. The latter company owned a number of flour mills and feed plants in various western cities and a blending plant in Little Rock, Arkansas.

The Acquired Properties

Ballard and Ballard Company (hereafter referred to as Ballard), prior to June 12, 1951, was a corporation engaged in commerce and doing business under the laws of the state of Kentucky. It had its principal place of business in Louisville, Kentucky. Most of Ballard's business was confined to the Southeastern states. There it was broadly and generally engaged in the grain milling field. It produced and sold family flour, bakery flour, prepared mixes, a refrigerated dough product called "Oven-Ready Biscuits" and formula feeds. Ballard also sold cake mixes and pie crust mixes which were manufactured to its formula by other companies. It sold its family flour under the "Obelisk" brand.

Ballard's net sales between June 30, 1940, and June 30, 1950, grew from about $8,000,000 to about $30,000,000; its total assets increased from approximately $2,600,000 to about $11,300,000; and its net worth grew from approximately $2,400,000 to about $5,800,000.

Pillsbury, on June 12, 1951, acquired the assets of Ballard for approximately $5,171,000. It has since operated the business of Ballard as a part of the Pillsbury organization.

The complaint also challenges the acquisition of the Duff Baking Mix Division of American Home Foods, Inc., a New Jersey corporation and a wholly-owned subsidiary of American Home Products Corporation, a Delaware corporation (hereafter referred to as Duff). American Home Foods in 1944 acquired the business of P. Duff & Sons, Inc., a company which was engaged in the manufacture and sale of cake mixes, hot roll mixes, and other such products. American Home Foods operated this business as the Duff Division. In 1947 it built a new mix plant in Hamilton, Ohio. It also maintained six manufacturing and packaging lines in its plant at San Jose, California.

Duff sold its mixes on a nationwide basis. Its products bore the brand name "Duff's". During 1950 Duff sold 2,878,868 dozens of packages of its mixes for $7,962,202. In 1951, the year prior to its acquisition by Pillsbury, it sold 2,325,569 dozens of packages of its mixes for $6,828,373.

In March, 1952, Pillsbury, through a subsidiary, acquired the baking mix plant at Hamilton, Ohio, and the goodwill, franchise and other assets of the Duff Baking Mix Division from American Home Foods. In December, 1953, after the issuance of the complaint, Pillsbury sold some of the assets so acquired to the Duff Baking Mix Corporation, a New Jersey corporation organized in December, 1953, by Frederick J. Briefer and Edward J. Baker. The sale included Duff's goodwill, trade-marks, patents, formulae and other assets, but it did not include the mix plant at Hamilton, Ohio.

The Relevant Markets

A market under Section 7 of the Clayton Act consists of a "line of commerce", or the product market, and an appropriate "section of the country", or the geographic market. A market so defined does not necessarily comport with an economist's definition of a market. *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958). Apparently the respondent does not challenge the delineation of certain broad markets as the appropriate arenas in which to test the lawfulness of the acquisitions challenged here.

Referring to the Ballard acquisition, these markets are (1) family flour, (2) bakery flour, (3) flour-base home mixes, and, (4) formula feeds, all in the Southeast section of the country. As to Duff, the undisputed markets are flour-base home mixes in (a) the Southeast, and (b) the entire United States. The complaint defines the "Southeast" as "that part of the United States generally lying east of the Mississippi River and south of the Ohio and Potomac Rivers."

The examiner further subdivided the whole Southeast into urban and country or rural trading areas. He did not find a number of separate small markets; rather, he found two economically significant subdivisions of the Southeast—a rural market and an urban market. Respondent objects to this determination on the grounds that it is not responsive to the complaint and not supported by the evidence. The terms of the complaint are clearly sufficient to cover any proper subdivision of the Southeast. And the record supports the examiner's finding. There are no exactly identified areas in the case which can be termed urban or rural, but the general boundaries from a competitive standpoint are indicated. For instance, some of the major companies selling family flour in the Southeast concentrated on the rural trade and sold relatively little in metropolitan areas. Among them were Colorado Milling & Elevator Company, International Milling Co., Yukon Mill & Grain Co., Dixie Portland Flour Co., and General Foods Corporation. William P. Craig of Colorado Milling & Elevator Company testified:

We have always concentrated on what is referred to as the larger size packages, and the consuming public that uses those packages are principally the people out in the country.

* * * * * * *

We make no effort [to sell flour in cities] because we know there is big service and a lot of advertising required, and those things, and we were so late in considering the importance of the small package that it is too late now to try to get them.

A distinction in competition between the rural and the urban trade was demonstrated. Because of this difference, the examiner subdivided the market to determine the full effect of the acquisition. We believe he was correct in so doing. It is not necessary to determine the economically significant areas in an industry with the precision of a surveyor. Moreover, the effects of an acquisition can be considered in a general geographic area as well as in various subdivisions of the area. *United States* v. *Bethlehem Steel Corp.*, *supra; United States* v. *Brown Shoe Co.*, 179 F. Supp. 721 (E.D. Mo. 1959).

There is a further line of commerce in this proceeding relating to the Ballard acquisition. It might be termed the wheat flour milling product industry. This is the general flour milling industry in which such firms as Pillsbury and General Mills are engaged. As with the other lines of commerce examined here an appropriate "section of the country" is the Southeast. The wheat flour milling products industry includes companies engaged in the milling of wheat flour for sale as family flour and bakery flour, the manufacture and sale of flour-base mixes for home and institution use, and the manufacture and sale of commercial feed and feed products. Ballard and Pillsbury were both engaged in this general flour milling field. The complaint, charging as it does violations of Section 7 in the lines of commerce in which the acquired companies were engaged, clearly includes the wheat flour milling products industry within its compass. The evidence adduced here reveals the configuration of the industry with sufficient clarity to permit an analysis of the effects of the Ballard merger in this line of commerce.

The Market Share Data

Respondent sharply controverts the examiner's assignment of probative values to the market share data of record. Since the market shares and market positions of the acquired and acquiring firms are significant indicia in the measurement of competitive effect the major sources of this data must be plumbed.

The Mintener Letters

In 1951, prior to the Ballard acquisition, Mr. Bradshaw Mintener, then vice-president and general counsel of Pillsbury, submitted to the Commission certain figures as Pillsbury's "best estimates" of the total industry sales of family flour and flour-base home mixes and the sales and shares of markets of Pillsbury, Ballard, Duff and other companies for the fiscal year ended May 31, 1950. The admissibility of the Mintener letters is not a subject of dispute. The sole issue is the weight to be assigned to them. We recognize that the statistical data in these letters are at most estimates. But this does not mean that they lack probative worth. Even though they might be comparatively rough estimates, such as a businessman might rely upon in making decisions in the usual course, they are valuable in a case of this character. In a Section 7 proceeding it is not essential that market positions be ascertained with absolute mathematical precision. Reliable, probative evidence demonstrating the unreliability of the Mintener statistics would, of course, destroy their probative value, but no evidence of record rises to that dignity.

The possibility that the Mintener letters may not have listed all important competitors is not greatly significant. Any such gaps that may have existed have been filled by other evidence. In passing upon the correctness of the examiner's conclusions on market structure it must be remembered that his findings were not premised solely upon the data in the Mintener letters. Other evidence figuring prominently in the findings includes the Commission surveys and the testimony of various competitors. In these circumstances we cannot say that the examiner gave undue weight to the Mintener letters. We sustain his assessment of their probative value.

The Detlefsen Estimates

Respondent put in evidence the estimates of Mr. G. R. Detlefsen, director of Pillsbury's Commercial Research and Development Department, covering the family flour, bakery flour and flour-base home mix markets, the shares of Pillsbury and Ballard of such markets and Duff's share of the flour-base home mix markets. As with the Mintener letters, the question is not one of admissibility but the weight to be assigned. The examiner gave these estimates little or no weight. We concur in his ruling. The Detlefsen estimates were developed by the use of complicated and apparently novel methods. Mr. Detlefsen himself referred to the statistics as involved and complex. The novelty was such that the examiner was initially requested to receive the materials *in camera*. The data from which the estimates were prepared apparently included Bureau of Census statistics showing the total United States civilian family flour consumption for 1945 and 1947 and total United States civilian bakery flour consumption for 1947, and certain Department of Agriculture total United States civilian flour consumption statistics. In connection with Department of Agriculture statistics, Mr. Detlefsen sought to develop household and per capita consumption rates of family flour and flour-base home mixes for both the United States and the Southeast for the fiscal years 1945–46 and 1951–52. The rates were derived from two Pillsbury surveys which were allegedly designed to measure consumer buying and baking habits. With the results, he made estimates of both total and southeastern consumption of family flour and flour-base home mixes. Using an estimating equation which in his judgment gave correct effect to the various factors and variables influencing flour and mix consumption, he then obtained his estimates for family flour and mix consumption for the entire period 1945–46 through 1952–53 by interpolating between his estimates for 1945–46 and 1951–52 and extrapolating beyond the latter. Other estimating procedures were used for additional results.

The estimates so obtained may be compared with the respondent's estimates contained in the Mintener letters. A comparison shows:

Item	Estimates in Mintener letters		Detlefsen estimates	
	Cwts.	Percent of market	Cwts.	Percent of market
U.S.:				
Total family flour	50, 000, 000		74, 984, 323	
Total flour-base home mixes	7, 627, 000		10, 301, 010	
Pillsbury family flour	4, 700, 000	9. 4	4, 909, 311	6. 5
Southeast:				
Total family flour	20, 000, 000		27, 093, 211	
Total flour-base home mixes	666, 000		1, 704, 144	
Pillsbury family flour	732, 475	3. 66	739, 967	2. 7
Pillsbury flour-base home mixes	151, 000	22. 7	147, 489	8. 7
Ballard family flour	930, 000	4. 65	962, 773	3. 6
Ballard flour-base home mixes	80, 000	12. 0	76, 846	4. 5
Duff flour-base home mixes	68, 000	10. 2	71, 753	4. 2

Obviously, the net effect of the Detlefsen estimates is to decrease the market positions of Pillsbury, Ballard and Duff especially in the Southeast from those otherwise shown. This results in part from the much higher figures arrived at for the total markets than were contained in the earlier estimates.

We do not lightly refuse to assign a significant probative value to these estimates. Proper estimating procedures may be used in Section 7 cases and in some instances will no doubt be as accurate as an actual survey of industry sales. Our principal objection to Mr. Detlefsen's procedures is to the wide use of his personal judgment, rendered necessary, it seems, by the paucity of basic statistical data. The consumer surveys, for example, were not projectionable to quantities or market shares and apparently were projectionable only to consumer buying and baking habits. Applying his judgment to this data, and interpreting population statistics, Mr. Detlefsen estimated total United States and Southeastern consumption of family flour and flour-base mixes. The net effect seems to be estimates based as much on Mr. Detlefsen's judgment as upon statistical fact.

In parts of the procedure adjustments were used which appear inconsistent with adjustments made elsewhere and for which no sufficient justification was given. Since the estimates are based principally on Pillsbury's consumer surveys, and since these surveys were not conducted for the purpose of projecting market shares or quantities, therefore requiring considerable alteration and adjustment even to be used for Mr. Detlefsen's purposes, a large question arises as to the validity of the final results.

To illustrate, Mr. Detlefsen made the assumption that Southeastern housewives understated their consumption of all-purpose flour in 1952 and made adjustments to correct this assumed understatement. It appears that a differently designed survey would not require the same assumption, since this supposed understatement was not assumed throughout. Without necessarily disputing Mr. Detlefsen's judgment in making this assumption, we observe that it results in a steeper upward trend in flour consumption in the Southeast and lowers estimates of market shares of Pillsbury products in more recent years. Here the apparent inadequacy of the primary material required pure assumptions resulting in significant deviations in final estimates. When a number of such adjustments are necessary and when they cannot be or are not sufficiently explained, we believe that the final product has dubious probative value. In all the circumstances, we conclude that the examiner correctly disregarded the Detlefsen estimates in his resolution of the issues in this proceeding.

However, even if we accepted respondent's contention that the Detlefsen estimates have greater probative value for the purposes of this case, there would be no such showing here as to require dismissal of the complaint. Even if the smaller market shares established by the Detlefsen estimates be accepted as fact, nevertheless a finding of violation of Section 7 may be premised on these estimates when viewed in the total setting. Cf., *United States* v. *Brown Shoe Co.*, 179 F. Supp. 721, 735–740, esp. 739 (E.D. Mo. 1959). In that case Brown's share of shoe production constituted only 5% of the national market and the share of Kenney, the acquired firm, was only .5% of the market. But the Court properly held that an analysis of the legality of a merger does not end with the determination of market percentages. Rather, the analysis must extend to a search for the meaning of those percentages in the factual setting of a particular case. In Section 7 cases the ultimate question to be resolved is not whether the acquiring and acquired firms had a quantitatively substantial share of the market or a large proportional share of the market. The ultimate question is whether the merger produces a likelihood of a substantial lessening of competition or a tendency toward monopoly in the future. That question cannot be resolved merely by measuring market shares against some rigid statistical standard of universal applicability.

The Commission Surveys

The record contains data from surveys conducted by the Commission's staff covering family flour sales in the Southeast and cake mix sales in the United States. Respondent objects to this evidence, contending that the surveys are unreliable and incomplete, that they were improperly admitted and that they have been misused and misapplied by the examiner.

To judge the admissibility and relative probative value of surveys by a standard of absolute accuracy and completeness would be unrealistic and unreasonable. If surveys are soundly conceived, well conducted and substantially complete the data so obtained is worthy of consideration.

It has been demonstrated that great care was used in the conduct of the Commission surveys. Checks on the accuracy and completeness of the data originally submitted were made, and in some instances these checks resulted in the revision of survey results. An effort was made to cover every significant company in the lines of commerce surveyed. The fact that the Commission's processes under Sections 6 and 9 of the Federal Trade Commission Act were utilized in making these surveys furnishes an earnest of completeness and trustworthiness. The information provided by each concern was, of course, independent of the data supplied by other firms; even if it be established that there were minor discrepancies in the raw data the probative value of the survey results would not be seriously diminished.

After due deliberation we conclude that the examiner correctly received these surveys and properly considered them in resolving the issues.

The Pillsbury Birmingham and Louisville Surveys

Respondent introduced in evidence surveys of the family flour and flour-base home mix markets in Birmingham, Alabama, and Louisville, Kentucky, wholesale trading areas and censuses of wholesalers located in the same cities. These surveys and censuses were conducted by Mr. Michael H. Halbert, who at the time was working as a market analyst and operations research specialist for Alderson & Sessions, a management consulting firm. The surveys, conducted in April, May and June, 1954, covered both consumers and retail stores. The consumer surveys were apparently designed to show in part the shares of market and market positions of brands of family flour and flour-base home mixes sold in the territories surveyed. The results are not projectionable to other trading areas. The hearing examiner found that the consumer surveys were without probative value.

The significance of these consumer surveys has not been made clear by respondent. Mr. Halbert testified that they show a total picture of flour and flour-base mix purchases, uses, brand preference, attitudes and opinions on the part of the consumer in the Birmingham area and in the Louisville area. These areas, however, constitute only several of the many trading territories in the Southeast and in the country as a whole. Any findings based on this evidence would not be dispositive of the question of the market positions of competitors in the broader relevant markets. Therefore, we do not believe, even if given weight, that this evidence would change the ultimate conclusions, but the examiner has made a thorough review of the factors which bear on the probative value of the consumer surveys and has decided not to give weight to this evidence in his determinations. We agree with his decision.

Competitive Effects

That a merger violates Section 7 if there is a reasonable probability that it will substantially lessen competition or tend to create a monopoly is well settled. *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 603 (S.D.N.Y. 1958). *United States* v. *Brown Shoe Co.*, 179 F. Supp. 721 (E.D. Mo. 1959). Cf., *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586 (1957). In making the determination a variety of competitive factors must be examined. *Scott Paper Co.*, (D. 6559, on interlocutory appeal, January 5, 1959); *Pillsbury Mills, Inc.*, 50 F.T.C. 555 (1953).[71]

The question of whether there is a future likelihood of substantial lessening of competition or a tendency to monopoly cannot be answered on the basis of market statistics alone. In the *Brown Shoe* case the court, after reviewing the legislative history of amended Section 7, concluded that "certainly it is evident that Congress intended to encompass minute acquisitions which tend toward monopoly and to do so in the incipiency. Courts have recognized the necessity to act toward violations as they begin, rather than wait until it has become *fait accompli*." 179 F. Supp. at 737.

In the *Bethlehem Steel* case the court, citing the legislative history of amended Section 7, held that there may be a substantial lessening of competition or a tendency to monopoly when a merger substantially increases concentration or eliminates a substantial factor in competition, among other stated effects.

The utilization of this approach does not mean that Section 7 cases are to be considered dumping grounds for masses of economic data. In our previous consideration of this case we held that a prima facie case was established despite the fact that the development of the significant market factors in the record as it then existed was something less than exhaustive. We do not read our decision as standing for the proposition that broad economic inquiries into every conceivably relevant market factor are necessary or even desirable in Section 7 cases. If a general examination of a limited number of important market factors establishes the statutory requisites or compels a conclusion that the statutory tests have not been met then further economic detail is superfluous. To launch a minute scrutiny of unimportant market indicia is merely to pile Pelion upon Ossa.

Our analysis of this record is guided by these precepts.

We confine our consideration of probable competitive injury to these relevant markets: family flour in the Southeast, flour-base home mixes in the Southeast and in the country as a whole, as well as appropriate subdivisions of these markets; and the wheat flour milling products industry in the Southeast.

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71 When this matter was before us on appeal from the hearing examiner's dismissal of the complaint at the close of the case-in-chief of counsel supporting the complaint, we held that Section 7 cases are not to be decided on the basis of *per se* tests. *Pillsbury Mills, Inc.*, 50 F.T.C. 555, 572 (1953). We stated that there must be a case-by-case examination of all relevant factors in order to ascertain the potential economic consequences of the challenged merger. In Section 7 cases decided since that decision the courts have examined a wide range of market factors in considerable detail and have avoided *per se* rulings. *American Crystal Sugar Co.* v. *The Cuban-American Sugar Co.*, 259 F. 2d 524 (2d Cir. 1958); *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958); *United States* v. *Brown Shoe Co.*, 179 F. Supp. 721 (E.D.Mo. 1959).

The Family Flour Market in the Southeast

One of the appropriate markets for determining the effect of the Ballard acquisition is the family flour market in the Southeast.

There were a considerable number of companies in the Southeast engaged in the milling and sale of family flour during the period that concerns us. A Commission survey of milling companies having a capacity of over 400 cwts. identified 124 companies making deliveries in the Southeast in one of the three years surveyed—1952, 1954 or 1956. It must be noted that many of these mills were not significant competitors. Most were very small and practically unknown outside of the local territories. Only 21 of the companies surveyed had as much as 1% of all the flour deliveries reported in 1952, and these 21 accounted for more than 70% of the total deliveries in the Southeast for that year.

As found by the Commission's family flour survey, the larger companies in the Southeast and their market shares were as follows:

Company	Percent of survey		
	1952	1954	1956
Pillsbury Mills, Inc. (including Ballard)	9.39	9.61	11.02
General Mills, Inc.	9.57	9.29	9.86
Colorado Milling & Elevator Co.	7.32	6.75	6.00
Dixie-Portland Flour Co.	5.11	5.12	5.24
Martha White Mills	4.96	3.96	5.38
General Foods Corp.	3.94	3.73	2.77
J. Allen Smith & Co.	3.58	3.98	4.02
International Milling Co.	3.56	3.45	4.31
Yukon Mill & Grain Co.	3.47	3.28	1.86

The other companies among the first 21 had varying smaller percentages of the market.

The estimates contained in the Mintener letters give an indication of the market positions of the leading competitors in the family flour market in the Southeast in 1949–50, prior to the Ballard Acquisition:

Company	*Share of Market*
1. General Mills	9.05
2. Dixie-Portland Flour Mills	6.25
3. Ballard and Ballard	4.65
4. Cohen Williams [Martha White]	3.75
5. Pillsbury Mills	3.66

The extent of the direct competition which existed between Ballard and Pillsbury prior to the merger is best illustrated by a comparison of sales of the two companies in Ballard's warehouse areas:

Sales in cwts. between July 1, 1950 and May 31, 1951

Ballard warehouse area headquarters	*Pillsbury's Best*	*Ballard Obelisk*
Atlanta, Ga	6, 435	55, 669
Augusta, Ga	9, 153	27, 478
Birmingham, Ala	13, 510	51, 768
Bluefield, W. Va	39, 531	8, 329
Brookneal, Va	6, 142	1, 775
Charleston, S.C	10, 662	31, 041
Chattanooga, Tenn	1, 800	28, 432
Greenville, S.C	16, 140	8, 583
Gulfport, Miss	3, 871	28, 751
Jackson, Miss	3, 454	10, 812
Jacksonville, Fla	63, 927	53, 474
Louisville, Ky	10, 015	92, 229
Memphis, Tenn	30, 180	19, 742
Mobile, Ala	2, 144	46, 989
Montgomery, Ala	5, 482	30, 235
Nashville, Tenn	1, 543	2, 608
New Orleans, La	7, 025	61, 658
Norfolk, Va	104, 296	44, 114
Orlando, Fla	30, 866	11, 985
Raleigh, N.C	23, 681	17, 041
Richmond, Va	107, 520	6, 420
Savannah, Ga	3, 121	35, 381
Tampa, Fla	182, 176	24, 517
Thomasville, Ga	5, 731	24, 096
Wilmington, N.C	2, 174	7, 264
Winston-Salem, N.C	11, 563	30, 182
Unallocable	100, 890	---------
Mill Accounts	--------	56, 987
Total	803, 032	817, 560

Ballard was an old established firm engaged in business throughout the Southeastern states. It was highly diversified. Ballard competed with Pillsbury in a broad line of milling products. It produced and sold family flour, bakery flour, flour-base home mixes, formula feeds and other products. It maintained warehouses for the distribution of its own products and a variety of other products. Ballard was a competitor with aggressive management. It pioneered in the packaging of family flour in 2 and 5 pound boxes instead of sacks. It had been in the field of prepared dough products since 1931 with its "Oven-Ready Biscuits." Ballard's brands were well known and had high acceptance over the Southeast. Its "Obelisk" brand of family flour was a premium product and one of the important brands in the market. It outsold even "Pillsbury's Best."

Ballard was one of the few regional companies in the Southeast in a position to compete effectively with such large nationwide distributors as Pillsbury and General Mills, especially in the urban centers where premium brands dominated sales. The few other regional companies of significant size having comparable premium flours either did not sell widely in the market or they emphasized sales in rural areas and thus were not generally as competitive in the cities as Ballard. J. Allen Smith's White Lily brand was sold in larger cities, but it was important mainly in a few centers such as Knoxville, Tennessee, and Atlanta, Georgia. Colorado Milling & Elevator Co. sold its premium family flours throughout the Southeast, but only in rural areas and to the large-bag trade. Dixie Portland Flour Co. sold many brands of premium flour throughout the market as exclusive brands, but mostly to rural trade. Martha White Mills' premium flour was sold in several urban markets but its flours were sold principally to the rural trade. International Milling Company sold Robin Hood and other premium flours in the Southeast, but these brands were more competitive in the rural areas than they were in the cities.

It is clear, therefore, that the acquisition of Ballard removed an important and effective competitor from the Southeastern market.

As for Pillsbury, the acquisition materially and significantly added to its competitive strength. Pillsbury is a substantial company in the milling industry. Bureau of Census figures show that it had in excess of 9% of flour production in the United States in the fiscal year ending May 31, 1951. Combining its strength in family flour sales in the Southeast with that of Ballard gave Pillsbury a position in the whole market exceeding even that of General Mills and put it in first place in this market. The Ballard acquisition added to or supplemented in many ways the competitive stature of Pillsbury in the Southeast, greatly increasing its importance in that market. The mill facilities of Ballard enabled Pillsbury to meet peculiar requirements for family flour products in the Southeast with greater ease. This acquisition gave Pillsbury a broader sales base and thus justified more intensive sales promotions in the area. It permitted Pillsbury to expand its family flour business in a territory in which it had not been so strong as in other sections of the country.

Respondent, therefore, by the Ballard merger, has substantially increased its position in the Southeastern area and has materially furthered concentration in that market. In 1956, Pillsbury and General Mills together had more than 20% of the sales of family flour in the Southeast.

This increase in concentration must be viewed from a perspective that envisions the history of mergers in the industry and the trend to fewer, larger firms. *United States* v. *Bethlehem Steel Corp.*, *supra; United States* v. *Brown Shoe Co.*, *supra.* Census statistics shows a decline in the number of establishments in the United States engaged in the milling of flour and meal, from 11,601 in 1909 to 803 in 1954. There has been a definite concentration in the larger concerns. In about 1947 the four largest milling companies in the United States controlled about 23% of the total milling capacity; in 1952 the four largest had about 28% of the capacity. In 1947 the four largest companies accounted for 29% of the total value of the shipments of flour and meal; in 1954 the shipments of the four largest companies represented 40% of the total. A significant part of the concentration so shown has resulted from the merging of milling concerns.

A further factor in the concentration trend is the almost complete lack of new entries in the family flour business in the Southeast. There has been only one new flour mill built in the Southeast since 1940, the one constructed by Nebraska Consolidated Mills Co. of Omaha, Nebraska. In contrast, there have been many withdrawals. The evidence shows that a number of companies discontinued the milling, blending or selling of family flour since January 1, 1952.

Considering all these factors, we believe the examiner's findings that the Ballard acquisition may substantially lessen competition and tend to create a monopoly in the family flour market in the Southeast are supported by reliable, probative and substantial evidence.

The Wheat Flour Milling Products Industry in the Southeast

The acquisition of Ballard by Pillsbury removed one of the foremost competitors in the wheat flour milling products industry in the Southeast. Ballard's effectiveness as a competitor cannot be tested solely on the basis of its performance in the various sepaarte product markets in which it was engaged. Ballard was an effective competitor in significant part because it was widely engaged in the wheat flour milling field. This diversity contributed to Ballard's stature as an important and substantial competitor. The evidence in this record showing the trend toward concentration in the flour milling field, the great decrease in the number of wheat flour mills over the years, the increase in the control of milling capacity by a few large firms, and the enhanced position which Pillsbury obtained in the Southeast as a result of the Ballard acquisition, relates as much to the general flour milling field as it does to the family flour line of commerce. We conclude that the acquisition of Ballard may substantially lessen competition and tend to create a monopoly in the wheat flour milling products industry in the Southeast.

The Flour-Base Home Mix Markets

The nationwide market for flour-base home mixes is a proper arena for testing the competitive effects of the Duff acquisition. Both the Duff and Ballard acquisitions must be examined for effects upon the Southeastern flour-base home mix market. The relevant product line includes cake mixes, pie crust mixes and hot roll mixes, among other prepared home mixes. Respondent apparently does not challenge this definition of the relevant product line; rather it asserts that the examiner failed to apply the definition and erroneously premised his findings of anticompetitive effects in these markets upon a view of the cake mixes segment of the markets in isolation.

The evidence on cake mixes is only a part of the evidence relied upon by the examiner in framing his findings relating to these markets. Moreover, the record shows that cake mix is a significant and substantial part of the flour-base home mix business, if not the leading item in the field. A demonstration of adverse competitive effects in this portion of the mix market clearly must be accorded great weight in the determination of competitive effects upon the market as a whole. The impact of a merger upon competition in a multi-product line of commerce may not always be evenly distributed throughout the line. In Section 7 cases the determination looks to the future. If there has been a greater impact in some segments of the product line than in others those segments may well furnish a portent of the probable course of events in the whole industry. We think that the examiner correctly considered the cake mix evidence.

The market for flour-base home mixes is of comparatively recent origin. Mixes of this type, which are a blend of flour, shortening, sugar and other ingredients, were introduced in the 1930's. The manufacturers of "Duff's" mixes was one of the first companies in the field. However, it was not until after World War II that prepared mixes gained widespread public acceptance. By 1954 deliveries of cake mixes alone amounted to over four and one-half million hundredweights annually.

General Mills and Pillsbury were among the companies which early expanded into this new prepared mix market. Respondent's vice president, Samuel Gale, testified that these two companies and General Foods Corporation are the principal marketers of cake mixes throughout the country. Pillsbury is the leader in the mix industry in terms of packages sold, according to the testimony of Paul Gerot, respondent's director and president.

The Commission's cake mix survey shows the relative positions of leading companies in the cake mix field for 1952 and 1954:

Manufacturer	Percent of U.S. total deliveries		Percent of total deliveries in Southeast	
	1952	1954	1952	1954
Pillsbury	31.06	31.26	35.43	32.31
General Mills, Inc.	20.74	34.94	15.65	32.39
General Foods Corp.	13.69	9.82	16.48	11.72
Hills Bros. Co.	7.69	3.57	15.62	4.03
Nebraska Consolidated Mills Co.	6.77	12.34	5.07	7.26

Other companies such as Cinch Products, Inc., Quaker Oats Company and Kitchen Art Foods, Inc., had varying smaller percentages of the geographical markets.

The estimates contained in respondent's correspondence to the Commission (The Mintener Letters) disclose the approximate market positions of certain leading competitors in the mix field in about 1949–50:

Company	Percent of sales in United States	Percent of sales in Southeast
General Mills	21.29	10.5
Pillsbury	15.97	22.7
Quaker Oats	13.88	13.5
General Foods	6.48	10.2
American Home Foods (Duff)	5.93	10.2
Hills Bros. Co.	4.04	4.5
Flake Products Co.	2.41	1.4
Russel-Miller	1.98	.6
Sunnyfield (A & P Tea Co.)	1.96	1.7
Red-ee Foods, Inc.	1.79	
Albers Bros. Milling Co.	1.72	
Ballard and Ballard	1.13	12.0

The listings include other companies with varying smaller percentages of the geographical markets.

Mr. Gerot, director and president of Pillsbury, testified that Duff was in 6th to 8th place in the national mix market. Ballard, although not large in the sale of mixes in the national market, was an important factor in the Southeast.

The significance of the Duff acquisition cannot be measured by statistics alone. Duff was one of the oldest brands in the business. It had a recognized, well-established label with good consumer acceptance throughout the country. Duff was a highly effective competitor in a number of ways. It carried a full line of products in cake mixes and other flour-base mixes. It produced a variety of cake mixes including some that even Pillsbury did not make until after it acquired Duff. Duff products were distributed through the nationwide sales organization of American Home Foods. The line was sold by American's sales force of approximately 400 salesmen to chains, wholesale accounts and other outlets. Stocks of Duff mixes were maintained in the warehouse facilities of American Home Foods at various locations. Duff had modern production facilities, especially in its new Hamilton, Ohio, plant. The total dollar volume of Duff mix sales in 1951 was $6,828,373. All of these considerations contribute to the conclusion that Duff was a well established and substantial competitor.

The acquisition of Duff by Pillsbury removed an effective competitor from an industry in which sales were already concentrated in a few leading companies. This acquisition greatly enhanced Pillsbury's standing in the market. It gave Pillsbury a wider market, access to formulae and procedures which Duff possessed and, most important, modern production facilities. Utilizing these new facilities, Pillsbury was able to immediately expand its operations in the flour-base home mixes markets.

The result was increased concentration in the mix industry. Pillsbury was one of the two top companies which together in 1954 controlled about 66% of the cake mix business in the United States and 64% of that business in the Southeast. The acquisition of Duff further accentuated this accumulation of competitive strength in the hands of the largest companies in the industry.

Pillsbury competed in the sale of flour-base home mixes with both Ballard and Duff in the Southeast. Duff was an effective competitor in this area just as it was an effective competitor nationally. The Southeast was an important market for Duff. As for Ballard, its sales of 80,000 hundredweights of mixes in the 1949–50 period prior to its acquisition were more than one-half of Pillsbury's sales of 151,000 hundredweights at that time in the Southeast.

The acquisition of Ballard and Duff had the same general effects on the mix market in the Southeast as the acquisition of Duff had on the mix market in the United States; if anything the effects were more serious. Respondent eliminated two effective and substantial competitors in this area. Its position as one of the major competitors in the Southeast was strengthened and improved. Concentration in this market was substantially increased, with the probable result of a serious detrimental effect on competition.

The record demonstrates that the effect of the Duff and the Ballard acquisitions may be substantially to lessen competition and tend to create a monopoly in the relevant flour-base home mix markets.

The Bakery Flour and Formula Feed Markets

The examiner concluded that the evidence of record did not warrant a finding that there was a probability that the Ballard acquisition would cause competitive injury in the bakery flour market in the Southeast and the formula feed market in the Southeast. Since we affirm the examiner's findings of probable competitive injury in the markets heretofore discussed and since these findings are sufficient to warrant a conclusion that the Ballard acquisition violated amended Section 7, we deem it unnecessary to assess the propriety of the examiner's findings as to these markets.

Ballard's Financial Condition

Respondent vigorously contends that Ballard was a "failing firm," and, therefore, that its acquisition by Pillsbury was not a violation of Section 7. Respondent also contends that the examiner erred in rejecting certain evidence of trends in Ballard's financial condition.

In passing upon the evidentiary issue we note that the financial condition of Ballard has been developed in this record in extensive detail. We note also that the vast bulk of the rejected testimony was not offered to alter or extend the objective record facts of financial condition (e.g., profit and loss history, total investment, net worth, current assets and current liabilities), but to interpret those facts or to project trends from them. Opinions and interpretations of this sort can become cumulative and repetitive at some point. The examiner must be allowed some discretion to prevent unnecessary proliferation. The respondent has failed to demonstrate that the examiner abused his discretion in excluding further evidence on this question.

Respondent relies primarily upon *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291 (1930), to support its failing company position. Because of the central importance of that single precedent we must examine the structure of the Court's opinion in some detail. In reviewing a Commission finding that International's acquisition of the capital stock of the McElwain Company violated old Section 7, the Court first held that the Commission's conclusion "to the effect that the acquisition of the capital stock in question would probably result in a substantial lessening of competition must fail for lack of a necessary basis upon which to rest." 280 U.S. at 299. The Court then reviewed the financial condition of the McElwain Company and noted the loss of $6,000,000 in the year prior to acquisition and that within a year a surplus of about $4,000,000 was not only exhausted but a deficit of over $4,000,000 had accrued. The company owed large sums, new orders were not coming in, and its factories were producing at a low percentage of capacity. The company could no longer pay its debts as they became due. Its next balance sheet would disclose a condition of insolvency and bring the company to the point of involuntary liquidation under the applicable Massachusetts statute. Dividends on the second preferred and common stock had been discontinued, and the first preferred stockholders had received a notice of imminent discontinuance. During the period of McElwain's difficulties, International was operating profitably and expanding rapidly. International was the only prospective purchaser available. After reciting these facts the Court then framed this alternative holding:

> In the light of the case thus disclosed of a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (*there being no other prospective purchaser*), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act. [280 U.S. at 302–303. Emphasis supplied.]

Justices Stone, Holmes and Brandeis dissented. The dissenting opinion contained this statement: "Nor am I able to say that the McElwain Company, for the stock of which petitioner gave its own stock having a market value of $9,460,000, was then in such financial straits as to preclude the reasonable inference by the Commission that its business, conducted either through a receivership or a reorganized company, would probably continue to compete with that of petitioner." 288 U.S. at 306.

Any resemblance between the financial condition of Ballard at the time of acquisition and the financial position of the McElwain Company at the time of acquisition is so remote as to be well-nigh indiscernible. Ballard, although apparently under heavy financial obligation, was a profitable going concern. Ballard was insolvent neither in the equitable or bankruptcy sense. It was rated a prime credit risk and it was far removed from the brink of involuntary liquidation. It was operating profitably at the time of sale and it had earned a net profit in every year from 1940 to the time of sale. Ballard's total dollar sales rose from about $20,000,000 for the year ending June 30, 1945 to nearly $33,000,000 for the 11 months ending May 31, 1951. Earnings per dollar of sales were comparable with those of Pillsbury. Ballard's mills were operating at a high percentage of capacity. And unlike the situation at the time McElwain was acquired by International Shoe, another offer to purchase Ballard was outstanding at the time it was acquired by Pillsbury.

It is obvious, then, that the financial condition of Ballard at the time of acquisition cannot be equated with the condition of the

McElwain Company at the time of acquisition. But respondent has not anchored its failing firm defense solely on the then-current condition of Ballard. It has introduced a volume of evidence purporting to show adverse pressures on Ballard's financial position. This evidence tends to demonstrate that due to an extensive post-war expansion program Ballard needed additional working capital at the time of acquisition. A portion of this evidence plots Ballard's ratio of current assets to current liabilities, its ratio of net worth to total debt, and its net earnings and profit per dollar of sales over the five year period immediately preceding the merger. The plots for each of these factors generally demonstrate that, after a sharp advance in 1947–49, there was a decline in each of these measurements of financial condition in 1949–51. Respondent then argues that if this downward trend had continued and if the necessity for acquiring additional working capital was not obviated, then Ballard would have failed in the near future. Thus, respondent's "failing firm" position cannot rest upon the holding in *International Shoe* alone; the doctrine of that case must be extended radically if it is to cover the position of respondent. This would be so even if, as respondent contends, the *International Shoe* case establishes an absolute defense in Section 7 cases, rather than merely establishing imminent insolvency as one of the relevant factors in assessing competitive effect. Cf. Connor, *Section 7 of the Clayton Act: The "Failing Company" Myth*, 49 Georgetown L.J. 84 (1960).

We are not disposed to extend the rationale of *International Shoe* beyond the ambit of its facts and holding. Respondent states that the test of *International Shoe* is satisfied by proof of the probability of insolvency or bankruptcy. But the opinion in that case clearly states that the test is whether "a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave possibility of a business failure." 280 U.S. at 302. We are not persuaded that the Court's use of the word "grave" was mere surplusage, especially when it included a reference to the facts of the McElwain Company's position in this very sentence. Respondent refers us to the legislative history of the 1950 amendment. See H.R. Rep. No. 1191, 81st Cong., 1st Sess., (1949); Sen. Rep. No. 1775, 81st Cong., 2d Sess., (1950). But we find no Congressional intent in that history or in the text of the amendment to expand the *International Shoe* doctrine. Even if we follow all the signs set out by respondent, we see, at most, a profitable enterprise under some financial pressure. There was no "grave probability of a business failure."

Moreover, the Court placed a qualification on the *International Shoe* test. The Court noted that there was "no other prospective purchaser" available to salvage McElwain's going concern value in its statement of the holding. Here, Ballard had received three offers of purchase in the five years preceding the merger and one offer was pending at the time of the Pillsbury acquisition.

We hold that Ballard was not a failing firm within the meaning of the *International Shoe* case at the time of acquisition.

Due Process Questions

Respondent asserts that after the close of the hearings counsel supporting the complaint submitted so-called *ex parte* material to the examiner and that this action deprived respondent of its right to due process. This seriousness of this charge demands that we examine the challenged action with great care.

At the conclusion of the testimony in this case, the examiner set a date (July 15, 1958) for the filing of proposed findings by counsel for both sides. In the proposed findings submitted by counsel supporting the complaint on that date there were a number of blank spaces where there were references to delivery figures contained in an exhibit received in evidence *in camera*. Evidently counsel supporting the complaint was not certain how reference was to be made to the *in camera* evidence. Later, apparently for the examiner's convenience, he submitted a copy of his proposed findings with the blanks filled in. Counsel supporting the complaint had duly furnished a copy of his original proposed findings to respondent, but there was no simultaneous service upon respondent at the time of his second submission, although respondent thereafter received the information.

It is important to note that the material submitted was not "*ex parte* material," if that term means "extra-record material." The figures furnished the examiner were all matters of record, except that several of them proved to be slightly in error. Thus we are not faced with an attempt to advise the examiner as to matters not in evidence or an attempt to exert naked influence. The mistake of counsel supporting the complaint's conduct was his failure promptly to transmit a copy of his submission to counsel for respondent. This omission while unfortunate and not condoned by the Commission has not been shown to have deprived respondent of due process. Counsel for Pillsbury were furnished a copy of the submission and had sufficient opportunity to be heard on all issues surrounding the information supplied since the initial decision was not filed until long after the incident.

Respondent excepts to what it terms an exchange of *ex parte* communications between the Commission and Dr. Kottke, an employee of the Commission and a witness in this proceeding. During the course of the hearings before the examiner Dr. Kottke made a request to the Commission for permission to release certain files to the respondent for use in cross-examination. The written communications between Dr. Kottke and the Commission were concerned solely with this request. The Commission advised Dr. Kottke that it had no objection to the production of files for the purpose indicated but without prejudice to any rights available to counsel. We do not see any impropriety in this request to the Commission for permission to release confidential files, nor do we think that any right of respondent was violated.

We have not overlooked respondent's assertions that the examiner's actions during the course of the hearings amounted to a denial of due process. These exceptions recite rulings limiting the scope of issues, rulings on the relevancy of inquiries and rulings on the admissibility of evidence. In a marathon proceeding the examiner must impose some limits and establish some order. We have examined each of the rulings challenged by respondent, and we are satisfied that the examiner did not transgress any substantial right of the respondent.

THE ORDER

Both counsel supporting the complaint and respondent appeal from the scope or the form of the order contained in the initial decision.

Respondent challenges the provisions of the order which require divestiture "in such a manner as to restore [each company] as a going concern." Respondent's contention is that the Commission cannot exercise the powers of a court of equity in Section 7 proceedings and, therefore, cannot compel the restoration of an acquired firm. *Farm Journal, Inc.*, 53 F.T.C. 26 (1956), is cited in support of this contention, but that proceeding is distinguishable on its facts. There the impossibility of any effective restoration of the competing farm magazine was apparent at the time the order was entered.

Respondent's position is that the order can go no further than to require respondent to divest itself in good faith of assets acquired, and still held, in violation of Section 7; that the Commission cannot require respondent to divest itself of post-acquisition additions to the property acquired, to recapture acquired assets it has sold, to "restore" or organize "going concerns" for the purpose of purchasing assets to be divested, or prohibit respondent from selling such assets to any particular purchaser not connected with respondent.

This order is similar in many respects to orders previously entered by the Commission in other Section 7 cases. *Crown Zellerbach*

Corp., 54 F.T.C. 769 (1957); *Reynolds Metals Co.*, Docket 7009 (January 21, 1960); *A. G. Spalding & Bros., Inc.*, Docket 6478 (March 30, 1960). We believe that an order requiring the restoration of the acquired firms as competitors is fully within the Commission's authority and is justified here. Piecemeal divestiture will not correct the harm which has been rendered competition.

However, the scope of the initial order has not been justified to the extent that it may require the divestiture of all assets acquired subsequent to the mergers without regard to the necessity of divesting those assets in order to achieve restoration of the acquired firms. Respondent's appeal on this point is granted.

We observe that the order in the initial decision appears to require no more than the restoration of "going concerns." In each acquisition challenged here, the probable harm to competition is related significantly to the fact that substantial and effective competitors have been eliminated. Therefore, the order should provide for the restoration not only of going concerns but companies which will be substantial and effective competitors.

Since the initial order requires the submission of a plan setting forth the details of the method of compliance, it, in effect, provides respondent with an opportunity to be heard on the way in which compliance is to be achieved. The alternatives to an order of this character are: (a) an order which would defer any ruling on the divestiture, if any, to be required and expressly provide for further hearings on this question, a procedure followed by the court in *United States* v. *Brown Shoe Co., supra*; and (b) an order containing the final detailed requirements for divestiture, including the method of compliance. We have considered and rejected both of these alternatives. The first entails a prolonged delay in correcting an established violation of law. The second does not appear to be practical because of the difficulty of determining at this time the course of action which will provide the most effective relief, and is not wholly fair to the respondent since it would have no opportunity to present objections and recommendations. The respondent may recommend an approach different from any now contemplated that would effectively restore the competitive situation existing at the time of the acquisition and at the same time allow respondent to retain its legitimate growth. We do not wish to preclude this possibility.

The appeal of counsel supporting the complaint raises two issues relating to the scope of the order.

A challenge is addressed to the provision which excludes from the required divestiture of Ballard the "assets, properties, rights or privileges, tangible or intangible, including plants, machinery, equipment, trade names, trademarks, and good will of the said Ballard and Ballard Company pertaining to the manufacture and sale of formula feeds, or the manufacture and sale of Oven-Ready biscuits." The examiner apparently excepted these products from the order of divestiture because he had specifically found no probability of competitive injury as to formula feeds and because of his conclusion that no issue was raised in the complaint as to refrigerated dough products.

Section 7 prohibits in certain instances the acquisition of stock or assets "where *in any line of commerce in any section of the country*, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." (Emphasis supplied.) The statute is violated if the forbidden effect or tendency is produced in one of many relevant lines of commerce. *Van Camp & Sons Co.* v. *American Can Co.*, 278 U.S. 245, 253 (1929); *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957). The remedy is divestiture of all the stock and assets involved in the acquisition. Even if this issue were not governed by precedent, the remedy here would be complete divestiture because we have found a violation of the statute in the wheat flour milling products line of commerce, which includes all of the products manufactured by Ballard and Duff.

In *Erie Sand & Gravel Co.*, Docket 6670 (October 26, 1959), an equivalent to a property acquired was not ordered divested, but this involved only the use of an allowable discretion in the fashioning of an appropriate remedy. See *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 612–613 (1946); *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 (1952); *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419 (1957). The propriety of an exercise of discretion in a similar manner has not been demonstrated in this proceeding. We hold that the order of divestiture incorrectly excluded, as to the Ballard merger, the assets relating to Oven-Ready Biscuits and formula feeds. The order will be modified accordingly.

The second point raised by counsel supporting the complaint concerns the failure of the hearing examiner to grant their request for an order prohibiting respondent from future violations of Section 7. We rejected such a provision in *Reynolds Metals Co.*, *supra*. Counsel has not justified the need for such a prohibition here. Therefore, we do not reach the question of whether such a requirement properly may be included in the order in a Section 7 proceeding.

CONCLUSION

Other exceptions of respondent and counsel supporting the complaint have been considered and rejected. The appeal of respondent and the appeal of counsel supporting the complaint are granted in part and denied in part. The initial decision, to the extent that it is contrary to the views expressed in this opinion, is modified to conform with such views. An appropriate order will be entered.

Commissioner Mills did not participate in the decision of this matter for the reason that he did not hear oral argument herein.

FINAL ORDER

This matter having come on to be heard upon the cross-appeals of respondent and counsel in support of the complaint from the hearing examiner's initial decision filed February 19, 1959, and upon the briefs and oral argument of counsel in support thereof and in opposition thereto; and

The Commission having rendered its decision denying in part and granting in part the appeal of respondent and the appeal of counsel in support of the complaint, and having directed that the order contained in the initial decision be modified in accordance with its views expressed in the opinion:

It is ordered, That the order contained in the initial decision be, and it hereby is, modified to read as follows:

It is ordered, That respondent The Pillsbury Company (formerly Pillsbury Mills, Inc.), a corporation, and its subsidiaries, officers, directors, agents, representatives and employees, shall divest itself absolutely, in good faith, of all assets, properties, rights and privileges, tangible or intangible, including but not limited to all plants, machinery, equipment, trade names, trade-marks and good will acquired by said respondent as a result of the acquisition of the assets of the Ballard and Ballard Company, together with so much of the plants, machinery, buildings, improvements, equipment and other property of whatever description that has been added to them, as may be necessary to restore a substantial, going concern and an effective competitor in all the lines of commerce in which the former Ballard and Ballard Company was engaged.

It is further ordered, That respondent, The Pillsbury Company, a corporation, and its subsidiaries, officers, directors, agents, representatives and employees, shall divest itself absolutely, in good faith, of all assets, properties, rights and privileges, tangible or intangible, including but not limited to all plants, machinery, equipment, trade names, trade-marks and good will acquired by said

Pillsbury as a result of the acquisition of the assets of the Duff Baking Mix Division of American Home Foods, Inc. (a subsidiary of American Home Products Corporation), together with so much of the plants, machinery, buildings, improvements, equipment and other property of whatever description that has been added to them as may be necessary to restore a substantial, going concern and an effective competitor in all the lines of commerce in which the former said Duff Baking Mix Division was engaged.

It is further ordered, That in such divestitures hereinbefore mentioned, none of the said assets, properties, rights and privileges, tanglible or intangible, shall be sold or transferred, directly or indirectly, to anyone who, at the time of the divestiture, is a stockholder, officer, director, employee or agent of, or otherwise, directly or indirectly, connected with, or under the control of, respondent or any of respondent's subsidiaries or affiliated companies.

It is further ordered, That in such divestitures hereinbefore mentioned, none of said assets, properties, rights or privileges, tangible or intangible, shall be sold or transferred, directly or indirectly, to any corporation, or to anyone, who at the time of the divestiture, is an officer, director, employee or agent of such corporation, which is a substantial factor in any of the lines of commerce in this proceeding.

It is further ordered, That respondent The Pillsbury Company shall, within sixty (60) days from the date of the service upon it of this order, submit in writing for the consideration and approval of the Federal Trade Commission, its plan for carrying out the provisions of this order, including the date within which compliance can be effected.

It is further ordered, That the findings, conclusions and order contained in the initial decision, as modified, be, and they hereby are, adopted as those of the Commission.

Commissioner Mills not participating for the reason that he did not hear oral argument herein.

IN THE MATTER OF

SCOTT PAPER COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 6559. Complaint, June 1, 1956—Decision, Dec. 16, 1960

Order requiring the nation's leading seller of sanitary paper products—including toilet and facial tissue, paper napkins and towels and household