Complaints

IN THE MATTERS OF

CARNATION COMPANY ET AL., DOCKET 6172

THE BORDEN COMPANY ET AL., DOCKET 6173

BEATRICE FOODS COMPANY (DELAWARE) ET AL., DOCKET 6174

NATIONAL DAIRY PRODUCTS CORPORATION ET AL., DOCKET 6175

PET MILK COMPANY ET AL., DOCKET 6176

FAIRMONT FOODS COMPANY ET AL., DOCKET 6177

ARDEN FARMS CO. ET AL., DOCKET 6178

FOREMOST DAIRIES, INC., ETC., DOCKET 6179

H. P. HOOD & SONS, INC., DOCKET 6425

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

*Amended Complaints, Sept. 12, 1955 *—Decisions, May 23, 1962*

Orders dismissing, for failure of proof, complaints charging major ice cream manufacturers with unlawfully lessening competition by granting such inducements to retail customers as providing refrigeration cabinets and other equipment, and servicing the equipment, and giving discounts, rebates, and allowances; but including warning that the Commission would continue close scrutiny of the granting of loans to retailers on the condition that the recipient deal exclusively with the giver.

AMENDED AND SUPPLEMENTAL COMPLAINTS

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the corporations listed above in the caption hereof and more particularly described and referred to hereinafter as respondents have violated the provisions of Section 5 of the said Act (U.S.C. Title 15, Sec. 45), and it appearing to the Commission that proceedings by it in respect thereof would be

*Similar amended and supplemental complaints are combined along with the original complaint in docket 6425, issued October 3, 1955, which was substantially identical with the amended complaints.

in the public interest, hereby issues its amended and supplemental complaints, stating its charges in that respect as follows:

PARAGRAPH 1. Each of the following named respondents is a corporation organized, existing, and doing business under the laws of the State and with its principal office and place of business located as hereinafter set forth:

CARNATION CO. ET AL., DOCKET NO. 6172

Name	State of incorporation	Principal office and place of business
Carnation Company	Delaware	5045 Wilshire Boulevard, Los Angeles, California.
Carnation Co. of Washington	Washington	W. 411 Cataldo Avenue, Spokane, Washington.
Carnation Co. of Texas	Texas	326 Ohio Street, Wichita Falls, Texas.
Carnation Co. of Oklahoma	Oklahoma	115 No. Cheyenne Street, Tulsa, Oklahoma.
Damascus Milk Co.	Oregon	3342 S. E. Morrison St., Portland, Oregon.
Carnaco Equipment Co.	Delaware	5045 Wilshire Boulevard, Los Angeles, California.

Respondent, Carnaco Equipment Co., is hereinafter referred to as the "Equipment Company." Respondent Carnation Company is hereinafter referred to as "Carnation." The other above named respondents, when referred to collectively hereinafter, will be referred to as the "Carnation Companies."

Carnation was founded by the late Elbridge A. Stuart at Kent, Washington, on September 6, 1899. Its growth was rapid and after various organizational changes it was incorporated under the laws of the State of Maine as Carnation Milk Products Co., and, on July 1, 1920, respondent Carnation was chartered under the laws of the State of Delaware to take over the business of the aforesaid Maine Corporation. During the history of its growth Carnation has acquired a number of independent frozen products manufacturers. On November 1, 1929, the corporate name was changed to Carnation Company, the style now used.

Carnation owns the preferred stock and the stockholders of Carnation own the common stock of the Equipment Company, which was organized by Carnation in 1948 as a corporate device for use in connection with the purchase, sale, lease and loan of ice cream cabinets and other refrigeration equipment. The Equipment Company is operated, controlled and managed as a unit of Carnation's business, and has been and is used by Carnation for the purchase, sale, lease and loan in interstate commerce of such equipment.

Carnation operates its frozen products business directly and through the Carnation Companies, which it wholly owns and controls.

THE BORDEN CO. ET AL., DOCKET NO. 6173

Name	State of incorporation	Principal office and place of business
The Borden Company	New Jersey	350 Madison Avenue, New York 17, New York.
Fussell Ice Cream Company, Inc.	New York	350 Madison Avenue, New York 17, New York.
The Ricciardi Co., Inc.	New York	551 Waverly Avenue, Brooklyn 38, New York.

Respondent, The Borden Company, is hereinafter referred to as "Borden." The other above named respondents, when referred to collectively hereinafter, will be referred to as "Borden Companies."

Borden was founded by Mr. Gail Borden, now deceased, in 1857 in Burrville, Connecticut. This business founded by Mr. Borden in 1857 later became known as New York Condensed Milk Co., which was in turn succeeded on April 24, 1899, by Borden's Condensed Milk Company, organized and incorporated on that date under the laws of the State of New Jersey. The present corporate title was adopted in October, 1919.

Respondent, Fussell Ice Cream Company, Inc., was recently merged with its parent corporation, respondent Borden.

Borden operates its frozen products business directly and through the Borden Companies, and other wholly owned and controlled subsidiaries. During the history of its growth, Borden has acquired a number of independent frozen products manufacturers.

BEATRICE FOODS CO. ET AL., DOCKET NO. 6174

Name	State of incorporation	Principal office and place of business
Beatrice Foods Company	Delaware	120 S. LaSalle St., Chicago 6, Illinois.
Beatrice Foods Company	Ohio	943 Carr Street, Cincinnati, Ohio.
Meadow Gold Products Company	Delaware	120 So. LaSalle St., Chicago, Illinois.
Meadow Gold Dairies of California, Inc.	Delaware	442 So. Fair Oaks Ave., Pasadena, California.
Meadow Gold Products Corporation	New York	777 Kent Avenue, Brooklyn, New York.
Wright & Wagner Dairy Company	Wisconsin	525 Cross Street, Beloit, Wisconsin.
Meadow Gold Ice Cream Company	Maryland	1726 E. Pratt, Baltimore, Maryland.

Respondent, Beatrice Foods Company (Delaware), is sometimes hereinafter referred to as "Beatrice." The other named respondents when referred to collectively hereinafter, will be referred to as "Beatrice Companies." The Beatrice Companies are each wholly owned subsidiaries of Beatrice. This business originated in 1890 in Beatrice, Nebraska, as a partnership styled Haskell & Bosworth. In 1897 Beatrice was incorporated to succeed the partnership. In 1905 this corporation was succeeded by an Iowa corporation under the same name. Later, on November 20, 1924, Beatrice was incorporated under the laws of the State of Delaware, retaining the same name, Beatrice

Creamery Company. The present name, Beatrice Foods Company, was adopted on June 1, 1946.

The business of respondent Creameries of America, Inc., a Delaware Corporation, 727 W. 7th Street, Los Angeles, 17, California, was recently merged into the business of Beatrice. Likewise Beatrice has recently succeeded through merger and otherwise to a number of important frozen products businesses, among which are Louis Sherry, Inc., 30–30 Northern Blvd., Long Island City, New York, Russell Creamery, 1627 Broadway, Superior, Wisconsin, and Greenbrier Dairy Products Co., 704 Donnally St., Charleston, West Virginia. In addition, Beatrice, since its incorporation, has acquired a number of independent frozen products manufacturers.

Beatrice conducts and operates its business directly and through the said wholly owned subsidiaries, the Beatrice Companies, which are operated as divisions. There are extensive inter-company merchandise transactions between the parent, respondent Beatrice, and the Beatrice Companies, and among the Beatrice Companies themselves. Beatrice also makes loans and advances to the Beatrice Companies.

NATIONAL DAIRY PRODUCTS CORP. ET AL., DOCKET NO. 6175

Name	State of incorporation	Principal office and place of business
National Dairy Products Corporation	Delaware	260 Madison Avenue, New York, N.Y.
Ballard Ice Cream Co., Inc	Delaware	217 W. State Street, Huntington, Ind.
Breyer Ice Cream Co	Delaware	43d St. and Woodland Ave., Philadelphia, Pa.
Castles Ice Cream Co	New Jersey	444 Raymond Blvd., Newark, New Jersey.
Clover Farm Dairy Co	Tennessee	175 Walnut Street, Memphis, Tennessee.
Cloverland Dairy Products Corp	Delaware	3400 S. Carrollton Ave., New Orleans, La.
Cloverleaf Creameries, Inc	Delaware	Huntington, Indiana.
Consolidated Dairy Products Co., Inc	Delaware	11–50 44th Road, Long Island City, N.Y.
Detroit Creamery Co	Michigan	3333 Grand River Ave., Detroit, Mich.
Ewing-Von Allmen Dairy Co	Delaware	431 W. Oak Street, Louisville, Kentucky.
The Franklin Ice Cream Co	Delaware	1217 Harrison St., Kansas City, Mo.
Frechtling Dairy Co	Delaware	950 Kenyon Avenue, Cincinnati, Ohio.
General Ice Cream Corp	New York	101 Nott Terrace, Schenectady, N.Y.
The Harding Co	Missouri	715 So. 72nd St., Omaha, Nebraska.
Hydrox Corporation	Delaware	415 E. 24th St., Chicago, Ill.
Hydrox Ice Cream Company, Inc	New York	Van Dam St. and 47th Ave., Long Island City, N.Y.
Luick Ice Cream Co	Delaware	505 E. Capitol Drive, Milwaukee, Wisconsin.
Ohio Clover Leaf Dairy Co	Delaware	1820 Vermont Ave., Toledo, Ohio.
Rieck Ice Cream Co	Pennsylvania	4634 Browns Hill Road, Pittsburgh, Pa.
J. D. Roszell Co	Delaware	736 So. Washington, Peoria, Illinois.
St. Louis Dairy Co	Delaware	2001 Chestnut St., St. Louis, Mo.
The Sanitary Milk Co	Ohio	801 Cherry Ave., N.E., Canton, Ohio.
Southern Dairies, Inc	Delaware	500 Dalton Avenue, Charlotte, N.C.
Supplee-Wills-Jones Milk Co	Pennsylvania	15 So. 34th St., Philadelphia, Pa.
Telling Ice Cream Co	Delaware	3740 Carnegie Avenue, Cleveland, Ohio.
Union Ice Cream Co	Tennessee	1156–62 Broad St., Nashville, Tenn.
Youngstown Sanitary Milk Co	Delaware	715 Erie Street, Youngstown, Ohio.

Respondent National Dairy Products Corporation is sometimes hereinafter referred to as "National." The other named respondents, when referred to collectively hereinafter, will be referred to as "Na-

tional Companies." The National Companies are each wholly owned subsidiaries of National except in the case of Southern Dairies, Inc., of which National owns 98.05 per cent of the stock.

The business of respondent, Ballard Ice Cream Co., Inc., has recently been transferred to respondent Cloverleaf Creameries, Inc.

National was incorporated under the laws of the State of Delaware on December 8, 1923. Since then, it has acquired ownership of many dairy companies, including respondent National Companies, most of which had their inception prior to the date of incorporation of respondent National. Several of the National Companies have been in operation for fifty years or more. One has been operating for more than a century.

National conducts and operates its business through the said National Companies which are operated as divisions.

National maintains general control over each of the National Companies through approval or disapproval of budgets, the supplying of large capital expenditures, the approval or disapproval of the acquisition of property sites, the approval or disapproval of loans of money to dealers and in various other ways and means. For this purpose regular meetings of the board of directors and of an operating committee and executive committee are held.

PET MILK CO. ET AL., DOCKET NO. 6176

Name	State of incorporation	Principal office and place of business
Pet Milk Company	Delaware	1401 Arcade Building, St. Louis, Missouri.
Pet Dairy Products Company	Delaware	303 W. Walnut Street, Johnson City, Tenn.
Colville Ice Cream Company	Utah	159 W. First S., Salt Lake City, Utah.

Respondent, Pet Milk Company, is hereinafter referred to as "Pet." The other above-named respondents, when referred to collectively hereinafter, will be referred to as "Pet Companies."

Pet was incorporated under the laws of the State of Delaware on March 31, 1925, and acquired at that time all of the property, business and assets of an Illinois corporation of the same name which had succeeded by change of name on September 6, 1923, another Illinois corporation named Helvetia Milk Condensing Company, which was incorporated February 16, 1885, with a 20 year life.

Pet conducts and operates its business directly and through wholly-owned and controlled subsidiaries, including the Pet Companies. Pet controls and directs the activities of the Pet Companies through the use of common officers and through control of large capital ex-

penditures, acquisition of new facilities, loans of money for expenses and working capital, approval or disapproval of budgets submitted, and other general supervision.

Respondent, Pet Dairy Products Company, a wholly owned subsidiary of respondent Pet, was incorporated under the laws of the State of Delaware on April 16, 1952, succeeding to the business of various subsidiary corporations of respondent Pet as follows:

Meier Ice Cream Company which was incorporated under the laws of the State of Wisconsin in March 1927; Kellogg Ice Cream Company was incorporated under the laws of the State of Wisconsin in 1930 and was merged into Meier Ice Cream Company on June 15, 1948, and the name of Meier Ice Cream Company, the surviving corporation, was changed to Pet Ice Cream Company, still a Wisconsin corporation; the name of the Pet Ice Cream Company was changed to Pet Dairy Products Company on December 28, 1951; another corporation named Pet Dairy Products Company was incorporated under the laws of the State of Tennessee on July 11, 1929; on May 1, 1952, the business of the Tennessee corporation and the Wisconsin corporation was transferred to the Delaware corporation and the Delaware corporation was the only surviving corporation under the name Pet Dairy Products Company.

Respondent Colville Ice Cream Company, a wholly owned subsidiary of respondent Pet, is a corporation organized and existing under and by virtue of the laws of the State of Utah, having its principal office and place of business at 159 W. First S., Salt Lake City, Utah.

During the history of its growth Pet has acquired a number of independent frozen products manufacturers.

FAIRMONT FOODS CO. ET AL., DOCKET NO. 6177

Name	State of incorporation	Principal office and place of business
Fairmont Foods Company	Delaware	3201 Farnam Street, Omaha, Nebraska.
Fairmont Foods Co., Inc.	New York	197 Scott Street, Buffalo, New York.
Fairmont Foods Company of Wisconsin	Wisconsin	165 N. Broadway, Green Bay, Wisconsin.

Respondent Fairmont Foods Company is sometimes hereinafter referred to as "Fairmont." The other named respondents when referred to collectively hereinafter will sometimes be referred to as "Fairmont Companies."

The corporate history of Fairmont Foods Company is as follows: This business was originally established in 1834 when a Nebraska corporation was chartered at Fairmont, Nebraska, under the style of

Fairmont Creamery Company. On March 5, 1929, the business was incorporated under the laws of the State of Delaware as the Fairmont Creamery Co., with various wholly owned subsidiaries. In August 1945, Fairmont Creamery Co. acquired the assets of Imperial Ice Cream Co. of Parkersburg, West Virginia. On May 3, 1947, the articles of incorporation were amended to adopt the present name, Fairmont Foods Company.

Fairmont conducts and operates its business directly and through wholly owned and controlled subsidiaries, which are operated as divisions. The portion of Fairmont's business which is hereinafter described, is conducted and operated directly and through the Fairmont Companies. Fairmont controls and operates the activities of the Fairmont Companies through the use of common officers and through control of large capital expenditures, acquisition of new facilities, loans of money for expenses and working capital, approval or disapproval of budgets submitted and other general supervision.

Respondent, Fairmont Foods Co., Inc., was originally incorporated as Fairmont Creamery of New York in June 1912, under the laws of the State of New York. On May 6, 1947 its present name was adopted.

Respondent, Fairmont Foods Company of Wisconsin, was incorporated on March 4, 1915 under the name of Green Bay Cheese Company, Ltd., and was changed to Fairmont Creamery Company of Wisconsin on August 24, 1917, when the assets were acquired by the respondent. Later, on May 6, 1947, its present name was adopted. During the history of its growth respondent Fairmont has acquired a number of independent frozen products manufacturing firms.

ARDEN FARMS CO. ET AL., DOCKET NO. 6178

Name	State of incorporation	Principal office and place of business
Arden Farms Co.	Delaware	1900 W. Slauson Ave., Los Angeles 17, Calif.
Stokes Creamery Co.	Washington	1501— 4th Street, Seattle, Washington.
Equipment Enterprises, Inc.	California	1900 W. Slauson Ave., Los Angeles, Calif.
Melvern-Fussell Ice Cream Co. (formerly known as Fussell-Young Ice Cream Co.).	California	400 Calvert Avenue, Alexandria Virginia.
Kansas City Diced Cream Co.	California	325 E. 31st Street, Kansas City, Missouri
Camellia Diced Cream Co. (formerly known as Houston Diced Cream Co.).	California	2006 Westheimer St., Houston, Texas.

Respondent Arden Farms Company is sometimes hereinafter referred to as "Arden." The other named respondents, except Equipment Enterprises, Inc., when referred to collectively hereinafter, will be referred to as "Arden Companies." Equipment Enterprises, Inc., is hereinafter referred to as the "Equipment Company."

Arden was founded by the late Samuel H. Berch. Mr. Berch founded a company known as Velvet Ice Cream Company in Seattle, Washington, in 1919. This became the nucleus of respondent Arden, of which Mr. Berch was president since its inception in 1925.

Respondent Arden's business was incorporated under the laws of the State of Delaware on December 11, 1933, as Western Dairies, Inc. The present name, Arden Farms Company, was adopted through a merger of Western Dairies, Inc., and three companies known as Arden Farms Co. (formerly Western Products Company), Arden Farms, Inc. (formerly Western Dairy Products, Inc. and California Dairies, Inc.), and Arden Protected Milk Company (formerly California Cooperative Creamery Company).

Arden conducts and operates its business directly and through wholly owned and controlled subsidiaries and other subsidiaries in which it has majority ownership of the capital stock, all of which are operated as divisions. Respondents Stokes Creamery Company, Equipment Enterprises, Inc., Melvern-Fussell Ice Cream Co. (formerly known as Fussell-Young Ice Cream Co.) and Kansas City Diced Cream Co. are wholly owned. Respondent Camellia Diced Cream Co. (formerly known as Houston Diced Cream Co.) is 55 per cent owned by Arden. Respondent Arden has recently acquired the stock and assets of its subsidiary respondents, Stokes Creamery Company and Kansas City Diced Cream Co. During the past few years Arden has bought up and taken over the stock and assets of a number of important dairy products concerns.

FOREMOST DAIRIES, INC., ETC., DOCKET NO. 6179

Name	State of incorporation	Principal office and place of business
Foremost Dairies, Inc.	New York	2093 College Street, Jacksonville, Fla.
Phenix Dairy, Inc.	Texas	1220 South Street, Houston, Texas.
Tennessee Dairy, Inc.	Texas	216 N. Crowdus St., Dallas, Texas.
Tennessee Milk Company, Inc.	Texas	Odessa, Texas,
Southern Maid, Inc.	Virginia	Bristol, Virginia.
Welch Milk Company, Inc.	West Virginia	Welch, West Virginia.
Bridgeman-Russell Co., Inc.	Minnesota	110 W. Michigan, Duluth, Minnesota.

Respondent, Foremost Dairies, Inc., is sometimes hereinafter referred to as "Foremost." The other named respondents, when referred to collectively hereinafter, will be referred to as "Foremost Companies." Foremost conducts and operates its business directly and through wholly owned and controlled subsidiaries. Other wholly owned or controlled subsidiaries of Foremost engaged in the frozen products business, in commerce, as frozen products are hereinafter defined, are made respondents in this complaint.

Foremost is the result of mergers and acquisitions, including the following: A merger between Foremost Dairies, Inc., a Delaware corporation, and Maxson Food Systems, Inc., a New York corporation. Foremost Dairies, Inc., a Delaware corporation, was organized in 1931 and is the principal component of the present organization. Maxson Food Systems, Inc., was organized in 1945 to succeed the former Maxson Food Systems, which was a division of W. L. Maxson Corporation. The aforesaid merger was effective February 8, 1949. The name of the surviving corporation, Maxson Food Systems, Inc., was changed to Foremost Dairies, Inc., as of the date of the merger. A more recent merger was one in which respondent Golden State Company, Ltd., a Delaware corporation, 425 Battery Street, San Francisco, California, was merged into respondent Foremost, the agreement having been approved initially by the respective Boards of Directors on December 3, 1953 and ratified on February 25, 1954 by the respective stockholders, with the corporate name remaining as Foremost Dairies, Inc. The former business of Golden State Company, Ltd., has been continued by respondent Foremost under a division known as Golden State Division.

During the history of its growth, Foremost has acquired a number of independent frozen products manufacturers.

H. P. HOOD & SONS, INC., DOCKET 6425

Respondent H. P. Hood & Sons, Inc., sometimes hereinafter referred to as Hood, is a corporation, organized, existing and doing business under the laws of the State of Massachusetts, with its principal office and place of business located at 500 Rutherford Avenue, Charlestown, Mass.

The present Hood corporation was organized on February 2, 1920, at which time it acquired all of the assets and assumed all of the liabilities of H. P. Hood & Sons, a Maine corporation. Prior to the incorporation under Massachusetts law, the firm had functioned as an individual proprietorship and as a corporation in Massachusetts since 1846.

In addition to its plant at Charlestown, Massachusetts, respondent Hood manufactures its frozen products at plants located at Bangor, Maine; Portland, Maine: Saint Johnsbury, Vermont; Manchester, New Hampshire; Boston, Mass.; Springfield, Mass.; Providence, Rhode Island; New Haven, Connecticut, and Ravena, New York.

Apart from the above named manufacturing plants respondent has a number of branch sales offices where no manufacturing activity takes place. These sales offices operate as satellites of the branch manufacturing facilities. Respondent has branch sales offices located

in the following municipalities: Troy, New York; Houlton, Maine; Lewiston, Maine; Rutland, Vermont; Dover, New Hampshire; Concord, New Hampshire; Fall River, Mass.; Fitchburg, Mass.; Hyannis, Mass.; Northampton, Mass.; Quincy, Mass.; New Bedford, Mass.; Salem, Mass.; Springfield, Mass.; Taunton, Mass.; Lawrence, Mass.; Worcester, Mass.; Hartford, Conn., and Norwich, Conn. In addition to these sales offices respondent maintains two branch sales offices at the firm's headquarters in Charlestown, Mass. Apart from the absence of manufacturing activity in these branch sales offices, respondent operates them in the same manner as those offices where manufacturing is conducted except that rather than manufacturing some of their own needs, all frozen products sold by them are received from one or another of the manufacturing facilities.

Respondent sells its frozen products principally at wholesale to retailers and other handlers of same, such as drug, grocery and confectionery stores, restaurants, hotels and institutions. There are approximately 12,000 of these establishments purchasing ice cream from the various Hood facilities throughout New England. The number of customers served by the various sales offices varies from 123 served by Northampton to 1101 served by Boston West, the great concentration of customers being located within the large municipal centers through New England. Delivery to these retail customers by the Hood facilities is, in virtually all cases, by route trucks operating from a manufacturing plant or sales office, although in some instances customers in outlying areas are served by rail or independent contract carriers.

PAR. 2. Respondents are engaged in the business of producing, purchasing, processing, manufacturing, selling, and distributing dairy and related food products among which are ice cream, sherbets and other similar frozen dairy foods, hereinafter referred to as "frozen products". In carrying on their frozen products business respondents buy, sell, lease, and loan ice cream cabinets and other refrigeration equipment hereinafter referred to as "facilities".

Respondents sell their frozen products principally at wholesale to retailers and other handlers of same, such as drug, grocery and confectionery stores, restaurants, hotels, and institutions.

Because of the nature of frozen products it is necessary for such retailers and handlers to have a facility or facilities of some sort designed and manufactured for use in connection with the storage, display, and sale of them to the purchasing public.[1]

[1] Respondent Arden organized the Equipment Company as a corporate device for use in connection with the purchase, sale, lease, and loan of facilities. The Equipment Company is operated, controlled, and managed as a unit in Arden's business and has been and is used by Arden in the purchase, sale, lease, and loan in interstate commerce of facilities.

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Generally, retailers and other handlers of frozen products handle, store, and sell only one manufacturer's line of such products in their stores and places of business. Most retailers have limited floor space for such facilities in their places of business. The placement by an ice cream manufacturer of facilities on the premises of a retailer or handler and the performance of any of the other acts and practices alleged in paragraph 6 hereof with or without an agreement, condition or understanding that only the frozen products of said manufacturer shall be stored in or sold from such facilities, or that such dealer will purchase his full requirements of frozen products from such manufacturer, are in effect the same as exclusive requirements dealing arrangements or contracts.

Ice cream cabinet and refrigeration facility units which a retailer must have in his place of business for selling and distributing frozen products vary in price according to size. The size of the facility unit that a retailer needs varies with his volume of business. The cost of these units to retailers ranges from $500.00 or less, to $5,000.00 or more.

PAR. 3. Respondents are engaged in interstate commerce in that they purchase and produce ingredients which are used in the manufacture of frozen products and cause some of these to be shipped across state lines to the states of manufacture of such frozen products; in that they sell and distribute frozen products across state lines; in that in carrying on the acts, practices and methods herein alleged respondents buy, sell, lease, loan, and supply facilities, buy, sell, and supply equipment other than facilities, make arrangements for loans of money, furnish services and facilities, and arrange for terms and conditions of sale, across state lines; in that in connection with the carrying on of their said business as aforesaid in frozen products over the area of the states of the United States in which they operate, respondents send and receive orders, information, signs, advertising material, advertising copy, and material and equipment relating to the said business and products thereof; and, in general, promote said business through the media of interstate transactions.

PAR. 4. In the course and conduct of their said business said respondents are, and have been for a substantial time in the past in competition with firms, partnerships, corporations, and individuals engaged in the aforesaid business of frozen products and facilities in commerce between and among various of the States of the United States.

PAR. 5. Ice cream was first manufactured for wholesale in this country in 1851 and was first officially reported as manufactured in the United States in 1859. By 1869, ice cream was being produced

in this country at the rate of 24,000 gallons a year. Since then, ice cream and other frozen products have steadily increased in importance as foods in the economic life of the United States and many foreign countries. In 1951, 642,639,000 gallons of frozen products were produced and sold in the United States.

Carnation Company et al., Docket 6172

In the year [1951] respondents produced and sold approximately 1.73% of the total of frozen products in the United States, representing a total of 11,150,487 gallons of frozen products. In 1951 the total net sales of all dairy products produced and sold by respondents amounted to $297,729,394. Of these approximately 5.6% were of their frozen products, amounting to $16,828,175.27. Respondents' sales of frozen products and their sales, loans, leases and subleases of facilities were in areas of the United States west of the Mississippi. Respondents are a major factor in this business in these trading areas.

The Borden Company et al., Docket 6173

In the year [1951] respondents produced and sold approximately 10% of the total of frozen products produced and sold in the United States.

The net sales of dairy products by respondents in 1951 amounted to $792,056,671, of which 16% were of their frozen products amounting to approximately $117,000,000.

Borden has divided the United States into geographical trading areas. For example, Borden's Pioneer Ice Cream Division includes parts of the States of New York and New Jersey. Respondents operate 84 manufacturing plants and 228 distributing branches in 31 States of the United States in the conduct of their business in frozen products and facilities.

Beatrice Foods Company et al., Docket 6174

In the year [1951] respondents, collectively, but excluding Creameries of America, Inc., which was acquired at a later date, produced and sold approximately 4 per cent of the total of frozen products in the United States, representing a total of 25,024,337 gallons. In the same year, 1951, the net sales of respondents, excluding Creameries of America, Inc., of all dairy products sold amounted to $228,661,163.24. Of this, approximately 16 per cent, or $36,585,700 were of their frozen

products. The sale of frozen products by respondents and the aforesaid sales, loans and leases of facilities by them were made in a substantial number of the States of the United States and in the District of Columbia.

National Dairy Products Corporation et al., Docket 6175

In the year [1951] respondents produced and sold approximately 14 percent of the total of frozen products in the United States, representing a total of 86,129,249 gallons. In the same year, 1951, the net sales of respondents of all dairy products sold amounted to $1,038,422,-362. Of this, approximately 15 per cent, or $155,456,543 were of their frozen products. In 1952, respondents increased their total to 89,444,-810 gallons out of a total 588,750,000 gallons in the United States, representing a sales dollar volume of $163,406,514 and approximately 15.19 per cent of the total of the national figure. In 1952 respondents' total net sales of all dairy products sold was $1,141,295,700. The sale of frozen products by respondents and the aforesaid sales, loans and leases of facilities by them were made in a substantial number of the States of the United States and in the District of Columbia.

Pet Milk Company et al., Docket 6176

In the year [1951] respondents produced and sold approximately 2 percent of the aforesaid total of frozen products in the United States, representing a total of approximately 13,333,333 gallons. In the same year, 1951, the net sales of respondents of all dairy products sold amounted to $127,809,984, and increased in 1952 to $165,286,857. Of the 1951 net sales, approximately 12%, or $20,000,000, were of their frozen products.

The sale of frozen products by respondents and the aforesaid sales, loans and leases of facilities were in the States of Tennessee, Kentucky, North Carolina, South Carolina, Georgia, Virginia, West Virginia, Wisconsin, Illinois, Utah and Idaho. Respondent Pet, through the Pet Companies, is an important factor in this business in these trade areas.

Fairmont Foods Company et al., Docket 6177

In the year [1951] respondents produced and sold approximately 1.6 per cent of the total of frozen products in the United States, representing a total of 10,650,000 gallons. In the same year 1951, the net sales of respondents of all dairy products sold amounted to $111,531,-415. Approximately 15 per cent of these were of their frozen products, amounting to $17,600,000. In 1952, net sales of all dairy products increased to $121,000,839.

The sale of frozen products by respondents and the aforesaid sales, loans and leases of facilities were in the States of Massachusetts, Connecticut, Pennsylvania, Ohio, Michigan, Kansas, Texas, Oklahoma, Arkansas, Nebraska, North Dakota, Minnesota, Iowa, Kentucky, West Virginia, Maryland, New York and Wisconsin. Respondents are an important factor in this business in these trade areas.

Arden Farms Company et al., Docket 6178

In the year [1951] respondents produced and sold approximately 2 per cent of the total of frozen products in the United States, representing a total of 12,959,100 gallons. In the same year, 1951, the net sales of respondents, except those of respondent Melvern-Fussell Ice Cream Co. (at that time known as Fussell-Young Ice Cream Co.) of all dairy products sold amounted to $130,328,509.01. Of this, approximately 14 per cent, or $18,372,884.54 were of its frozen products. The sale of frozen products by respondents and the aforesaid sales, loans and leases of facilities by them were made principally in the Pacific coastal States, the States adjacent thereto, Kansas, Missouri, Texas, Virginia, Maryland, and the District of Columbia.

Foremost Dairies, Inc., Etc., Docket 6179

In 1951 net sales of all dairy products produced and sold by Foremost were $53,627,028. This increased in 1952 to $77,912,842. In the same year respondents, Foremost and its then wholly owned subsidiaries, produced and sold a total of 8,268,113 gallons of frozen products, representing approximately 1.3 per cent of the national figure. This represented approximately 25 per cent of the total sales of all products sold by those respondents, amounting to approximately $12,945,790. The other respondents, Foremost Companies, whose sales and production of frozen products in 1951 are not included in this total, were acquired by Foremost at a later date. The sale of frozen products by respondents and the aforesaid sales, loans and leases of facilities by them were in the States of Alabama, Florida, Virginia, Louisiana, Massachusetts, North Carolina, South Carolina, New York, Pennsylvania, Tennessee, Texas, North Dakota, South Dakota, Minnesota, Kentucky, West Virginia, Wisconsin and California.

H. P. Hood & Sons, Inc., Docket 6425

For the fiscal year ending February 28, 1953, the total net sales of all dairy products produced and sold by respondent amounted to $110,898,128.00. Of this approximately 15% was of their frozen products amounting to $17,361,648.00. Respondent's sales of frozen prod-

ucts together with its sales and loans of facilities were and are made in the six New England States and in that part of New York State surrounding the city of Troy. Respondent is a major factor in this business in this trading area.

In 1920, 148,298,000 gallons of frozen products were produced and sold in the United States. This volume was increased to 618,532,000 in 1950. During the same period the number of establishments manufacturing frozen products gradually decreased from 2,427 in 1920 to 1,521 in 1941. The number of employees engaged in the frozen products industry increased from 15,443 in 1939 when there were 2,734 manufacturing establishments to 35,974 in 1947 when the number of such establishments had decreased to 1,521. This decrease in the number of manufacturing establishments occurring as it has during the period of the aforesaid increase in the production of frozen products and increase in the population of the United States from 105,710,760 in 1920 to 145,000,000 in 1947 and 150,000,000 in 1950 has been accompanied by a gradual increase in the degree of the concentration of ownership of the production facilities of such manufacturing establishments in terms of volume produced in the hands of a comparatively few corporations, including respondents. This increase in concentration has resulted in part from the impact of the methods of competition and acts and practices described hereinafter in paragraph 6. Small business entities in this industry have been and are forced to attempt to meet and to meet such competitive method, acts and practices, but, because of lack of capital means to do so, many have had to sell out to the larger corporations, including respondents, while others have been forced into bankruptcy.

PAR. 6. For more than two years last past and continuing up to the present time, respondents, in carrying on their business of manufacturing, selling, and attempting to sell, frozen products, have attempted to induce, and have induced, retail dealers and prospective retail dealers and other handlers of frozen products to handle, store, and sell respondents' products exclusively, by doing, engaging in, and carrying out various acts, methods and practices including the following:

1. Respondents have made facilities available to retail dealers and prospective retail dealers and other handlers of frozen products by sale, loan and lease, and through arrangements with others to supply such dealers and handlers facilities, on the condition, agreement, or understanding, express or implied, that the lessee, purchaser, or borrower thereof shall not handle, store, or sell the frozen products of respondents' competitors.

2. Respondents have made facilities available to retail dealers and prospective retail dealers and other handlers of frozen products by sale, loan, and lease on the condition, express or implied, that only the frozen products of repondents shall be stored therein or sold therefrom.

3. Because of their purchasing power and the resources at their command, respondents are able to, and have, and do now purchase and lease "facilities" at prices no higher and in some cases less than the prices paid by regular licensed facility dealers and small ice cream manufacturers and have and do now sell, lease, loan and install such facilities at prices less, and on terms more favorable than retail dealers or prospective retail dealers or other handlers of frozen products have been able to or can obtain them elsewhere.

4. Respondents have sold, leased, loaned and rented facilities to frozen products dealers and prospective dealers or other handlers of frozen products without receiving or contemplating receiving any direct profit or compensation from such transactions.

5. Respondents have made facilities available to retail dealers and prospective retail dealers and other handlers of frozen products.

6. Respondents have made loans of money to retail dealers and prospective retailer dealers and other handlers of frozen products on the condition, agreement, or understanding, express or implied, that such dealers and handlers shall not handle, store or sell the frozen products of respondents' competitors.

7. Respondents have made loans of money to retail dealers and prospective retail dealers and other handlers of frozen products for building, repairing, and remodeling stores and for the purchase of facilities and for the purpose of supplying the needs of such dealers and handlers for general operating expenses, without receiving or contemplating receiving any direct interest or compensation from said loans.

8. Respondents have made loans of money and have arranged with others by various means and methods to make loans of money to retail dealers and prospective retail dealers and other handlers of frozen products.

9. Respondents have supplied retail dealers and prospective retail dealers and other handlers of frozen products with other equipment than facilities, and arranged with others to supply such dealers and handlers with equipment, for use in the conduct of their business, e.g., soda fountains, and other store fixtures by sale, lease and loan and otherwise, on the condition, agreement, or understanding, express or implied, that the lessee, purchaser, or borrower thereof shall not handle, store, or sell the frozen products of respondents' competitors.

10. Respondents have supplied retail dealers and prospective retail dealers and other handlers of frozen products with other equipment than facilities, and arranged with others to supply such dealers and handlers with equipment, for use in the conduct of their business, e.g., soda fountains, and other store fixtures, by sale, lease, and loan without receiving or contemplating receiving any direct profit or compensation from such transactions.

11. Said respondents have supplied retail dealers and prospective dealers and other handlers of frozen products with other equipment than facilities for use in the conduct of such dealers' and handlers' business, e.g., soda fountain equipment and store fixtures.

12. Respondents have performed and furnished services of value for and to retail dealers and prospective retail dealers and other handlers of frozen products, e.g., repainting of the interior of a dealer's or prospective dealer's or handler's establishment, servicing facilities or soda fountain equipment, and supplying signs and advertisements, on the condition, agreement or understanding, express or implied, that the dealer or handler shall handle, store or sell the frozen products of respondents only.

13. Respondents have performed and furnished services of value for and to retail dealers and prospective retail dealers and other handlers of frozen products, e.g., repainting of the interior of such dealers' stores, servicing facilities or soda fountain equipment without receiving or contemplating receiving any direct profit on or compensation for such services.

14. Said respondents have performed and furnished services of value for and to retail dealers and prospective retail dealers, and other handlers of frozen products, e.g., repainting of the interior of a dealer's or prospective dealer's or other handler's establishment or servicing facilities or soda fountain equipment.

15. Respondents have granted discounts and rebates on sales of frozen products to retail dealers and other handlers on the condition, agreement, or understanding, express or implied, that the dealer or handler shall handle, store or sell the frozen products of respondents exclusively.

16. Respondents have granted volume discounts and rebates on the prices of frozen products sold to retail dealers and other handlers sufficiently large enough to constitute an inducement to such dealers and handlers to handle, store, or sell respondents' frozen products exclusively.

17. Respondents have made allowances or payments in connection with sales of frozen products in the form of discounts or rebates to retail dealers and other handlers who own their own facilities on the

condition, agreement, or understanding, express or implied, that said dealers and handlers shall handle, store, or sell the frozen products of respondents exclusively.

18. Said respondents have made allowances or payments in connection with sales of frozen products in the form of discounts or rebates to retail dealers and other handlers who own their own facilities while not making or offering to make such allowances or payments on sales of frozen products to competing retail dealers and handlers who do not own their own facilities.

PAR. 7. The aforesaid acts, practices and methods of respondents have induced, and do now induce a substantial number of frozen products dealers and users of facilities to refrain from buying or leasing facilities from regular licensed facility dealers and handling the frozen products of respondents' competitors and to deal in respondents' frozen products exclusively; and such acts, practices and methods of a comparatively few of the larger corporations, including respondents, have caused a substantial number of manufacturers with resources insufficient to carry on said practices to sell out to or merge with respondents or others, or to go out of business entirely. The effect upon competition of the use of the aforesaid acts, practices, and methods by respondents is adverse to the public interest and the capacity, tendency and effect of said acts, practices and methods are and have been, unreasonably to hinder, hamper and restrain competing manufacturers of competitive products in disposing of their products to frozen products dealers. Said acts and practices and methods have and do now unreasonably hamper, restrain, lessen and eliminate competition in the sale and distribution of frozen products and have the capacity to create in the hands of a few, including respondents, a tendency toward monopoly in the sale and distribution of frozen products. The use by respondents and others of such unfair methods of competition is advantageous to competitors with the most resources at their command and prejudicial to small business concerns with limited resources; and they tend to destroy the freedom of retailers to select frozen products pursuant to customer demands or their own free will. Said acts, practices, and methods are all to the prejudice and injury of the public, and in the circumstances constitute unfair methods of competition and unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

Mr. Lynn C. Paulson, *Mr. Ashby H. Cantor* and *Mrs. Estelle L. Ague* supporting the complaint.

Mr. Gordon T. Jeffers and *Mr. James R. Baird, Jr.*, of Los Angeles, Calif., for Carnation respondents.

Mr. Cecil I. Crouse and *Dewey, Ballantine, Bushby, Palmer & Wood*, by *Mr. John E. F. Wood, Mr. Charles E. Stewart, Jr.*, and *Mr. E. Deane Turner*, of New York, N.Y., for Borden respondents.

Mr. Walter L. Dilger and *Mr. John P. Fox*, and *Winston, Strawn, Smith & Patterson*, by *Mr. Thomas A. Reynolds* and *Mr. Edward J. Wendrow*, of Chicago, Ill., for Beatrice Foods respondents.

Mr. Robert S. Gordon and *Snyder, Chadwell, Fagerburg & Keck*, by *Mr. John T. Chadwell, Mr. Richard W. McLaren, Mr. John W. Thomas* and *Mr. Jean Engstrom*, of Chicago, Ill., and *Whiteford, Hart, Carmody & Wilson*, by *Mr. John J. Carmody*, of Washington, D.C., for National Dairy respondents.

Mr. Gene Mayfield, of St. Louis, Mo., and *Cann, Taylor, Lamb & Long*, by *Mr. George P. Lamb, Mr. C. Brewster Chapman, Jr.*, and *Mr. Carrington Shields*, of Washington, D.C., for Pet respondents.

Mr. Charles H. Flansburg, of Lincoln, Nebr., for Fairmont Foods respondents.

Mr. Milton H. Barker and *Gibson, Dunn & Crutcher*, by *Mr. Julian O. von Kalinowski* and *Mr. John J. Hanson*, of Los Angeles, Calif., for Arden respondents.

White & Case, by *Mr. Edgar Barton* and *Mr. Thomas M. Johnson*, of New York, N.Y., and *Milam, LeMaistre, Ramsay & Martin*, by *Mr. George W. Milam*, of Jacksonville, Fla., for Foremost respondents.

Ropes, Gray, Best, Coolidge & Rugg, by *Mr. Charles B. Rugg* and *Mr. Frank W. Crocker*, of Boston, Mass., for H. P. Hood & Sons, Inc.

Initial Decision by John Lewis, Hearing Examiner

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STATEMENT OF PROCEEDINGS

These are nine separate proceedings instituted by the issuance of separate, but substantially identical, complaints against the above-named respondents charging them with having engaged in various unfair methods of competition and unfair acts and practices, in com-

merce, in violation of Section 5 of the Federal Trade Commission Act. Complaints were originally issued against the respondents in the first eight of the above-captioned proceedings on February 15, 1954. Said proceedings were initially assigned for hearing to another examiner of the Commission. After the filing of their respective answers by said respondents, a joint pre-hearing conference was held before said examiner on April 22, 1954. Thereafter, five of the proceedings were reassigned to the undersigned hearing examiner, by order of the Commission issued September 2, 1954. A further joint pre-hearing conference was held on September 2, 1954. Two of the remaining three of the original eight proceedings were thereafter reassigned to the undersigned by order of the Commission issued October 11, 1954, and the third was reassigned on November 22, 1954.

Separate hearings on the original complaints were held before the undersigned in Washington, D.C., seriatim, on various dates between September 14, 1954 and May 13, 1955. Thereafter, motions were filed by counsel supporting the complaint to amend and supplement the complaint in all eight proceedings. Following a hearing in Washington, D.C., on August 22, 1955, and subject to certain conditions agreed to by all counsel, the undersigned filed his orders, dated September 12, 1955, in each of said proceedings, granting the motions and directing that the complaints be amended and supplemented in accordance therewith. Following service of said amended and supplemental complaints, the respondents filed their respective answers thereto. On October 3, 1955, the Commission issued and thereafter served on respondent Hood a complaint identical with the amended and supplemental complaints theretofore issued against the respondents in the original eight proceedings. Answer to said complaint was duly filed by respondent Hood.

Further hearings for the purpose of receiving evidence in support of the complaints in these proceedings were held before the undersigned on various dates between October 24, 1955 and December 18, 1956 in Portland, Oregon; Seattle, Washington; San Francisco and Los Angeles, California; Washington, D.C.; Richmond, Virginia; Easton, Maryland; Charlotte, North Carolina; Atlanta, Georgia; Jacksonville and Miami, Florida; Houston, Texas; Phoenix, Arizona; New York, New York; Pittsburgh and Philadelphia, Pennsylvania; Knoxville, Tennessee; Chicago, Illinois; Des Moines, Iowa; Omaha, Nebraska; Rapid City, South Dakota; Cincinnati, Ohio; Kansas City, Missouri; Portland, Maine; and Hartford, Connecticut. The evidence offered at the above hearings consisted mainly of testimony as to competitive conditions in the above areas. In order to avoid the necessity for having to recall witnesses where their testimony related to more

than one respondent, joint hearings were held with respect to all respondents doing business in any hearing area, and the testimony of all witnesses called was transcribed in the record of each respondent doing business in such area, subject to the right of any repondent to move to strike such portions of the testimony of any witness as did not pertain to it.[1]

At the close of the case-in-chief counsel for respondents were granted approximately one month to determine whether to file motions to dismiss or strike, or to proceed with their defense. Counsel for all respondents, except Pet, thereafter notified the examiner that they would reserve all motions until the close of the case and would proceed with the presentation of defense evidence. A motion to dismiss was filed by respondent Pet which was denied by order of the undersigned dated March 5, 1957.

Separate defense hearings were thereafter held in each of these proceedings on various dates between April 29, 1957 and November 22, 1957, except for consolidated hearings on September 16–20, 1957 at which certain economic and statistical evidence was offered on behalf of all respondents, except Fairmont, Hood and Pet. Portions of the testimony and evidence received at the consolidated hearings were later stipulated into the Pet record. At the close of all the evidence respondents other than Hood, Fairmont and Pet moved to consolidate various portions of the testimony and other evidence taken in their proceedings subsequent to the amendment of the complaints. Said motions were made and granted on the condition that the consolidation of such testimony would not prejudice the separate identity of each proceeding and the right of each respondent to make a separate appeal from any adverse ruling in these proceedings.

Counsel were granted leave to file proposed findings, conclusions, and briefs in support of their respective positions, and appropriate motions to dismiss or strike. Thereafter six of the respondents filed joint findings and briefs, together with an appendix thereto, and separate motions to dismiss or strike. Respondents in the Hood, Fairmont and Pet proceedings filed separate proposed findings, briefs and motions to dismiss or strike. Counsel supporting the complaint filed a single set of proposed findings and brief, together with an appendix thereto, in all nine cases. In lieu of oral argument counsel were granted leave to

[1] This procedure was agreed to by all counsel, except counsel for Pet and counsel supporting the complaint. Counsel for Pet requested that separate hearings be held with respect to their client. Counsel supporting the complaint sought a complete consolidation of all records, with the testimony of all witnesses to be received in the record of each respondent, irrespective of whether said respondent did business in the particular portion of the country from which a witness was being called or not. Both objections were overruled.

file replies to the proposed findings and briefs of opposing counsel. Respondents Hood, Fairmont and Pet filed separate replies to the proposed findings and brief of counsel supporting the complaint.[2] The remaining respondents filed a joint reply to the proposals and brief of counsel supporting the complaint and several of such respondents also filed separate supplemental replies. Counsel supporting the complaint elected not to file any reply to the proposals or briefs of respondents, but filed a document entitled "Supplemental Brief" which is, in substance, a response to the ancillary motions of certain respondents to dismiss on grounds of lack of commerce and to strike certain evidence.

At the hearings held herein all parties were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to offer evidence, and to examine and cross-examine witnesses. The records in these proceedings consist of approximately 14,000 pages of testimony (not counting testimony which is duplicated in more than one record) and 3,800 exhibits, some of which exhibits consist of several hundred pages. The proposed findings, briefs and motions filed at the close of the evidence aggregate approximately one thousand pages.

The undersigned has concluded that in view of the substantial identity of many of the basic issues of fact and law in these proceedings and the fact that the records in six of them have been largely consolidated, and in the interest of a more expeditious disposition of these protracted proceedings, that it would be appropriate to issue a single decision in all nine cases. The examiner has concluded that this may be done, without prejudicing respondents' right of due process, by issuing a basic decision setting forth the facts and legal principles common to all cases and pointing up, wherever necessary, significant factual differences in the individual cases, and by supplementing such decision with an appendix containing more detailed facts concerning the separate market areas where each group of respondents does business, as reflected by the evidence.

Having carefully reviewed the entire records in these proceedings, and the proposals and briefs of the parties,[3] and based on the entire record and his observation of the witnesses, the hearing examiner makes the following:

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[2] Counsel for said respondents, in the replies filed by them, have objected to the procedure of counsel supporting the complaint in joining their clients in a single set of proposals and in treating the separate proceedings as if they were a single case. Said respondents request that the hearing examiner issue a separate decision in each of their proceedings.

[3] Proposed findings not herein adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

FINDINGS OF FACT

I. The Business of Respondents

1. Respondent National Dairy Products Corporation, sometimes referred to hereinafter as "National," was incorporated under the laws of the State of Delaware on December 8, 1923. Its principal office and place of business is at 260 Madison Avenue, New York, New York. It is engaged, either directly or through various subsidiaries or divisions, in the manufacture, sale and distribution of a variety of dairy and related products, including ice cream and other frozen desserts. At the time of the issuance of the amended complaint it had 26 subsidiaries engaged in the manufacture, sale or distribution of ice cream and other frozen desserts. Said subsidiaries have been named as respondents along with respondent National. Until May 1956 all of said subsidiaries were wholly owned by respondent National, except for respondent Southern Dairies, Inc., in which respondent National owned more than 98 percent of the stock. Beginning May 31, 1956 respondent National began a program of merging its subsidiaries into the parent company. When completed, all of the subsidiaries will become divisions of respondent National.

As of 1952, respondent National and its subsidiaries had manufacturing plants and/or distribution branches in 28 states of the United States and the District of Columbia. The area of operation of the National companies includes most of the eastern and midwestern portion of the United States. They do not operate on the west coast, in the Rocky Mountain States, or in Texas. Most of the divisions of respondent National use the "Sealtest" label on the ice cream products distributed by them, except for the Breyer Division which uses the "Breyer" label.

2. Respondent The Borden Company, hereinafter sometimes referred to as "Borden," was incorporated under the laws of the State of New Jersey on April 24, 1899 under the name Borden's Condensed Milk Company. The present corporate title was adopted in October 1919. Its principal place of business is 350 Madison Avenue, New York, New York. It is engaged in the manufacture, sale and distribution of a variety of dairy and related products, including ice cream and other frozen desserts. Respondent Fussell Ice Cream Company was a wholly-owned subsidiary of respondent Borden but was dissolved on September 24, 1953, after having disposed of its assets to respondent Borden. Respondent Ricciardi is a wholly-owned subsidiary of respondent Borden and operates a frozen diary products business in the New York metropolitan area. Borden has manufac-

turing plants and/or distribution branches in 41 states of the United States. It operates generally throughout the eastern and midwestern portions of the country and in the western states of California, Arizona and New Mexico. Its standard ice cream products are distributed generally under the "Borden" label, except that in the New York metropolitan area it also uses the "Ricciardi," "Horton" and "Reid" labels, and in the Baltimore area it also uses the "Hendler" label.

3. Respondent Foremost Dairies, Inc., hereinafter sometimes referred to as "Foremost," is a corporation organized, existing and doing business under the laws of the State of New York, with its principal office located as 2093 College Street, Jacksonville, Florida. It is the result of a merger, effective February 8, 1949, between Foremost Dairies, Inc., a Delaware corporation organized in 1931, and Maxson Food System, Inc., a New York corporation. It is engaged, either directly or through various subsidiaries, in the manufacture, sale and distribution of a variety of dairy and related products, including ice cream and other frozen dairy products. Its sales of ice cream and other frozen desserts are made in 22 states of the United States. Prior to 1951 its operations were confined mainly to eight southern states. Thereafter, and largely by the acquisition of other companies, it extended its operations to the central states of Minnesota, Wisconsin, North and South Dakota, Kansas, Missouri and Arkansas, to the eastern states of New York, Pennsylvania, Massachusetts and Connecticut, and to the western states of New Mexico and California. Its ice cream products are sold mainly under the "Foremost" label.

4. Beatrice Foods Company (Delaware), sometimes hereinafter referred to as "Beatrice," is a corporation organized, existing and doing business under the laws of the State of Delaware, with its principal office and place of business at 120 South LaSalle Street, Chicago, Illinois. It originated in 1890 in Beatrice, Nebraska, as a partnership and was incorporated in 1897. The company became a Delaware corporation in 1924. It is engaged, directly or through various subsidiaries, in the manufacture, sale and distribution of a variety of dairy and related products, including ice cream and other frozen dairy products. Beatrice and its subsidiaries are engaged in the manufacture, sale and distribution of ice cream and other frozen products in 36 states of the United States and the Territory of Hawaii, and operate manufacturing plants and distribution branches in 20 states and Hawaii. Originating in the Midwest, the company and its subsidiaries have extended their operations to the east and west coasts, aided substantially by the acquisition of a number of other companies.

Their ice cream products are sold mainly under the "Meadow Gold" label.

5. Respondent Arden Farms Co., sometimes hereinafter referred to as "Arden," is a corporation organized, existing and doing business under the laws of the State of Delaware, with its principal office and place of business located at 1900 West Slauson Avenue, Los Angeles, California. Its predecessor company was founded in 1919 in Seattle, Washington, under the name Velvet Ice Cream Company by Samuel H. Berch. Arden's business was originally incorporated under the laws of the State of Delaware on December 11, 1933, as Western Dairies, Inc. The present name was adopted through a merger of Western and three companies using the name Arden. It is engaged, directly or through several subsidiaries, in the manufacture, sale and distribution of a variety of dairy and related products, including ice cream and other frozen dairy products. Its frozen products subsidiaries are: Melvern-Fussell Ice Cream Co., a California corporation whose principal office and place of business is 400 Calvert Avenue, Alexandria, Virginia, and Camellia Diced Ice Cream Company, a California corporation, whose principal office and place of business is 2006 Westheimer Street, Houston, Texas. A former subsidiary, Kansas City Diced Cream Company, ceased operating January 1, 1955 and was merged with respondent Arden. Another Arden subsidiary is respondent Equipment Enterprises, Inc., which is a California corporation having its principal office at 1290 Wilshire Boulevard, Los Angeles. It is engaged in a general financing business, including the leasing and sale of equipment, and is not in the frozen products business.

Respondent Arden for many years operated mainly on the west coast. However, in recent years it has expanded through its subsidiaries into Missouri, Texas, Maryland and Virginia. Its expansion into Texas occurred in 1950, when it acquired a controlling interest in the company which became Camellia Diced. It entered the eastern area around 1951 by acquisition of the company which became Melvern-Fussell. Arden and its subsidiaries presently have manufacturing plants and/or distribution branches in California, Oregon, Washington, Arizona, Texas, Missouri and Virginia. In addition to the above States, the Arden companies sell in Idaho, Montana, Kansas, Maryland, West Virginia and the District of Columbia.

6. Respondent Carnation Company, sometimes hereinafter referred to as "Carnation", is a Delaware corporation with its principal place of business at 5045 Wilshire Boulevard, Los Angeles, California. It was founded on September 6, 1899 at Kent, Washington, was incor-

porated in Maine as Carnation Milk Products Company, and was subsequently chartered under the laws of the State of Delaware on May 21, 1920. It is engaged, directly or through various subsidiaries, in the manufacture, sale and distribution of a variety of dairy and related products, including ice cream and other frozen products. It has three frozen dairy products subsidiaries operating, respectively, in the States of Washington, Texas and Oklahoma, each of which bears the Carnation name followed by the name of the state of incorporation. Another frozen products subsidiary is Damascus Milk Company, incorporated in Oregon and operating in that State and Washington. Respondent Carnaco Equipment Company is not in the frozen products business, but leases equipment to the other Carnation companies. The controlling stock interest in that company is held by respondent Carnation. In addition to the States of California, Oregon, Washington, Arizona, Texas and Oklahoma, in which the Carnation companies operate manufacturing plants and distribution branches, they have distribution branches and sell in Nevada and Idaho.

7. Pet Milk Company, hereinafter sometimes referred to as "Pet Milk", is a Delaware corporation having its principal office at 1401 Arcade Building, St. Louis, Missouri. It is engaged in the manufacture, sale and distribution of dairy and related products, but does not directly manufacture and sell ice cream or other frozen dairy products. Respondent Pet Dairy Products Company, sometimes hereinafter referred to as "Pet Dairy", is a Delaware corporation having its principal office and place of business at 303 West Walnut Street, Johnson City, Tennessee. It is a wholly-owned subsidiary of Pet Milk and is engaged in the manufacture, sale and distribution of ice cream and other frozen dairy products in seven southern states. It formerly also operated in Wisconsin and Illinois but sold out its interests in that area in November 1954. Respondent Colville Ice Cream Company, sometimes hereinafter referred to as "Colville", is a Utah corporation having its principal office and place of business at 159 West First Street, Salt Lake City, Utah. It is also a wholly-owned subsidiary of Pet Milk and operates in Utah, Nevada and Wyoming. In view of the disposition to be made of this proceeding the examiner finds it unnecessary to resolve the issue raised by respondent Pet Milk as to whether its control over its two subsidiaries is such as to subject it to liability for their activities.

8. Respondent Fairmont Foods Company, hereinafter sometimes referred to as "Fairmont", is a Delaware corporation having its principal office at 3201 Farnam Street, Omaha, Nebraska. It was originally incorporated in Nebraska in 1884 under the name the Fair-

mont Creamery Co. and became a Delaware corporation on March 5, 1929. It is engaged, either directly or through its subsidiaries, in the manufacture and sale of a variety of dairy and related products, including ice cream and other frozen dairy products. It also prepares and distributes frozen foods other than frozen dairy products. Respondents Fairmont Foods Company, Inc., and Fairmont Foods Company of Wisconsin are New York and Wisconsin corporations, respectively, with their respective principal offices at 197 Scott Street, Buffalo, New York, and 165 North Broadway, Green Bay, Wisconsin. Both are wholly-owned subsidiaries of respondent Fairmont. The Fairmont companies sell and distribute ice cream and other frozen dairy products in 19 states, all but seven of which are located in the central part of the United States. It has extended its operations in recent years into portions of Virginia, West Virginia, Kentucky, Maryland, Pennsylvania, New York, Connecticut and Massachusetts.

9. Respondent H. P. Hood & Sons, Inc., sometimes hereinafter referred to as "Hood", is a Massachusetts corporation having its principal place of business at 500 Rutherford Avenue, Boston, Massachusetts. The company and its predecessor have engaged in the manufacture and sale of dairy products, including ice cream and other frozen dairy products, since 1918. It has eight manufacturing plants located in five New England States and New York State. It distributes ice cream and frozen dairy products in all six New England States and a portion of eastern New York State. Its operations were confined to the New England States until it acquired two companies in eastern New York in 1953 and 1954.

II. Interstate Commerce

1. Each of the respondents operates a number of manufacturing plants located in various states of the United States. To a considerable extent the frozen products business is local in nature, and sales and shipments of frozen dairy products are made within a more limited radius of the producing plant than sales and shipments of less perishable products. For this reason sales and shipments from a number of plants of respondents are made entirely or almost entirely within the state of production. However, other plants of the same respondents do make sales and shipments across state lines. In some instances such sales or shipments are quite substantial, while in others they represent a relatively small percentage of total production of the plant.

2. Each of the respondents purchases or receives a significant portion of the ingredients or other materials used in the manufacture

of its frozen products from states other than the state of production. Signs, advertising materials, refrigeration equipment and other equipment relating to the sale, storage or distribution of frozen dairy products are also received by the various respondents from without the state of production and, in some instances, are transported to the establishments of retail customers located outside the state where such materials and equipment have been received. In some instances the supplying of equipment or furnishing of assistance to retail customers, of the general type referred to in the complaints, is subject to the approval of a head office or headquarters of a particular respondent located in a state other than that in which the supplying plant or division is located.

3. Some of the respondents have questioned the jurisdiction of the Commission with respect to their subsidiaries, divisions or plants which sell entirely within a given state. For example, the Oklahoma subsidiary of respondent Carnation makes no sales outside the State of Oklahoma, and various other plants of the company make no sales or shipments across state lines. Similarly, respondent Arden's subsidiary in Texas, Camellia Diced, makes no sales or shipments in commerce, nor does its plant in Arizona.

In view of the disposition hereinafter made of the complaints in these proceedings, the examiner finds it unnecessary to make detailed commerce findings with respect to each respondent and the various subsidiaries, divisions or operations of each respondent. Aside from other interstate aspects of their frozen products business, since each group of respondents regularly makes some sales or shipments of frozen products across state lines, in excess of de minimis quantities, with respect to some portion of their operations, there is a sufficient showing of commerce to warrant denial of motions to dismiss based on lack of jurisdiction, and to justify consideration of the substantive issues raised by the complaints.

III. The Alleged Unlawful Practices

A. *Background and Issues*

1. The complaints in these proceedings challenge various practices which are alleged to be used by respondents for the purpose of inducing retail dealers to handle or to continue handling the ice cream and other frozen products manufactured and sold by respondents. Before turning to a consideration of the charges it is desirable to note briefly certain basic facts concerning the ice cream industry and its methods of distribution.

2. Generally speaking, ice cream manufacturers distribute their products to the public through retail outlets which are not owned or affiliated with the ice cream manufacturer. However, a small, but increasing, percentage of ice cream is sold through retail outlets which have their own ice cream manufacturing facilities or are affiliated with an ice cream manufacturer. An example of this is the Safeway grocery chain which at one time purchased its ice cream from non-affiliated ice cream manufacturers, but more recently has set up its own manufacturing facilities in various sections of the country. A manufacturer who distributes ice cream through retail outlets is referred to as a wholesaler of ice cream. Where the manufacturer is owned by or affiliated with the retail outlets distributing his ice cream he is referred to as a "captive" or "affiliated" wholesaler. The latter terms refer to distribution through multiple outlets. Where there is a single retail outlet involved which manufactures entirely for retail sale on the premises, it is regarded in the industry as a retail, rather than a wholesale operation.

3. Most of the wholesaling of ice cream involves the direct sale or distribution by the manufacturer to the retail outlets. However, some manufacturers sell a portion of their products to middlemen, usually referred to as a "distributor," who in turn sell to retail stores. So far as appears from the record, the distribution of ice cream through distributors involves a relatively small percentage of the ice cream distributed in the United States, the usual channel of distribution being directly from the manufacturer to the retail outlet. Another exception to the direct manufacturer-dealer relationship is the sale by one manufacturer to another manufacturer. This usually involves specialty items which the purchasing manufacturer does not himself produce. It includes such items as popsicles, creamsicles and similar items, which are referred to in the industry as "novelties." Still another exception to the usual manufacturer-retailer channel of distribution is the relatively minor amount of distribution directly from the manufacturer to the consumer. This usually involves small dairy companies in rural areas, which deliver ice cream to the home along with milk.

4. Within the category of ice cream manufacturers are some who manufacture and distribute only ice cream and related frozen products, while others produce or distribute a broad line of dairy products, including milk, cream, butter and eggs. The record does not contain any numerical breakdown between ice cream manufacturers who are exclusively in the ice cream manufacturing business and those which produce and distribute a broad line of dairy products. It does

appear, however, that in recent years a number of companies which were formerly only in the milk business have expanded into the ice cream business in order to have an outlet for their surplus milk production and in order to take advantage of the preference existing on the part of some retail dealers for purchasing their entire line of dairy products from the same supplier.

5. The basic product manufactured by an ice cream manufacturer is, of course, ice cream, which is made out of a combination of cream, milk, flavor extracts, fruits, nuts, stabilizers and other ingredients, which are frozen in a freezer and maintained in hardening rooms prior to retail distribution. However, in recent years many of such manufacturers have supplemented their manufacture of ice cream with various other frozen desserts. Among these are ice milk which, as the name implies, contains milk but no cream and has a much lower butterfat content than regular ice cream. It is a product which appeals to calorie-conscious people. Another such product is known as "Mellorine", which has made rapid strides in the Southwest, particularly in Texas. It is made from fats and vegetable oils other than milk fats, and bears the same relationship to ice cream as oleomargarine does to butter. Other products produced by ice cream manufacturers include sherbets (with or without milk) and water ices.

Most of the above products are considered hard-frozen products. However, there are also a number of plants and establishments which produce soft-frozen dairy products. These are frozen products which are sold directly from the freezer, without going through a hardening process, or are kept in a hardening cabinet for less than twelve hours. In recent years there have arisen a number of retail establishments along the highways and byways of the United States which have their own counter-freezers and which sell soft-frozen dairy products from purchased ingredients. Many of such establishments are affiliated with a chain or operate under a franchise arrangement, such as the Dairy Queen, Tastee-Freeze and Carvel stores. Such soft ice cream establishments, while still a relatively small factor in the industry as a whole, have been making rapid strides since the end of World War II and, in some areas, have managed to become a troublesome factor to traditional ice cream manufacturers by virtue of their competition for the consumer's dollar.

6. Traditional ice cream and related hard-frozen dairy products are sold to the public in various forms and through various types of retail establishments. The two major forms are bulk and package ice cream. Bulk ice cream is sold to the dealer in large bulk containers, from which it is resold to the public in smaller quantities, either for con-

sumption on the premises or in small packages for use at home. Ice cream is also sold by the manufacturer to the retailer in package form suitable for resale in the same form to the consumer. This is known in the industry as package ice cream. The usual quantities in which such packages are prepared are pints, quarts, half gallons and gallons.

7. The types of retail establishments through which ice cream is sold to the public include restaurants and other eating establishments, where it is usually purchased for consumption on the premises; drug and confectionery stores, where it may be purchased either for consumption on the premises or away from the premises; and grocery and similar food establishments, where it is purchased primarily for consumption away from the premises. Restaurants and similar eating establishments usually purchase only bulk ice cream; confectionary establishments and drug stores usually carry both bulk and package ice cream; and grocery and food establishments usually only carry package ice cream.

8. Prior to World War II the great preponderance of ice cream sold in the United States reached the public through confectionery, drug and other establishments which handled ice cream in bulk form. Food stores handling package ice cream constituted a relatively small outlet for ice cream. It is estimated that during this period approximately two-thirds of the ice cream sold in the country was distributed in bulk form. However, during the postwar period there was a marked shift in the channels of distribution and, at the present time, approximately two-thirds of the ice cream consumed is sold through food stores which handle it in package form. There has also been a substantial increase in sales of ice cream novelties and of ice cream substitutes, such as Mellorine and soft ice cream.

9. In the parlance of the ice cream industry a retail establishment through which ice cream is sold to the public is known as a "stop". One which handles bulk ice cream is known as a bulk or "wet" stop, while one handling package ice cream is known as a package or "dry" stop. Most establishments have traditionally handled the ice cream of only a single manufacturer, due mainly to limitations of floor space. However, there is a growing trend in some sections of the country for retail establishments to carry more than one brand of ice cream. This is particularly true in the larger food stores and supermarkets. An establishment which handles more than one manufacturer's brand is known as a "split" stop.

Ice cream dealers are also differentiated in industry parlance on the basis of whether the account was formerly served by another manufacturer, at the same location, or was initially acquired by

the manufacturer serving it when the account entered business. An account which is acquired from another manufacturer is known as a "switch" account. One which is acquired by a particular manufacturer at the time the account entered business is referred to as a "pioneer" account.

10. The complaints in these proceedings attack as illegal certain forms of assistance given by respondents to their retail dealer accounts. It is charged that these forms of assistance are used as an inducement for the dealers to handle or continue handling the frozen dairy products of the respondent offering them. The forms of dealer assistance which the complaints challenge fall into four broad categories; (a) furnishing of refrigeration facilities and other types of equipment to dealers, (b) making loans to dealers, (c) performing various services of value for dealers, and (d) granting discounts to dealers.

11. The original and the amended complaints are basically the same insofar as the practices challenged are concerned. However, there are two noteworthy differences, one of which involves a broadening of the charges and the other a narrowing thereof. The original complaints challenged the practices in question only when they were used in connection with "switch" accounts, i.e., when a particular respondent used them to induce a dealer handling a competing ice cream manufacturer's products to switch to that respondent. The use of the practices in connection with new or "pioneer" accounts was thus not challenged, nor was their use challenged in connection with accounts which were already being served by the respondent in question. The amended and supplemental complaints have broadened the charges so that the practices in question are now attacked not merely when used in connection with inducing accounts to "switch", but also when they are used in obtaining "pioneer" accounts and in seeking to retain accounts which the respondent in question is already serving.

12. While broadening the charges in the respect that the challenge to the practices is no longer limited to "switch" accounts, the amended and supplemental complaints have made a significant retreat in their attack on the practices in question, in that the practices are now challenged only when they are used to induce the handling of a respondent's products "exclusively." The original complaints contained no such limitation. Their attack on the practices was, in most instances, in the form of a trilogy, only one allegation of which involved the element of exclusivity. For example, the furnishing of refrigeration equipment was alleged to be illegal (a) when done with

an agreement or understanding, express or implied, that the dealer would handle respondent's products exclusively, (b) when the equipment was made available at less than cost, and (c) when the equipment was simply made available to the dealer. Under the first subparagraph, the furnishing of equipment was challenged only when it involved an exclusive dealing arrangement, while under the second subparagraph it was challenged only when supplied at less than cost. The third subparagraph attacked the practice as such, irrespective of whether it occurred in an exclusive dealing context or one which involved the element of below cost. The rationale of the original complaints appears to have been to advance alternative challenges to the practices in question, the strongest (albeit the last stated) being an attack on the practice as such, and the second two being alternative positions to which counsel could retreat in the event the strongest attack proved to be untenable.

While the amended and supplemental complaints still contain the essential triad form of attacking the practices in question, the basic allegation in Paragraph Six of the complaint which introduces the subparagraphs describing the specific practices has been amended so as to make exclusivity an essential element of the offense, by alleging that all of the practices in question were used to induce dealers "to handle, store and sell respondents' products *exclusively*." The word "exclusively", which was added to Paragraph Six of the amended complaints, also appears in Paragraph Seven of the complaints in which it is alleged that by use of the practices in question respondents have induced retail dealers "to deal in respondents' frozen products *exclusively*." It cannot be assumed that the introduction of the word "exclusively" in the amended and supplemental complaints was intended as a nullity. While, as in the original complaints, certain of the subparagraphs contain no reference to an understanding as to exclusivity, the reference to "exclusively" in the basic allegation of Paragraph Six is a clear indication of an intention to challenge the practices only when they are used in a context of exclusive dealing, whether or not there is any specific agreement with respect to this subject.

The introduction of the limiting factor of exclusivity, not found in the original complaints, would appear to have been motivated by a decision to recede from the broad and possibly untenable attack on the practices as such, but which was restricted to switch accounts, in order to attack the practices without regard to the type of account involved.

During the course of the hearings and in his brief and proposed findings, counsel in support of the complaint has chosen to ignore the

allegation of exclusivity and to treat the complaints as an attack on the practices as such, without regard to whether they are used with the purpose or effect of inducing exclusive dealing.[4] In fact, the proposed order submitted by counsel seeks to have the practices outlawed without regard to whether they are used in a context of exclusive dealing or not. This approach, however, is not justified under the language of the complaint and, as will be hereafter discussed, is of dubious legal merit.

13. As indicated above, the practices which the complaints attack revolve about four main items: (a) equipment, (b) loans, (c) services and (d) discounts. Respondents are alleged to have used these to induce retailers to handle their products exclusively as follows:

(a) *Equipment.* The subparagraphs dealing with equipment refer to two separate classes of equipment. The first involves ice cream cabinets and similar refrigeration equipment used for storing ice cream and related frozen products, which the complaints designate as "facilities." The second class of equipment is a broad catagory covering all types of equipment other than facilities, and includes such items as soda fountains and store fixtures. There are five subparagraphs dealing with facilities and three dealing with other equipment. In general, it is alleged that respondents have made facilities available to dealers (apparently without charge) or have sold or leased facilities or other equipment to dealers, either with an understanding as to exclusive dealing or at less than cost or without profit. In the case of facilities there is an alternative allegation that they have been supplied with an understanding as to exclusive storage, i.e., that only the respondents' products will be stored therein. In both instances there is an alternative allegation, similar to the third alternative in the original complaints, which simply alleges that respondents have supplied facilities or other equipment.

(b) *Loans.* There are tripartite allegations with respect to the making of money loans to dealers as follows: (1) That such loans are made with an understanding as to exclusive dealing, (2) that they are made without interest, and (3) that they simply are made.

(c) *Services.* The same formula is repeated with respect to services, *viz.*, (1) that they are performed with an understanding as to exclusive dealing, (2) that they are performed without cost, and (3) that they simply are performed. The services alleged to be rendered

[4] Reference to counsel supporting the complaint is generally herein made in the singular since much of the presentation of evidence and argument appears to reflect the views of the senior attorney in support of the complaint, who was substituted for earlier counsel following the amendment of the complaints.

by respondents include such services as repainting the interior of a dealer's store, servicing facilities or soda fountain equipment and supplying signs and advertisements.

(d) *Discounts and Rebates.* The subparagraph dealing with discounts and rebates falls into two main categories: (1) Volume discounts and (2) discounts based on dealers owning their own facilities. Under the first category it is alleged, in the alternative, that discounts and rebates are granted with the understanding that the dealer will handle respondents' products exclusively, or that the discounts are so large as to constitute an inducement, in fact, for a dealer to handle respondents' products exclusively. Under the second category it is alleged, in the alternative, that respondents grant discounts and rebates to dealers who own their own refrigeration facilities with the understanding that they will handle respondents' products exclusively, and that respondents grant discounts and rebates to such dealers without making them available to dealers who do not own their own facilities.

14. Under Paragraph Seven of the complaint it is alleged that the practices in question have affected three different economic groups. The primary group involved are competing manufacturers of frozen products who, it is alleged, have been unduly hindered in disposing of their products because respondents have used the practices in question to induce retailers to deal in respondents' products exclusively. It is alleged, in this connection, that a substantial number of competing ice cream manufacturers have not had resources sufficient to use the practices in question and have been forced to sell out or to merge with respondents or others or to go out of business entirely. The second group involved are "regular licensed facility dealers" who, it is alleged, have been affected because respondents have induced users of such facilities to refrain from buying or leasing facilities from the regular licensed facility dealers. The third group allegedly affected are the retail ice cream dealers who, it is alleged, have been precluded from selecting frozen products "pursuant to customer demands or their own free will."

15. The basic factual issues arising under the complaints are: (a) To what extent do respondents assist dealers by supplying equipment or services, or by granting financial assistance or discounts in the manner indicated in the complaints; (b) are such forms of dealer assistance offered as, or do they act as, an inducement to dealers in their choice of an ice cream supplier or in their continuing to handle the products of a particular supplier; (c) are such forms of assistance offered with the understanding that the recipient dealer will handle

exclusively the products of the manufacturer furnishing them, or do they in fact result in, or tend to result in, the exclusive handling of the products of the manufacturer supplying them; and (d) has the furnishing of assistance to dealers in the manner charged resulted in, or is there a reasonable probability that it will result in, injury to competition.

16. In the brief and proposed findings filed by counsel supporting the complaint it is asserted that respondents concede the use of the practices in question, that they have "introduced no evidence to counter the Commission's proof of injury" to competition and that they have raised no issue of fact but merely one of law as to whether the practices constitute unfair methods of competition within the meaning of the Federal Trade Commission Act. This does not fairly or accurately reflect the position of respondents or the real issues in these proceedings. Respondents do concede that they have assisted dealers and performed various services for them, some of which assistance or services fall within certain of the broad categories referred to in the complaints. However, respondents deny that such assistance or services are utilized to the extent or with the purpose and effect claimed by counsel supporting the complaint. Respondents contend that the furnishing of such services and assistance constitutes a normal incident of doing business and is engaged in generally by ice cream manufacturers. They also contend that such assistance or services are not offered as an inducement to dealers to handle or continue handling their products, and that because they are generally available to dealers from most ice cream suppliers, they do not materially affect the dealers' choice of a supplier. While it is conceded that some of the respondents have used agreements in connection with some of the practices, which contain exclusive dealing provisions, it is contended that such clauses are not enforced in practice and that the use of the practices in question has neither resulted in exclusive dealing nor had any tendency in that direction. Finally, respondents deny that the practices have had or are likely to have any adverse competitive effect.

17. The evidence presented by counsel supporting the complaint was offered in two phases. The first phase occurred prior to the amendment of the complaints and consisted of stipulations of facts and documentary evidence as to each respondent's size and scope of operations, statistical information as to dollar amounts invested in the complaint practices, forms of leases and agreements used in connection therewith, copies of price lists and discount schedules, and detailed information as to assistance given specific dealer accounts or to dealers

in specific geographic areas. The information as to the use of the complaint practices was confined mainly to "switch" accounts since it was offered prior to the amendment of the complaints. However, following the amendments further information was submitted which was not so limited.

The second and major phase of the presentation of the case-in-chief took place following the amendment of the complaints and consisted mainly of testimony by competing ice cream manufacturers and retail dealers in various market areas. Such evidence was apparently offered to show the competitive impact of respondents' use of the complaint practices and the extent to which the practices influence the dealer's choice of a supplier.

The evidence offered by respondents in defense consisted largely of testimony and other evidence offered by each respondent, separately, with respect to its methods of selling and distributing frozen products, and the extent to which the complaint practices play a part therein. Certain of the respondents also called dealer and competitor witnesses. A number of the respondents also joined in presenting certain statistical and economic evidence. This evidence consisted of two parts. One involved the results of a statistical survey of ice cream dealers conducted by National Analysts, Inc. of Philadelphia on behalf of a number of respondents, purporting to show the extent to which the complaint practices play a part in the choice of a supplier by dealers. The second part of the joint evidence consisted of testimony and other evidence offered through Professor M. A. Adelman of Massachusetts Institute of Technology, based on official data of the Department of Agriculture, purporting to show the market and production shares of certain of the respondents in various market areas and states.

Counsel supporting the complaint called in rebuttal an official of the Department of Agriculture for the purpose of explaining certain industry data compiled and published by the Department of Agriculture.

Before turning to a consideration of the evidence with respect to the complaint practices, it is desirable to consider at this time motions filed by a number of respondents to strike substantial portions of the testimony adduced by counsel supporting the complaint on the ground that such testimony is hearsay or consists of unsupported conclusions and opinions. Since a large portion of the argument of counsel supporting the complaint is based on such testimony, it is important to dispose of the motions before discussing the evidence.

B. *The Motions to Strike*

During the presentation of the case-in-chief counsel supporting the complaint called a number of ice cream manufacturers who testified concerning competitive conditions in their respective market areas. Certain of such manufacturers claimed that their ice cream sales had declined in recent years or had failed to keep pace with population increases. In an effort to attribute these conditions to respondents, counsel supporting the complaint sought to show through these competitor witnesses that they had lost or been unable to acquire a number of specifically named retail accounts because the accounts had been assisted by respondents in one of the ways challenged by the complaints.

The testimony of these witnesses as to why they had lost the accounts in question was based, in many instances, on conversations allegedly had with the retail dealers in which the latter purported to state the reason they had switched to a particular respondent or were doing business with that respondent. In some instances the competitor witness had not himself spoken to the dealer but based his testimony on information received from a salesman or driver who had allegedly spoken with the dealer. In other instances the witness' testimony as to why the account had been lost or could not be acquired was based merely on his own opinion or surmise, it not appearing that either he or an employee had been informed as to the reason by the dealer.

Respondents objected to such testimony as being hearsay or based on unsupported conclusions. The examiner ruled that the testimony of a conversation between a competitor witness and a dealer would be received as evidence of the dealer's state of mind, provided that independent evidence was later offered to show that the dealer had in fact been assisted in the manner related by him, but that a motion to strike would be entertained if such independent evidence was not offered. Objections were sustained as to testimony regarding the reasons for loss of accounts where such testimony was based on reports received from third persons or merely on the witness' own conclusions. However, in a number of instances, such testimony came into the record before it was apparent that it was not based on personal conversation between the witness and the dealer involved.

Despite numerous admonitions by the examiner that he would make no findings as to why competitor witnesses had lost specifically named accounts unless independent evidence was offered to establish the assistance of such accounts by respondents, counsel supporting the complaint failed to offer such evidence with respect to the bulk of the

accounts in question.[5] Counsel for six of the respondents have, accordingly, filed motions to strike the testimony of competitor witnesses dealing with the loss of or inability to acquire such accounts.

The testimony of competitor witnesses concerning the loss of, or inability to acquire, particular retail accounts has relevance in this proceeding only insofar as this condition is attributable to the complaint practices and to respondents' use thereof. The mere fact that respondents engage in some of the complaint practices and that competititors have lost accounts to respondents does not necessarily establish a causal connection between the two, since such losses may have been due to competitive factors having no connection with the complaints. Counsel supporting the complaint apparently recognized this by seeking to elicit from competitors the fact that it was respondents' use of the complaint practices which was the specific reason for the loss of, or inability to acquire, the accounts referred to.

In order to demonstrate that an account was lost to a respondent because it had received assistance in one of the ways indicated in the complaints, two facts must be established: (1) That the account was in fact assisted in the manner alleged in the complaints, and (2) that this assistance was, in fact, the reason for the account's choice of respondent as his supplier. For example, if it is sought to establish that Doe Ice Cream Company lost Jones' Grocery Store to respondent National Dairy because of a loan, it must appear (1) that Jones did in fact receive a loan from respondent National Dairy and (2) that this was his reason for switching from Doe Ice Cream Company to respondent National. The testimony by Doe's president that Jones informed him that a loan from National was his reason for changing suppliers is acceptable evidence that he was induced to switch because of the loan, provided there is independent evidence in the record that Jones did, in fact, receive a loan from respondent National. However, the testimony of the conversation between Doe and Jones cannot be used to establish both the fact of the giving of the loan by National

[5] During the course of the proceedings a number of the respondents offered to supply counsel supporting the complaint with information from their records as to whether dealers specifically named by competitors had been assisted by them, if counsel would furnish them with a list of dealers as to which such information was desired. So far as appears from the record, no such request was made by counsel supporting the complaint. Subpoenas duces tecum requesting detailed information with respect to assistance to dealer accounts, beyond that which the examiner deemed necessary for purposes of these proceedings, were quashed or limited on motion of a number of the respondents. The examiner's order of May 1, 1956, quashing certain of such subpoenas provided that an application for new subpoenas could be made in the event respondents failed to supply information with respect to specifically named accounts, in response to a request from counsel supporting the complaint. No application for a renewal of such subpoenas was ever made.

and Jones' motive or state of mind in switching. As evidence of Jones' state of mind, the testimony is admissible as exception to the hearsay rule. As evidence of the fact of granting the loan the testimony is pure hearsay.

Respondents suggest that the best evidence of why a dealer ceased dealing with his former supplier and switched to a respondent would be the testimony of the dealer himself, rather than the testimony of his former supplier. Respondents cite, in this connection, the decision of a Commission hearing examiner in *Yale and Towne Manufacturing Company*, Docket No. 6232, holding such evidence to be unreliable hearsay. This holding was, however, later modified by the Commission in its opinion in the case, which held that such evidence "came within one of the recognized exceptions to the hearsay rule." The Commission's holding in this respect is in accord with the line of authority beginning with *Lawlor* v. *Loewe*, 235 U.S. 52, which is cited in this examiner's decision (as affirmed by the Commission) in *Purex Corporation, Ltd.*, 51 FTC, 100, 121 (fn. 12).

However, while testimony of conversations between a competitor of respondent and a dealer is admissible to show the state of mind or motive of the dealer, it is pure hearsay insofar as establishing the fact of assistance to the dealer by respondent. Absent independent evidence of the latter, there is nothing for the appendage of the competitor's testimony as to motive to attach to, and such testimony standing alone can be given no probative weight. See, in this connection, *Harley-Davidson Motor Co.*, 50 FTC, 1047, a proceeding under Section 3 of the Clayton Act, where letters of dealers indicating their refusal to deal with a competitor of respondent because of an exclusive dealing arrangement with respondent were held admissible as an exception to the hearsay rule, as showing reason or motive, but where the Commission stated that (p. 1068):

> *Standing alone, these letters could not establish the existence of an exclusive dealing agreement. But where the exclusive dealing arrangement has been established,* and where certain of respondent's dealers have stopped buying certain competitive products, *letters of these dealers to the sellers cut off are competent to show the reason* for this action given by the dealer at the time. Taken together with other evidence showing the existence of respondent's activities to enforce its exclusive dealing policy, and the actual stopping of purchases from the competitor, these letters are very persuasive, competent, and clearly material as part of the evidence showing the effect of respondent's practices on competition. [Emphasis supplied.]

See also, *Purex Corporation, Ltd.*, *supra*, at 125, 143, 154-155, 158, 160, where the testimony by competitors of respondent concerning conversations with distributor customers was held to have no pro-

bative value in establishing that a discriminatory price received from respondent was the reason for the change in suppliers, where there was no independent evidence of the discriminatory price in the market areas involved.

The second main category of evidence objected to involves testimony of competitors relating conversations purported to have been had with a dealer by one of the witness' employees, rather than by the witness himself. Such testimony is a classic example of hearsay evidence. It is not admissible evidence of motive or reason for changing suppliers since the witness himself did not talk to the dealer, but is a mere recitation of a conversation reported to the witness by a third person. Counsel supporting the complaint has urged that such testimony is admissible as being a report made in the regular course of business. The exception to the hearsay rule involving reports made in the regular course of business, relates to written reports made substantially contemporaneously with the event recorded. Furthermore, such exception does not make admissible matters of hearsay and opinion contained in the report. See *Purex Corporation*, *supra*, at 130, holding to be unreliable hearsay, oral reports of conversations with a dealer reported to the witness by a third person. See also *Woody Fashions*, *Inc.*, 51 FTC 62, 63, 66, holding that even a written report is inadmissible as hearsay when the person who prepared it was not available to testify. In any event, since the testimony of conversations between competing manufacturers and dealers is admissible only to show motive, and since there is no independent evidence of dealer assistance by respondents to most of the accounts involved, the evidence of such conversations can have no probative value absent such independent evidence.

The final category of testimony objected to consists largely of testimony by competitors seeking to attribute the loss of certain accounts to respondents, where it does not appear from their testimony that their conclusions regarding the loss of the accounts is based on anything more than their own opinion, conclusion or surmise. It does not appear in most of such instances that the witness' opinion is based either on a personal conversation with the dealer or that it is even based on a report received from one of his employees who talked to the dealer. In most of such instances the witness appeared to be simply giving his own opinion or that of an employee as to why the account had been lost or could not be acquired. Such conclusory testimony is clearly not reliable evidence upon which to base a finding. Moreover, as in the case of testimony involving conversations with dealers, there is no independent evidence in most of such

instances that the dealer had actually received assistance from one of the respondents in the manner claimed.

Counsel supporting the complaint makes a general argument in favor of receiving hearsay evidence in an administrative proceeding, citing the opinion of Judge Wyzanski in *U.S.* v. *United Shoe Machinery Corp.*, 89 F. Supp. 349, which holds that it is not error to receive such evidence in civil antitrust cases tried without a jury. However, the opinion cited does not stand for the proposition that hearsay is generally admissible, but only where it involves testimony "of the kind that usually affects fair-minded men in the conduct of their more important affairs." The testimony which counsel supporting the complaint is here urging as admissible does not fall within the exception cited in the *United Shoe Machinery* case since it is of a generally unreliable nature. A number of the competitor witnesses themselves recognized that credence could not be given to such reports from dealers, concerning what another manufacturer had done for them or had offered to do for them, since dealers traditionally play off one manufacturer against another in an effort to make the best deal. As one of them testified: "I would say you hardly ever get the whole truth by talking to one party in an affair." In a number of instances the reports allegedly received by competitor witnesses from dealers, as to what assistance certain respondents had given them, were demonstrated to be false by other evidence offered by counsel supporting the complaint, which disclosed that the dealers in question had not received the reported assistance. While hearsay may be admissible under the more lenient rules applicable in administrative proceedings, it is not generally considered to be reliable and substantial evidence and hence, unless corroborated, cannot be made the basis of a finding. *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229–230; *Willapoint Oysters, Inc.* v. *Ewing*, 174 F. 2d 676, 690–691 (C.A. 9); *Yiannopoulos* v. *Robinson*, 247 F. 2d 655, 657–658 (C.A. 7); *Compagnie de Navigation Cyprien Fabre* (Federal Maritime Board), August 18, 1955, 5 Pike & Fischer, Admin. Law (2d) 441.

Accordingly, in each instance where the testimony concerning the loss of, or inability to acquire, specific accounts by competitor witnesses is not buttressed by independent evidence establishing that the dealer referred to did in fact receive assistance or an offer of assistance in the manner indicated, the examiner will make no finding that the competitor lost or was unable to obtain the account in question for the reason indicated. Ordinarily the examiner would consider it appropriate to strike such hearsay evidence in view of counsel's failure to offer evidence necessary to give it probative value. However, the ex-

aminer does not consider it practical to do so in this instance. Respondents' specifications of the testimony they seek to have stricken cover 36 pages and involve hundreds of pages of testimony. In view of the ultimate disposition to be made of these proceedings, the examiner deems it impractical to rule upon each and every one of the specifications set forth in the motions. It is sufficient at this point for the examiner to indicate his general intention not to rely on such hearsay testimony. Specific instances of the evidence falling within this general rule will hereafter be adverted to.

C. *The Complaint Practices*

1. Cabinets (Facilities)

1. There are five allegations in Paragraph Six of the complaints dealing with the supplying of refrigerated cabinets for the storing of ice cream and other frozen products (such cabinets being referred to in the complaints as "facilities"). Basically, what the complaints charge is that respondents have supplied cabinets to dealers as an inducement for the dealers to handle respondents' products exclusively. Refinements of this basic practice are alleged to involve the sale, loan or lease of such facilities (a) with the understanding that the dealer will not handle the products of respondents' competitors, (b) with the understanding that only respondents' products will be stored in the cabinets, (c) on terms more favorable than could be obtained from regular facility dealers or (d) without direct profit or compensation to respondents.

The basic issues which arise with respect to supplying of cabinets by respondents, the supplying of which is not generally in dispute, are: (a) Do respondents use facilities as an "inducement" for dealers to handle or continue handling their products or, stated differently, does the supplying of facilities by respondents have the effect, whether intended or not, of inducing dealers to handle their products, and (b) has the supplying of such facilities involved any understanding as to exclusive dealing or has it had the tendency or effect, whether intended or not, of bringing about exclusive dealing. There is also presented an issue as to whether the supplying of cabinets under the circumstances alleged has had any effect on competition or is likely to have such an effect. Since most of the evidence in the record with respect to injury to competition cannot be segregated as between the various complaint practices, this question will be generally reserved for later consideration in connection with a general analysis of the evidence of injury. However, to the extent that claims of injury spe-

cifically attributable to cabinets were made, some reference to them will be made in this portion of the decision.

2. It is clear from the evidence that the mere fact of furnishing a cabinet to a dealer, either by sale, loan or lease, does not act as an inducement for the dealer to purchase his frozen products from respondents. This could be true only if respondents were the sole group of manufacturers or were part of a limited group of manufacturers who furnished cabinets to dealers. The contrary is, however, the case.

The evidence discloses that from the very infancy of the industry it has been customary for the ice cream manufacturer to supply the container in which the product was stored. This has been necessary because of the highly perishable nature of the product, which must be maintained at around zero degree temperature, and because of the unwillingness or inability of the dealer to provide the storage container himself. It has been considered to be in the manufacturer's interest to provide this facility since he has been held responsible, both by the dealer and the consuming public, if his product becomes unsaleable or unpalatable by virtue of melting and refreezing.

Thus in the very earliest days of the industry the ice cream manufacturer supplied a wooden tub in which the ice cream was stored, packed it with salt and ice, and kept it supplied with salt and ice. Around 1920 a wooden cabinet came into use, in which the tub, packed in salt and ice, was placed. This too was supplied by the ice cream manufacturer. During the 1920's the first electrical cabinets were developed by equipment manufacturers and began to be supplied by ice cream manufacturers in lieu of the old tubs and wooden cabinets. By the 1930's electrical cabinets supplied by ice cream manufacturers were generally in use in the ice cream retailing industry.

Up to the period of World War II the electric cabinets were relatively simple and inexpensive. They served primarily a utilitarian purpose of storing and preserving the ice cream until sold. However, subsequent to World War II manufacturers of refrigeration equipment began to develop newer and more attractive types of cabinets. The earliest types of such cabinets had a sliding top in place of the stationary cover over the openings in the cabinet. Later models had open tops and still later models had glass fronts and were self-defrosting. The latter types are generally referred to as display-types or merchandising cabinets, since they bring the ice cream into view of the purchasing public and are calculated to stimulate consumer appetite for ice cream. These more modern cabinets are larger and more expensive than the conventional pre-war types. However, many ice cream manufacturers felt that the additional expense was justi-

fied since ice cream is essentially an impulse item, and storing it in an attractive cabinet, conveniently placed in the store, has tended to stimulate ice cream sales.

3. It has been the general practice for ice cream manufacturers in most sections of the country to supply their customers with ice cream cabinets. These cabinets are customarily loaned to dealers on a rent-free basis. In the minority of instances where dealers do own their own ice cream cabinets the ice cream manufacturers generally grant them a special discount (sometimes referred to as a "refrigeration allowance" or an "iceless discount") in recognition of the fact that the manufacturer has been relieved of an expense which is customarily borne by him. The ice cream supplier loaning the cabinet usually undertakes to keep it in a proper state of repair by periodic inspection or service calls. Where dealers have desired to own their own cabinet equipment, in order to take advantage of a refrigeration allowance or for some other reason, it has been customary for ice cream manufacturers to arrange to sell them a cabinet. Customarily such cabinets have been sold on a time-payment basis, under a conditional sales arrangement.

The practice of leasing cabinets to dealers under a rental arrangement has largely ceased. This practice, which was used in certain sections of the country, particularly in rural areas, had begun to dwindle even before World War II. Some manufacturers have, however, continued to charge a rental to dealers who have a very small volume which does not justify the furnishing of a cabinet on a rent-free basis. The only area of the country where it is the general practice to lease cabinets on a formal rental basis is the State of California where, by statute enacted in 1939, a manufacturer is prohibited from furnishing a cabinet without making a rental charge therefor.

4. The competitor witnesses called by counsel supporting the complaint differed among themselves with respect to the desirability of the practice of ice cream manufacturers in supplying cabinets to their dealers. Some indicated that they preferred not to have to supply cabinets because of the expense involved. However, a number of others expressed approval of the practice for the reason that many dealers would not otherwise handle ice cream because they could not afford to purchase and maintain a cabinet, particularly small and medium-sized retail outlets. Some of the witnesses indicated that they had no objection to supplying cabinets if a rental charge could be made to defray the cost thereof. However, others indicated that the difference between supplying a cabinet free-of-charge and supply-

ing one on a rental basis was more apparent than real, since the dropping of the formal rental charge was usually accompanied by a price adjustment to take care of the fact that the manufacturer was no longer charging a rental to help defray his cabinet costs. Some in the latter group indicated that the bookkeeping and other expenses involved in collecting the rental largely offset the amount of the rental.

5. Most of the criticism of competitor manufacturers having to do with the practice of furnishing cabinets was directed not at the practice of furnishing cabinets as such, but revolved about the substantial increase in cabinet costs which occurred during the postwar period as a result of the fact that dealers began to demand the larger and more expensive display-type cabinets when they came into vogue. Many of these witnesses conceded that the newer types of cabinets had been helpful to the industry by boosting ice cream sales, thereby largely offsetting the increased cost thereof. However, some of them claimed that some manufacturers were supplying more cabinets than were required or larger ones than were justified by a dealer's volume. There was also criticism in some areas that manufacturers were supplying cabinets for use in storing frozen foods other than ice cream or were permitting frozen foods to be stored in ice cream cabinets which were too large for the dealer's ice cream needs.

The gravamen of the testimony of competitor witnesses who referred to the subject of cabinets was thus directed at the furnishing of "excessive" equipment (excessive either in number or type), rather than at the practice of supplying cabinets as such. This also appears to be the position of counsel supporting the complaint who interprets the complaints as alleging that respondents "supply better cabinets than are needed and more cabinet space than is required." To this extent counsel appears to have receded from the broad attack of the complaints on the supplying of cabinets as such.

6. Insofar as the basic practice of supplying cabinets is concerned, the evidence fails to establish that respondents are responsible either for its origination or its continuance. The practice originated before some of them went into the ice cream business and has been in vogue in some sections of the country where none of the respondents operated. The deeply ingrained nature of the practice and respondents' lack of leadership in it is demonstrated by the failure of efforts on the part of some of them to terminate or modify the practice. Thus, efforts by respondent Borden in New York City, in Phoenix, Arizona, and in Iowa to get out of the cabinet business by selling out their cabinets to dealers have met with no success. A serious effort by respondent Na-

tional in the upstate New York area to induce its dealers to purchase the cabinets which it had loaned them resulted in less than 3.5 percent of their dealers agreeing to purchase cabinets and the effort had to be abandoned. Similarly, efforts by respondent Arden to collect cabinet rentals in the Portland, Oregon, market, where it is a substantial factor, and by respondents Arden and Carnation to introduce the California practice of charging rentals in the Phoenix, Arizona, market, where they are leading factors, have been unsuccessful.

7. As already noted, the thrust of the testimony of competitor witnesses dealing with the subject of cabinets was not directed so much at the practice of supplying cabinets, but at the excesses which had allegedly arisen in connection with the furnishing of cabinets, i.e., that some manufacturers used cabinets as a vehicle for acquiring or retaining dealer accounts by making offers beyond what the dealer's normal needs require. It was asserted, for example, that newer-type cabinets were being supplied to dealers before their present cabinets had become obsolete, that dealers were supplied with more cabinets than required for their ice cream needs, that dealers were supplied with larger cabinets than their sales required, and that dealers were supplied with cabinets for use in storing products other than frozen dairy products.

In connection with such claims, it should first be noted that there is a large element of subjectivity involved, and that the size and number of cabinets will vary with the particular manufacturer's business judgment and method of operation. One manufacturer may feel that a small cabinet or a single cabinet of the non-display type is suitable for a particular dealer because of the dealer's small size and his location. Another manufacturer may feel that the dealer has a greater potential than his present sales indicate and that the supplying of a more modern type of cabinet will help realize his sales potential. One manufacturer may be extremely conservative in his cabinet policy and permit a cabinet to remain in a dealer's premises after it has become obsolete. Another may have a more progressive cabinet policy and feel that his sales will be aided by furnishing more modern cabinets as they are brought on the market, even though many of his cabinets are not yet obsolete. One manufacturer having a daily delivery schedule in a particular area may feel that a single cabinet or one of a smaller size is suitable for a particular dealer. Another manufacturer, in an effort to cut down on his delivery costs, which are a significant factor in the industry, may feel that it will ultimately be cheaper to furnish a dealer with an additional cabinet for storage or with a cabinet of larger size in order to accommodate the manufacturer's less frequent delivery schedule.

The evidence fails to establish in definitive terms that there are any recognized and universal norms of cabinet size and type against which the practices of respondents or of ice cream manufacturers generally can be measured. For this reason it is difficult to evaluate the opinions and conclusions of some competitor witnesses that certain of the respondents had furnished dealers with more or better equipment than these particular witnesses thought was justified. Such generalized opinion testimony is of limited value, except as it is related to specific accounts where the volume of the account is known and the delivery pattern of the manufacturer is disclosed, and where the size and type of cabinet alleged to have been improperly furnished are clearly established. It may also be noted, in evaluating such generalized claims, that it is not in the economic interest of an ice cream manufacturer to supply a dealer with more equipment than his volume will justify since equipment must pay for itself out of the dealer's purchases. There may be instances where a manufacturer will misjudge a dealer's volume and supply him with a cabinet which is too large and expensive for his needs. However, the simple economics of the situation will soon dictate to the manufacturer that he must rectify the situation. Where this happens the manufacturer will usually move the cabinet to a more suitable location and replace it with one more appropriate for the volume and type of establishment of the particular dealer.

It should also be noted that the mere fact that a manufacturer furnishes a cabinet to a dealer which is larger or of a more modern type than that of the dealer's former supplier does not necessarily mean that the dealer changed suppliers because of the cabinet. The evidence discloses that there are a great many reasons which cause dealers to switch having no connection with the complaint practices, such as greater consumer acceptance of the new supplier's products, a better merchandising program, better prices, better service, dissatisfaction with a salesman or driver, or better salesmanship. Very often where dealers change suppliers because of circumstances unconnected with the complaint practices, there is no discussion as to what type of cabinet the dealer will receive, it being implicitly understood that he will be furnished with an appropriate cabinet to replace that of his former supplier.

8. The evidence with respect to cabinets upon which counsel supporting the complaint relies falls into three main categories, (a) statistical evidence as to the amounts which respondents have invested in cabinets, (b) testimony by competitor witnesses concerning respondents' use of cabinets in acquiring accounts, and (c) testimony

of dealer witnesses who were supplied with cabinets. Each is hereinafter discussed.

(a) *Cabinet Investment.* Counsel supporting the complaint cites the large amounts spent by each respondent for cabinets and suggests that such amounts are abnormal and beyond the reach of other manufacturers. The figures cited include each respondent's total investment in cabinets, as of December 31, 1955, and the amounts spent for cabinets in 1955 as follows:

	Total cabinet investment as of Dec. 31, 1955	Amount spent for cabinets in 1955
National	$17,751,545	$3,468,475
Borden	4,816,017	332,244
Foremost	4,596,177	407,873
Beatrice	[1] 8,792,638	[2] 2,884,407
Arden	1,081,586	221,602
Carnation	4,401,122	1,175,658
Fairmont	1,532,685	443,451
Pet	953,662	212,251
Hood	2,628,128	775,899

[1] This figure includes $5,252,601 invested by companies having no affiliation with Beatrice, from which the latter leases the cabinets.

[2] This figure includes $1,785,932 in cabinets leased from others.

The above figures, while indicating that each of the respondents has invested substantial amounts in cabinets supplied to dealers, establish nothing in themselves. Cabinet investment is a relative thing. It involves a relationship to the number of accounts served by a company and the gallonage of such accounts. There is no showing in the record that relative to the number of accounts which they serve and the gallonage thereof any of the respondents has an inordinate investment in cabinets. Counsel supporting the complaint argues that by reason of their financial ability, respondents are able to spend more for cabinets than their smaller competitors. The record does not, however, demonstrate that the respondents have in fact invested sums in cabinets beyond that normally expended by competitors generally. In fact there is no reliable and substantial evidence in the record as to the cabinet expenditures of other manufacturers in relationship to the gallonage figures of such companies.

It will be observed that there are wide differences in cabinet expenditures among the respondents themselves, with Pet's investment being under $1,000,000, as compared to National's investment of over $17,000,000. When it is noted that National's ice cream gallonage in 1955 was almost 86,000,000 gallons, while Pet's was approximately 4,000,000, the lack of significance of total figures of cabinet expenditures becomes apparent. There is no evidence that

relative to its frozen products business any respondent has an abnormal investment in cabinets.

Counsel supporting the complaint cites figures purporting to reflect the per gallon investment in cabinets by each respondent and suggests that the per gallon cabinet investment of respondents is unusually high. The figures cited by counsel have been computed by dividing each respondent's total cabinet investment by its total ice cream gallonage in 1955. This method involves two basic errors. First, in dividing by the gallonage for only one year, it is assumed that the cabinets involved have a useful life of only one year, which is contrary to the evidence. Secondly, except for Beatrice, counsel uses each respondent's hard ice cream sales as the divisor rather than its total frozen products sales, although the cabinets are used to store all frozen dairy products. This tends to exaggerate each company's per gallon expenditures. The extent thereof becomes apparent when it is noted that Carnation's hard ice cream gallonage figure (used by counsel as a divisor) is approximately 10,215,000 gallons, while its total frozen products sales are approximately 16,000,000 gallons.

Even accepting the figures used by counsel supporting the complaint, they vary so widely from company to company as to reflect no common pattern and to have no meaningful significance. Thus the per gallonage cabinet investment figures of Arden and Borden are 7.8 cents and 8.5 cents, respectively, while those of National and Hood are 20.7 cents and 31.1 cents, respectively. Such differences may readily be accounted for by the fact that one company may have a large quantity of older, depreciated cabinets in use which may shortly be replaced, while another may recently have replaced a number of its older cabinets. The figures cited by counsel supporting the complaint, both with respect to total cabinet expenditures and per gallon investment, fail to support any inference adverse to respondents.

(b) *Competitor Testimony.* There is relatively little testimony by competitor witnesses critical of the basic practice of supplying cabinets to dealers. For the most part competitor witnesses referred to it as a normal and traditional industry practice. To the extent that there was any criticism of the practice, it centered about certain excesses which had allegedly arisen. These, as already noted, involved the supplying of more or better cabinets than dealers required, or the furnishing of cabinets for use in storing non-dairy frozen foods.

In his brief, counsel supporting the complaint cites the testimony of several competitor witnesses purporting to be critical of the basic practice of supplying cabinets. One is a Seattle manufacturer who

testified in the affirmative in response to the leading question of counsel as to whether his investment in cabinets was a "drain on your capital structure." Another is an Atlanta manufacturer who expressed the opinion that the supplying of cabinets is no longer a necessary element in the development of ice cream sales. Still another is a Beaumont, Texas, dealer who testified that he would prefer to sell cabinets to dealers or to lease them rather than supply them without charge.

However, there were many witnesses called by counsel supporting the complaint whose testimony was favorable to the practice of supplying cabinets to dealers. These ice cream manufacturers indicated that many small and medium-sized dealers could not afford to purchase their own cabinets and would not carry ice cream if they were not supplied with a cabinet. While some of these expressed concern over the increased cost of cabinets, particularly the modern display-type cabinets, a number of them indicated that the increased sales resulting from the use of such cabinets justified the increased expense thereof. The Atlanta witness whose testimony is cited by counsel supporting the complaint agreed that the open display-type cabinets had been a factor in his company's substantial increase in sales. Likewise, the Seattle manufacturer whose testimony counsel cites conceded that the newer type cabinets helped increase sales in the modern stores where there is considerable customer traffic.

Insofar as the preference on the part of some manufacturers for leasing cabinets to dealers rather than supplying them on a rent-free basis, a number of the manufacturers indicated that the difference was one of form rather than of substance, since the price of the ice cream inevitably included the cost of the cabinet. Where a formal rental is charged, the price is somewhat lower than if the cabinet is supplied on a so-called rent-free basis. Some manufacturers indicated that the cost of collecting rentals largely offset the value of the formal rental charge.

Similarly, in the case of selling cabinets to dealers, there is little difference in the basic cost to the manufacturer. Since most dealers cannot afford to pay cash, the cabinet is paid for on an installment basis, with the ice cream manufacturer still bearing the same basic cost of the cabinet until it is paid for. The special refrigeration allowance generally granted to dealers who own their own cabinet results in a price reduction, which largely pays for the cabinet and is the substantial equivalent of a cabinet rental charge.

In any event, it is not the function of the Commission to act as an arbiter among the conflicting preferences of ice cream manufacturers.

The basic question is not whether some manufacturers like or dislike certain practices or prefer somewhat different or better ways of selling ice cream, but (a) whether certain practices are basically unfair and inimical to competition, and (b) whether respondents are responsible for either initiating the practices or have used them unfairly to injure competition.

As has already been noted, the practice of supplying cabinets by ice cream manufacturers is an ancient practice in the industry and is one for which respondents are not responsible. The decline in the practice of charging rentals, which was formerly in vogue in some sections of the country, cannot be attributed to respondents. As already noted, efforts by some of the respondents to introduce or continue the practice of charging rentals have been unsuccessful. Likewise, efforts by some respondents to sell cabinets to dealers, rather than furnish them on a so-called free basis, have been unsuccessful. Ironically, while counsel supporting the complaint cites with apparent approval the testimony of the Beaumont manufacturer that he would prefer to sell cabinets than loan them, counsel called a manufacturer in Knoxville, Tennessee who criticized respondent Pet for doing precisely that, viz., selling cabinets to dealers who wished to purchase them.

The failure of the efforts on the part of some of the respondents to change or modify basic cabinet practices, in markets where such respondents are an important factor, attests to the deep-rooted nature of the practices and respondents' lack of control over them. This was confirmed by the testimony of competitors who conceded that even if respondents ceased supplying cabinets, many of their competitors would continue to do so. Such witnesses also agreed that any company which was prohibited from supplying its customers with cabinets would be put in a precarious competitive position.

As previously noted, the bulk of the testimony critical of the practice of supplying cabinets was directed at so-called excesses, rather than at the basic practice itself. Typical of such testimony is that of the Beaumont manufacturer cited by counsel supporting the complaint, who testified in the affirmative in response to the leading and suggestive question of counsel supporting the complaint as to whether: "Competition forced you to exceed what you thought was adequate and put in a still better cabinet?" Counsel supporting the complaint apparently equates the witness' reference to "competition" with "respondents", as he does in numerous other references to the testimony. However, not only did the witness make no claim that any of the respondents was responsible for the prevailing cabinet practices in

his area, but his principal complaint related to price competition and mainly involved a nonrespondent company.

To a large extent the claims of difficulties arising in connection with the supplying of cabinets were attributed to the increased cost thereof (as cabinets have become larger and more elaborate) and to the demands of dealers, rather than to the activities of particular competitors. Typical is the testimony of the Seattle manufacturer cited by counsel supporting the complaint, who stated that as the stores became larger and more modern they demanded more and better equipment. He did not, however, attribute this to any of the respondents but stated that all companies in the area were "in the same boat," insofar as being subject to the demands of dealers for better equipment.

While there were some witnesses who sought to attribute to respondents the use of cabinet excesses in the acquiring of accounts, their testimony was generally of a conclusory nature and, insofar as they sought to refer to specific accounts which they had allegedly lost or were unable to acquire because of such practices, their testimony consisted mainly of unreliable hearsay, conjecture and surmise. Typical is that of a witness from San Antonio, Texas, cited by counsel supporting the complaint, who claimed that respondent Carnation had supplied an account with a cabinet for use in storing frozen foods. Other than the witness' hearsay and conclusory testimony, there is no reliable evidence in the record as to the supplying of a cabinet to the account in question, for use in storing frozen foods, by Carnation. The witness conceded that it was not uncommon to find frozen foods in his own company's cabinets, despite its efforts to discourage such use by dealers. The testimony of other witnesses indicates that this is a problem shared by most ice cream manufacturers, including respondents.

With respect to the testimony of those witnesses who claimed that respondents had supplied larger or better cabinets than they considered proper, it has already been noted that the record contains no substantial evidence as to objective cabinet standards against which such subjective claims can be weighed. Moreover, in most instances there is no reliable evidence as to what cabinets were furnished by respondents to the accounts in question, nor as to the gallonage of such accounts. There is therefore no basis for determining whether the supplying of cabinets in such instances, if it occurred, extended beyond the exercise of sound business judgment with respect to appropriate cabinet size and type. The record is also lacking in reliable evidence that the furnishing of cabinets acted as an inducement for dealing with respondents in any substantial number of instances.

While some of the competitor witnesses claimed that certain dealers had advised them that the receipt of a cabinet by a respondent had been a factor in their choice of a supplier, the record is lacking in reliable evidence as to what type of cabinet, if any, such dealers had received. No weight can therefore be given to such testimony for the reasons heretofore indicated in the section entitled "The Motions to Strike."

While it may be that some of the competitor witnesses called by counsel supporting the complaint have a predilection against the supplying of cabinets, there is no substantial evidence that the practice has had an anti-competitive effect. Of the ten competitors whose testimony counsel cites in his main brief and proposed findings, only two have sustained a decline in sales in recent years and in neither instance does the evidence establish that such decline can be attributed in any significant degree to the use of cabinets as a competitive weapon by respondents. Moreover, the evidence fails to establish any injury to competition in any market area, aside from the alleged difficulties of a few individual competitors.

(c) *Dealer Testimony.* As has been previously indicated, the mere fact that a dealer receives a cabinet does not establish that this was his motive for dealing with a particular supplier, since cabinets are generally available from ice cream suppliers. Even the fact that he has received a larger or better cabinet than that furnished by a previous supplier does not by itself establish that this was his reason for switching. The evidence discloses that dealers will frequently switch for reasons having nothing to do with a cabinet, and that incidental thereto they may receive a better cabinet.

In apparent recognition of this, counsel supporting the complaint called a number of dealer witnesses for the ostensible purpose of establishing their reason for dealing with a particular supplier. In all, he called 73 dealer witnesses. While in almost every instance these dealers had received a cabinet from one of the respondents, there were only a handful of cases where there was any reference to a cabinet as having played a part in the dealer's choice of a supplier.

Three of the dealers in the latter category were from Bellingham, Washington. One had switched to Arden after a local competitor had failed to replace a 16-year-old cabinet, despite repeated promises to do so. Another also switched to Arden after the same local supplier failed to replace an old, leaking combination cabinet and fountain. A third switched to Arden after another local supplier failed to replace what the dealer described as an "outmoded" cabinet, which was too small. These instances hardly establish that respondent Arden

undertook to obtain accounts by offering excessive cabinets. So far as appears, it simply undertook to meet the normal needs of these dealers which were being neglected by their former suppliers. In at least two of the above instances the installation of appropriate cabinets resulted in an increase in the dealer's sales.

Another instance where the supplying of a cabinet was stated to have played a part in the dealer's choice of a supplier involved a dealer in Houston, Texas. The dealer stated he had switched to respondent Arden mainly because it supplied him with a display-type cabinet in place of a conventional cabinet furnished by his former supplier, who had advised him he did not think the more modern type was suitable for his drive-in establishment. Subsequent events confirmed Arden's judgment since there was a substantial increase in the dealer's sales.

The final instance involved a dealer in Knoxville, Tennessee who switched from respondent National to respondent Pet when the latter sold him a cabinet, which he wished to purchase in order to take advantage of the special five per cent refrigeration allowance. The significance of this witness' testimony is somewhat difficult to comprehend. Apparently it is the position of counsel supporting the complaint that National was acting improperly in loaning cabinets to its customers rather than selling them, but that Pet was wrong in selling cabinets rather than loaning them.

The record contains evidence of some other instances where dealers had received better cabinets from a respondent than they had had from a former supplier. However, in these instances it does not appear that the cabinet was a reason for the change, or the dealer specifically negatived it as his motive for switching. For example, a dealer in Houston had received two open-type cabinets from Carnation in place of two closed cabinets from another supplier. The dealer's primary reason for changing was Carnation's better discount schedule, rather than the cabinets. The dealer was shown pictures by Carnation's salesman of the type of cabinet which was thought to be appropriate for his establishment and was told it would sell more ice cream. The latter prediction was borne out by a substantial increase in the dealer's sales of ice cream. Another dealer in Knoxville had received a better cabinet from Pet than from a local supplier, but testified this had nothing to do with his switching. The dealer had not asked the local supplier for a better cabinet and had not discussed with the Pet salesman the type of cabinet he would receive. By the time of the hearing he had already switched to another local supplier because of his dis-

satisfaction with Pet service, and had received an equivalent cabinet from the new supplier. The testimony of the latter witness is typical of most dealer witnesses, who take it for granted that they will receive an appropriate cabinet and whose choice of a supplier is usually based on other considerations.

9. In the above discussion consideration has been given mainly to the evidence adduced by counsel supporting the complaint, without the benefit of countervailing evidence offered by respondents. The evidence offered by respondents establishes that their primary effort in the sale of ice cream is centered on improving their product, in building up consumer acceptance through widespread advertising, merchandising and promotional programs, and in aiding their dealers through educational programs and advice as to the best ways for displaying and merchandising ice cream, rather than on "buying" or "captivating" accounts as contended by counsel supporting the complaint.

Insofar as cabinets are concerned, they are supplied in accordance with established industry practice on the basis of respondents' business judgment as to the size and type of cabinet suitable to the particular dealer and with due regard to their delivery schedule in the area. Only a small percentage of the cabinets supplied by respondents are of the modern display type. They are mainly placed in accounts where it is felt sales will be stimulated and increased thereby. Most of such cabinets are placed in existing accounts, rather than in accounts obtained from competitors. For the most part cabinets are supplied to small and medium-sized dealers, since the larger supermarkets and chains usually prefer to own their own refrigeration equipment. Dealers are encouraged to own their own equipment by being offered a special discount therefor but, except for the larger outlets, they have beeen reluctant or unable to undertake the expense.

10. The survey of ice cream dealers conducted by National Analysts, Inc., which respondents offered in evidence, tends largely to support the claims of respondents that the supplying of cabinets plays a relatively minor role in the dealer's choice of his supplier. The survey covered 1,331 dealer outlets handling 1,784 brands of frozen products, sold by 1,514 different ice cream manufacturers. The dealer outlets included 620 which handle the brand or brands of the respondents (except respondent Hood) and 894 served by nonrespondent companies.[6] So far as appears from the record, the survey was conducted

[6] Totals to more than 1,331 outlets because some carry multiple brands of more than one manufacturer.

in an objective, impartial manner and is statistically reliable.[7] The dealers were asked, (1) why they were handling their present brand or brands of ice cream, (2) what other reason they had for handling the brand, in addition to the reason or reasons first given and (3) which one of the reasons given was the most important reason for handling their present brand and which the second most important. The reasons given by the dealers are expressed in terms of percentages of the total number of dealer-brand combinations involved (referred to as "brand mentions"), rather than as a percentage of the number of dealers because of the multiple brands handled by some dealers. In most instances the totals of the responses exceed 100 percent because of the multiple reasons given by some dealers.

On this basis it will be noted that in answer to the general question in which dealers were asked why they were handling their present brand, only 6.4 per cent of the brand mentions involving respondents' dealers (out of a total of 167.2%) gave the furnishing of a cabinet or the servicing thereof as a reason for choosing one of the respondents as a supplier. When the dealers were asked what other reason they had for choosing their present supplier, an additional 4.4 percent (out of a total of 128.8 per cent) referred to cabinets as a reason. When the dealers were asked which of the reasons given was the most important reason and which was the second most important, the responses referring to cabinets were only 3.2 percent and 1.3 percent, respectively. It is significant that the responses from dealers purchasing the brands of other companies were almost identical, percentagewise, with those of respondents' dealers, indicating that the offering of cabinets as an inducement by respondents does not differ significantly from that of other companies and that in neither instance is it a major factor in the choice of suppliers.

The results of the survey also include a select group of dealers who had changed suppliers since January 1, 1955, which was within two years prior to the conducting of the survey. Although it might be expected that the results of this select group of dealers, who had recently switched, might show a larger proportion switching because of cabinets, the results were substantially identical as those of the larger group of dealers surveyed.

11. As has been heretofore noted, an essential element of the charges in these proceedings is the allegation of exclusive dealing. Insofar as cabinets are concerned, it is alleged that they are supplied pursuant

[7] The report of the survey, which was received in evidence without objection by counsel supporting the complaint, is part of the record of all of the above proceedings, except those involving respondents Pet, Fairmont and Hood.

to agreements which provide for the exclusive handling of the supplier's products or that the supplying thereof leads to exclusive dealing because of limitations of floor space. These allegations are considered below.

(a) *Exclusive Dealing Agreements.* It is customary for most manufacturers in supplying refrigeration equipment to a dealer to have him sign some type of form acknowledging receipt of the cabinet, compressor and related equipment. The nature and wording of such forms vary widely among the respondents and even differ among the various branches, divisions or subsidiaries of particular respondents. The forms bear such varying titles as "Refrigeration Equipment Agreement," "Loan of Equipment," "Bailment Lease," "Equipment Receipt," "Loan Receipt," "Delivery Receipt," "Installation Receipt," and "Lease Agreement." Some of the documents purport to be in the nature of formal agreements with undertakings by both parties. Others are more in the nature of simple receipts, some of which contain certain commitments on the part of the dealer. Some of the forms contain clauses which are in the nature of an exclusive dealing undertaking on the part of the dealer; others contain a more limited commitment, in the nature of an undertaking to store only the supplying manufacturer's products in the cabinet, but not prohibiting the dealer from purchasing the frozen products of another manufacturer; and still other forms contain no commitment whatsoever limiting the dealer's right to purchase competing frozen products or to store them in the cabinet of the supplying manufacturer. Set forth below is a brief analysis of some of the forms used by the various respondents, with particular reference to whether they contain any limiting clauses with respect to the dealer's right to purchase or store competing ice cream products.

(1) *Carnation.* Respondent Carnation uses a form in California entitled "Refrigeration Equipment Agreement" under which the dealer agrees that as long as he uses the equipment furnished him he will buy from Carnation exclusively all of his requirements of ice cream and other frozen products. This agreement is not for any fixed duration, and the obligation to purchase Carnation products lasts only "as long as he uses said equipment." A variation of this form, which is used in the Houston, Texas market, merely provides that the cabinet only will be used for the storage of Carnation products, but does not prevent the dealer from purchasing the frozen products of other manufacturers provided he does not store them in the Carnation cabinet. Another form which is used in Oklahoma contains no commitment by the dealer to buy his ice cream requirements exclusively from Carna-

tion or restricting his use of the cabinet to the storing of Carnation products.

(2) *Borden.* Respondent Borden uses a form of agreement entitled "Loan of Equipment," which provides that in consideration of the furnishing of mechanically refrigerated equipment for preserving ice cream and the furnishing of signs and advertising material the dealer agrees, during the term of the agreement, to buy his ice cream and other frozen commodities from respondent Borden "exclusively and to the extent of his requirements." An agreement of this type, having a term of five years, has been used by respondent Borden in the Philadelphia market. A similar form of agreement, having a more limited term of three years, has been used in the New York, New Jersey and Connecticut markets. A similar agreement, having a term of only one year, has been used in the Pittsburgh market.

Respondent Borden also uses a number of forms in connection with the loaning of cabinets which contain no requirement for exclusive dealing. Thus, an alternate form of document used in Connecticut entitled "Equipment Receipt" contains no agreement either with respect to exclusive purchase or exclusive storage of Borden products. A document entitled "Equipment Installment," used in California, and another entitled "Receipt", used in Iowa, likewise contain no exclusive provision, either with respect to the purchase or storage of Borden products. A "Lease Agreement" used in Wisconsin requires that the cabinet be used exclusively for storing Borden products, but contains no undertaking not to purchase competitive products. A form used in Florida likewise provides for the exclusive storage of Borden products in the cabinet, but contains no limitation on the purchase of the products of other manufacturers so long as they are not stored in the Borden cabinet.

(3) *Beatrice.* Respondent Beatrice and its subsidiaries have had in general use a form entitled "Equipment Receipt," which contains no provision that the dealer will buy his ice cream requirements exclusively from that supplier, although the form does provide that the equipment supplied to the dealer will only be used for the storing of products purchased from Beatrice. Counsel supporting the complaint cites in his brief a document entitled "Bailment", which contains a provision that the lessee of the equipment will, during the term of the lease, buy his ice cream and other dairy products from Beatrice "to the extent of his requirements for products of such nature." So far as appears from the record this form was used only in the Pittsburgh market and was abandoned in August 1953, prior to the issuance of the original complaints. Accordingly, it would appear that for over

five years respondent Beatrice has not used any form of agreement or receipt in connection with the supplying of facilities which requires that the dealer purchase his ice cream requirements exclusively from that respondent.

(4) *National.* Respondent National and a number of its subsidiaries have used a form of agreement in connection with the furnishing of cabinets and compressors which provides that for a term of one year the dealer will sell National products "exclusively to the full extent of Dealer's requirements". Other forms used by a number of the subsidiaries or divisions of respondent National, while containing a provision that the dealer will purchase his ice cream products exclusively from the company supplying the cabinet, do not obligate the dealer to do so for any specific term and give him the right to cancel the relationship at any time or after giving a brief notice.[8]

A number of the forms used by subsidiaries or division of respondent National contain no provision whatsoever for the exclusive purchase of National products, although in some instances the forms do limit the use of the equipment furnished to the storage of the company's products. Among the subsidiaries or divisions falling in this category is Southern Dairies, which operates throughout a wide area in the southeastern United States. The subsidiaries or divisions of respondent National which do not use any agreement or receipt containing a requirements or exclusive dealing clause serve 33.4 per cent of respondent National's dealers and sell 31 per cent of its volume.

(5) *Arden.* Respondent Arden has used a form entitled "Installation Receipt and Lease Agreement" in its Oregon and Washington State territories, which provides that during the term of the lease the lessee agrees to purchase all his ice cream and other frozen products from respondent Arden. This agreement is, however, terminable at will by either party. Another form, used in California and in Kansas, contains no provision with respect to exclusive dealing, but does require the dealer to use the cabinet only for the storage of respondent Arden's products. A form of receipt used by Arden's subsidiary, Melvern-Fussell, in Washington, D.C., contains no provision either with respect to exclusive dealing or exclusive storage.

(6) *Foremost.* A form in general use by respondent Foremost in many markets, including New York, South Carolina, Texas and Min-

[8] A "Loan Receipt" used in Indiana, Ohio, Illinois, Kansas and Missouri, obligates the dealer to use Sealtest products only as long as the cabinet remains in his possession. A similar document used in Louisville, Kentucky, and another used in upstate New York and the New England States, are subject to cancellation on 30 days' notice. An agreement used in Wisconsin and parts of Illinois is terminable on five days' notice. Another agreement used in parts of Pennsylvania and West Virginia is terminable at will.

nesota, contains a provision that equipment will be used only for storing products of respondent Foremost, but does not prohibit the dealer from buying a competitor's products nor require that he buy his exclusive requirements from respondent Foremost. A form of lease agreement which was used in Tennessee by Foremost's subsidiary Southern Maid (which has since been dissolved), did require the dealer to purchase his ice cream supplies from Southern Maid. However, the agreement was cancellable at any time.

(7) *Pet.* Respondent Pet does not use any form of agreement, lease or receipt, in connection with the furnishing of facilities, which requires the dealer to purchase exclusively from that respondent. It did at one time use a form of "Equipment Lease" in its Wisconsin territory which required the dealer to buy his requirements exclusively from respondent Pet during the term of the lease. However, it has been stipulated that this form of agreement was superseded in 1952 by one which contains no such provision. Moreover, respondent Pet has disposed of its Wisconsin operation since the inception of this proceeding and the forms there used have not been adopted in its other operations. The form which is generally in use throughout Pet's primary market, in the southeastern part of the United States, contains no provision requiring the dealer to purchase his frozen products exclusively from respondent Pet nor prohibiting the dealer from storing other products in the Pet cabinet. A form of receipt used by respondent Pet's subsidiary Colville Dairy in the Utah territory, while not requiring the dealer to purchase his requirements exclusively from that company, does prohibit the dealer from using the cabinet for the storage of frozen products sold by any other company.

(8) *Fairmont.* Respondent Fairmont uses various forms of receipts and leases in connection with the supplying of facilities, none of which prohibit the dealer from purchasing or using the products of a competing manufacturer. Most of the forms do, however, provide that the cabinet supplied by Fairmont will be used only for the storing of its products.

(9) *Hood.* So far as appears from the record, respondent Hood uses no forms of agreement, lease or receipt in connection with the supplying of refrigeration equipment which prohibit the dealer from using another manufacturer's products or which require that the equipment be used only for the storing of Hood products.

(b) *Practical Operation.* As indicated by the foregoing, there is considerable variance among the forms used by respondents, insofar as the requirement for exclusive purchase of the suppliers' products.

The forms used by respondents Beatrice, Foremost, Pet, Fairmont and Hood contain no such provision. Some of the agreements used by respondents Arden and Carnation do contain the provision, but it is effective only as long as the dealer chooses to use the cabinet. Some of the agreements used by respondent National containing such a provision have a fixed duration of one year, while others are terminable at will or on short notice, and approximately one-third of its gallonage is not covered by such agreements. While respondent Borden uses some agreements of longer duration containing the questioned clause, in other areas the clause is not used.

It is the position of the respondents who use agreements containing the contested clause that, whatever meaning such agreements may have had in years past, during recent years they have not been enforced and serve mainly as cabinet receipts. The examiner finds it unnecessary to decide what legal significance such agreements have, either as binding cabinet agreements or as mere receipts. The evidence discloses that such agreements have no substantial practical impact on dealer-supplier relationships. In actual practice it appears to make little difference whether the dealer has or has not signed a cabinet agreement, receipt or lease, or whether the document contains an exclusive dealing clause, or whether it is for any fixed duration. The evidence indicates a high degree of volatility in dealer-supplier relationships and that leases, agreements or receipts have no practical effect in limiting the mobility of dealers.

The continuance of particular dealer-supplier relationships depends essentially on the dealer's satisfaction with the supplier's product, price and service. When a dealer becomes dissatisfied with his supplier, for whatever reason, he will switch to another supplier. So far as appears from the record, the existence of an exclusive dealing agreement is not an inhibiting factor in such switches. In fact many of the dealers who testified were not even aware that they had entered into any formal agreement with their supplier or that they were obligated to deal with him for any definite period or were prohibited from handling another manufacturer's products. The record does not contain a single instance of a respondent seeking to hold a dealer to an exclusive dealing agreement.

Counsel supporting the complaint argues that limitations of floor space have the practical effect of resulting in exclusive dealing, even without any formal agreement. In the opinion of the examiner the existence of a tradition of single dealing in the industry tends to defeat the argument of counsel supporting the complaint. It demonstrates that exclusive dealing agreements have little practical preclusive effect

since most dealers will deal with a single supplier anyway, irrespective of whether a formal agreement requires them to do so or not.

However, it does not follow, as counsel contends, that because of the single-dealing tradition the mere furnishing of a cabinet has a significant preclusive effect. It is preclusive only in the sense that a dealer who customarily handles a single brand will only purchase the products of the supplier furnishing the cabinet, for as long as he uses the cabinet. However, since there are numerous other suppliers ready, willing and able to supply another cabinet, such preclusion continues only as long as the dealer wishes it to, i.e., as long as he finds his relations with his present supplier satisfactory. In practical effect this results in considerable mobility among dealers, with the supplying of a cabinet having no essential tying effect.

It should also be observed that there have been considerable inroads into the tradition of single dealing in recent years. In many sections of the country it is becoming quite commonplace to find two, three and even four different suppliers' products in the same establishment, particularly in the medium- and larger-size food stores and supermarkets. Even some of the smaller retail stores have begun to split their ice cream business. The record contains instances where this splitting has occurred among retailers dealing with respondents, despite the existence of exclusive dealing agreements. There are also instances in the record of dealers placing another supplier's products in the cabinet of a respondent, despite a clause requiring the cabinet to be used only for the storage of the respondent's products.

Despite the fact that most retailers do deal with only one supplier, it is within their power to change suppliers almost at will. There is no evidence that any form of agreement, lease or receipt used in connection with the supplying of a cabinet has any significant effect in tying a dealer to a particular supplier. Nor is there any evidence that the supplying of a cabinet as such has any substantial preclusive effect.

12. Based on the foregoing, and the evidence as a whole, it is concluded and found that:

(a) The record fails to establish by a preponderance of the reliable, probative and substantial evidence that any of the respondents has attempted to induce or has induced retail dealers, to any significant extent, to handle, store, and sell such respondent's products, exclusively or otherwise, by selling, leasing, loaning or otherwise making available to them facilities for the storage and sale of frozen products.

(b) While facilities are made available to retail dealers by respondents, the furnishing of such facilities is not a substantial inducing factor in the dealer's choice of a frozen products supplier since such

facilities are generally available to dealers from most frozen products suppliers. Respondents did not originate such practice and there is no reliable, probative and substantial evidence that they have used it, to any substantial extent, as a competitive device in the acquisition or retention of retail dealer accounts.

(c) While some of the respondents, as more specifically above found, have used agreements purporting to require dealers to whom they supply facilities to use their frozen products exclusively, such agreements, with few exceptions, are of limited duration or are terminable at will or on short notice. Moreover, such agreements are not enforced in practice and dealers shift from supplier to supplier without regard to such agreements.

(d) The record fails to establish that respondents' practices in supplying facilities to dealers have resulted in injury to competition in any relevant market area or that there is any reasonable probability of such injury.

2. Financing

1. The complaints contain two main groups of allegations pertaining to practices which counsel supporting the complaint lumps under the heading of "Financing." The first group relates to the making of money loans to dealers and the other to the supplying of equipment. In connection with money loans it is alleged that such loans (a) are made with the understanding that the dealer will not handle the products of respondents' competitors, (b) are made without interest or other compensation and (c) are simply made to dealers. In connection with the supplying of equipment (which is generally sold on a time-payment basis) it is alleged that such equipment (a) is supplied with an understanding as to exclusive dealing, (b) is supplied without any profit to the respondent and (c) is simply supplied. The equipment referred to in this group of allegations consists of such items as soda fountains, store fixtures, and other items of equipment other than facilities.[9] The issues which arise under these allegations are similar to those discussed in connection with the furnishing of facilities, viz., whether respondents use financial assistance as an "inducement" for dealers, whether the practice results in exclusive dealing, and whether there has been or is likely to be injury to competition.

2. The rendering of financial assistance to dealers by ice cream manufacturers takes two basic forms, (a) the loaning of money and

[9] Such equipment is apparently referred to separately from facilities for the reason that it is usually sold to the dealer, while facilities are usually loaned and sometimes leased.

(b) the sale of equipment on a time-payment basis. Dealers generally borrow money to enable them to remodel or modernize their stores or to purchase needed equipment. Where the ice cream manufacturer arranges for the dealer to purchase equipment or sells it to him, the latter usually makes a small down payment and pays the balance in monthly installments, which are sometimes collected by a surcharge on ice cream purchases. The equipment sold typically involves a soda fountain or store fixtures. In the case of money loans the dealer usually signs a promissory note and gives the ice cream supplier a chattel mortgage on his store fixtures. In the case of larger amounts other security for the loan may be given, such as insurance policies or a mortgage on realty. Where the manufacturer sells the equipment to a dealer on a time-payment basis, this is usually accomplished by the signing of a conditional sales contract, pursuant to which title remains in the ice cream manufacturer until payment is completed. While some of the respondents have, in the past, not charged interest in connection with some financing transactions, in recent years it has been the usual practice to add an interest charge of four to six per cent.

3. As in the case of the supplying of ice cream cabinets, the rendering of financial assistance to dealers is not a recent innovation in the industry. An ice cream manufacturer from Danbury, Connecticut, indicated that manufacturers in his area had been rendering financial assistance to dealers since the 1920's. Another government witness, a manufacturer from Washington, D.C., testified that manufacturers in that area had been making loans to dealers since the middle 1920's. There was also testimony by a witness representing a large eastern ice cream manufacturer, with headquarters in the Philadelphia metropolitan area, to the effect it had been the practice in his area for a great many years to assist dealers financially.

The record fails to establish that respondents are responsible for initiating the practice of assisting dealers financially or that their activities in this regard differ materially from those of their competitors generally. All of the respondents render financial assistance to customers, either by way of money loans or financing the purchase of equipment. The same is true of most of their competitors, including a number who were called to testify against respondents. Respondents' lack of leadership in the practice was attested to by competitor witnesses in Portland, Oregon, and in Chicago. The testimony of one of the Portland manufacturers, that even if respondents Arden and Carnation (the two largest manufacturers in the area) ceased giving financial assistance to dealers, the practice would nevertheless continue, is indicative of the widespread character of the prac-

tice and the lack of leadership of the two respondents in question. A Chicago manufacturer indicated that although National's Hydrox Division had ceased giving advance rebates in the form of loans several years previously, the practice had nevertheless continued in the market. The same witness identified two large local companies as the "toughest" competitors in the area.

4. The rendering of financial assistance by ice cream manufacturers to dealers performs a two-fold function, (a) it enables dealers to remodel, modernize or expand their operations, thus putting them in a better competitive position and (b) it helps increase the sales of the ice cream manufacturer through more modern and expanded retail outlets. Counsel supporting the complaint suggests in his brief that it is not necessary for ice cream manufacturers to perform this function. While a small proportion of dealers might be able to obtain credit at banks and regular financial institutions for modernizing and similar purposes, a great many of the dealers do not have the financial standing or the necessary security required for bank loans. The only security most of them have is the equipment in their stores which banks would have difficulty in disposing of in case of default on the loans. The ice cream manufacturer, on the other hand, can either remove the equipment to another location which he is supplying or can find a buyer for the establishment through his many contacts in the industry.

The record demonstrates that the vast majority of the loans and other financial assistance is rendered to small and medium-sized dealers, and not to the large chains and supermarkets. The latter very infrequently ask for any financial assistance. They usually make their own arrangements with respect to financing or the purchase of equipment. Their primary interest is in securing a favorable price from the ice cream manufacturer. Many of the outlets which receive financial assistance are so-called "mamma and papa" grocery stores, which desire to modernize their establishment in order to remain competitive with the chain and supermarkets. Others are individually operated drug stores, which seek to modernize or expand in order to compete with the drug chains or other large outlets. One small dealer characterized the ice cream manufacturer as the dealer's "ace in the hole" when he gets into financial difficulty and needs help in a hurry. This attitude was echoed by a number of other dealer witnesses.

The record contains numerous instances where as a result of modernization and expansion, dealers have increased their sales very substantially, benefiting not only themselves but their suppliers. For

example, a loan to a dealer in Seattle by respondent Carnation for remodeling purposes enabled the dealer to increase his gallonage by 150 per cent. A dealer operating a small confectionery establishment in the District of Columbia was enabled, through a loan from respondent National, to open a new ice cream specialty shop in suburban Maryland which developed into a very large and successful operation. The latter dealer could not borrow the money required for this new enterprise from the bank and would not have opened his second establishment, but for the assistance received from his supplier.

5. As in the case of cabinets, the evidence upon which counsel supporting the complaint relies falls into three categories, (a) statistical evidence as to amounts involved in financing, (b) testimony of competitor witnesses regarding the alleged competitive effects of financing and (c) testimony of dealers who allegedly received financial assistance. These are discussed below.

(a) *Amounts Involved.* Counsel supporting the complaint cites the large amounts spent by respondents in various forms of financial assistance, as indicative of the fact that small manufacturers are placed at a competitive disadvantage because of their more limited resources.

Before indicating the extent of each respondent's commitments in financing, reference should be made to several questions which have been presented concerning the correctness of the computations used by counsel supporting the complaint. The first of these involves the inclusion, under the heading of financing, of loans made to dealers by banks or other financial institutions where a respondent has endorsed the note or otherwise guaranteed the credit of the borrower. This practice is not utilized to any significant extent by any of the respondents except respondents Arden and Carnation, whose financial assistance to customers by way of endorsement of credit exceeds the amount of direct money loans. It is contended by these respondents that since this does not involve any actual outlay of capital, as does the making of cash loans and the sale of equipment on a time-payment basis, the figures of amounts of loans guaranteed are not properly included under the category of financing. This argument finds support in the testimony of some competitor witnesses whose objection to the making of loans or financing of equipment was based on the claim that they did not have sufficient capital available for such outlays. This objection does not exist to the same extent in the case of the endorsement of loans, unless there is any substantial amount of loans on

which the borrower has defaulted. The record discloses, however, that the losses on loans are almost infinitesimal. For purposes of convenience the examiner has concluded that the amounts of loans guaranteed may be included under the general category of financing. However, the amounts thereof will be specifically indicated where applicable.

The second category of assistance as to which some question has been raised as being properly included in the category of financing is what is designated in various areas as "Trade Agreements", "Performance Contracts" or "Advance Rebates." In substance, the manufacturer advances to the dealer a certain amount which is usually designated as a "loan." It is agreed that if the dealer purchases a given amount of ice cream from the manufacturer or remains his customer for a given period of time the loan will liquidate itself. This practice is engaged in to a limited extent in certain large metropolitan areas and generally involves new accounts. The manufacturer, in effect, estimates what the dealer's volume will be over a given period and gives him his volume rebate in advance. In some instances, however, the dealer may also receive his regular volume rebate in addition to the cash advance. In either instance, the sum advanced is really in the nature of a price cut given to the dealer in return for his purchasing a given amount of ice cream or remaining a customer for a given period of time, rather than a true loan. There is no evidence in the record that this practice has been used at all by respondents Foremost, Arden, Carnation, Pet or Fairmont. It has been used to a very limited extent by respondents National, Borden, Beatrice and Hood. While it is dubious whether the amounts involved in such advances should be included under the category of financing, the examiner has so included them for purposes of the computations hereinafter made, but the extent thereof will be specifically designated.

The final item which is the subject of dispute among counsel involves the amount of each respondent's financially assisted gallonage. The figure which counsel supporting the complaint has used is a computed figure based on actual gallonage figures supplied by each respondent. Counsel supporting the complaint assumes that the period for repayment of the loans made by each respondent averages about three years and argues that the annual gallonage of each account should be multiplied by three in order to show the total gallonage which has been "induced" to deal with a respondent. In the case of

respondents National, Borden and Foremost, since the gallonage figures supplied by these respondents only include sales made after the date of financial assistance (this being the only portion which can be said to have been "induced" in any sense), counsel supporting the complaint argues that the gallonage figures should be multiplied by six, on the assumption that the average loan was made in mid-year.

None of the assumptions made by counsel supporting the complaint is correct. While the terms for the repayment of loans and equipment purchased sometimes extends beyond a year, there are very few instances in the record where the period extends as long as three years. Most of such transactions involve a period of eighteen months or less. This period of time is further reduced by the fact that in a number of instances the balances on loans or amounts due on equipment are prepaid for one reason or another, including circumstances where the dealer switches to another supplier. There is no accurate basis in the record for estimating the precise average period for the repayment of loans in the case of each respondent or for the respondents generally. Such evidence as there is would indicate that the period is closer to a year than to three years. In the case of respondents National, Borden and Foremost there is no basis for assuming that the average loan is made in mid-year, since loans are made at different times during the year and the gallonage of each assisted account may vary considerably. In any event, for purposes of demonstrating the order of magnitude of each respondent's financing operations on an annual basis, which is counsel's apparent purpose, its actual financing commitments for a particular year and the annual gallonage of the financially assisted accounts (based on actual figures in the record) constitute a reasonably accurate measure thereof. These are the figures which are hereafter used.

Set forth below is a table showing the amount committed by each respondent during the year 1955 for the financial assistance of retail dealers in the manner previously described, the number of accounts so assisted and the gallonage sold to such accounts. As previously indicated, the gallonage figures of National, Borden and Foremost include the gallonage actually sold to the assisted accounts in 1955 after the date of financial assistance, whereas in the case of the other respondents they also include 1955 sales made prior to the date of financial assistance.

FINANCING—1955

	Dollar amount	Number of accounts	Gallonage of accounts
National	[1] $3, 510, 436	1, 803	1, 417, 204
Borden	[2] 2, 741, 721	1, 367	1, 435, 174
Foremost	[3] 848, 390	418	1, 007, 108
Beatrice	[4] 745, 353	644	1, 073, 000
Arden	[5] 841, 664	262	489, 546
Carnation	[6] 494, 362	227	323, 947
Fairmont	438, 043	[7] 410	[7] 525, 025
Pet	116, 587	56	[8] 100, 230
Hood [9]	306, 952	238	823, 794

[1] Above figures include advances or loans pursuant to performance contracts, trade agreements and similar arrangements amounting to $21,317 and involving 53 accounts with a gallonage of 39,542.

[2] Above figures include advances or loans pursuant to trade agreements, etc., amounting to $62,199 and involving 173 accounts with a gallonage of 149,265.

[3] Above figures include guarantees and endorsements of loans made by others, amounting to $10,000 and involving a gallonage of 2,502.

[4] Beatrice figures are computed by projecting the actual figures for a five-market area, which it was stipulated were typical. The computations are based on an average expenditure of $.021 per gallon for financing in the five-market area (which represents 18 per cent of the company's total gallonage and 17 per cent of its accounts). The figures include advances or loans pursuant to performance contracts and advance rebates amounting to approximately $22,000 and involving an estimated 22 accounts with an approximate gallonage of 40,000.

[5] Above figures include guarantees and endorsement of loans made by others amounting to $624,088 and involving a gallonage of 276,794.

[6] Above figures include guarantees and endorsements of loans made by others amounting to $203,000 and involving a gallonage of 46,605.

[7] These figures are computed in part by a projection of actual figures representing equipment sales in a five-market area, acounting for 11 per cent of the company's total gallonage. The record contains actual figures on a national basis for loan accounts but not for accounts to whom equipment was sold.

[8] The record contains information with respect to dollar amount of sales to financially assisted accounts but not the gallonage thereof. The gallonage figure has been computed by dividing the amount of dollar sales by the average cost per gallon of $1.60.

[9] Above figures include loans made to peddlers and vending machine operators amounting to $100,242 and involving a gallonage of 364,238. Since such accounts are more in the nature of wholesale customers than traditional retail dealer accounts, this inclusion tends to exaggerate the figures. Also included are loans made pursuant to trade agreements, amounting to $40,555 and involving 126 acounts with a gallonage of 211,954. Excluded from the totals are overdue amounts from retail accounts of $7,145, involving 19,257 gallons since these merely involve credit balances owing from delinquent accounts which, for bookkeeping purposes, have been acknowledged by a note.

The total amounts involved in the furnishing of financial assistance to retail dealers are obviously not insubstantial. However, like cabinet expenditures, such total figures establish nothing by themselves, but are significant only in relation to the size of each company's operations. Whether, as contended by counsel supporting the complaint, they involve amounts beyond the capabilities of the average ice cream manufacturer can only be determined by relating each respondent's investment in financing to its total business.

Using a figure of 8.3 per cent as being the percentage of dealers financially assisted by respondents (based on a misinterpretation of the National Analysts' survey figures) and an assumed average-sized loan of $2,000, counsel argues that a small manufacturer with 300 accounts would have to furnish financial assistance to 25 accounts and expend $50,000 a year in order to be competitive with respondents. Aside from the question (which will hereafter be discussed) of

whether the proper standard for measuring fair competition is what the small manufacturer can afford to spend, the actual figures in the record do not support counsel's argument. While the average amount invested in financing by some of the respondents is approximately $2,000, the percentage of financially assisted accounts in most instances is under 2 per cent, rather than 8.3 per cent, as the table below indicates:

	Average amount of financial assistance per account in 1955 [1]	Percentage of accounts receiving financial assistance in 1955 [2]
		Percent
National	$1,945	1.91
Borden	2,005	1.89
Foremost	2,030	1.20
Beatrice [3]	1,105	1.35
Arden	[4] 3,210	2.03
Carnation	[5] 2,175	1.71
Fairmont	1,065	[6] 2.95
Pet	2,080	.54
Hood	1,290	2.38

[1] Computed by dividing total amount of financing by total number of accounts.

[2] Computed by dividing total number of accounts served by number receiving financial assistance.

[3] Beatrice figures have been computed from the actual figures for the five-market area stipulated to be representative, rather than from the projected figures.

[4] This computation is based on the inclusion of the amount of loans guaranteed by others, where no capital outlay by Arden was involved. If the amount of such guarantees were excluded, the average amount figure would be reduced to $1,360.

[5] This computation is likewise based on the inclusion of the amount of loan guarantees. If the amount thereof were excluded, the average amount figure would be reduced to $1,325.

[6] This figure is based on a comparison of accounts receiving financial assistance in 1955 with total number of accounts in 1952, that being the latest year for which the latter information appears in the record. Since the record indicates a gallonage increase of over 2 million gallons between 1954 and 1955, it may be assumed the number of Fairmont accounts has increased substantially since 1952. On this basis the above percentage is undoubtedly much higher than the actual percentage would be if available.

As is apparent from the above figures, the accounts which receive financial assistance from respondents represent a very minute fraction of the total number of accounts served by them, and the average amount involved in such assistance is relatively small. As will also be observed from the figures, the fact that some companies have a larger proportion of financially assisted accounts does not necessarily mean that they have a larger investment in financing. For example, while Hood and Fairmont appear to have a larger proportion of assisted accounts, the average amount invested by them per account is smaller than almost all the other respondents. Although the above computations involve a comparison in terms of number of accounts, rather than in terms of gallonage served, it seems clear that a comparison on the latter basis would also reveal the relative insignificance of respondents' financing operations. A precise computation on a gallonage basis is not possible for any of the respondents, other than

Carnation and Beatrice, since the gallonage figures of financially assisted accounts which are in the record include all frozen products, whereas the total gallonage figures are restricted to hard ice cream only (except for the two respondents mentioned). However, a comparison of figures of these two respondents, as well as a somewhat exaggerated comparison with total hard ice cream sales for the other respondents, indicates that in almost every instance the gallonage of financially assisted accounts represents well below 5 percent of each company's total gallonage.[10]

(b) *Competitor Testimony.* More of the competitor witnesses were critical of the practice of assisting dealers financially than was the case with respect to the supplying of cabinets, although in a number of sections of the country there was almost no reference to financing. Much of the testimony was of a general conclusory nature, consisting of expressions of opinion and preference, with little reliable evidence that any of the respondents were leaders in the practice, had used it aggressively to acquire accounts, or had caused competitive injury by reason thereof. Typical is the testimony of a large Toledo manufacturer cited by counsel supporting the complaint, who expressed the opinion that the rendering of financial assistance to retail dealers does not help develop ice cream business and indicated that he opposed the practice. In contradistinction to this is the testimony of a Danbury, Connecticut, manufacturer who, after first expressing a preference for not having to make loans, conceded that the smaller independent stores had to have financial assistance in order to obtain needed equipment. This manufacturer and others stated that the practice had been followed by ice cream manufacturers generally for a great many years. Not only is there no evidence that respondents originated the practice, but the evidence shows it was utilized in some areas before any of the respondents had entered them.

In addition to such general expressions of opinion, some of the competitor witnesses claimed that they had lost business because of the practice and, in some instances, sought to attribute such losses to various of the respondents. For the most part such testimony was of an unreliable nature, consisting of hearsay and unsupported conclusions. In the relatively few instances where there was any reliable evidence that some of the respondents had given financial assistance to specific retail accounts referred to by competitors, the record generally fails to establish that the rendering of such assistance was a

[10] In the case of respondent Beatrice the percentage is 3.52 per cent, while in the case of Carnation it is 3.10 per cent including the gallonage of loan guarantee accounts. The exaggeration in percentages which could appear if the comparison were with hard ice cream gallonage only is demonstrated by the fact that a comparison on the latter basis reveals the Carnation percentage to be 4.84 per cent, as compared to 3.10 per cent.

material factor in the respondent's acquisition or retention of the account or that it resulted in competitive injury.

Indicative of nature of the evidence upon which counsel supporting the complaint relies is that of the Toledo manufacturer referred to above. This witness at first testified that his company had been losing "about 35 to 50 accounts per year because of, well, competitive practices in which we do not engage—making loans of money, of course, enabling a dealer to finance soda fountains and counters * * *." However, after this sweeping broadside, when the witness proceeded to particularize with respect to sixteen accounts alleged to have been lost by his company, financing was claimed to have been involved in connection with only one account, and the witness' testimony as to whether a respondent had assisted this account was pure hearsay. Furthermore, it developed on cross-examination that the "35 to 50 accounts" which the witness claimed he had lost every year was not a net loss but was normal turnover in a company having 1,600 accounts, and that the company had actually gained more accounts than it lost each year. The record also discloses that the company in question has enjoyed a very substantial increase in the number of its accounts and in its gallonage during the post-war period.

Cut from the same cloth are the broad-brush claims of the Washington, D.C., manufacturer, whose testimony is quoted by counsel supporting the complaint to the effect that he had lost "other customers" to "other companies" because of loans of money. Not only did the witness not identify the "other companies", but he could recall only a single account where a loan was a factor in the alleged loss, and there is not a scintilla of reliable evidence in the record that any respondent had loaned the account in question anything. The company has gained more accounts than it lost. While its gallonage has not increased significantly during the post-war period this is also true of the respondents operating in the Washington area.

The testimony of the other competitor witnesses referred to by counsel supporting the complaint is similar to that discussed above. Much of it is long in accusation (couched in broad general terms), but short in reliable proof when related to individual competitive situations cited in support of the general charges. In only a handful of instances is there any reliable evidence of financial assistance by respondents to any of the accounts referred to and in only a negligible fraction of these is there any reliable evidence to show that the financial assistance was a material inducing factor in the choice of a respondent as a supplier. The testimony of these witnesses fails to establish that respondents have used financing on a substantial scale as an aggressive

competitive device or that respondents' use of the practice has resulted in competitive injury.

(c) *Dealer Testimony.* A number of the dealer witnesses called by counsel supporting the complaint had received financial assistance from some of the respondents in the form of loans, sale of equipment or advance rebates. The respondents involved in these transactions were National, Borden, Beatrice, Foremost or Pet. None of the dealers called to testify had received financial assistance from respondents Arden, Carnation, Fairmont or Hood. While the fact that the dealers in question had received financial assistance from certain of the respondents is not in dispute, in only a few instances does it appear that the rendering of such assistance was an inducing factor in the dealer's choice of a supplier. For example, of five dealers called in Washington, D.C., who had received loans from respondent National, four were already dealing with respondent National at the time of receiving the loan. One of these was about to open an additional establishment and had received offers of loans from a number of other manufacturers, but preferred to deal with National because of his long association with that company and its products at his existing location. The single pioneer account involved had chosen respondent National as his supplier after having had a consumer survey conducted (at his own expense), which indicated that National's brand was the most popular one in the neighborhood. The dealer had received similar offers of loans from other suppliers, including one from a manufacturer who was called as a witness by counsel supporting the complaint.

Out of fourteen dealers who had received loans in the New York City area, approximately four were dealers who were already purchasing from the particular respondent at the time of receiving the loan from it. Three of the loans made to switch accounts merely involved the assumption of the balance of a loan due to the former supplier, where the evidence discloses that the account had decided to switch for reasons having nothing to do with the loan. Of the five remaining switch accounts, only two indicated that the loan had been a factor in their decision to switch. However, one of the latter two accounts later became dissatisfied with respondent National (from whom it had received a loan) and switched back to his original local supplier, who assumed the balance of the loan due to respondent National and even increased the amount thereof. In the case of one dealer in the Philadelphia area who had received a loan from respondent National in connection with the opening of a new establishment, other evidence offered by counsel supporting the complaint discloses that respondent

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National's offer was made to meet a competitive offer by a local supplier which had been brought to the respondent's attention.

The foregoing demonstrates that a mere showing that a dealer has received financial assistance does not necessarily establish that this was the reason why he chose to deal with the company assisting him. In the case of existing accounts, there is almost no evidence in the record that the rendering of financial assistance acted as an inducement for such accounts to deal with respondents. In the case of switch accounts, while the evidence discloses that the furnishing of financial assistance did influence some dealers, others switched because they had become dissatisfied with their former supplier and had decided to switch to one of the respondents for reasons unrelated to financial assistance. Some instances involved merely the assumption of a balance due the former supplier on financing by him. Even in the case of pioneer accounts the furnishing of financial assistance is not necessarily the reason for the dealer's choice of suppliers. Several of the dealers had received offers of assistance from a number of suppliers, but chose one of the respondents for reasons unconnected with financing. In some instances the dealers had sought out the respondent because of some basic reason for dealing with it and had not even been approached by other suppliers. The record establishes that some of the offers of assistance by respondents were made after it had been learned that similar offers had been made by competitors.

6. The statistical evidence in the record tends to place in proper perspective the sometimes exaggerated claims of certain competitor witnesses and the testimony of that segment of dealer witnesses whose choice of supplier appears to have been influenced by the receipt of financial assistance. These figures disclose the relatively small extent to which respondents engage in the financial assistance of dealers and the fact that the bulk of such assistance goes to their own existing accounts, where there is the least probability that it is being used as an aggressive competitive weapon.

The total financing figures of each respondent have already been discussed above. From these it is fairly evident that respondents are not engaged on any mass scale in the furnishing of financial assistance to dealers. The fact that less than two per cent of the accounts of most of the respondents receive financial assistance in any year, representing a gallonage of a comparable order of magnitude, hardly suggests that respondents are engaged in any all-out effort to obtain business through the use of financial aid to dealers.

The record also contains other statistical evidence, which tends to confirm the conclusions suggested by the overall figures, concerning the limited scope of respondents' use of financial assistance of dealer

accounts and the generally nonaggressive character thereof. These include a breakdown of the figures of financial assistance for some of the respondents as between existing, switch and pioneer accounts, and also indicate the extent to which accounts obtained from competitors receive financial assistance. Set forth below are some of the figures appearing in the record. As will be noted therefrom, the information in the record concerning National is somewhat more extensive than that for some of the other respondents. However, since that respondent does business over a wider area than the other respondents, and figured more extensively in the testimony of Government witnesses, it may be assumed that the trend indicated thereby is generally applicable to most of the respondents.

(a) *National.* A study of the loans and of the sales of equipment pursuant to conditional sales contract by seven of the plants of respondent National's subsidiaries or divisions (serving such representative cities as Newark, New Jersey; Memphis, Tennessee; Cincinnati, Ohio; Peoria, Illinois; Cleveland, Ohio; New Haven, Connecticut; and Providence, Rhode Island) reveals that out of 290 customers receiving such assistance in 1954 and 1955, 186 (or 64.3%) were old accounts and the balance were almost evenly divided between pioneer and switch accounts (18.3% being pioneer and 17.6% being switch).[11]

The pattern above indicated is confirmed by a breakdown of the figures covering loans and financing of equipment by respondent National's Breyer Division, which does business over a wide area of the eastern United States, including such cities as New York, Philadelphia, Washington, D.C., and Richmond. Out of 542 accounts receiving financial assistance in 1954 and 1955, 360 (or 66.4%) were old accounts, 21 per cent were pioneer accounts and only 12.1 per cent were switch accounts. A similar pattern appears with respect to 42 accounts financed by respondent National's Southern Dairies Division, during 1954 and 1955, in Jacksonville, West Palm Beach and Miami, Florida, as to which evidence was offered by counsel supporting the complaint. Of the 42 accounts involved, 32 (or 76.2%) were old accounts, 8 (or 19%) were pioneer and only 2 (or 4.8%) were switch.

As is apparent from the above figures, the great preponderance of accounts receiving financial assistance are National's own existing ac-

[11] It should be noted that the above computations differ from those proposed by respondents, in that there is excluded from the category of old or existing accounts 35 accounts which received financial assistance during a period of from 30 days to one year after the account was acquired. It seems evident that some indeterminate portion of these accounts may be regarded as old accounts, although the exact proportion thereof cannot be determined from the record. If all of them were included in this category the percentage of old accounts receiving financial assistance would be increased to 76 per cent, and the other percentages would be reduced proportionately.

count, which would indicate that the great majority of loans are made defensively or are nonaggressive in character. This does not necessarily mean that the remainder are aggressive in character, since the evidence indicates that many pioneer and switch accounts who receive financial assistance choose their supplier for reasons unconnected with financing.

The above figures must also be viewed in the light of the fact that the order of magnitude of all accounts receiving financial assistance is only about two per cent per year of the entire number of accounts served. While the record contains no information as to what proportion of the entire number of accounts added each year receive financial assistance, such information is available with respect to switch accounts. Evidence offered by counsel supporting the complaint indicates that respondent National made 95 loans to switch accounts in 1952 and financed the sale of equipment for 27 accounts in the same year. The accounts receiving such loans represented only 1.8 per cent of the total number of accounts acquired by National from competitors in 1952, and those receiving financial assistance on the purchase of equipment represented only 0.5 per cent of the total number acquired from competitors in the same year.

(b) *Borden.* While the information in the record with respect to Borden is not as extensive as that pertaining to National, it appears to follow a similar pattern. Thus of 18 transactions involving loans or conditional sales of equipment to customers in Jacksonville and Miami, Florida, as to which evidence was offered by counsel supporting the complaint, all but two were to existing accounts of Borden. The two exceptions involved switch accounts where Borden merely refinanced the balance of a loan received from a competitor. Likewise, it appears that the 85 loans shown by counsel supporting the complaint to have been made to switch accounts in 1952, and the 102 loans made in 1953, represent only 1.5 per cent and 1.7 per cent respectively, of the total number of accounts acquired from competitors by Borden in each of these years.

(c) *Beatrice.* The record discloses that in a five market area, stipulated to be typical and including the cities of Chicago, Des Moines, Omaha, Cincinnati and Kansas City, existing accounts accounted for 88.5 per cent of the gallonage of all accounts receiving financial assistance in 1955 (not including financial assistance in the purchase of cabinets).[12]

[12] Since the gallonage of accounts purchasing cabinets is only 17,694 out of a total assisted gallonage of 314,252, it seems evident that this exclusion would not materially affect the above-indicated percentage.

(d) *Foremost.* In the case of respondent Foremost, evidence offered by counsel supporting the complaint discloses that it made only four loans per year to switch accounts in 1952 and 1953. Since the record contains no information as to the total number of loans made in those years, it is not possible to compute the exact percentage which these represent of all loans made. However, on the basis of a comparison with the number of loans made in 1954, this would represent only about 15 per cent of the total number of loans.

(e) *Pet.* Out of a total of 96 loans made by respondent Pet in 1954 and 1955, 61 (or 63.5%) were made to old accounts, 27 (or 28.1%) were made to pioneer accounts and only 8 (or 8.3%) were made to switch accounts.

(f) *Fairmont.* Evidence with respect to a five-city area in which Fairmont does business discloses that out of 31 loans made during the fiscal year ending February 28, 1956, all but two were made to existing accounts. One of the latter was made to an account which switched to Fairmont because of a preference for its advertising and merchandising program, and the second was made to the new owner of an existing store which had previously been served by respondent Borden.

* * *

Similar statistical information does not appear in the record with respect to the remaining respondents. However, there is no reason to believe that the financial assistance rendered by them is not also furnished primarily to existing accounts. Officials of several of them testified that it was their policy to assist mainly their own accounts and not to seek to obtain competitors' accounts by offering financial assistance.

Counsel supporting the complaint has suggested that loans to existing accounts may also be aggressive in character, by seeking to hold accounts which may be interested in switching to a competitor. There is, however, no substantial and reliable evidence in the record to support this thesis. The overwhelming portion of the complaints of competitors dealt with accounts which they had lost, rather than with those which they sought to obtain from a respondent. While there were a few accounts falling in the latter category, there is no reliable evidence that the receipt of financial assistance from a respondent was responsible for such accounts not switching to a nonrespondent competitor. On the contrary, the record contains a number of instances of dealers switching to a competitor despite the receipt of financial assistance from a respondent.

7. Additional evidence of the limited role played by financial assistance, in the choice of suppliers, appears in the report of National Analysts, Inc. (previously referred to at page 1329, par. 10). The report which is in evidence covers not only the general survey of 1,331 dealers discussed in connection with cabinets, but a separate survey of 405 dealers all of whom had received financial assistance in 1954 or 1955. The results of both surveys indicate that the rendering of financial assistance plays a minor role in the dealer's choice of supplier.

In the general survey, which covers dealers without regard to whether they had or had not received financial assistance, the furnishing of financial assistance by a respondent was referred to as a factor in the choice of supplier in a total of 6.8 per cent of the brand mentions.[13] This result was produced by responses to three questions. The first question was a general "open end" question of why the dealer was handling his present ice cream brand or brands. In response to this question financial assistance from a respondent was given as a reason in 0.2 per cent of the situations involved. The second question, also of the open-end type, as to whether there were any other reasons involved, produced the result of 0.5 per cent in which financing was referred to as a reason. The third question utilized the "aided recall" technique and involved showing the dealer a printed card containing a list of possible reasons for choosing their present brand, including that of financial assistance, and asking the dealer which of these were of importance in handling their ice cream. This question produced the result of 6.1 per cent, in which financial assistance from a respondent was referred to.

The above results are of interest not merely because they indicate the limited role which financing plays in the choice of a supplier, but because of the fact that the results with respect to dealers handling the brands of nonrespondents were not significantly different from those applicable to respondents' dealers. The totals with respect to nonrespondent dealers who referred to financing as a reason were 8.0 per cent, as compared to 6.8 per cent for respondents' dealers. The total for all dealers, respondent and nonrespondent, who referred to financing was 7.5 per cent.

It is apparently on the basis of this result that counsel supporting the complaint makes the argument, previously referred to, that 8.3 per cent of all dealers are financed and that a manufacturer in order to be

[13] As previously noted, the results of the survey are generally expressed in terms of brand mentions, i.e., brand-dealer combinations, rather than in terms of the number of dealers, because of the fact that some dealers handle the products of more than one supplier and more than one brand of ice cream.

competitive must have capital sufficient to finance that number of accounts. Aside from a question as to the accuracy of the percentage used by counsel, the above figures do not establish that at any given time a manufacturer must be prepared to finance the percentage of his accounts indicated thereby. Some of the dealers interrogated had been financed as far back as 1947 and had paid off their obligation. While they may have referred to financing as a reason, there was no financial obligation outstanding as of the time of their interrogation. The results of the survey do not indicate what proportion of this group of dealers actually had a financial obligation outstanding at any given time, but merely that at some undisclosed period they had received financial assistance from a supplier.

The 6.8 per cent figure for respondents' dealers, it should be noted, is an optimum figure which includes any reference to financing as a reason by a dealer, even though it may have played a very minor role in the dealer's choice of supplier. To establish the relative importance of the reasons assigned, the dealers were asked to review the reasons given by them and to indicate which was the most important, and which the second most important, reason for handling their present brand. The results were 2.1 per cent in which financing was given as the most important reason and 1.3 per cent in which it was the second most important reason. These results indicate that for most of the dealers who referred to financing it was not a reason of the first magnitude.

The second survey involved 405 dealers who had received financial assistance from respondents Arden, Beatrice, Borden, Carnation and National during 1954 and 1955. These were selected on a random sampling basis from a list of dealers who had received financial assistance from the five respondents during these two years. By the time they were interviewed 33 of the dealers were no longer handling the brands of the respondent which had assisted them. An additional 28 of the dealers were handling the brands of other manufacturers, as well as those of the respondents assisting them. Because of the multiple brands handled by some dealers there were 517 brand-dealer combinations among the 405 dealers interviewed.

The dealers were interrogated in a manner similar to that used in the general survey. In response to the question of why they were handling their present brand or brands, 6.0 per cent of the dealer-brand combinations involved referred to financing as a reason; in response to the follow-up question of whether there were any other reasons, an additional 1.0 per cent referred to financing; and in response to the "aided recall" question in which the dealers were shown

a card containing a list of possible reasons, including financing, 9.6 per cent mentioned financing.

While the aggregate of the responses, 16.6 per cent, is somewhat higher than that in the general survey, this is not surprising considering that all of the dealers had been financially assisted. The results do not sustain the position of counsel supporting the complaint that all or substantially all financially assisted dealers choose their supplier on the basis of such assistance. It must also be observed that the above figure is an optimum figure since it includes all references to financing, even though it was a factor of the lowest order of magnitude in importance. In this connection it should be noted that when the above group of dealers was asked which of the reasons given was the most important and which the second most important, references to financing were, respectively, 5.4 per cent and 4.0 per cent. Finally, in order to keep the above results in proper perspective, it must be recalled that the entire body of financially assisted dealers themselves constitute only a very minor fraction of each respondent's total number of accounts.

8. As in the case of the supplying of cabinets, an essential element of the complaints, with respect to the furnishing of financial assistance, is that it occurs in a context of exclusive dealing, i.e., that it is done pursuant to agreements which call for the exclusive handling of a respondent's products or that because of the nature of the industry the furnishing of financial assistance by a respondent necessarily results in the exclusive handling of its products. These allegations are considered below.

(a) *Exclusive Dealing Agreements.* The record discloses that it is customary for most manufacturers to enter into a written agreement with a dealer to whom they furnish financial assistance. The forms of agreement used by respondent which are in evidence indicate that there is considerable variance among them and even among different plants of a particular respondent, insofar as a requirement that the dealer handle only the products of the respondent giving him financial assistance is concerned. Set forth below is a brief analysis of the forms of agreement used by the various respondents, with particular reference to whether they contain a requirement for exclusive dealing.

(1) *Carnation.* The record contains two executed conditional sales contracts covering the sale of equipment to dealers in Phoenix, Arizona, and Seattle, Washington, both of which require the dealer to purchase Carnation products until the equipment is paid for. There is nothing in either agreement to prevent prepayment of the monthly installments

provided for. In fact the Arizona agreement specifically provides that it may be terminated at any time by payment of the balance due. In addition to these executed agreements, there are also in evidence unexecuted forms of conditional sales agreements used in Texas, Oklahoma, Washington and Oregon which require the dealer to purchase his frozen products exclusively from Carnation until the equipment is paid for. There is nothing in any of the agreements to prevent the termination thereof by prepayment of the balance due.

While the Arizona and Washington agreements referred to above contain exclusive dealing provisions, there is also in evidence a form of conditional sales agreement used in both states which does not contain such provision, although it does provide that only Carnation products will be stored in the equipment sold. A form of agreement used in California likewise contains no exclusive dealing provision, but does provide that during the term thereof the equipment sold may only be used to store Carnation products.

The above agreements all pertain to the sale of equipment on an installment basis. While Carnation also renders financial assistance in the form of money loans or guaranteeing bank loans, there are no agreements covering such transactions in evidence. It cannot therefore be determined whether they provide for either exclusive dealing or exclusive storage.

(2) *Borden.* There are several unexecuted forms of loan agreement in evidence used in the New York and New Jersey markets, which contain a provision that during the term thereof the dealer will buy his frozen products requirements exclusively from Borden. These agreements purport to be for a fixed term, but the range of the duration of the term thereof does not appear from the record. Some of the agreements provide for repayment of the loan by a surcharge on ice cream purchases and others provide for fixed monthly installment payments. It does not appear from the record whether agreements similar to these are used by Borden in connection with the making of loans in any of the other numerous markets in which it does business, other than New York and New Jersey, or whether the agreements in evidence are typical of those used elsewhere.

There are also in evidence forms of conditional sales contracts used by Borden in connection with the sale of equipment in New York, New Jersey, Wisconsin, Iowa and Indiana. These provide that the dealer will purchase frozen products exclusively from Borden during the term of the agreement. The range of the duration of the term of such agreements does not appear in the record. While requiring the exclusive handling of Borden products during the term of the agreement,

some of the forms (including those used in New York, New Jersey, and Indiana) permit termination of the arrangement by prepayment of the balance due.

In addition to the agreements used in connection with the sale of equipment in the states above mentioned, there are also in evidence agreements used in Florida and California, which contain no provision for the exclusive purchase or storage of Borden products. There is no evidence in the record with respect to whether agreements used in connection with the sale of equipment in the many other states in which Borden does business, other than those referred to above, contain exclusive dealing provisions.

(3) *Beatrice.* The record contains evidence of two forms of loan agreement used in New York City and two executed agreements used in Evanston, Illinois, all of which contain exclusive dealing clauses. One of the New York forms provides that the dealer will purchase his ice cream requirements exclusively from Beatrice for a specified period, while the other provides for exclusive purchase during the period of repayment of the loan. However, there is also in evidence a third form of agreement used in New York which contains no exclusive dealing clause, but merely provides that the dealer will purchase ice cream manufactured by Beatrice (the amount required to be purchased being unspecified), until the loan is repaid.[14] Of the two Evanston agreements, one is for a definite two-year term, while the other requires exclusive purchase of Beatrice's ice cream for two years or until the loan is repaid. There is no indication in the record as to whether loan agreements used by Beatrice in other parts of the country contain exclusive dealing provisions.

While some of the loan agreements discussed above contain exclusive dealing provisions, there is no evidence that any of the agreements used by Beatrice in connection with the sale of equipment contains such a requirement. There are three forms of conditional sales agreement in evidence which are used in Muncie, Indiana; Galesburg, Illinois; and Great Falls, Montana, none of which contains any exclusive provisions. While an earlier form of agreement used in Montana did contain such a provision, it has not been used since 1947.

(4) *National.* The record discloses that some of respondent National's divisions use agreements in connection with the making of

[14] Of 24 loan transactions in the New York area, five involved the use of the third form, which does not require the exclusive purchase of Beatrice products. It may also be noted that the period provided for repayment of the loans was one year in the case of 11 of the loans, 18 months in five instances, two years in 7 instances and three years in only a single transaction. It is also of interest that the majority of the transactions involved the acquisition of accounts from a respondent competitor, mainly from respondent National.

loans which contain exclusive dealing provisions. Evidence of such agreements involves the Breyer Division in New York City and Philadelphia,[15] Consolidated Dairy Products Division also in the New York area, General Ice Cream Division in Upstate New York and New England, Clover Farm Dairy Division in Mississippi and Tennessee, and Detroit Creamery Division in Michigan. Some of these agreements require the dealer to purchase his exclusive requirements of frozen products only until the loan is repaid and some provide for purchase for a specific period. The terms of the agreements vary from a period of months to as long as five years. Outside of the agreements used in the above-mentioned areas, there is no evidence as to what types of loan agreement are used in the rest of respondent National's far-flung operations.

There is also in evidence a series of forms of conditional sales contract used by various divisions of respondent National in connection with the sale of equipment in New York, the New England States, Iowa, Nebraska, Wisconsin, Illinois, Tennessee, Arkansas, Michigan, Missouri and Kansas. These agreements all contain a provision requiring the exclusive purchase by the dealer of the products of respondent National or its divisions. The duration of such requirement varies. In some instances the requirement is to remain in effect until the equipment purchased has been paid for. In others the duration of the agreement is for a specific period of time or until the payment of the purchase price has been completed, whichever event occurs later. Others provide for a fixed term or until a specified amount of ice cream has been purchased, "whichever period is longer." The fixed term referred to in these forms varies from one year to five years. It does not appear whether agreements containing similar provisions are used in any of the other states where National does business.

(5) *Arden.* The only documentary evidence reflecting the type of agreement used by this respondent in the making of loans is three actual agreements with dealers in Portland, Oregon, and one with a dealer in Battleground, Washington. All four agreements provide that the dealer will purchase his entire requirements of ice cream from Arden during the term of the agreement, which term is specified to be until the loan is fully repaid but not in excess of a specified period of time. There is no evidence as to the provisions of loan agreements used by respondent Arden in any other area in which it does business, including those where evidence was offered against it such as Seattle,

[15] The record also contains such an agreement involving the Breyer Division in Washington, D.C. However, the use of this agreement was abandoned in 1953.

Washington; Houston, Texas; Phoenix, Arizona; and Washington, D.C.

There are two forms of agreement in evidence used by respondent Arden in connection with the sale of equipment under conditional sales contract. One is a blank form of agreement used in Arizona and the other is an executed conditional sales agreement entered into with a dealer in Bellingham, Washington. Neither agreement contains any provision requiring the exclusive purchase of Arden products or the exclusive storage of such products in the equipment purchased.

(6) *Foremost.* The record contains documentary evidence with respect to only two loan transactions involving respondent Foremost. The first of these is an agreement entered into in connection with the making of a loan to a dealer in New York City in November 1952, and provides that during the term thereof the dealer will purchase from Foremost all the ice cream products sold by him. There is nothing in the record to indicate whether this executed agreement is typical of other agreements used by respondent Foremost in the New York area or elsewhere, in connection with the making of loans. The other documentary evidence involves a loan transaction with a dealer in Texas and consists of a promissory note and chattel mortgage, neither of which contain any provision that the dealer will purchase his ice cream requirements exclusively from Foremost, or any other provision of an exclusive nature. There is no evidence in the record concerning the type of agreement used elsewhere in the United States by respondent Foremost, in connection with the making of money loans to customers.

The record does contain several conditional sales agreements used by respondent Foremost in connection with the sale of facilities or other equipment on a time-payment basis. Those used in the Florida area do include a provision that the dealer will purchase all of his requirements of frozen products from Foremost until such time as the conditional sales contract is completed by payment of the purchase price of the equipment. However, several other agreements which are in evidence, involving the sale of equipment in the Houston and Dallas areas, contain no provision with respect to exclusive purchase or exclusive storage of Foremost products.

(7) *Pet.* While there are several agreements in evidence involving the making of loans by respondent Pet, none of them contains any requirement that the dealer will purchase exclusively from that company. There are also several forms of agreement in evidence involving the sale of equipment on a time-payment basis but, with one exception, none of these contains any requirement as to the exclusive

purchase or storage of Pet products. The one exception involves a form which was discontinued in 1952 and was used only in Pet's Wisconsin operation, which was sold in 1954.

(8) *Fairmont.* There are no agreements in evidence involving the making of money loans by respondent Fairmont, and there is no basis for any finding that this respondent requires the dealers to whom it makes loans to purchase their ice cream requirements exclusively from that company. The record does contain several forms of conditional sales agreement in evidence which are used in connection with the sale of equipment by Fairmont on a time-payment basis. One is a form used in Nebraska, Illinois, Michigan, and Wisconsin, and the other is a form used in Ohio and Texas. Neither form contains any provision obligating the dealer to purchase his ice cream requirements exclusively from Fairmont. However, both forms require that the equipment sold be used solely for the storage of Fairmont products purchased from that company. While the agreements are for a term of three years, it has been stipulated that the above provision with respect to storage of Fairmont products in the equipment was never enforced after the purchase price had been paid in full.

(9) *Hood.* The only agreement involving respondent Hood in evidence is a so-called "Trade Agreement", which provides that respondent Hood will loan the dealer $2,500 with the understanding that if the dealer is purchasing its entire requirements of dairy products from the company on the due date of any of the annual payments required thereunder, he will be excused from such payment and the principal sum will be reduced proportionately. While the record establishes that this agreement is typical of other "Trade Agreements" entered into by the company, it does not appear what forms of agreement are used in connection with ordinary money loans or in the sale of equipment on a time-payment basis.[16] Accordingly no finding can be made as to whether the latter forms of agreement contain any exclusive provisions.

(b) *Practical Operation.* The foregoing indicates that there is considerable variance in the forms of agreement used by respondents, insofar as exclusive dealing provisions are concerned. In the case of some of the respondents the evidence fails to disclose that they use such provisions at all. Some of the respondents use such provisions in connection with loans of money, but not in connection with the sale of equipment. In the case of some respondents the reverse is the case. While some respondents make use of agreements containing such

[16] The record discloses that financial assistance through the use of trade agreements constitutes only 13.2 per cent of the entire amount of financial assistance by Hood in 1955.

clauses in some areas, there is no evidence that they use them in many other areas where they do business. There are also wide differences in the terms of such agreements, both among respondents and among the different plants or divisions of particular respondents. In some instances such arrangements can be terminated forthwith by repayment of any balance due, while in others the agreement continues for a theoretically fixed period despite repayment.

In actual practice, however, the inclusion or non-inclusion of such clauses appears to have little practical effect on dealer-supplier relationships. The relationship between dealers and those respondents who have entered into exclusive arrangements does not appear to differ significantly from that existing between dealers and other, or the same, respondents where such agreements have not been used. Likewise the relationship between respondents and their financially-assisted dealers does not appear to differ from that existing between dealers and non-respondent ice cream manufacturers generally, a number of whom also make use of exclusive dealing agreements.

The record discloses that dealers will split their frozen products business, despite the receipt of financial assistance from one of their suppliers and despite a contract requiring the exclusive purchase of the products of that supplier. It also appears that dealers will switch from a supplier despite the rendering of financial assistance by that supplier, even though there may be an unexpired contract requiring them to purchase the supplier's products for a given period of time. While it is the usual practice for dealers to pay off the balance of any outstanding financial commitment to a supplier before switching, this does not appear to raise any significant barrier to the switching of dealers. In most cases there are a number of other suppliers in the market ready, willing and eager to assume the balance of any outstanding amount due the former supplier and to arrange for the dealer to make payments to the new supplier or, in some instances, the dealers themselves will pay off the outstanding balance at the time of switching to a new supplier. The record discloses that losses from the furnishing of financial assistance to dealers are negligible. In fact since interest at current rates is now generally charged, the furnishing of such assistance has its profitable aspects.

Although the complaints challenge the practice primarily because of the exclusive dealing aspect thereof, there was almost no reference to the latter feature in the testimony of competitor witnesses. To the extent that competitors were critical of the practice, their criticism was directed at the practice as such, particularly at the expense attendant thereon, rather than at the fact that it involved exclusive

dealing. This likewise appears to be the position of counsel supporting the complaint, whose criticism of the complaint practices is based on the fact that they result in "very expensive competition" to the smaller companies.

The position of counsel supporting the complaint with respect to the exclusive dealing issue is that irrespective of any formal understanding as to exclusive dealing, the very act of financing a dealer results in "captivating" the account. This argument is apparently based on the single-dealing tradition which prevails in the industry and the sense of obligation which financial assistance allegedly instills in the dealer. In the opinion of the examiner any argument based on the single-dealing tradition in the industry is largely self-defeating. To the extent that a dealer, because of space limitations or custom, normally handles the products of only a single manufacturer any agreement which requires him to do what he is already doing is so much surplusage. This self-evident fact was taken note of in the testimony of a Portland manufacturer who indicated that he didn't usually require dealers to whom he sold equipment to handle his products exclusively since most dealers in the area normally handled only a single supplier's products. Moreover, he expressed the opinion that such agreements had little value anyway since "any time they want to pay us up in full they can pay us in full and kick us out."

The argument based on the dealer's sense of "moral obligation" toward the manufacturer likewise has little merit, insofar as establishing that the furnishing of financial assistance to a dealer necessarily tends to tie up the account on an exclusive basis. Counsel supporting the complaint cites in his brief the testimony of a Knoxville dealer (which appears only in the Pet record), to the effect he felt a sense of "obligation" toward Pet because of a loan which it gave him. However, the testimony of the same witness, as well as that of other dealers called by counsel supporting the complaint, indicates that any sense of obligation which stems from financial assistance received by the dealer is a slender reed upon which to rest a dealer-supplier relationship. Continuance of such relationships, as has been heretofore indicated in the discussion of cabinets, rests on the dealer's total satisfaction with the supplier's product, price and service. Should dissatisfaction arise for any reason, the fact that the dealer has received financial assistance has little effect, so far as appears from the record, in holding him. It is noteworthy, in this connection, that despite the loan from Pet, the dealer to whom

counsel makes reference later took on respondent National's ice cream in response to consumer demand.

The ephemeral and mercurial nature of dealer-supplier relationships is amply demonstrated by the following examples of dealers who switched away from respondent or split their business, despite the receipt of financial assistance and, in some instances, despite unexpired exclusive agreements:

(1) The operator of a drug store in Charlotte, North Carolina, switched to a local North Carolina company from respondent National when he became disappointed at the rebates he had received from the latter, despite the fact that there was an unexpired exclusive dealing agreement in effect at the time. The agreement provided that the dealer would buy all of his dairy requirements from National until payment of the purchase price of a soda fountain sold to him by National or "until the specified due date of the last installment of said purchase price, whichever is later." The dealer himself paid off the balance due and switched despite the fact that some time remained before the "due date of the last installment." It is noteworthy that the dealer in question, like a number of other dealers who testified, was not even aware that the agreement he had signed called for the exclusive handling of National's products for a specified period, and completely ignored this provision.

(2) The operator of a grill and soda shop in Winston-Salem, North Carolina, switched from respondent National to the same local North Carolina company mentioned above, despite an unexpired loan agreement with National. The new supplier enabled the dealer to pay off the balance of the National loan and even loaned the dealer an additional amount.

(3) Of 14 dealer witnesses called by counsel supporting the complaint in New York City who had received loans from a respondent, at least five later switched to another supplier despite an outstanding balance on the loan. In four instances the new supplier enabled the dealer to pay off the balance (even increasing it in one case) and in the fifth, the dealer himself paid off the balance. Since the respondents involved in these transactions were National and Borden, and since the record discloses that both use exclusive dealing agreements in connection with the making of loans in the New York area, it seems probable that the switches above discussed occurred despite the fact that such agreements had been entered into by the dealers.

(4) The owner of a drug store in Pittsburgh who had switched to respondent National after receiving a loan from it, switched back

to his former local supplier within six months thereafter, despite the fact that a substantial balance remained on the loan, because customers in the area favored the other brand. The local supplier enabled the dealer to pay off the balance of the National loan and even loaned the dealer an additional amount.

(5) A dealer in Evanston, Illinois, who had switched to respondent Beatrice from a local supplier because the latter refused to manufacture ice cream for him under a private label and who had obtained a loan from Beatrice (most of which was used to pay off the balance of a loan from the local supplier), switched back to the local supplier within a year, despite an outstanding exclusive dealing agreement requiring the purchase of Beatrice products for two years. The switch occurred because of dissatisfaction with Beatrice's ice cream and the dealer had no difficulty in obtaining a loan from the local supplier to enable him to pay off the balance due to Beatrice, the other supplier even increasing the amount thereof.

(6) The above all involve instances of dealers, who had been financially assisted by a respondent, switching to another supplier despite the fact that there was still a balance owing and, in many instances, despite an unexpired contract. There are likewise a number of instances of dealers splitting, despite the receipt of financial assistance from a respondent. One has already been referred to above, involving a dealer in Knoxville who added National's ice cream in response to customer demand, despite a loan from Pet. The largest loan made by Arden in Seattle was to an account which was split among three suppliers. The largest loan (a guaranteed loan) made by Arden's subsidiary in Houston likewise was made to a split account. Respondent Beatrice made a loan to a dealer in Evanston who was splitting his business between National and another supplier. Beatrice replaced National as a supplier in this instance, but the dealer continued to deal with his second supplier despite an exclusive dealing provision in the loan agreement with Beatrice. In the Florida area a dealer for whom National had financed a soda fountain continued to buy a portion of his requirements from another supplier.

The record does not contain a single instance where a respondent has sought to hold a dealer to an agreement, made in connection with the rendering of financial assistance, which required the dealer to handle the respondent's products exclusively or otherwise for any particular period of time. So far as appears from the record respondents have permitted such dealers to terminate the relationship with them or to split their business with another supplier without bringing any legal pressure to bear. The sole incident in the record of anyone seek-

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ing to hold a dealer to such an agreement involves a nonrespondent competitor witness in Philadelphia, who threatened to bring suit in order to prevent a dealer to whom he had made a loan from switching to a respondent.

The lack of captivation resulting from financing, which the above-cited examples of individual accounts suggest, is confirmed by statistical information of a somewhat more extensive nature which appears in the record. Thus, the National Analysts' survey of dealers who had received financial assistance from respondents during 1954 and 1955 discloses that 38.1 per cent of the dealers involved had been lost or split by 1955, and 55 per cent were still operating and handling the same brand, while 6.9 per cent could not be interviewed. This accords with a separate analysis of the dealers of respondent National's Breyer Division, which discloses that of 223 dealers who had received financial assistance in 1954, 37.2 per cent had been lost by April 1957, and out of 319 dealers similarly assisted in 1955, 25 per cent had been lost by April 1957. A similar pattern appears with respect to a group of 42 dealers of National's Southern Dairies Division in Florida who had received financial assistance in 1955. By early 1957, 30.95 per cent of these accounts had been lost. These figures indicate a substantial loss-rate among financially assisted accounts. What is even more significant, however, is the fact that according to the uncontradicted and credited testimony of officials of Beatrice, Borden and National, the loss-rate among financially assisted accounts is no lower than that which exists among non-assisted accounts.

It seems evident from the foregoing that the furnishing of financial assistance to dealers, with or without any understanding as to exclusive dealing, does not result in the tying up, holding or "captivating" of accounts to any significant degree.

9. Based on the foregoing, and the evidence as a whole, it is concluded and found that:

(a) The record fails to establish by a preponderance of the reliable probative and substantial evidence that any of the respondents has attempted to induce or has induced retail dealers, to any significant extent, to handle, store and sell such respondent's products, exclusively or otherwise, by making loans of money, guaranteeing loans by others, or supplying or selling equipment on a time-payment basis or otherwise.

(b) While respondents do loan money to customers or guarantee loans, and do supply or sell them equipment on a time-payment basis and otherwise, their practices in this regard are in accordance with long-established industry practices. Such assistance is rendered pri-

marily as a service to dealers to enable them to increase and expand their sales of frozen products. The evidence fails to establish that any of the respondents has used the furnishing of such assistance, to any substantial extent, as a competitive weapon in order to induce retailers to deal or continue dealing with them or that the offering thereof operates, to any significant extent, as a substantial inducing factor in the dealer's choice of a supplier.

(c) While some of the respondents have to some extent, as hereinabove more specifically set forth, utilized agreements containing provisions which purport to require the exclusive use of the particular respondent's products until repayment of a financial obligation or for a definite period, such agreements in practice have no significant effect in the retention of dealer accounts on an exclusive basis or otherwise, and do not prevent the switching or splitting of accounts. So far as appears from the record, such agreements are not enforced by respondents and there is no practical difference between the mobility of such accounts and that of accounts which have not entered into such agreements. The record also fails to establish that, aside from such agreements, the furnishing of financial assistance, as such, to dealers results in or is likely to result in the exclusive handling or storing of respondents' products. So far as appears from the record the furnishing of such assistance has no significant effect in preventing the switching or splitting of dealer accounts.

(d) The evidence fails to establish that respondents' practices in rendering financial assistance to dealers, in the form of loans, equipment or otherwise, have resulted in injury to competition in any relevant market area or that there is any reasonable probability of such injury.

3. "Services of Value"

1. The complaints allege that respondents have performed or furnished "services of value for and to retail dealers", citing as examples of such services, "repainting of the interior of a dealer's * * * establishment, servicing facilities or soda fountain equipment, and supplying signs and advertisements." Such practices are alleged to be illegal, (a) when done with the understanding that the dealer will handle only the frozen products of respondent involved, (b) when done without receiving any direct profit and (c) when simply done. Counsel supporting the complaint characterizes the practices included under these allegations of the complaint as "Miscellaneous inducements" and cites, in addition to those services specifically alleged in the complaint, the following: Supplying "unwarranted" cabinets and compressors for refrigeration equipment, supplying cabinets for the

storage of frozen foods other than dairy products, black-topping driveways, supplying napkins and menus, granting advertising allowances and purchasing obsolete equipment from dealers at abnormally high prices.

2. Under the rule of *ejusdem generis*, most of the additional items referred to by counsel supporting the complaint can hardly be characterized as the performing or furnishing of "services of value for and to dealers", within the meaning of the complaints. For example, the supplying of "unwarranted" cabinets, compressors, or cabinets for frozen foods would appear to be properly challengeable, if at all, under the allegations having to do with the leasing, loaning or sale of facilities or other equipment. These matters have already been largely discussed above. However, brief consideration will be given to them at this point.

In connection with the challenge to the supplying of "unwarranted cabinets", it is not clear from counsel's argument whether he intends to concede that the supplying of "warranted" cabinets, i.e., cabinets which are genuinely needed for the storage and sale of frozen products of the manufacturer is a proper function for an ice cream manufacturer. If so, those allegations of the complaint having to do with the supplying of facilities would fall, unless they can be interpreted as being limited to supplying excessive equipment. Aside from whether counsel intends to make such a concession or not, it is not clear from his argument at what point he contends that the supplying of cabinets becomes "unwarranted" or excessive. As previously noted in connection with the discussion of the subject of supplying cabinets, there is a complete failure of proof with respect to definitive and recognized standards in the industry, against which it can be determined whether the supplying of any given number or size of cabinets is unwarranted or excessive. There is not a scintilla of evidence in the record to support counsel's ipse dixit that "10% of the cabinets placed with dealers by respondents [is] unwarranted." In fact, there is no reliable evidence in the record that any of the respondents has supplied any cabinets to dealers which, in terms of the size and potential of the account and the delivery pattern of the manufacturer, can be considered to be "unwarranted."

It may be that the reference to "unwarranted" cabinets is intended to be to the alleged practice of supplying cabinets which are used for storing non-dairy frozen products. This practice was referred to by some of the competitor witnesses in a few areas. In most instances, it did not involve the actual supplying of cabinets for frozen foods, but rather the practice of permitting dealers to place some frozen

foods in the ice cream cabinets. Some of the complaints involved old ice cream cabinets which are sometimes used for the storage of excess quantities of ice cream. Such cabinets are supplied primarily for the convenience of the ice cream manufacturer in order to obviate the need for extra deliveries on week-ends or during other periods of peak demand. From time to time dealers may use a portion of such storage cabinets, and sometimes even the regular display cabinets, to store frozen vegetables, juices, meats or other non-dairy foods, even though they may not have the permission of their supplier. Ice cream manufacturers generally, including respondents, seek to discourage dealers from doing this since the storage of other foods may give the ice cream an unpleasant odor. However, it is a situation which is difficult to police, as a number of the competitor witnesses conceded, and requires the use of the utmost tact on the part of the manufacturer lest he lose the account. While it is a somewhat annoying practice, it does not appear to constitute a major problem in the industry.

The record fails to establish that any of the respondents has, to any substantial extent and as an aggressive competitive practice, permitted dealers to store other frozen foods in the ice cream cabinet supplied by them or supplied a separate cabinet for frozen foods. Most of the testimony of competitor witnesses who referred to the subject was of a general complaining nature, like that above discussed in connection with cabinets, and was not directed specifically at the practices of respondents. To the extent that there was any reference to the respondents the testimony was, for the most part based on hearsay or on conclusion or surmise, and failed to establish that any of the respondents had supplied a cabinet with the understanding, express or implied, that it could be used for the storage of other frozen products.

The testimony of dealer witnesses does disclose three instances of the supplying of cabinets for the storage of frozen foods, involving two of the respondents, but these were obviously defensive in nature or appear to be atypical. Two of the instances involved respondent Arden's subsidiary in Houston, which supplied an additional old storage cabinet to two dealers for use in storing frozen foods, but in both instances the cabinets merely replaced similar cabinets which had previously been supplied to the dealers by two local manufacturers, from whom the dealers had switched for other reasons. The third instance involves an existing account of Foremost in Miami to whom that respondent supplied an old storage box during an emergency to prevent the spoilage of some frozen foods, but the box was also used to store other Foremost dairy products.

To the extent that the supplying of cabinets for the storage of frozen foods other than frozen dairy products may constitute a problem in the ice cream industry, the record fails to establish that any of the respondents has either initiated the practice or has used it, to any substantial extent, in the acquisition or retention of dealer accounts. It may be noted, in this connection, that in the National Analysts' survey only 0.2 per cent of all the dealer-brand combinations involved and only 0.3 per cent of respondent-dealer brands referred to the supplying of cabinets which could be used for the storage of other products, as a reason for dealing with their supplier. The evidence also fails to establish that the use of such practice by respondents has involved any understanding as to exclusive dealing or that it has resulted in competitive injury.

Counsel's reference to the supplying of compressors to dealers apparently is to the practice of ice cream manufacturers of supplying a compressor to operate a soda fountain or other refrigeration equipment, used primarily for the storage of dairy products. There was almost no reference to this practice in the testimony of competitor witnesses as constituting a significant competitive problem. It was referred to by only a single dealer witness in New York, who testified that respondent National had loaned him several compressors to operate some soda fountains, but that they merely replaced similar equipment which had previously been supplied by a local ice cream manufacturer and that the supplying thereof was in accordance with the prevailing practice of manufacturers in the New York area. The record fails to establish that the supplying of compressors represents a significant competitive problem, that it is used by respondents to induce dealers to handle their products, exclusively or otherwise, or that it has had or is likely to have any substantial adverse competitive effect.

The reference to "black-topping driveways" and to the supplying of napkins and menus, by counsel supporting the complaint, is apparently based on the casual reference to the former practice by a single witness from Louisville and to the latter practice by a witness from the Philadelphia suburban area. In each instance the witness mentioned the practice as being among a number of practices utilized in the area but made no effort to attribute either of the practices to any of the respondents, either generally or in connection with any specific competitive situation. There is not a scintilla of evidence that any of respondents has utilized the practices or that the practices constitute a serious competitive problem.

Counsel's reference to the granting of advertising allowances is based on the alleged granting of such an allowance by respondent Beatrice to a dealer in Washington, D.C., "with no supervision over how the advertising allowances were spent." The testimony of the dealer in question indicates that he received the allowance in lieu of the benefit he had been receiving from the radio and television advertising program of his former supplier, since Beatrice did not have such a program in the area. There is no evidence in the record to indicate that this practice is engaged in by respondents on any substantial scale or to indicate any adverse effect on competition. The competitor who lost the account in question is a very substantial operator in the Washington area and, although present during the hearings, was not called to testify by counsel supporting the complaint.

The final so-called "miscellaneous inducement" referred to by counsel, which does not fall within the scope of the complaints, involves the alleged purchasing of obsolete equipment. The incident cited by counsel is based on the hearsay testimony of a competitor witness as to the alleged purchase of such equipment from a dealer by respondent Carnation. There is a complete failure of proof that (a) Carnation did purchase the equipment, (b) that the price it paid was disproportionate to the value of the equipment or (c) that the purchase thereof acted as an inducement for the dealer to handle Carnation's products. Moreover, if the incident did occur, there is nothing to indicate that it is anything but an isolated transaction having no competitive impact.

3. The only practices falling within the scope of the allegations of the complaint dealing with the performing or furnishing of "services of value", as to which there was any significant reference by competitor witnesses, are the supplying of signs and the servicing of facilities and other equipment. Turning first to the practice of supplying signs, the record discloses that a number of the respondents do supply signs to the dealers handling their products, as do ice cream manufacturers generally. Such signs vary from small wooden, metal or plastic signs, to more elaborate neon or other illuminated signs. In most instances two-thirds of the sign is devoted to the name and brand of the ice cream manufacturer, and a panel about one-third of the size of the sign (which is referred to in the industry as a "privilege panel") contains the dealer's name or the nature of his business (e.g., "Grocery," "Drugs," etc.). The signs are generally hung outside the dealer's premises, but sometimes are displayed in his window. Most of these signs are stock signs running in cost from about $30.00 to $100.00. However, some of the larger neon signs range to $200 and

$300. In some instances, special signs are supplied to meet the needs of specific dealers. However, in many of such instances the dealer is required to pay for a portion of the cost of such special signs. In almost all cases the dealer is required to pay for the cost of electricity used in the lighted signs. Most manufacturers also supply a variety of indoor display materials which primarily advertise their products.

There is no substantial evidence in the record that respondents have used signs as an inducement to dealers to purchase their products, or that the furnishing thereof by respondents constitutes a significant competitive problem. So far as appears from the record, respondents' practices in supplying signs to dealers do not differ materially from those of their competitors generally. Respondents advertise their products extensively through various media of mass communications, such as newspapers, radio and television. The supplying of signs to dealers is merely an extension of this advertising program. Having created a demand for their products by mass advertising, the respondents seek to inform the public as to the specific locations where their products may be purchased. This they are able to do by placing a sign outside of the dealer's establishment or in his window. Occasionally the sign may be painted on one of the exterior walls of the dealer's premises.

Counsel supporting the complaint appears to recognize the advertising value of placing signs, which advertise a manufacturer's product, in front of or near the dealer's premises. While the complaint appears to attack the furnishing of signs and advertising material broadly, the attack of counsel supporting the complaint in his proposed findings is limited to the supplying of signs "in excess of those recognized as justifiable for advertising purposes." Counsel singles out particularly the supplying of privilege panels on signs and contributing to the cost of more expensive signs. The record fails, however, to establish that any of the respondents has supplied signs "in excess of those recognized as justifiable for advertising purposes."

The supplying of a privilege panel containing the dealer's name is a practice which can be amply justified. It is the dealer's quid pro quo for allowing the ice cream manufacturer to place a sign on the dealer's premises, the greater part of which is devoted to advertising the name and brand of the manufacturer. Were the manufacturer to place an equivalent sign on the public highway or to advertise on billboards the monthly advertising rates therefor would be substantial. The dealer charges the manufacturer nothing for the space used to advertise the manufacturer's product. The dealer also pays

for the electricity consumed in the lighted signs. Giving the dealer a small privilege panel on the sign, containing his name or type of establishment, is a small price for the manufacturer to pay in return for the advertising value he receives from the sign. The few instances in the record of the supplying of special signs involved dealers situated on a national highway or in another strategic location where the increased advertising benefit to the manufacturer more than offset any additional expense that might have been involved.

There is relatively little evidence in the record critical of the practice of supplying signs to dealers. Most of the witnesses who referred to the practice of supplying signs did so in terms of approval, including the practice of furnishing privilege panels. In the few instances where competitors were critical of the practice, it was more on the basis of the alleged supplying of an excessive number of signs or of larger signs than they considered necessary being supplied. However, there is no reliable evidence that any of the respondents has engaged in or been responsible for the supplying of excessive signs.

Of the witnesses whose testimony counsel supporting the complaint cites, not a single one ascribed to a respondent any competitive difficulty due to the furnishing of signs. The manufacturer from Sac City, Iowa, whose testimony is cited, spoke of the practice as being of value to both the manufacturer and the dealer from an advertising standpoint, and indicated that it was unobjectionable so long as dealer demands were not excessive. The witness made no claim that any of the respondents was furnishing signs which he considered excessive, or that he had lost or been unable to acquire any accounts because of the furnishing of such signs by any respondent. The testimony of the manufacturer from the Eastern Shore of Maryland, cited by counsel, while more critical of the practice of supplying signs, was directed mainly at a large nonrespondent company and the witness made no claim to having lost any accounts to any of the respondents because of it. The manufacturer from western North Carolina whose testimony is cited, while also critical of the practice, could not name a single account where it had been involved in competition with any respondent. A witness from High Point, which is located in the same area, had no criticism of the basic practice, but indicated that the supplying of the more expensive neon signs recently was a troublesome innovation. However, he ascribed the initiation of this trend to a large North Carolina company and made no claim that any of the respondents had used it as an aggressive competitive weapon.

The record is wholly deficient, insofar as establishing that respondents have either initiated the practice of supplying signs or have used

it to any substantial extent as an inducement in the acquisition or retention of dealer accounts. The limited role played by signs in the choice of a supplier is indicated by the results of the National Analysts' survey in which 0.7 percent of the brand mentions referred to the furnishing of signs and displays as a reason for dealing with a respondent. This compares with a response of 0.9 percent of dealers handling the products of other manufacturers. Since these results are based on the supplying of relatively inexpensive display materials as well as signs, it seems probable that the above percentages would be even lower if based solely on signs.

4. Another "service of value" about which some reference was made is the servicing of equipment. It is the general practice for most ice cream manufacturers to service the ice cream cabinets and other refrigeration equipment furnished to dealers for the storage and sale of the manufacturer's products. There was very little complaint about this practice, except by those few manufacturers who complained about the basic practice of supplying cabinets and any expense attendant thereon. Most of the witnesses who referred to the subject were in agreement that if the manufacturer supplied a cabinet it was also desirable for him to maintain the cabinet in good running order. In fact, if he failed to do so, the basic purpose of supplying a cabinet (viz., to assure the product reaching the public in the same palatable form in which it was delivered to the dealer) would be frustrated.

Counsel supporting the complaint has apparently abandoned any attack on the servicing of manufacturer-owned ice cream equipment and has limited himself to the alleged practice of servicing dealer-owned equipment, including soda fountains, ice cream cabinets, meat cases and other refrigeration equipment owned by the dealer himself. Such testimony as there is on this subject involves a few witnesses in the Virginia-Carolina area who claimed that some manufacturers, in addition to servicing their own equipment, also serviced dealer-owned equipment without making any charge therefor. The testimony of these witnesses was of a general nature and there is no reliable evidence that the practice has been involved in any competitive difficulties with the respondents. A manufacturer from Danville, Virginia, testified that the practice was engaged in generally in that area and, while claiming that Pet was more troublesome in this respect than other manufacturers, he could not name a single account where this had been involved as a competitive problem. A manufacturer from Fredericksburg, Virginia, who also referred to the practice, conceded that it involved a matter of "slight expense" and was "just an inconvenience," rather than a serious competitive problem. The only reliable evidence

in the record with respect to the servicing of dealer-owned equipment by a respondent involves Pet, and the testimony of the dealer in question (the operator of a restaurant in Charlotte, North Carolina) discloses that he had to pay for any parts which were involved and also for labor if the repairs were extensive. The dealer had been a customer of Pet for 22 years and there is no indication that he was induced to purchase from it because of this incidental service.

To the extent that Pet or any other respondent doing business in the area has performed any service on dealer-owned equipment it has involved an occasional situation where the manufacturer's service man was already on the dealer's premises making a regular call to service company-owned equipment and, as an accommodation to the dealer, might have made some minor adjustment on the dealer's own refrigeration equipment if the dealer requested it. However, where any substantial repairs or dealer-owned equipment have been involved, the manufacturer has usually charged for parts which were supplied and for the labor of the service man. The evidence fails to establish that any of the respondents, as a matter of regular routine, has serviced dealer-owned equipment free of charge where substantial repairs were involved, or that such servicing as has been performed constitutes a significant competitive problem.

5. Unlike the statistical evidence pertaining to respondents' expenditures for cabinets and financial assistance to dealers, that offered with respect to the various "services of value" falling within the allegations of the complaint discussed above is meager, both in terms of the total and relative amounts involved and with respect to the respondents for which such evidence is offered. Such evidence was offered only with respect to respondents Beatrice, Pet, Fairmont and Hood and indicates that the only expenditures of any consequence for miscellaneous services of value are for signs containing privilege panels.

Counsel supporting the complaint has chosen to ignore the actual figures offered by him with respect to these respondents and has proposed in lieu thereof certain computed figures for all nine respondents. Compounded of a phantasmagorial combination of unfounded assumptions, estimates and sheer guesswork, the figures proposed do not have the remotest resemblance to anything in the record.[17]

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[17] Counsel's figures include estimates on "unwarranted" cabinets, compressors and frozen food cabinets. Aside from the propriety of including these items under the category of "services of value", the figures are based on the unfounded assumption that 10 per cent of cabinets supplied are "unwarranted." Furthermore, figures on these types of equipment are to a large extent already included under the figures for facilities and other equipment. Counsel's figures are based, in addition, on a series of estimates and

The absurdity of the figures suggested by counsel supporting the complaint may be observed by a comparison with some of the actual figures which appear in the record. The evidence discloses that in a five-market area stipulated to be typical, respondent Beatrice in 1955 supplied signs with privilege panels to 23 accounts and some used cabinets for frozen foods to three accounts, out of a total of 8,579 customers in the area. These accounts had a gallonage of 31,300 gallons out of a total gallonage of 5,969,000 gallons sold in the area. Translating this to a national basis it would mean that in 1955 Beatrice had rendered miscellaneous services of value to 143 customers (compared to 4,693 suggested in the computations of counsel supporting the complaint), with the value of the services amounting to $41,729 (as compared with counsel's proposed figure of $1,674,650) and involving a gallonage of 185,984 (not 3,549,300 as proposed by counsel). On the basis of the actual figures it appears that 0.3 per cent of Beatrice's accounts in 1955 received assistance by the furnishing of miscellaneous services of value and that these accounts represented 0.5 per cent of that respondent's total gallonage.

The figures for respondent Pet disclose that in 1955 it furnished signs with privilege panels to 138 accounts at a total cost of $23,569. The accounts so assisted represented approximately one per cent of the accounts served by that respondent. The figures for respondent Fairmont indicate that its total investment in signs of all types in a representative five-market area during 1955 amounted to $10,185, such signs being supplied to 53 accounts. The accounts receiving such assistance had a total of 76,825 gallons, which represented approximately 5 per cent of the total gallonage of all Fairmont accounts in the area.[18] For respondent Hood, the record contains the limited information that during the fiscal year ending February 1, 1954, it supplied signs and display material for use on ice cream cabinets having a value of $21,097. Its total sales during this period were $17,620,654. There are no meaningful figures in the record disclosing the amounts expended by respondents National, Borden, Foremost, Arden or Carnation for signs or other forms of miscellaneous service.

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guesses concerning costs of servicing equipment and supplying signs for which there is no record basis and are contrary to actual figures in the record. In the case of a number of the respondents there is no evidence that they supply any equipment or services falling in some of the categories referred to.

[18] It is not possible to compute the percentage which the number of accounts receiving signs represents of the total number of accounts, since the record contains no information as to the number of accounts served in 1955, either in the five-market area or nationally.

6. The record contains almost no evidence that any of the respondents, in supplying signs or performing other miscellaneous services of value, does so on the understanding that the dealer will purchase the respondent's products exclusively, nor does the evidence establish that the supplying or performing thereof results in exclusive dealing. The only evidence indicative of any agreement of an exclusive nature involves respondent Borden, and consists of the form of agreement entitled "Loan of Equipment", which has been previously referred to as being used in connection with the supplying of cabinets in the Philadelphia area. The form contains an incidental reference to the supplying of "signs and advertising material" and provides that the dealer will purchase his ice cream from Borden "exclusively and to the extent of his requirements, during the term of the agreement." However, as indicated in connection with the discussion of such agreements under the heading "Cabinets", such provisions have very little practical effect. Whatever is there stated with respect to the splitting and switching of accounts which have received cabinets, applies equally to those which have received signs.

Another agreement in the record, which involves respondent Foremost, provides that it will supply a sign to a particular dealer "for the duration of [the] business association" between them and that if the dealer decides to change to another dairy company he will pay Foremost for the cost of the sign and the installation charge. The agreement does not, however, contain any provision for the exclusive purchase of Foremost products during the period of the dealer's association with Foremost. Since the sign was apparently one that was especially made up for the dealer and was not useable by Foremost if the dealer switched, the provision requiring the dealer to pay for the sign in that case appears not to be unreasonable. This is, moreover, the only such incident in the record. There is no evidence in the record that any of the other respondents has used any exclusive dealing agreements, even on a pro forma basis, in connection with the supplying of signs to dealers or the performance of other miscellaneous "services of value."

7. Based on the foregoing, and the evidence as a whole, it is concluded and found that:

(a) The record fails to establish by a preponderance of the reliable, probative and substantial evidence that any of the respondents has attempted to induce or has induced retail dealers, to any significant

extent, to handle, store and sell such respondent's products, exclusively or otherwise, by performing and furnishing services of value for and to retail dealers, including such services as repainting the interior of a dealer's establishment, servicing facilities or soda fountain equipment, supplying signs and advertisements, or any other services of value.

(b) While some of the respondents do perform or furnish some services of value for and to retail dealers, such as the supplying of signs or the servicing of facilities or equipment furnished to dealers by such respondents, such services of value are performed and furnished in accordance with long-established industry practice. The evidence fails to establish that any of the respondents originated such practice or has used it as a competitive weapon to obtain or retain dealer accounts, or that the furnishing thereof operates, to any significant extent, as an inducing factor in the dealer's choice of a supplier.

(c) The evidence fails to establish that any of the respondents has, to any substantial extent, entered into agreements or understandings with retail dealers in connection with the performing or furnishing of any of the services of value above discussed, which require such dealers to handle respondents' products exclusively or which, by their operation, tend to require the exclusive handling of respondents' products.

(d) The evidence fails to establish that the performing or furnishing of services of value by any of the respondents for retail dealers has resulted in competitive injury in any relevant market area or that there is any likelihood of such injury.

4. Discounts and Rebates.

1. The complaints contain two sets of allegations dealing with the subject of discounts and rebates. The first revolves about quantity discounts and the element of exclusive dealing. It is alleged, in this connection, (a) that respondents have granted discounts and rebates on the condition, agreement or understanding that the dealer will handle respondents' products "exclusively" and (b) that respondents have granted discounts or rebates which are sufficiently large to constitute an inducement to dealers to handle respondents' products exclusively (apparently without regard to whether there is any actual agreement as to exclusive dealing or not). The second series of allegations have to do with the granting of discounts and rebates to

dealers who own their own ice cream storage facilities. It is alleged, in this connection, that respondents grant rebates and discounts to such dealers on condition that they handle respondents' products exclusively and, in the alternative, that rebates and discounts are made to dealers owning their own facilities which are not paid or offered to competing dealers not owning their own facilities.

2. Turning briefly to the second of the above group of allegations, dealing with the granting of discounts to dealers who own their own facilities, it would appear that the attack on this practice has been abandoned by counsel supporting the complaint. There was almost no complaint concerning this practice in the testimony of witnesses and it is not referred to in the proposed findings and brief filed by counsel supporting the complaint. The record discloses that most ice cream manufacturers throughout the country grant a special "refrigeration allowance" or "iceless discount" to dealers who own their own equipment. This is in recognition of the fact that by owning their own cabinets they have relieved the manufacturer of a cost which he ordinarily bears, viz., supplying a cabinet to the dealer and servicing such cabinet. Such allowances or discounts are made as an incentive for dealers to own their own cabinets. It is difficult to understand how the complaints can, on the one hand, attack the supplying of cabinets by ice cream manufacturers as an undesirable practice, and at the same time also attack as undesirable a practice which seeks to encourage dealers to own their own equipment.

In any event, there is no evidence in the record that the granting of discounts to dealers for owning their own equipment constitutes a significant competitive problem in the industry. If anything, it constitutes a boon to the smaller manufacturers who prefer not to have to supply their dealers with cabinets. As indicated above, it is a practice which is almost universally followed by ice cream manufacturers. There is likewise no evidence that the granting of such discounts is conditioned in any way on the dealer's handling the granting manufacturer's products exclusively, nor does it appear that the limiting of such discounts to dealers who own their own equipment places the dealers who do not receive such discounts at a competitive disadvantage. The whole purpose of the discount is to equate dealers who have the added expense of paying for and servicing their own cabinets with dealers who have been relieved of such expense by their ice cream supplier.

3. Turning next to the subject of discounts and rebates which are either granted with an understanding as to exclusive dealing or which, because of the size thereof, allegedly result in exclusive dealing, it would appear that the attack based on these allegations of the complaint has been substantially modified by counsel supporting the complaint. Whereas the language of the complaints appears to be directed generally at quantity or volume discounts, or at what is referred to in the industry as "sliding scale" discounts, the attack made in counsel's brief and proposed findings is limited mainly to what counsel designates as "Off List Pricing." Very little reference is made to discounts and rebates which are given pursuant to respondents' published price lists and discount schedules. While copies of these were offered in evidence early in the proceedings, they were not utilized to any significant extent by counsel supporting the complaint. Instead counsel requested respondents to submit further information concerning their off-list prices, and placed considerable emphasis on this subject in the examination of witnesses and in argument. It is not clear whether counsel now concedes that discounts and rebates given in accordance with published schedules are not an unfair competitive practice. It is clear, however, that the gravamen of his attack is directed at the off-list feature thereof.

4. The argument of counsel supporting the complaint revolves in large measure about statistical data obtained from respondents indicating the number of accounts which received the benefit of off-list prices and the gallonage of such accounts, with illustrations of the size of the discounts granted to particular types of accounts. Counsel contends that these figures establish that "respondents sell from 20% to 40% of their gallonage off list." Counsel further contends that the illustrative price data supplied demonstrates that amounts of the off-list discounts are unusually large, with that of respondent National averaging 20 cents per gallonage and those of the other respondents being equally large. The record does not support counsel's conclusions with respect to the proportion of respondents' accounts which are granted off-list discounts nor with respect to the size of such discounts.

5. Set forth below is a table indicating the proportion of each respondent's total number of accounts which received the benefit of off-list prices in 1955, and the proportion of each respondent's total gallonage which was sold off list in that year.

OFF LIST ACCOUNTS AND GALLONAGE—1955

	No. of off list accounts	Percentage of total accounts	Off list gallonage	Percentage of total gallonage [1]
		Percent		*Percent*
National	5,469	5.7	12,253,258	14.2
Borden	5,300	7.3	12,577,000	22.2
Foremost	1,604	4.6	2,450,415	9.0
Beatrice [2]	1,643	3.3	4,436,625	12.2
Arden	866	6.7	3,363,059	24.2
Carnation	912	6.9	2,542,879	15.2
Fairmont [3]	----------	----------	958,078	7.7
Pet	None	----------	None	----------
Hood	2,518	[4] 25.2	2,927,000	32.3

[1] The percentages in this column are somewhat overstated, except for Beatrice, Carnation and Fairmont, since they are based on a comparison of off-list sales of all frozen products, with total gallonage figures which are limited to hard ice cream only. Except for the three respondents mentioned, the only total gallonage figures in the record are for hard ice cream. The extent by which the above percentages may be overstated is indicated by the fact that in the case of respondent Carnation (for which the record includes total figures of both hard ice cream and all frozen products), a comparison of off-list sales of all frozen products with total figures of hard ice cream would result in increasing the percentage figure of that respondent from 15.2 per cent to almost 25 per cent.

[2] The percentage figures for this respondent are based on actual figures for a representative five-market area. The total figures of accounts and gallonage are based on a projection of these actual figures.

[3] The percentage figure for this respondent is based on the actual figures for a representative five-market area. The total gallonage figure is based on a projection of the actual figures. While it does appear that 55 accounts were granted off-list discounts in the five-market area, it is not possible to compute the total number or percentage of accounts involved since the record contains no total figures of the number of accounts served in either the five-market area or nationally.

[4] The exact number of accounts served by respondent Hood does not appear in the record. The only information in the record is that it serves approximately 10,000 accounts. The above percentage is computed on the basis of a comparison with this approximate number of accounts.

6. The above figures do not bear out the contention of counsel supporting the complaint that respondents sell "20% to 40% of their gallonage off list." Only one of the respondents even remotely approaches the 40% figure and the next two in order of magnitude are only slightly in excess of the 20% minimum figure cited by counsel. While the balance (except for Pet which makes no off-list sales) are considerably below the 20% minimum figure, it must be recognized that in terms of the percentage of total gallonage sold off list, the amounts involved are not insubstantial. This, however, is a matter of limited significance since a true insight into the competitive impact of off-list selling cannot be gained from these single-dimensional figures. Such figures by themselves mean little unless there is taken into consideration the extent to which the prices are off list and, more importantly, unless the base or list prices, from which such deductions are made, are compared. For example, deviations from list averaging two or three cents per gallon and involving as many as 50 per cent of a manufacturer's accounts may have less of a competitive impact than deviations averaging 20 or 30 cents per gallon and involving only 15 per cent of a manufacturer's accounts. Similarly, a price deviation of 20 cents from a base price of $1.85 a gallon may have little or no competitive

effect on another manufacturer whose base price is $1.65, but who has a smaller percentage of discounts or none at all.

7. The record likewise fails to support the assertion of counsel supporting the complaint that the off-list prices range as high as 40 cents off list, in the case of National, or that the average of the off-list prices of that respondent is 20 cents a gallon. In fact, there is no record basis for computing the average of the off-list discounts granted by any of the respondents. What the record does contain are illustrations or examples of the amount of the off-list discounts granted to certain unnamed customers falling into each of the following three categories of customers, (a) "Voluntary Group", (b) "Chain" and (c) "Individual Account." There is nothing to indicate that the figures in the record are typical of each group or that they represent an average of the amount of the off-list discounts granted to customers in each of the three categories. There is no information in the record as to the range of the distribution of the discounts in each category or as to the number of customers within each category receiving discounts in a particular amount, or any other information which would serve as a basis for computing a meaningful average figure.

The record does disclose that respondent National did grant a 40-cent a gallon discount from a $1.85 list price on bulk ice cream to a single unnamed account. However, this account was entitled to a 19-cent a gallon rebate under the published schedule, based on the volume used by the account, so that the amount which was off list in this instance was 21 cents rather than 40 cents. Moreover, the 21-cent discount only applied to its bulk ice cream purchases, the amount of the off-list discount on package ice cream varying from two cents to 15 cents a gallon. The account in question falls in the "Individual Account" category. The record also discloses that respondent National granted a special discount to an unnamed "Voluntary Group" of thirteen stores. All of the stores received the benefit of respondent National's maximum discount in the area of 5 per cent. During 1955, nine of the thirteen stores actually earned the maximum discount based on the volume of their purchases, while some of the balance earned 4 per cent and a few earned only 2 or 3 per cent. On the basis of the list price of approximately $1.70 a gallon they all received approximately 8.5 cents a gallon rebate, whereas some would have been entitled to a discount of only 3.4 cents a gallon under the published schedule. In this instance, the maximum amount off list was approximately 5 cents a gallon, rather than 8.5 cents a gallon. The third example in the record involves a chain of stores served by several different branches of respondent National, which received dis-

counts on package ice cream ranging, by area, as follows: 13–15 cents, 2–5 cents, 13 cents, and 11–25 cents. In this instance the so-called off-list prices actually involved giving these stores the benefit, on package ice cream, of the regular schedule discount applicable to bulk ice cream. The record discloses that this price arrangement was due, in part, to an offer made to the chain by a competitor.

For the other respondents, the record contains examples of the off-list discounts or rebates granted by them to certain unnamed accounts falling within the categories mentioned above, as follows:

	Voluntary group	Corporate chain	Individual account
	Cents	*Cents*	*Cents*
Borden	15¾–17	18-28	11–13
Foremost	14	18	10
Beatrice	10	5–6	5
Arden	5–17.8	5–12	5–14
Carnation	5	5–18	4–15
Fairmont	15	1–7	4–10
Hood	12	6–15	8

It should be noted that in a number of the above instances the discount was granted on a limited portion of the dealer's purchases, such as on a secondary brand, and in a number of instances the concessions were granted wholly, or in part, to meet competitive offers of other ice cream manufacturers. In any event, the figures in the record have very limited significance since, as above noted, there is no indication of whether they are typical or represent an average of the off-list discounts granted by respondents. Moreover, the probable competitive impact cannot be determined without a definitive comparison of respondents' base prices with those of competitors, which is not possible to any considerable extent on the basis of the evidence in the record.

8. In addition to the statistical information discussed above, counsel supporting the complaint also relies on the testimony of a number of competitor witnesses who referred to competitive difficulties allegedly arising from the matter of price. As in the case of much of the testimony of such witnesses relating to other aspects of the complaint, that pertaining to the matter of price was of a rather general nature, involving broad references to pricing practices applicable in the market and little of it pertained specifically to the practices of any of the respondents. In many instances the complaints made were with regard to low prices in general, it not appearing whether the complaints related to off-list prices, volume discounts or simply low base prices. In most instances where references were made to any of the respondents as being responsible for the loss of, or inability to acquire,

specific accounts on a price basis, no reliable evidence was offered as to the price being charged by the respondent in the specific instances complained about. It cannot therefore be determined in most of such instances whether the complaint involved off-list prices, quantity discounts or lower base prices.

Indicative of the testimony upon which counsel supporting the complaint relies is that of a manufacturer in San Francisco, whose testimony counsel cites in his proposed findings and brief. The witness testified in broad-brush terms that "ice cream companies in order to acquire certain accounts have deviated from procedure, or are not charging the price out of the published price list." No reference appears in the testimony of this witness as to what ice cream companies he was referring to, nor was any reference made to specific accounts which this manufacturer lost or could not acquire due to such price practices. The fact of the matter is that under California statute deviations from published price lists are prohibited, except to meet competition, and then only if the deviating company files a notice with the state indicating the extent of such deviation and the reason therefor. It cannot be assumed, in the absence of specific and reliable evidence, that any of the respondents had deliberately engaged in a violation of the California law. No suggestion was made by the witness that he had filed any complaint with the California authorities charging respondents with price deviations in violation of law.

Another of the witnesses cited by counsel supporting the complaint, a manufacturer in Miami, Florida, referred vaguely to "high rebates" as a competitive practice. Yet the witness did not name a single account where this was involved in competition with the three respondents operating in the area, National, Foremost and Borden. In fact, he conceded that he had had no competitive problems with respondents Foremost and Borden for several years at least and that his only difficulty with respondent National was the alleged giving of an extra cabinet to a single account. The witness' testimony further indicates that his main competitive difficulties involve a non-respondent manufacturer.

There are a number of other references in the testimony of competitor witnesses to "price arrangements", "price", "low prices", "excessive discounts", and "chain store discounts", but very little of it pertains to off-list prices, very little of it specifically involves respondents and in very few instances is there any reliable evidence as to the prices of respondents which were involved in any competitive situation. One of the few specific instances as to which there was any reliable evidence offered is that cited by counsel supporting the complaint in his pro-

posed findings where a dealer in southern Florida was granted a 47-cent discount from base price by respondent Foremost. The testimony of a Foremost representative who was called as a witness by counsel supporting the complaint, indicates that the discount was computed on the basis of a projection of the dealer's anticipated gallonage and, in large measure, involved simply the application of Foremost's regular volume discount. It likewise appears that Foremost's base price is considerably higher than that of the supplier which formerly served the account, the actual difference in the net price of the two in this case being only 10 cents. In any event, the dealer himself testified that this was not his reason for switching to respondent Foremost, and that the former supplier had even offered to meet the Foremost price, but that it was his intention to switch to Foremost because of his former association with that company at another location and his preference for selling its brand.

The only other evidence in the record of off-list prices being involved in connection with any specific competitive situations involves two accounts of respondent Arden in the Houston market. In one instance the price, which was 15 cents off list, was granted by the respondent in response to an invitation to bid from a large food chain and was offered to meet the competition of a non-respondent company. In the other instance the price was the result of a bookkeeping error and was rectified as soon as it was discovered. In both instances, the chain stores were split with other suppliers by respondent Arden.

9. Basic to the allegations with respect to quantity discounts and rebates is the charge that they involve exclusive dealing, i.e., they are granted with an understanding that the recipient will deal only in the products of the manufacturer granting them, or that the discounts are so large as to induce such a course of dealing, irrespective of any specific understanding. This charge is not, however, borne out by the evidence.

The only evidence in the record of any specific agreement to use a particular manufacturer's ice cream exclusively in order to be entitled to a discount, involves respondent Borden. Several volume discount schedules used by the company and several subsidiaries in the New York and New Jersey area in 1952 contain the statement that the discounts will be paid only to dealers who use Borden's products exclusively. This statement does not appear on any of the other Borden discount schedules in evidence. The record does not indicate that the statement appeared on other discount schedules used in the New York area and New Jersey area after 1952. It does not appear that any dealer in that area failed to receive a discount because he

had split his business with another manufacturer. No reference was made to the subject by any of the considerable number of dealers from the New York area who were called to testify by counsel supporting the complaint. The testimony of such dealers indicates that it is traditional in the area for dealers to handle the products of a single ice cream manufacturer. On this basis, the reference of exclusive dealing on the volume discount schedules in 1952 would appear to have had no practical effect. No evidence was offered, through competing ice cream manufacturers within the New York area, to indicate that the clause in question had had any competitive impact on the market.

10. There being no evidence of any understanding as to exclusive dealing involving any of the other respondents (or in the case of respondent Borden, no evidence of any such understanding in any other section of the country) this next question is whether, irrespective of any actual understanding, the granting of off-list discounts, or even the granting of regular volume discounts, results in exclusive dealing. In this respect the record is almost completely deficient. Most of the testimony, even though lacking in specificity as to the nature of the price deviations or the identity of the companies involved, indicated that the problem of price competition existed mainly with respect to chain stores, supermarkets and other volume accounts. Yet the record indicates that a large proportion of such accounts are split between two or more ice cream manufacturers.

The most frequent reference in the record to price as a competitive factor was in the Texas area and in the Midwest area, including particularly Kansas and Missouri. Yet these very areas are the scene of some of the widest splitting of accounts of any section of the country, and the record indicates that local manufacturers are well represented in such split accounts. In areas where the tendency to split is not as pronounced, there is no evidence that the granting of discounts has been a factor in this situation. Even in these areas, which are mostly in the eastern section of the country, there appears to be a discernible trend toward splitting in the larger accounts, which are usually the ones receiving the discounts. There is no reliable evidence in the record that the granting of off-list prices or volume discounts has resulted in the exclusive handling of a particular manufacturer's products or may reasonably be expected to so result.

11. The record fails to establish that respondents have initiated the practice of granting off-list prices or quantity discounts or have used it as an aggressive competitive weapon for inducing dealers to handle their products. Their practices in connection with the granting of quantity discounts and deviating, to some extent, from their

published prices do not appear to differ materially from those of many of their competitors. While some of their competitors do maintain a single price system, without quantity discounts, the prices of such manufacturers in many instances are basically lower than those of respondents before application of respondents' discounts, and the granting of such discounts in many instances simply results in putting the respondents' prices in line with those of competitors. The evidence discloses a number of instances where the alleged lowering of respondents' prices, generally or in specific situations, was admittedly done in response to price cutting initiated by nonrespondent companies. This is particularly true in the Kansas and Missouri areas, where there was more emphasis on the problem of price competition than in most other areas.

Much of the testimony with respect to the matter of price did not involve either quantity discounts or off-list prices, but rather lower prices on secondary brands or on ice cream manufactured under private label. Such pricing practices are outside the scope of the complaints. The fact that some competitors prefer not to make a second brand or to manufacture private label ice cream, in accordance with the specifications of a particular outlet, is not an issue which is involved in these proceedings. There is no showing that such secondary brands or private label brands are comparable in quality to that of respondents' regular brands or that respondents have used such brands merely as a device for cutting price. Another complaint was based on the economic philosophy of certain competitors that the individual stores associated with a voluntary buying group should not be given the regular chain store quantity discount. This again does not involve off-list prices and has dubious relevance under the complaints.

12. Based on the foregoing, and the evidence as a whole, it is concluded and found that:

(a) The record fails to establish by a preponderance of the reliable, probative and substantial evidence that any of the respondents has, to any substantial extent:

(1) Granted discounts and rebates on sales of frozen products to retail dealers on the condition that such dealers will handle, store or sell such respondent's products exclusively;

(2) Granted volume discounts and rebates on the prices of frozen products sold to retail dealers sufficiently large to constitute an inducement to such dealers to handle, store, or sell such respondent's products exclusively; or

(3) Made allowances or payments in the form of discounts or rebates to retail dealers who own their facilities on the condition that such dealers will handle, store, or sell the frozen products of such respondent exclusively.

(b) While respondents do grant discounts and rebates in the sale of frozen products, the record fails to establish that they originated such practice or have used it as an aggressive competitive weapon to destroy competition, or that their practices in the granting of such discounts and rebates differ materially from those of their competitors generally.

(c) The evidence fails to establish that the granting of discounts and rebates in the sale of frozen products by any of the respondents has resulted in competitive injury in any relevant market area or that there is any likelihood of such injury.

D. *Competitive Injury*

1. The question of injury to competition resulting from the complaint practices has already been considered incidental to the discussion of each of the individual practices. At this point the question is considered in its broader aspect to determine whether there is any basis for a finding of competitive injury resulting from the combined effect of the practices. In order to justify such a finding it must appear (a) that competition in a relevant market or markets is an unhealthy state, and (b) that there is a definite causal connection between this condition and the use of the complaint practices by one or more of the respondents.

The evidence of economic unhealth rests largely on the claims by some competitors of loss of accounts or decline in gallonage, sales or profits, and to some extent on the departure from business of some companies. Counsel supporting the complaint also relies on an alleged increase in the market share of respondents, accompanied by a decline in that of smaller competitors. To establish a causal connection between these conditions and the complaint practices, counsel relies on the fact, (a) that respondents have used the complaint practices, (b) that some competitors claimed the complaint practices were a factor in their losses, and (c) that some competitors claimed that they had been informed by dealers that the loss of or inability to acquire specific accounts was due to the complaint practices.

2. Turning first to the question of causal connection, the mere fact that respondents have utilized the complaint practices in any market

does not mean that a competitor's claims of declines in business or losses of accounts can automatically be attributed to the respondents who do business in the area. As has already been observed, to the extent that respondents do engage in any of the complaint practices, their activities are similar to those of their competitors generally. In most market areas they have active and substantial competitors and it cannot be inferred that all or even a substantial part of the competitive difficulties of individual competitors are due to respondents and, more particularly, to their use of the complaint practices.

Nor do self-serving general accusations or opinions of competitors, unsupported by reliable evidence with respect to specific competitive situations, justify a finding that the competitive difficulties of individual competitors are attributable to respondents. A considerable portion of the testimony of competitors, as has already been noted, was devoted to general "gripes" about market practices. To the extent that these witnesses sought to attribute such conditions to any of the respondents, it was frequently based on unreliable hearsay, surmise, and opinion. Where there was evidence in specific situations that dealers had advised competitor witnesses that some form of assistance was a reason for switching to or dealing with a respondent, no independent evidence was introduced in most cases by counsel supporting the complaint to establish the fact of assistance. Where there was evidence of assistance there was frequently no evidence that it had played any role in the dealer's choice of supplier.

In addition to the weakness in the testimony of competitors, there is other evidence in the record which suggests a number of legitimate reasons for the adverse experiences of some competitors, or at least reasons having no connection with the complaint practices. For example, the evidence discloses the advent of additional competitors in some areas thereby cutting into the business of the older companies. The evidence also discloses that the growth of soft ice cream and counter-freezer establishments has made serious inroads in the business of hard ice cream manufacturers in some areas. Another factor has been the trend among some chain stores to establish their own ice cream manufacturing facilities, thereby depriving existing manufacturers of an outlet and adding to competition for the consumer's dollar. There is also considerable evidence that old-fashioned price competition, having no connection with the complaint practices, has played a part in the declines of some companies.

The weakness of the evidence in support of the complaint, combined with the existence of other market factors which also furnish a reasonable explanation of why certain competitors have declined or have

not made any progress, require the conclusion that, to the extent competitors have been experiencing competitive difficulties, the record does not support a finding that there is any substantial connection between such difficulties and the complaint practices. The nature of the evidence which is the basis of this conclusion has already been discussed to some extent and will be hereafter discussed in greater detail in the Appendix to this decision.

3. Turning to the question of whether the evidence establishes the existence of an unhealthy economic state in any relevant market (aside from the question of what caused it), the record is likewise deficient. As already indicated, the claim of injury rests in large measure on the testimony of competitor witnesses concerning declines in the number of their accounts and in their total gallonage sales or profits. Most of these claims rest on a comparison of recent sales figures with those of the peak early postwar years, 1946 or 1947. They are for the most part based on rough estimates and approximations of sales figures, unsupported by books and record. Irrespective of the dubious nature of some of the figures, the alleged declines in the sales of some competitors fail to establish an overall unhealthy competitive state in any market area.

Generally the declines of some competitors are counterbalanced by the advances of other nonrespondent competitors in the same market. In a number of instances the complaining competitors appear to represent small, marginal companies which are not truly representative of the market. Many of the claims of injury are based on the inability of the competitor to increase his sales commensurate with population increases, rather than on any actual decline. Yet the evidence discloses that despite population increases there have been no general increases in ice cream sales in a number of markets. In many of the instances where competitors claimed their sales had declined or had not increased proportionately, the record discloses that the respondents or some of them doing business in the same area have had a similar experience in their sales.

While individual companies have gone out of business in particular markets, the record fails to establish that there is any significant mortality among ice cream manufacturers. Frequently such companies have been replaced by new companies in the same market and sometimes by milk companies expanding into the ice cream business. While some of the departing companies have sold out to various of the respondents, many have sold out to other local competitors or to new entrants into the market. In a number of instances successor com-

panies have been successful in the same market where their predecessor failed.

Despite the problems of individual companies, the record fails to establish any significant mortality among so-called independent ice cream companies, or any such decline in their position in the various market areas where hearings were held as to support a finding that competition in these areas is in an unhealthy state. Equally important, the record fails to establish that such problems as do exist are due in substantial part to the use of the complaint practices by respondents. Further analysis of conditions in the various market areas involved, which are the basis for the above general findings, will be found in the Appendix to this decision.

4. Basic to the injury argument of counsel supporting the complaint is the assumption that any decline in sales since the early postwar years, or a lack of growth since then, bespeaks the existence of abnormal or unusual competitive factors in the market (his explanation therefor presumably being the complaint practices). However, there is considerable evidence in the record to indicate that the early postwar years were not typical or normal years. According to the testimony of a number of the competitor witnesses themselves, there was an unusual upsurge in demand during the first year or two after the end of World War II, which was never again equalled by most companies in many areas. This fact is attested to by the official production figures of ice cream manufacturers compiled by the United States Department of Agriculture (hereinafter referred to as USDA), which are in the record. The production of hard ice cream at wholesale declined from a peak of approximately 650,000,000 gallons in 1946 to slightly in excess of 500,000,000 gallons between 1949 to 1951. While it began to increase thereafter, it never again reached the 1946 peak, the maximum production in 1955 being approximately 575,000,000 gallons.

These figures are for the wholesale production of hard ice cream only. During the early postwar years the production of other frozen dairy products, such as milk sherbet and ice milk, was relatively small, accounting for less than 5 percent of all frozen dairy products produced. However, in the later period the production of these less expensive diet-appealing frozen desserts began to increase, until they reached 20 percent of the production of frozen products in 1955. If the production of these other frozen dairy products is included, the 1946 production figure of 746,710,000 gallons for all frozen dairy products was again surpassed in 1955 when total production reached approximately 791,000,000 gallons. In substantially all of the intervening years the total

production of frozen dairy products remained below the 1946 figure. Such other desserts have been more popular in some markets than in others, thus accounting for overall increases in production in some markets after 1946, while other markets were experiencing a decline.

5. The USDA figures likewise tend to disprove the argument of counsel supporting the complaint that there has been a substantial decline in the number of manufacturers producing hard ice cream at wholesale. According to these figures the number of wholesale producing plants has remained substantially the same during the postwar period. While the number of plants is not coextensive with the number of companies producing ice cream for wholesale distribution because of the fact that some of the larger companies operate multiple plants, it is nevertheless some gauge of the number of companies in the business. It is particularly significant that there has been no substantial change in the number of plants which produce less than 100,000 gallons annually, these being the plants which are generally owned by small independent companies operating only a single plant. Set forth below is a table containing a comparison of the total number of wholesale ice cream plants and a breakdown of the number of plants in the three smallest size categories, for the years 1947 and 1954, the latter being the latest year for which figures giving a complete breakdown of plants by size groups is available in the record:

COMPARISON OF NUMBER OF WHOLESALE ICE CREAM PLANTS

	1947	1954
Total Number of Plants	[1] 3,137	3,105
Plants Less Than 25,000 Gal	1,020	1,027
Plants Between 25,000 and 49,999	569	539
Plants Between 50,000 and 99,999	489	506

[1] In making a similar comparison counsel supporting the complaint has used the figure 3,766 as the total number of plants in 1947. However, this is a tentative figure, which was later corrected by the USDA, and a release containing such change and prepared at the request of counsel supporting the complaint, gives the above figure as the correct number of plants. The argument of counsel supporting the complaint as to why this uncorrected figure should continue to be used is entirely without merit. It is based upon the fact that there is no revised figure for 1955 with which to compare the revised 1947 figure. There is, however, a revised 1954 figure which is the figure above used as the basis for comparison.

As is apparent from the above table, there has been no significant change, either in the total number of wholesale plants or in the number of small plants, i.e., those producing less than 100,000 gallons annually. The slight decrease in the total number of plants may be accounted for largely by the fact that there has been a tendency among the larger companies to consolidate their operations into larger-sized producing units. This tendency has continued during 1955 and 1956.

6. Counsel supporting the complaint takes the position that the USDA figures do not correctly reflect the situation with respect to

the changes in the number of plants in recent years, in that there have been erroneously included in the category of wholesale plants two groups of producers which he contends should not be classified as wholesalers but as retailers. These are (a) "captive" plants, i.e., plants which produce only for retail sale in their own affiliated retail stores, and (b) small producers of under 50,000 gallons, most of which counsel supporting the complaint contends produce for retail sale on the premises rather than for resale to independent outlets. Counsel contends that if the number of "captive" plants and those which he claims are essentially retail producers were deducted from the total number of plants, this would reveal a substantial decline in the number of wholesale plants between 1947 and 1955. The argument pertaining to the so-called "captive" plants presents no problem. The record discloses that there were estimated to be 481 such plants in 1947 and 471 in 1954. Hence, even if it were conceded that such plants do not belong in the wholesale column, a deduction of 481 plants from the 1947 total figure of wholesale producing plants and 471 plants from the 1954 total would result in no significant net difference between the total number of wholesale plants in the two years. In fact, there would be ten more wholesale plants in the latter year than there would be under the above table.

Counsel's argument with respect to the second category of plants, i.e., those producing under 50,000 gallons, has an unreal, metaphysical quality about it which is strangely reminiscent of "Alice In Wonderland." By a breath-taking series of factual assumptions, based on such nonrecord sources as "our information" and "our view," counsel reaches the conclusion that all plants producing less than 25,000 gallons, which USDA classified as wholesale, are actually retail plants, and that an appreciable number of plants between 25,000 and 50,000 gallons are likewise retail, although the number of the latter is not specified.[19]

[19] Counsel's argument appears to be based in part on a distortion of a statement contained in the USDA release to the effect that where a plant produces 50 per cent or more of its products for sale at wholesale, its entire production is classed as wholesale, whereas if less than 50 per cent is produced for wholesale distribution, it is classed as retail. Counsel's confusion regarding this statement is compounded by misunderstanding of another statement that where USDA has no information on plants over 15,000 gallons, it classifies them as wholesale. Counsel suggests that the computations made by the Department of Agriculture are basically erroneous since all plants under 25,000 actually produce over 50 per cent of their products for sale at retail, as do a large part of those under 50,000 gallons. The representative of the Department of Agriculture testified that the Department had reasonably reliable information on all but about one hundred small plants, and that the likelihood of misclassification, on the basis of a plant which it classified as wholesale actually producing 50 per cent or more of its products for retail consumption, was very slight, since there are very few plants whose production falls that close to the dividing line. There is not a scintilla of evidence to warrant accepting the ipse dixit of counsel supporting the complaint, rather than the official figures of the USDA and the testimony of its official, who was called as a witness by counsel supporting the complaint.

Counsel supporting the complaint arbitrarily suggests that there are 1,000 such plants which should be considered as retail and should therefore be deducted from the number of plants classified as wholesale by the USDA. He further suggests that the number of such plants plus the multiple plants operated by respondents should be deducted from the total number of plants producing for wholesale in 1955, leaving a net of 1,767 plants for that year. Counsel concludes that comparing 1,767 plants in 1955 with 3,127 in 1947 indicates that 1,360 wholesale producing plants have "disappeared" from the scene since 1947. Aside from the lack of any record basis for counsel's claim that the USDA improperly classified 1,000 plants as wholesale and his further deduction of multiple plants operated by respondents (the reason for the latter deduction not being apparent from counsel's argument), counsel overlooks the fact that an equivalent number of plants should also be deducted from the 1947 total in order to make both figures comparable. The record indicates that there were substantially the same number of plants producing under 25,000 gallons in both years. Assuming arguendo that they were all retail in 1955, there is not the slightest reason to believe that they were not also retail in 1947. Hence, a deduction of substantially the same number of plants from 1947 and 1955 would leave the net number of plants in both years substantially the same.

7. By a process of reasoning similar to that discussed above, counsel supporting the complaint also seeks to establish that there has been a substantial decrease in the number of wholesale ice cream manufacturers between 1947 and 1955, as well as in the number of plants. Recognizing that the Department of Agriculture figures are in terms of the number of plants rather than companies, counsel seeks to reduce plants to companies. He does this by deducting from the 1955 official USDA figure of 3,008 plants, the following: 1000 plants which he claims are retail rather than wholesale (for the reasons indicated above), 241 multiple plants of respondents, and 95 multiple plants of nonrespondents (the figures on which counsel has obtained from an industry publication which is not in evidence). By this mathematical sleight of hand, counsel arrives at a net figure of 1,672, which he claims represents the number of wholesale ice cream producers in 1955. Then with an almost breath-taking disregard of elementary logic, counsel apparently compares 1,672 *companies* in 1955 with 3,127 *plants* in 1947, and claims that the number of *companies* in the United States "has been cut nearly in half" since 1947. Aside from the impropriety of comparing companies with plants, it is obvious that counsel has neglected to deduct from the 1947 figure an equivalent number of so-

called retail plants in the under 25,000–50,000 gallon category, and the multiple plants of respondents, as well as those of other companies operating multiple plants. Were this to be done there would be no significant difference between the two years. Based on the actual evidence in the record there is no way by which the number of companies in 1954 or 1955 may be precisely compared with those in 1947. However, from such evidence as does exist there is no reason to believe that the number of companies has declined significantly. The USDA figures with respect to the number of small plants give every indication that there has been no significant change in the number of small companies.

8. A considerable portion of the argument of counsel supporting the complaint is devoted to the proposition that the complaint practices have resulted in a trend toward concentration of the ice cream business in the hands of respondents. This is another way of saying that competition has been injured by a shift of business to respondents and away from competitors. Basic to this argument is the assumption that such shift has been due in substantial part to the complaint practices. The fact that a shift has taken place would not be legally significant in these proceedings unless a causal connection with the complaint practices is established. As has already been indicated, the record fails to establish any substantial causal connection between the complaint practices and the difficulties of competitors in any market area. Consequently there is no basis for a finding that the complaint practices have been a significant factor in any alleged trend toward concentration in the hands of respondents. Equally important, however, the record fails to establish any trend toward concentration, as suggested by counsel supporting the complaint.

9. The contention of counsel supporting the complaint that there has been a trend toward concentration among the respondents, rests on a comparison of the combined production shares of respondents in 1947 and 1955, with total United States production in those years. Aside from the basic impropriety of seeking to aggregate the production shares of all respondents as if they were one affiliated group of companies or as if this were a single conspiracy case, the mathematical inaccuracies and gratuitous assumptions on which much of counsel's argument is based result in production shares for both periods which are totally distorted. Contrary to the argument made by counsel supporting the complaint, there has been no significant increase in the aggregate production shares of the respondents.

According to counsel supporting the complaint, respondents' collective share of the national production of ice cream at wholesale in

1947 was 38 per cent and increased to 44 per cent in 1955, an increase of six per cent. Counsel then seeks to demonstrate that the increase is even greater than six per cent by eliminating from the total USDA production figure (which is the universe figure with which respondents' production is compared), production which counsel contends is non-wholesale. Counsel first eliminates the production of "captive" plants, thereby increasing respondents' 1947 production share to 40 per cent and their 1955 share to 47 per cent, or an increase of seven per cent.[20] Counsel then argues that the production of the 1,000 plants discussed above, which were allegedly misclassified by the Department of Agriculture as wholesalers, should also be deducted from the national figures of hard ice cream produced at wholesale. Counsel estimates the production of these 1,000 plants to be 37,530,000, based on a projection of the figures contained in a stipulation which was introduced in evidence solely in the Hood proceeding and which covers only the New England area. By thus distorting the 1955 figure of national wholesale production, counsel arrives at respondents' share of production in 1955 as 50.6 per cent, which he compares to a 1947 figure of 40.8 per cent in 1947, and claims that there has been an increase in respondents' production share of 10 per cent. Aside from the basic impropriety of making a computation based on data which is only in the Hood record, counsel's argument suffers from two fatal weaknesses. First, as has already been indicated above, there is no record basis for any assertion that USDA improperly classified 1,000 plants. Secondly, if they were misclassified, the same would be true basically of the 1947 figures, and if the production of these plants were deducted from both years, instead of only from 1955 as counsel has done, the result would indicate no significant change in production shares.[21]

In addition to the above errors, the basic computations of counsel supporting the complaint, on which the above refinements are based, contain a number of errors which affect counsel's basic argument with regard to increase in concentration. The figure used by counsel supporting the complaint as the 1947 total of respondents' production of ice cream is in error by 14,089,901 gallons. By using an erroneous figure for respondent National's 1947 gallonage (which was contained in an exhibit later revised), that company's 1947 gallonage is underestimated by 7,197,858. A further understatement of 6,892,043 results

[20] The production figures of "captive" plants are not included in the Pet, Fairmont or Hood records.

[21] The actual figure in 1954 for 1,027 plants whose production was less than 25,000 gallons (these being the nearest thing to the group of plants counsel is referring to) shows a total figure of 12,345,609 gallons in that year compared with 11,278,031 gallons in 1947.

from a misstatement of the total 1947 gallonage of all respondents.[22] This understatement of 14,089,901 gallons for 1947 is aggravated by an overstatement of respondents' gallonage for 1955 by 7,192,279 gallons. Thus, instead of respondents' share of the U.S. wholesale production in 1947 being 38 per cent and their share of production in 1955 being 44 per cent, as counsel suggests, the figures are as follows:

	1947	1955
Total Production of Ice Cream at Wholesale	577,026,000	574,376,000
Respondents' Total Production of Ice Cream	237,763,901	246,543,721
Respondents' Percentage of Total	41.2%	42.9%

As indicated by the above table, the net increase in respondents' production is 8,779,820, not 30,062,000, and the percentage increase is 1.7 per cent, not 6.0 per cent. This increase is more than accounted for by the fact that respondent Foremost's production figures, for 1955, include the gallonage of Golden State which it acquired in 1954, with a gallonage in excess of 10 million. If the production figures of companies acquired by other respondents after 1947 were also eliminated, it seems clear that respondents basically would be below their 1947 production figures for the equivalent number of plants in operation. In view of the inaccuracies in the basic figures used by counsel supporting the complaint, the further refinement of such figures by the deduction of captive plants and so-called retail plants are also obviously erroneous. The deduction of the gallonage of captive plants would not change the above percentages appreciably. There is likewise no basis for any deduction of the so-called 1,000 retail plants. As above indicated, there is no reliable evidence in the record that there is any such number of plants erroneously classified by the Department of Agriculture and there is, moreover, no reliable evidence as to the gallonage of such plants. Furthermore, if an equivalent deduction were made from the 1947 universe figure, there would be no significant increase in respondents' share between 1947 and 1955.

10. The above discussion of whether there has been an increase in respondents' share of national production has been considered in the context in which it has been presented by counsel supporting the complaint. His basic approach, however, is erroneous. Each group of respondents in each of these nine proceedings is a separate entity and the figures of each group must be separately considered and compared in order to determine whether their respective market positions have improved. It is manifestly improper to say that respondents as a group have increased their market position when a number

[22] The correct figure is elsewhere set forth in Table III, page 19 of counsel's brief.

of them have actually declined in some markets and on a national basis. It is not proper to balance these declines by the increases of some respondents, either in local markets or nationally, and argue that respondents as a group have improved their position, particularly since some of the increases represent the gallonage of acquired companies rather than true production increases.

On the basis of the data in the record it is possible to measure the separate fortunes of the respondents in three different ways: (a) In terms of whether their respective market shares have increased or decreased in key areas where evidence was offered against them; (b) in terms of whether their respective shares of state production in the states where they maintain manufacturing plants have increased or decreased; and (c) in terms of whether their respective shares of wholesale production of hard ice cream in the United States as a whole have increased or decreased. To a consideration of the data in the record in each of these categories the examiner now turns.

(a) *Market Shares In Key Areas.* There is in evidence statistical information showing each respondent's share of the market between 1950 and 1955 in a number of the areas where counsel supporting the complaint sought to show injury to competition. This information was prepared by Professor M. A. Adelman of M.I.T. from data supplied by respondents indicating their respective sales in these areas, and from computations made under his supervision indicating the total estimated sales in each of these markets. The market areas consist of the Standard Metropolitan Areas (SMA's) established by the United States Government, which are used by the Government and by industry for statistical purposes and market surveys. So far as appears from the record the market share information is sufficiently accurate from a statistical point of view as to furnish a reasonably reliable basis for measuring market share trends.

The primary objection to such data by counsel supporting the complaint was that the universe figures used were based on total production or sales, rather than on wholesale production or sales.[24] This objection, however, is not well taken for several reasons. In the first place there is some question as to the proportion of total production figures which is represented by retail production, and for purposes of measuring a trend it is more reliable to use total production figures than wholesale figures above.[25] In the second place retail production represents only a minor fraction of total production (less than 10 per cent) and while the deduction of such figures from the total figures for each year might indicate each respondent's share to be slightly

[24] See National Dairy record, p. 7073.
[25] Id. pp. 7056–7058.

larger, it would not affect the trend revealed by the figures in evidence. If anything, the deduction thereof would tend to favor respondents because the wholesale component has tended to increase faster than retail production.[26]

Set forth below is a table showing the percentage changes in market shares of six of the respondents in certain markets between 1950 and 1955, as revealed by the market share information in evidence.[27] The actual percentage which each respondent's share represents of such markets appears in the Appendix to this decision, in connection with the discussion of each such market. As noted above, the market areas are those concerning which counsel supporting the complaint offered evidence against the respondents. Where figures do not appear for a particular city with respect to a particular respondent, it is because that respondent does not do business in the area, unless otherwise indicated.

MARKET SHARE CHANGES, 1950-1955

	National	Borden	Beatrice	Foremost	Carnation	Arden
	Percent	*Percent*	*Percent*			
New York	−1.2	−4.7	+1.1	----------	----------	----------
Philadelphia	−9.3	−0.7	----------	----------	----------	----------
Baltimore	+0.5	−2.8	+1.0	----------	----------	----------
Washington, D.C	+0.5	+1.0	−1.6	----------	----------	[4] −3.6
Richmond	−4.6	----------	−0.7	----------	----------	+1.3
Charlotte	+4.8	+4.6	----------	−8.0	----------	----------
Jacksonville	−4.7	−3.9	----------	+1.0	----------	----------
Miami	−10.3	−5.4	----------	+11.8	----------	----------
Chicago	−0.3	+0.8	+0.7	----------	----------	----------
Cincinnati	[1] +0.6	[2] +0.1	−1.0	----------	----------	----------
Houston	----------	−0.7	----------	−6.6	−1.5	+2.9
Phoenix	----------	----------	----------	----------	−2.4	−20.7
Portland, Ore	----------	----------	----------	----------	−1.2	−1.8
San Francisco	----------	−1.4	−0.3	(3)	+0.5	+0.3

[1] The above percentage change is measured from 1951, data not being available for 1950.
[2] The above percentage change is measured from 1954, when Borden entered the market.
[3] Foremost entered this area in 1954 by acquistion of Golden State Dairy. No figures are available as to Golden State's market share in 1950.
[4] The above percentage is measured from 1953, when Arden entered market by acquisition of a local company.

As will be observed from the above figures, the respondents have, for the most part, lost rather than gained market position. Respondent National has gained in four areas but declined in six; respondent Borden has gained in four but lost in seven; respondent Beatrice has gained in three but lost in four; respondent Foremost has gained in two but lost in two; respondent Carnation has gained in one but lost in three; respondent Arden has gained in three but lost in three. For the most part, the gains are small and are offset by the losses in other areas. It will also be observed that while some of the

[26] Id. p. 7060.
[27] No similar information appears with respect to respondents Pet, Fairmont and Hood. However, information on a state basis which is hereafter discussed, gives some idea of their market trends.

respondents have gained in particular market areas, others have lost in the same area although they have all used substantially the same competitive practices. The figures not only reveal no trend toward concentration in favor of any of the respondents, but the variety of the experiences of particular respondents in different markets and among respondents in the same market suggests that the complaint practices do not play a significant role in affecting market trends.

(b) *Trend of Production Shares In States of Production.* The trend in each respondent's position may also be measured by comparing their production in the states where they have plants, with the total production of frozen dairy products manufactured in such states. This is not a precise measurement of their market shares since the frozen products produced in one state may be sold in an adjoining state or states. Nevertheless, it is a helpful method of analyzing the trend in respondents' positions in the general areas where their business is mainly concentrated. Set forth below is a comparison of the changes in the share of production of frozen dairy products of each respondent, except Fairmont (for whom such data is not available), between 1947 and 1955 in all states in which they have plants. The production share figures of each of the respondents in a number of the individual states involved are set forth in the Appendix, in connection with a discussion of these areas.

PRODUCTION SHARES OF RESPONDENTS (IN STATES IN WHICH THEY PRODUCED) IN RELATION TO TOTAL FROZEN PRODUCTS PRODUCED (IN THOSE STATES), 1947–1955

	1947	1955	Percent change
	Percent	*Percent*	
National [1]	22.5	17.5	−5.0
Borden [2]	12.5	10.8	−1.7
Beatrice [3]	5.1	6.1	+1.0
Arden [4]	17.8	14.7	−3.1
Carnation [5]	9.0	10.0	+1.0
Foremost [6] [1950]	6.5	7.9	+1.4
Pet [7]	8.9	8.9	+0.0
Hood [8]	26.5	19.0	−7.5

[1] Production percentage of 24 states. In the 27 states in which National produced in 1932, its percentage of state production was 30.1 per cent. These states were substantially the same as those in 1947 and 1955.

[2] Production percentage of 23 states.

[3] Production percentage of 17 states.

[4] Production percentage of four states.

[5] Production percentage of five states.

[6] The Foremost figures are based on a comparison of its production share in the 11 states which it served in 1950, with its share in the same states in 1955. No equivalent data is available for 1947, except for hard ice cream. In 1954 and 1955 it began serving seven additional states, largely through the acquisition of other companies. Its share of production in these states increased by 0.3 per cent between 1954 and 1955.

[7] Production percentage of three states.

[8] The above figures are based on a comparison of the production of hard ice cream at wholesale in the New England States. The record does not contain any information on the production of frozen products by this respondent other than hard ice cream. The above figures do not include the New York State area, which was entered by this respondent in September 1953 when it acquired a small company in the eastern part of the state. Another acquisition of a somewhat larger company was made in September 1954. Hood's share of the wholesale production of hard ice cream in New York State as of 1955 was 1.07 per cent.

As is apparent from the above figures, there has been no significant increase in respondents' respective production shares in the states in which they produce. Counsel supporting the complaint would, presumably, quarrel with the figures because they are based on a comparison with total production in these states, including that of retail and "captive" plants. However, all that the exclusion of the production of such plants would accomplish would be to slightly increase respondents' respective shares of production in each of the two years used for comparison, but the figures of percentage change would remain substantially the same.[28] The above figures have significance as a helpful indicator of the trend in respondents' production shares between 1947 and 1955.

(c) *Shares of Wholesale Production of Hard Ice Cream in U.S.* The trend in respondents' shares of production may also be measured by comparing them with the total wholesale production of hard ice cream in the United States. This is essentially the basis of comparison used by counsel supporting the complaint, except that his method involved lumping the production of all of the respondents together instead of comparing each one's production, separately, with total national production. Set forth below is a table indicating each respondent's total production of hard ice cream in 1947 and 1955, and comparing it with the total wholesale production of hard ice cream, as appearing in official USDA figures.

POSITION OF RESPONDENTS IN RELATION TO TOTAL U.S. WHOLESALE PRODUCTION OF HARD ICE CREAM, 1947-1955.
(Thousands of Gallons)

	1947		1955		
	Production	Percent	Production	Percent	Percent Change
Total	572,605	100%	574,271	100%	
National	101,209	17.7	85,871	15.0	−2.7
Borden	63,653	11.1	56,584	9.9	−1.2
Foremost	6,855	1.2	27,192	4.7	+3.5
Beatrice	20,138	3.5	27,682	4.8	+1.3
Arden	12,397	2.2	13,903	2.4	+0.2
Fairmont	10,751	1.9	12,128	2.1	+0.2
Carnation	8,033	1.4	10,215	1.8	+0.4
Hood	11,199	2.0	9,059	1.7	−0.3
Pet	3,529	0.06	3,910	0.07	+0.01

[28] The record contains no data on the production of retail and captive plants, except for hard ice cream. The production by retail plants accounted for less than 10 per cent of the total production of hard ice cream in 1947 and 1954. The production by captive plants accounted for approximately 5 per cent of the hard ice cream produced in 1947 and 6 per cent of that produced in 1954. Assuming similar proportions for other frozen dairy products, other than hard ice cream, it seems clear that the deduction of substantially identical amounts from the 1947 and 1954 production figures would produce substantially similar results, insofar as percentage change between the two years is concerned. While the latest year for which figures on both retail and captive plants appear in the record is 1954, there is no reason to believe that the 1955 figures would vary significantly.

As is apparent from the above figures, except for respondents Foremost and Beatrice, none of the respondent's shares of the wholesale production of hard ice cream in the United States has increased by as much as one per cent between 1947 and 1955. A large portion of the increase by respondents Foremost and Beatrice is due to their acquisitions of other companies, rather than by true increases in production. The same is true of some of the other companies represented above. Thus, for example, respondent Fairmont's gallonage in 1955 would have been below its gallonage in 1947, but for the acquisition of several other companies between 1950 and 1955 which had a combined gallonage of approximately two million gallons. The two largest companies, National and Borden, have actually sustained a decline both in absolute production figures and in relative production shares between 1947 and 1951, as has the respondent Hood. The figures fail to establish that there is any significant trend toward the concentration of the ice cream business in the hands of respondents.

Presumably, counsel supporting the complaint would quarrel with the above results because the total gallonage figures, comprising the universe with which respondents' gallonage is compared, include the production of "captive" or, as respondents call them, "affiliated" plants. Counsel supporting the complaint regards these plants as essentially retail, while respondents contend that they should be regarded as wholesale, which is the way the USDA classifies them. Assuming arguendo, the correctness of the position of counsel supporting the complaint and making the deduction which he suggests, the results do not differ significantly from the results and trend above indicated. Set forth below is a table in which there has been deducted from the total USDA figures of wholesale ice cream production, the production of affiliated plants. Such plants produced 28,909,000 gallons in 1947 and 35,992,000 gallons in 1955.[29]

RESPONDENTS' POSITION IN RELATION TO TOTAL WHOLESALE U.S. PRODUCTION OF HARD ICE CREAM, EXCLUSIVE OF PRODUCTION OF "CAPTIVE" OR "AFFILIATED" PLANTS, 1947-1955

	Percentage of 1947 production	Percentage of 1955 production	Percent point change
National	18.6	16.0	−2.6
Borden	11.7	10.5	−1.2
Foremost	1.3	5.1	+3.8
Beatrice	3.7	5.1	+1.4
Arden	2.3	2.6	+0.3
Fairmont	1.9	2.1	+0.2
Carnation	1.5	1.9	+0.4
Hood	2.1	1.7	−0.4
Pet	0.06	0.07	+0.01

[29] The figure for the latter year is actually that for 1954, but it is the latest figures in the record on such plants, and is the figure used by counsel supporting the complaint in making his computations.

Since the above results do not take into account the production of the approximately 1,000 plants which counsel supporting the complaint also claims are retail (based on alleged misclassification by the USDA), he would presumably also question the correctness of the above figures. As previously noted, there is no record basis for counsel's contention that there has been any significant misclassification of plants by the USDA, nor is there any basis for his computation of the production of such plants. However, assuming, arguendo, that there has been a misclassification of plants in the category suggested by counsel, the record affords a basis for determining the gallonage of such plants. A recomputation which excludes the gallonage of such plants results in no significant change in the basic trend reflected by the above figures.

The computation made below is based on the assumption that *all* plants producing under 50,000 gallons are retail. Counsel has argued that all plants under 25,000 gallons are retail and that some indeterminate number between 25,000 and 50,000 are retail. The USDA figures reveal that there were 1,589 such plants in 1947 with a gallonage of 32,711,914 and 1,563 such plants in 1954 with a gallonage of 32,097,000. Deducting the production of all such plants from the figures used in the previous table, rather than the niggardly 1,000 plants suggested by counsel, the results are as follows:

RESPONDENTS' POSITION IN RELATION TO TOTAL WHOLESALE U.S. PRODUCTION OF HARD ICE CREAM EXCLUSIVE OF PRODUCTION OF "AFFILIATED" PLANTS, AND PLANTS UNDER 50,000 GALLONS, 1947-1955

	Percentage of 1947 production	Percentage of 1955 production	Percent point change
National	19.8	17.0	−2.8
Borden	12.5	11.2	−1.3
Foremost	1.3	5.4	+4.1
Beatrice	3.9	5.5	+1.6
Arden	2.4	2.7	+0.3
Fairmont	2.1	2.4	+0.3
Carnation	1.6	2.0	+0.4
Hood	2.2	1.8	−0.4
Pet	0.07	0.08	+0.01

For convenience in comparing the results achieved under each of the methods of computing respondents' production shares discussed above, there is set forth below a recapitulation of the percentage of change between 1947 and 1955 in each respondent's share under each such method. The first column discloses the change between 1947 and 1955 in each respondent's share of production as compared to the production of the states in which their frozen products are produced. In the second column the comparison used for reflecting the percentage of change is that between respondent's production of hard ice cream