

Los Angeles Division

49. The headquarters of Creameries' Los Angeles Division was located in Los Angeles, where Creameries also operated an ice cream plant. The Division, in addition, had a milk processing plant at Pasadena (CX 16-Z 218). The milk plant was operated under the name Crown City Dairy, and the ice cream plant operated as Valley Maid Creameries (CX 16-Z 23, 24). The Los Angeles Division distributed its ice cream under the brand names Valley Maid and American Hostess. It distributed its milk, buttermilk, cottage cheese and butter and eggs under the brand name Valley Maid-Crown City (CX 16-Z 218).

50. At the time of the acquisition, the Valley Maid ice cream plant in Los Angeles was located in a well-constructed building and was in good condition. It manufactured bulk and package ice cream and ice cream novelties. It had a freezing capacity of 600 gallons per day. The processing equipment was relatively new and well maintained. The volume of the plant was capable of being expanded by the addition of hardening room space (CX 16-Z 23). The Crown City milk plant in Pasadena was located in an old building and was in poor condition. It processed about 7,500 gallons a day and had HTST pasteurizing equipment and automatic paper and glass filling equipment. However, most of this equipment was in only fair condition, and the refrigeration equipment was in poor condition (CX 16-Z 24). Respondent operated a combination milk and ice cream plant in Pasadena, the plant being known as the Fosselman plant (R. 3758, 3786). Shortly after the merger, respondent transferred its milk processing from the Fosselman plant to Creameries' Crown City plant in Pasadena (R. 3786). It continued to operate Creameries' Valley Maid ice cream plant in Los Angeles until late 1954 or early 1955, when it moved all of its ice cream production to its own Fosselman plant in Pasadena and sold the Valley Maid plant (R. 3843, 3792).

51. The Los Angeles Division was Creameries' smallest and least profitable division in California. Its net sales in 1951 were \$2,959,186, compared to net sales of \$3,629,182 by the San Jose Division and \$4,829,065 by the Bakersfield Division. The sales of the Los Angeles Division in that year represented 6.67% of the company's total sales (CX 16-Z 114). In 1952 the Los Angeles Division had a loss of \$82,251, compared to net earnings, before taxes, of \$250,764 for the Bakersfield Division, and \$48,073 for the San Jose Division (CX 16-Z 214). In the first four months of 1953, the Los Angeles Division

had net sales of \$1,121,401 out of total company sales of \$14,897,453 (CX 16-Z 122). It had a loss on such sales of \$13,196.

52. As in the case of the other divisions selling dairy products, the largest proportion of the sales of the Los Angeles Division consisted of fluid milk and cream products. For the 12 months ending December 31, 1952, the milk sales of the Los Angeles Division amounted to 2,157,971 gallons, compared to ice cream sales amounting to 703,915 gallons (CX 16-Z 206). During the first 10 months of 1950, the Division had a net loss of \$107,247 on its ice cream sales, compared to a loss of \$17,821 on its milk sales (CX 16-Z 118).

53. Respondent and Creameries distributed dairy products from their respective Los Angeles and Pasadena plants, predominantly in the Greater Los Angeles Area, although respondent has distributed frozen dairy products as far south as San Diego through an arrangement with a dairy company affiliated with a group of grocery chain stores (R. 3805, 3810, 3794). Although selling within the same general area in southern California, respondent and Creameries catered to somewhat different types of customers. Insofar as it distributed at wholesale, Creameries sold largely to restaurants, "Mom and Pop" grocery stores and other small retail establishments (R. 3838). Creameries had little supermarket business (R. 3847). Respondent, on the other hand, had a substantial amount of supermarket business. A large proportion of its ice cream production was distributed through another company, Jersey Maid Milk Products Co., which was owned by a number of supermarkets and for which respondent manufactured ice cream under a special arrangement pursuant to which it received a fee for the use of its facilities (R. 3793).

54. In 1952 there were 135 companies distributing fluid milk in the Los Angeles market area, as defined by the State of California. Of these, 17 companies were considered to be respondent's and Creameries' "principal competitors" (CX 16-Z 252, pp. 10-13). The six companies with the largest volume in the area were: Arden Farms, Golden State, Carnation, Knudsen Creamery, Adohr Milk Farms and Challenge Cream & Butter Association. In addition to the 17 principal competitors, there were four so-called "captive creameries" affiliated with retail grocery chains. There were approximately 200 distributors of frozen dairy products in the area, of which 14 were considered to be Creameries' "principal competitors" in that line of commerce. The largest of these were: Arden Farms, Golden State, Carnation, Challenge, Beverly Dairies, Minick Ice Cream, Balian Ice Cream and Swift. In addition to these companies there were nine specialty companies distributing frozen dairy products through their

own or affiliated stores, or selling directly to the consumer, such as Good Humor (CX 16-Z 252, pp. 14-16).

55. As in the case of the northern California area, complaint counsel and respondent are in disagreement concerning the area of effective competition in which to weigh the probable competitive impact of the acquisition, insofar as it involves the operations of Creameries' Los Angeles Division. Complaint counsel contend that the area of effective competition is the Los Angeles marketing area, as defined by the State of California for purposes of establishing minimum prices on fluid milk. This market consists essentially of Los Angeles County, including the city of Los Angeles. Complaint counsel propose the same geographic market area for both fluid milk and frozen dairy products. Respondent likewise proposes an "almost identical" area of effective competition for both products, but contends that the area is all of southern California. Essentially, this includes not only Los Angeles County, but seven or eight counties contiguous to and south of Los Angeles, including San Diego County.⁶¹ As in the case of the northern California areas previously discussed, respondent relies principally on the testimony of Dr. Clarke, in support of its position that all of southern California is one marketing area.

56. It is the opinion of the examiner that the entire southern California area does not constitute a single area of effective competition, in either the fluid milk or frozen dairy product line. The heart of the market insofar as Creameries' and respondent's southern California operations are concerned is, as Dr. Clarke's testimony suggests, the geographic area which is "centered around the Los Angeles area" (R. 4118). Dr. Clarke's report, prepared for the State legislature, indicates that only 8.7% of the standard fluid milk processed in the Los Angeles marketing area was shipped out of the area for sale elsewhere (RX 162-G). Of the counties which might be expected to be on the receiving end of milk processed in the Los Angeles area, Dr. Clarke's report indicates that San Diego County's receipts of processed milk amounted to only 13.2% of the milk processed and sold within the area (RX 162-P). The three marketing areas adjacent to Los Angeles received greater amounts of out-of-area milk, with Ventura receiving more milk from out of the area than it processed within the area, and San Bernardino-Riverside and Orange receiving

⁶¹ Although respondent contends that the geographic limits of the area are almost the same for both milk and ice cream, it may be noted that the area proposed for milk is somewhat broader than that proposed for ice cream, in that it includes all of San Bernardino County (east and north of Los Angeles), and all of San Luis Obispo County (northwest of Los Angeles), whereas the area proposed for ice cream includes only the southern half of San Bernardino County and does not include San Luis Obispo County (RX 95 and 96).

38% and 43%, respectively, from out of the area. This would indicate substantial interarea shipments in the counties contiguous to Los Angeles, but relatively small shipments to the more remote counties.

57. It is the conclusion and finding of the examiner that Los Angeles County is the appropriate geographic market area in which to gauge the competitive impact of the acquisition of Creameries' Los Angeles Division. This is the area in which Creameries made all of its sales, and in which respondent made all of its milk sales and that part of its ice cream sales which was not distributed through the captive creamery, Jersey Maid (R. 3805, 3810, 3794). The smaller companies competing with Creameries and respondent had limited distribution in Los Angeles County or portions thereof (CX 16-Z 252, p. 12). While some of the larger companies may have distributed beyond the confines of Los Angeles County, their distribution to more remote areas was generally from separate plants or distributing branches in those areas. Thus in 1951 Arden, Carnation, Challenge and Knudsen had separate plants or distributing branches in San Diego; Arden, Carnation, Golden State and Challenge had branches in San Bernardino or Riverside; and Arden, Challenge and Golden State had a plant or distributing branch in Ventura or Santa Barbara (CX 409).⁶² There were also separate groupings of smaller companies operating single plants in each of the above separate areas. It may be that a slightly broader area of effective competition could be marked out, so as to encompass some of the communities or portions of the counties adjacent to Los Angeles County. However, in the opinion of the examiner, a delineation on this basis would not materially affect a determination of the issues in this case since Los Angeles County accounted for the overwhelming bulk of the milk and ice cream distributed in southern California. For example, in 1952 sales of milk in Los Angeles County accounted for approximately 70% of the milk sold in southern California.⁶³ In the same year, plants in Los Angeles County accounted for approximately 75% of all frozen dairy products produced in southern California.⁶⁴

Market Shares

58. Set forth below are two tables reflecting the respective market shares of respondent and Creameries within the area of effective competition. Although that area has been found to be the Los Angeles

⁶² Even in 1962 most of these companies had multiple processing plants and distributing branches in southern California (CX 412, including Multiple Unit Section).

⁶³ There were 236,669,790 gallons of fluid milk products (including cream and skim products), sold in southern California in 1952 (RX 108-A), of which 163,052,235 gallons were sold in Los Angeles County (CX 421).

⁶⁴ There were 33,309,000 gallons produced in southern California plants (RX 115-A), of which 25,056,700 gallons were sold in Los Angeles (CX 16-Z 252, p. 17).

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marketing area, the tables also contain market share data in terms of the broader market proposed by respondent in order to provide a basis for gauging the order of magnitude of any difference in market shares which would result from the use of the geographic market proposed by respondent. The first table contains a comparison in terms of the fluid milk product line, and the second in terms of the frozen dairy product line.

Comparison of market shares in fluid milk, southern California areas, 1952

Area	Total production (gallons)	Beatrice		Creameries	
		Production (gallons)	Percent of market	Production (gallons)	Percent of market
Los Angeles County ⁶⁵ -----	144, 272, 076	1, 522, 666	1. 05	1, 650, 690	1. 1
Southern California ⁶⁶ -----	213, 083, 739	1, 522, 847	. 71	1, 651, 381	. 77

⁶⁵ The figures used for the Los Angeles marketing area are based on CX 16-Z 252, pp. 17-18, which is the exhibit principally relied upon by complaint counsel as reflecting market-share data. Complaint counsel also offered in evidence CX 16-Z 245, according to which respondent's market share for Los Angeles was 1.4% and Creameries' was 1.7%. The figures in the latter exhibit are expressed in terms of pounds, rather than gallons. The examiner has used the figures in CX 16-Z 252, rather than those in CX 16-Z 245, because the total market figure appearing in the former exhibit is substantially identical with that appearing in the reported statistics of the State of California for the dairy industry in 1952. CX 421, which was also introduced in evidence by complaint counsel, indicates that Creameries' market share of all fluid sales (including skim and cream) was 1.2% and that respondent's was 1.0%.

⁶⁶ The figures used above are based on RX 108-A. There is a slight discrepancy between the production figures of Beatrice and Creameries in RX 108-A from the figures appearing in CX 16-Z 252. There is no explanation for this discrepancy, in the record. However, the differential is so slight that it does not affect the market share percentages. RX 108-A contains two tables, one for fluid milk alone and the other for fluid milk including cream and skim products. The above table is based on that portion of RX 108-A which contains figures for fluid milk alone, in order to make it comparable to the figures in CX 16-Z 252, which are based on fluid milk alone. It should be noted, however, that if the allied fluid products were included, this would not materially affect the market share statistics revealed above. The only difference appearing in the two tables is that the inclusion of all fluid products would increase Creameries' share from 0.77%, as reflected in the above table, to 0.81%.

Before discussing the table reflecting market shares in frozen products, it should be noted that respondent has raised an issue as to whether part of the production of frozen dairy products in its plant should be taken into consideration in determining its market share. As previously noted, part of the production of respondent's plant in Pasadena was devoted to the production of frozen dairy products for Jersey Maid Milk Products Company. The latter is a "captive creamery," which processes fluid milk for a group of grocery chain stores with which it is affiliated, but apparently does not produce its own ice cream (CX 16-Z 252, pp. 11-12; R. 3793). Respondent produced ice cream and other frozen dairy products for Jersey Maid in its own plant under an arrangement whereby Jersey Maid supplied the

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cartons and some of the ingredients and did its own delivery in its own trucks, paying respondent a fee for the use of the latter's facilities (R. 3793). It is unnecessary to determine at this point whether the volume produced for Jersey Maid should be considered as part of respondent's market share. However, the table set forth below contains a breakdown reflecting that portion of respondent's production which is attributable to the arrangement with Jersey Maid.

Comparison of market shares in frozen dairy products, southern California areas, 1952

Area	Total production (gallons)	Beatrice		Creameries	
		Production (gallons)	Percent of market	Production (gallons)	Percent of market
Los Angeles County ⁶⁷	25, 056, 700	*1, 172, 502	*4. 68	698, 952	2. 8
		†334, 959	†1. 33		
Southern California ⁶⁸	33, 309, 000	*1, 177, 593	*3. 53	696, 913	2. 09
		†340, 050	†1. 02		

⁶⁷ The figures for Los Angeles County are taken from CX 16-Z 252, pp. 17-18, which is the exhibit principally relied upon by complaint counsel. CX 16-Z 245 also contains market share data, but is limited to ice cream and does not contain data for other frozen dairy products including ice milk and sherbet. Since the market share figures offered by respondent include all frozen dairy products, the examiner has used CX 16-Z 252, instead of CX 16-Z 245, in the above table in order that the data of both parties may be comparable. It may be noted, however, that if the market share data were limited to ice cream there would be no significant deviation from the above market share figures.

⁶⁸ The figures for the Southern California area taken from RX 115-A. It should be noted that the production figures for respondent and Creameries differ somewhat from those in CX 16-Z 252. However, this difference is so slight that it does not significantly affect the market share percentages.

*Includes Jersey Maid.

†Excludes Jersey Maid.

Concentration

59. As previously mentioned, the major companies distributing fluid milk in the Los Angeles area were Arden, Golden State, Carnation, Knudsen, Adohr, and Challenge. The record does not disclose the individual market shares of these six companies. However, it does appear that in 1952 these companies, as a group, accounted for about 60% of the fluid milk sold through wholesale channels, *i.e.*, milk sold through retail stores for resale to the public (CX 16-Z 252, p. 12). Four of these companies, *viz*, Arden, Golden State, Carnation and Adohr, accounted for about 60% of the fluid milk, cream, and fluid by-products sold through retail channels, *i.e.*, milk delivered directly to consumers in their homes. Arden, Golden State, Knudsen and Carnation were also the leading distributors of fluid milk in the southern California area as a whole (RX 112). In 1952 they accounted for 46.86% of the fluid milk sold in the entire southern California area (RX 109-A). In addition to the previously-named major companies, there were four so-called "captive creameries," distributing

milk to their affiliated stores and markets. These were Safeway Stores, Jersey Maid Milk Products Co., Ralph's Grocery Co. and Golden Creme Farms. These four companies distributed approximately 17½% of all milk sold at wholesale in the Los Angeles marketing area (CX 16-Z 252, p. 16).

60. The four largest distributors of ice cream and other frozen dairy products in the Los Angeles market area in 1952 were Arden, Golden State, Carnation and Challenge. The individual market shares of these companies do not appear from the record. However, as a group, they accounted for approximately 32% of all frozen dairy products sold in the Los Angeles County marketing area. Another group of "strong competitors" in the frozen dairy product line were Beverly Dairies, Minick Ice Cream Co., Balian Ice Cream Co. and Swift & Co., each of which distributed from 2 to 3% of the total volume of frozen dairy products in the area. The remaining six companies (out of the 14 companies characterized as comprising the "principal competitors" in the market) accounted for from 1% to less than ½% each, of the total sales of dairy products in the market (CX 16-Z 252, pp. 14, 16).

Other Acquisitions in California

61. Since 1950 approximately 25 dairy companies have been acquired in California by the so-called national dairy companies (CX 426-Z 75-80). The largest of these acquisitions was Foremost's acquisition of Golden State, which has been previously mentioned. The remainder of the acquisitions (other than that of Creameries) involved, for the most part, small companies, although some of the latter were substantial factors in the local areas in which they distributed. Respondent accounted for four of the acquisitions made by national companies since 1950, in addition to the Creameries acquisition. Two of the companies, viz, East Side Dairy of Santa Cruz, and Elkhorn Dairy of Watsonville, which were acquired in 1954, distributed milk in areas in which respondent had entered the fluid milk business through its acquisition of Creameries. East Side Dairy accounted for approximately 5% of the milk sold in Santa Cruz and its suburbs; and Elkhorn Dairy accounted for approximately 25% of the milk sold in Watsonville and its suburbs (CX 16-Z 252, pp. 36 and 33). Elkhorn had the second largest share of the market in the Watsonville area and it, together with Creameries (which had approximately 39% of the area's sales) accounted for approximately 64% of Watsonville area milk sales.

62. Borden made four acquisitions in the areas in which Creameries operated. Two of these were made prior to respondent's acquisition of Creameries. These were Meadow Brook Dairy in Santa Cruz and Blanco Dairy in Watsonville, both of which were acquired in

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1951. In 1952 Borden's Meadow Brook operation accounted for approximately 18% of the milk sales and 11% of the ice cream sales in Santa Cruz; and Borden's Blanco operation accounted for approximately 12% of the milk sales and 25% of the ice cream sales in Watsonville. In 1954 Borden acquired Pep Creameries of Watsonville and Carmel Dairy of Carmel, two of the few remaining independent ice cream manufacturers in the lower Bay Area. In 1952 Carmel accounted for approximately 12% of ice cream sales and 27% of milk sales in Monterey; and Pep accounted for approximately 4% of the ice cream sold in Watsonville and 3% of ice cream sold in Santa Cruz.

Decline in Number of Dairy Plants

63. The record reveals that there has been a substantial decline in the number of milk processing plants in California during the decade from 1950 to 1960. Set forth below is a table comparing the number of milk plants in California in 1950-1951 with the number in 1961-1962.

*Comparison in number of milk plants, California, 1950-51 and 1961-62*⁶⁹

Year	Number of plants					Total
	No volume listed	Under 1 million quarts	1-5 million quarts	5-10 million quarts	Over 10 million quarts	
1950-51.....	369	231	93	23	23	739
1961-62.....	135	148	116	31	30	460
Percent change.....	-63	-36	+25	+35	+30	-38

⁶⁹ The above table is based on CX 409 and 412. A similar comparison has been heretofore made for the United States as a whole (p. 496).

As the above table indicates, there has been a reduction of 279 milk plants in the State of California in a period of approximately ten years. However, as the above figures reveal, this decline has occurred entirely in two size categories, viz, plants with no volume listed (which have declined by 234), and those with a volume under 1 million quarts (which have declined by 83). As previously mentioned (p. 496), those plants with no volume listed are generally plants of very small size. Plants with a volume under a million gallons produce less than 800 gallons a day. In plants with a production over 800 gallons a day, the number of plants has actually increased by 38 since 1950-1951.

64. There has been a similar reduction in the number of plants manufacturing ice cream, as that above described with respect to milk. Set forth below is a table comparing the number of ice cream

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manufacturing plants in California in 1950-1951 with those in 1961-1962.

*Comparison in number of ice cream plants, California, 1950-51 and 1961-62*⁷⁰

Year	Number of plants			Total
	No volume reported	Volume less than 250,000 gallons	Volume over 249,999 gallons	
1950-51.....	43	111	15	169
1961-62.....	27	72	42	141
Percent change.....	-37	-35	+180	-17

⁷⁰ The above table is based on CX 409 and 412. A similar comparison has heretofore been made for the United States as a whole (p. 499).

As the above table reveals, the number of ice cream manufacturing plants in California has declined by 28 between 1950-51 and 1961-62. However, this decline has been entirely in the category of plants with no volume listed (which have declined by 16) and those with a volume under 250,000 gallons (which have declined by 39). As previously mentioned, those with no volume listed are generally the smaller plants (p. 499). The decline in the number of small plants has been partially compensated for by a substantial increase in the number of plants with a volume of 250,000 gallons and over, the number which has increased by 27 during the last decade.

65. As previously discussed (p. 499), it is respondent's position that the plants which have disappeared are generally the non-viable plants, *i.e.*, milk plants processing less than 1,600 gallons daily and ice cream plants producing less than 250,000 gallons annually. Such plants, generally speaking, lack modern automatic and semi-automatic processing and packaging equipment. Supplementing the evidence offered by complaint counsel with respect to the decline in the number of milk and ice cream plants between 1950 and 1961, respondent offered in evidence a comparison in terms of the number of viable companies, *i.e.*, those operating milk plants with a minimum volume of 1,600 gallons daily and those operating ice cream plants with a minimum volume of 250,000 gallons annually. This study reveals that the number of so-called viable milk companies in California has increased from 52 in 1953 to 67 in 1961 (RX 161-G), and that the number of viable ice cream plants has remained steady at 32 during the period from 1950 to 1961 (RX 161-B).

Recent Trends in Market Shares and Concentration in California

66. Complaint counsel and respondent both offered evidence as to the trend in respondent's market share and the extent of concentra-

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tion among the larger companies since the time of the Creameries acquisition. Some of the evidence relates to the individual markets claimed to be the areas of effective competition and some relates to the State of California as a whole. As might be expected, complaint counsel stress the evidence purporting to show an increase in respondent's market share and in concentration among the large companies, while respondent places emphasis on the evidence which purports to show a contrary trend. The examiner has undertaken below to analyze the trends in market shares and concentration, as revealed by the record.

Frozen Dairy Products

67. Complaint counsel place emphasis on the increase in respondent's position, and that of the national companies as a group, in the frozen dairy product line in the State of California as a whole. Set forth below is a table reflecting respondent's share, and that of all the so-called national companies doing business in California, in the production of frozen desserts in the State between 1950 and 1957. The table reflects sales of all frozen desserts, including those made of vegetable fat, as well as traditional frozen dairy products made of butterfat.

Production shares (frozen desserts), of respondent and all national companies, in California, 1950-57⁷¹

Year	Total production (gallons)	Beatrice		National companies	
		Production (gallons)	Percent of total	Production (gallons)	Percent of total
	<i>Thousands</i>	<i>Thousands</i>		<i>Thousands</i>	
1950-----	49,963	2,086	4.2	17,548	35.1
1951-----	52,917	2,262	4.3	19,454	36.8
1952-----	58,499	2,816	4.8	21,860	37.4
1953-----	64,232	3,886	6.0	23,516	36.6
1954-----	66,499	4,789	7.2	35,710	53.7
1955-----	70,301	5,347	7.6	40,059	57.0
1956-----	75,270	5,559	7.4	43,459	57.7
1957-----	80,378	5,938	7.4	44,095	54.9

⁷¹ The above table is based on CX 456-O. The figures for national companies included in the table are those of Borden, Arden, Carnation and respondent between 1950 and 1953. Beginning with 1954, the production of Foremost's Golden State operations is included in the table.

While the above table does indicate a 3.2% increase in respondent's production share in California between 1950 and 1957, the largest part of the increase, viz, 2.4%, occurred between 1952 and 1954. This is obviously attributable to the Creameries acquisition, which occurred during the middle of 1953. With respect to the 19.8% increase in the production share of the so-called national companies between 1950

and 1957, the largest part of this increase, viz, 17.1%, occurred between 1953 and 1954. This coincides with Foremost's acquisition of Golden State, which took place in February 1954. Although not reflected in the above table, Foremost had the largest share of California production between 1954 and 1957, its share ranging from 16.5% to 19.0%. The range in the production shares of the other companies, in order of rank, was: Arden 13.3-14.9%; Carnation 9.4-10.5%; and Borden 5.6-7.8%. Beginning in 1954 respondent became the fourth ranking company in California, when its share reached 7.2% and Borden's declined to 6.8%.

68. The latest year for which the record contains concentration data for frozen desserts is 1958. While the evidence is in terms of value of shipments, rather than in terms of production, the figures are fairly comparable to those revealed in the above table. Thus, respondent's share of frozen dessert shipments in California in 1958 was 6.8%, compared to its production share of 7.4% in 1957. The shipments of the six national companies, including respondent, Foremost, Arden, Carnation, Borden and Swift, amounted to 60.3% of the total shipments of frozen desserts in California in 1958.⁷² Eliminating Swift with 2.2%, since its figures were not included in the preceding table, the 1958 share of shipments by the national companies was 2.2% greater than the aggregate production shares of the same companies in 1957.

69. Although, as previously indicated, the evidence as to concentration does not extend beyond the year 1958, the record does contain evidence as to respondent's own industry position in California through 1960. Set forth below is a table reflecting respondent's share of sales of frozen desserts produced in California between 1952 and 1960.

Respondent's market share (frozen desserts), California, 1952-60⁷³

Year	Total California production	Beatrice		Creameries	
		Sales	Percent of production	Sales	Percent of production
	<i>Thousands</i>	<i>Thousands</i>		<i>Thousands</i>	
1952-----	61,033	2,759	4.5	1,343	2.2
1957-----	80,329	6,028	7.5	-----	-----
1960-----	91,121	8,588	9.4	-----	-----

⁷² The figures in this paragraph are based on CX 425-C and D. The universe figures appearing in the exhibit are taken from the U.S. Census reports. The figures for the individual companies are based on data supplied by these companies to the Commission.

⁷³ The above table is based on RX 115-A and B, and combines the frozen dessert figures for northern California and southern California, which are separately reflected in the exhibit.

As indicated in the above table, respondent's market share in the State as a whole more than doubled between 1952 and 1960. Respondent contends that this does not reflect its true position in the frozen dairy product line of commerce since it includes sales from its southern California plant under the special arrangement with Jersey Maid previously discussed, and also includes sales of frozen vegetable-fat desserts (principally from its northern California plant), which were not manufactured in quantity until after 1957. Respondent's sales through Jersey Maid more than quadrupled between 1952 and 1960, from 836,000 gallons to 3,654,000 gallons, representing 43% of respondent's sales in 1960 compared to 30% in 1952. Its sales of frozen desserts of vegetable-fat content, which were non-existent in 1952, reached 2,126,000 gallons in 1960 and represented 25% of respondent's sales in California.

Fluid Milk

70. The evidence offered by complaint counsel purporting to show concentration in the fluid milk line in California is limited to the year 1958. While not affording any basis for comparison with the period prior to the Creameries acquisition, it does disclose that in 1958 five national companies accounted for 45.3% of the value of shipments of bottled milk products in California.⁷⁴ Respondent's share was the smallest of the national companies, being 2.5%. The shares of the other companies, in order of rank, were: Foremost 13.8%; Arden 12.0%; Carnation 9.1%; and Borden 7.9%.

71. While, as above stated, the statistical evidence offered by complaint counsel does not disclose the extent of concentration in California in the fluid milk line at the time of the Creameries acquisition, evidence offered by respondent does disclose this fact, as well as developments through 1960. Thus it appears that in 1952 the four companies with the largest sales volume accounted for 49.94% of fluid milk sales in California. By 1957 the market share of the four largest companies had declined to 46.0%, and by 1960 to 41.93%, representing a decline of 9% in eight years (RX 109-A). The record does not reveal the identity of the four companies accounting for the largest sales volume in the State, although it is clear from the record that neither respondent nor its predecessor, Creameries, was in this category.

72. The record does not disclose the trend in concentration in terms of the market areas found to be the areas of effective competi-

⁷⁴The figures here used are based on CX 425-E and F. This exhibit is based on shipments of bottled milk and cream, plus other related bottled products such as buttermilk and chocolate drink.

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tion in fluid milk. It does, however, reveal such trend in terms of the broader, regional markets which respondent contends are the appropriate market areas. While these areas are somewhat broader than those found by the examiner to be the areas of effective competition, there is no reason to believe that the trend would be significantly different in the latter areas. Set forth below is a table reflecting the combined market share of the four companies with the largest sales volume in each of the four regional milk markets in California between 1952 and 1960 (RX 109-A).

Market shares (fluid milk) 4 largest companies, in four major California areas, 1952-60

[In percent]

Area	1952	1957	1960
San Francisco Bay Area.....	58.14	54.27	49.37
Sacramento Valley.....	73.27	65.94	61.20
San Joaquin Valley.....	44.35	37.73	33.40
Southern California.....	48.86	43.12	39.15

As indicated by the above table, the market share of the four companies with the greatest share of the market has declined in each of the major market areas of the State. Neither respondent nor Creameries has been in the ranks of the "big four," except in 1952 when Creameries was No. 3 in the San Joaquin Valley Area, and in 1957 when respondent (which had acquired Creameries in 1953) was No. 4 in that area. In the San Francisco Bay Area the ranks of the four largest companies in 1960 included the local California company, Challenge Creamery, as the No. 4 company after Foremost, Borden and Carnation. In the San Joaquin Valley Area, Knudsen Dairy and Challenge were the No. 3 and No. 4 companies in 1960, after Foremost and Borden. In the Southern California Area, Knudsen was No. 3 after Arden and Foremost, and was followed by Carnation. In the Sacramento Valley Area, the first company in sales in 1960 was Crystal Creamery, followed by Foremost, Borden and McColl's (RX 112).

73. During the period between 1950 and 1960 there was a substantial increase in the market position of the larger independent dairies, *i.e.*, those which produce at least 3,000 gallons per day and are not connected with any national dairy company. Set forth below is a table comparing the market shares of such companies between 1950

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and 1960, in terms of the major market areas proposed by respondent (RX 109-B).

Market shares of nonnational dairies processing 3,000 gallons per day, 3 major California areas, 1950-60

[In percent]

Area	1950	1952	1957	1960
San Francisco Bay Area.....	17. 32	25. 82	36. 15	34. 45
Sacramento Valley, San Joaquin Valley ⁷⁵	8. 81	18. 75	37. 49	47. 85
Southern California.....	39. 88	40. 22	48. 52	51. 59

⁷⁵ Data for the two indicated areas were combined in RX 109-B because there were too few plants in the Sacramento Valley in 1950, 1957, and 1960 for the State to separately supply the data.

The above table includes the production of so-called "captive creameries," *i.e.*, those affiliated with a retail food chain, as well as non-affiliated dairies. To this extent the market-share figures are somewhat distorted, insofar as they purport to reflect the trend in the market position of independent dairies. The record discloses that in 1950 captive creameries produced 16,883,000 gallons compared to 76,945,470 gallons by nonaffiliated independents, and in 1960 the captives produced 45,416,000 gallons, compared to 185,392,172 gallons by the nonaffiliated independents (RX 110-A). The record does not contain data as to the standing of the nonaffiliated independents, in terms of the above major market areas. However, the record does disclose the trend in their position in the State of California as a whole (RX 110-A). Set forth below is a table reflecting such data.

Market share of independent (noncaptive) dairies processing 3,000 gallons per day, California, 1950-60

[In percent]

1950	1952	1957	1960
23. 3	26. 1	34. 8	37. 1

While the table reflects an increase in the market share of the non-captive independents between 1950 and 1960, it is not nearly as pronounced as the increase revealed by the preceding table which includes the captives in the ranks of the independents.

74. Except for the increase resulting from the business which it acquired from Creameries, there has been no improvement in respondent's share of the California milk market between 1950 and

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1960. In 1950 its share of fluid milk sales in California (including cream and skim products) was .5%, and Creameries' share was 2.0%. In 1952, the year before the acquisition, respondent's share had declined slightly to .4%, and Creameries' remained static at 2.0%. In 1957 respondent's share was 2.4%, which corresponds exactly to the combined shares which it and Creameries had before the acquisition. By 1960 respondent's milk market share in California had declined to 2.0%.⁷⁶

75. The situation which is revealed above, for the State as a whole, is pretty much duplicated in the various markets which have been found to be the areas of effective competition in the fluid milk line of commerce. Set forth below is a table comparing respondent's position in these markets before and after the Creameries acquisition (CX 421).

Market shares (fluid milk) in California market areas, 1952 and 1957

[In percent]

Market area	1952		1957,
	Beatrice	Creameries	Beatrice
Santa Clara.....		9.2	7.2
Monterey-Santa Cruz.....		28.6	24.2
Kern-Tulare.....		24.8	21.1
Los Angeles.....	1.0	1.2	2.3

As indicated in the above table, respondent lost market share in the two markets in the lower Bay area and in the one market in the lower San Joaquin Valley, in which it had acquired Creameries' milk business. In the Los Angeles area its share in 1957 was substantially that which it and Creameries, together, had in 1952.

76. The record does not disclose respondent's relative rank in terms of the markets found to be the areas of effective competition in the fluid milk line of commerce. However, the evidence relating to the somewhat broader regional markets proposed by respondent suggests that its relative position has either declined or remained static despite the Creameries acquisition. Thus, in the San Joaquin Valley area in which Creameries had been the third ranking milk company in 1952, respondent declined to the fifth ranking company by 1960. In the San Francisco Bay area, in which Creameries had been the

⁷⁶ The figures cited above are computed from RX 108-A and B. The figures for the various California areas, as appearing in the exhibit, have been combined for the State as a whole.

seventh ranking company in 1952, respondent retained that rank in 1960. In southern California, where respondent was the twelfth ranking company in 1952, it had declined to 21 by 1960 (RX 111 and 112; R. 4100).

b. *Intermountain Area and West Texas*

77. Creameries had three separate Divisions which operated in the area between the Pacific Coast and the western slope of the Rocky Mountains. These were the Utah Division, the Idaho Division, and the El Paso Division. Each of these Divisions manufactured a full line of dairy products, including milk and ice cream. The Utah Division had its headquarters in Salt Lake City and distributed dairy products in Utah, western Colorado, and southwestern Wyoming. The Idaho Division had its headquarters in Boise and distributed principally in the State of Idaho. The El Paso Division had its headquarters in El Paso, Texas, and distributed in western Texas and southeastern New Mexico. In addition to processing and manufacturing plants at Salt Lake City, Boise and El Paso, each Division had additional branch plants and distribution branches located at convenient points within its territory. The El Paso Division also operated a dairy farm in New Mexico.

78. The Utah Division operated under the name Arden-Sunfreze Creameries; the Idaho Division operated as Idaho Creameries; and the El Paso Division operated as Price's Creameries, Inc. The Utah Division sold its ice cream under the brand names Arden-Sunfreze and American Hostess, and its milk products under the name Arden. The Idaho Division used the brand names Sunfreze, Maid O'Clover and American Hostess for its ice cream, and Arden for its milk. The El Paso Division used the brand names Price's Velvet and American Hostess for its ice cream, and Price's for its milk products (CX 16-Z 217-218). These three Divisions accounted for the following percentages of Creameries' net sales in 1952: Utah, 20%; Idaho, 8%; and El Paso, 19% (CX 143, p. 6). The El Paso Division was the most profitable of the three Divisions in 1952, with earnings before taxes of \$524,506. The earnings of the Utah Division were \$341,381 and those of the Idaho Division were \$193,536 (CX 16-Z 214).

79. The main plant and divisional headquarters of the Utah Division was at Salt Lake City, Utah. It had branch plants at Ogden, Provo, Cedar City and American Fork, all in Utah; and at Grand Junction and Delta in Colorado. It also operated distributing branches at Cortez, Colorado and Rock Springs, Wyoming (CX 16-Z 218). The principal communities in which it distributed were Salt

Lake City, Ogden, Provo, Cedar City, in Utah; Evanston, Kemmerer, Rock Springs, Rawlins and Casper in Wyoming; and Delta, Grand Junction and Cortez in Colorado (CX 16-Z 252, pp. 62-85). It distributed fluid milk, ice cream, and other milk products in all of these communities. In 1952 the Utah Division sold a total of 6,442,755 gallons of milk and 948,636 gallons of ice cream (CX 16-Z 206). In 1949 its operating profit on sales of milk and ice cream was \$64,832 and \$164,916, respectively (CX 16-Z 117).

80. The Utah Division processed and bottled milk at four plants in Utah and one in Colorado. The main plant in Salt Lake City was located in a new building and was in excellent condition. It had a volume of 8,000 gallons daily. Its equipment was generally very good. It had HTST pasteurization equipment and bottling equipment for both paper and glass containers (CX 16-Z 22, p. 30; CX 16-Z 49). A second bottling plant was located at Ogden, approximately 35 miles north of Salt Lake City. The plant was in good condition. It had HTST pasteurization equipment capable of processing 7,000 pounds of milk per hour, and had both paper and glass packaging equipment (CX 16-Z 56). A third milk plant in Utah was located at Provo, 50 miles south of Salt Lake City. The plant was located in leased premises, on which the lease was about to expire, and was poorly arranged. Creameries contemplated moving the automatic bottling equipment, which was in good condition, to its Salt Lake City plant and bottling milk for the Provo area at Salt Lake City (CX 16-Z 59). The fourth Utah bottling plant was located at Cedar City, in southwestern Utah 260 miles from Salt Lake City. The plant was in good condition and bottled 14,000 to 20,000 pounds of milk daily. It had an HTST pasteurizer and paper packaging equipment (CX 16-Z 62). The bottling plant in Colorado was located at Delta, in western Colorado. The plant was in good condition and bottled 40,000 pounds of milk daily. It had an HTST pasteurizer and automatic packaging equipment for quart-size paper containers (CX 16-Z 66).

81. The Utah Division manufactured ice cream at four plants in Utah and one in Colorado (CX 16-Z 22, p. 30). The main plant was in Salt Lake City, in a building separate from the milk bottling plant. It was in good condition, but was located in a congested area and was not capable of any substantial increase in volume. It manufactured both packaged ice cream and novelties, its production in 1952 being 500,000 gallons (CX 16-Z 51). The second Utah ice cream plant was located in Ogden, in a building separate from the milk bottling plant in that city. The plant was in good condition and pro-

duced 150,000 gallons of ice cream in 1952. It had a continuous freezer for ice cream and a batch freezer for sherbets and ices. It was capable of handling additional volume without any change (CX 16-Z 54). The third Utah ice cream plant was located at Provo, in the same plant which bottled milk. The plant manufactured 150,000 gallons of ice cream in 1952. The plant was in poor condition, and Creameries contemplated moving its ice cream manufacturing equipment to Orem (about six miles to the north). It was not considered practical to move the ice cream equipment to Salt Lake City, as was contemplated for the milk processing equipment, because of the impracticality of handling any substantial additional volume at the Salt Lake City ice cream plant (CX 16-Z 58). The fourth Utah ice cream plant was located at Cedar City, in the same premises as the milk bottling plant. The plant was in good condition and produced both ice cream and novelties (CX 16-Z 62). The Colorado ice cream plant was located at Grand Junction in western Colorado. The plant and equipment were in generally good condition. It produced 1,600 gallons of ice cream and 1,400 dozen novelties a day (CX 16-Z 64).

82. The Idaho Division had its divisional headquarters and main plant at Boise, Idaho. It also had a branch plant at Pocatello, and distributing branches at Twin Falls and Idaho Falls, all in Idaho (CX 16-Z 31). The plant at Boise was in a new building and was in excellent condition. It was used both for the processing of milk and the manufacturing of ice cream. It had HTST equipment for pasteurizing milk and automatic equipment for paper packaging. The plant's milk volume was 17,000 pounds daily. The ice cream department was well equipped, and had a capacity of 3,000 to 4,000 gallons daily. The plant had a capacity for handling several times its current volume (CX 16-Z 70). There were separate milk and ice cream plants in Pocatello, both in good condition. The milk plant had HTST equipment and automatic paper packaging equipment. It had a volume of 1,400 gallons daily (CX 16-Z 80). The ice cream plant had a semi-continuous freezing unit, and produced ice cream novelties as well as packaged ice cream. It produced 500,000 gallons a year and was capable of turning out three times that amount with an additional freezer (CX 16-Z 82). The branch at Idaho Falls distributed both ice cream and milk processed at Pocatello. It was in excellent condition. The territory of this branch included Yellowstone National Park and other points in Wyoming (CX 16-Z 78 and 82). The Twin Falls distributing branch distributed milk and ice cream processed at Boise. It was in excellent condition (CX 16-Z 79).

83. The Idaho Division sold 840,872 gallons of milk and 912,327 gallons of ice cream in 1952 (CX 16-Z 206). Its operating profits on milk and ice cream sales were approximately \$110,000 and \$92,000, respectively, in 1949, the last full year for which figures are available (CX 16-Z 118). The Division as a whole showed a profit of \$193,536 before taxes in 1952, making it the least profitable dairy Division outside of San Jose and Los Angeles in California (CX 16-Z 214).

84. The El Paso Division had its divisional headquarters, and a milk and ice cream plant, at El Paso, Texas. It also had branch plants at Roswell, Portales, Las Cruces and Carlsbad, New Mexico; and distributing branches at Hobbs, Deming and Artesia, New Mexico; and Alpine, Texas (CX 16-Z 217). The plant at El Paso was in excellent condition. It bottled milk and manufactured ice cream. The milk department processed and bottled 8,500-9,000 gallons of milk daily. It had HTST equipment and automatic paper and glass bottling equipment. The ice cream department had a capacity of 450 gallons an hour for ice cream and 150 gallons per hour for novelties (CX 16-Z 29). The plant at Carlsbad, New Mexico, bottled milk in glass only. It had a volume of about 1,800 gallons daily and was in fairly good condition. There was also an ice cream storage room at the plant (CX 16-Z 33). The plant at Las Cruces bottled milk in paper only. It had a small volume and was in only fair condition (CX 16-Z 25). The plant at Roswell bottled milk in paper only. It had a volume of 6,000-7,000 gallons a day, and was in excellent condition (CX 16-Z 40). The Portales plant manufactured ice cream, in addition to condensed milk and cottage cheese. It had a volume of 1,200 gallons a day, and was in good condition (CX 16-Z 37). The distributing branch at Hobbs distributed both milk and ice cream, the milk originating in Roswell and the ice cream at Portales (CX 16-Z 22, p. 32). The branch at Artesia, New Mexico, distributed both milk and ice cream, the ice cream being supplied from Portales and the milk from Carlsbad (CX 16-Z 33 and 37). The branch at Alpine, Texas, distributed both milk and ice cream (CX 16-Z 46).

85. The El Paso Division sold 1,000,000 gallons of ice cream and 5,600,000 gallons of milk in 1952 (CX 16-Z 206). Its operating profits on ice cream and milk sales in 1949 were \$136,000 and \$189,000, respectively (CX 16-Z 117). The Division as a whole showed a profit, before taxes, of \$524,873 in 1952, making it the most profitable dairy division of the company in the continental United States (CX 16-Z 214).⁷⁷

⁷⁷ The Honolulu Division showed a profit of \$5,000 more than the El Paso Division.

Market Shares and Concentration

Utah Division

86. As previously mentioned, the Utah Division distributed milk, ice cream and other dairy products in Utah, western Colorado and southwestern Wyoming. Respondent did not sell in any portion of this territory. Its closest plant was at Denver, Colorado, on the eastern slope of the Rocky Mountains. The principal communities in which Creameries' Utah Division sold were: Salt Lake City, Ogden, Provo, and Cedar City, Utah; Grand Junction, Delta and Cortez, Colorado; Evanston, Kemmerer, Rock Springs, Rawlins, and Casper, Wyoming. All were located west of the Continental Divide.

87. As in the case of Creameries' California Divisions, the parties are in sharp disagreement concerning the geographic confines of the market areas in which to measure the probable competitive impact of respondent's acquisition of Creameries' Divisions in the Intermountain Area. This difference extends not merely to the Utah and Idaho Divisions, but includes the El Paso Division in the Southwest as well. The position of complaint counsel, essentially, is that each of the areas served by one of Creameries' plants or distributing branches, constitutes an appropriate market area for determining market share percentages and concentration. The market share data offered by complaint counsel are based principally on the groupings of communities or counties served by the various plants or branches of Creameries in the Intermountain Area.⁷⁸ Respondent contends that the appropriate market area is a "Six-State Area" consisting of Idaho, Utah, Nevada, New Mexico, Arizona and Texas (RPF, p. 123). However, as graphically portrayed by respondent, the area actually consists of portions of nine States including, in addition to the above six States, western Wyoming, a portion of eastern Oregon and western Colorado (RX 94).

88. It is the opinion and finding of the examiner that, generally speaking, the areas proposed by complaint counsel are the appropriate market areas for purposes of weighing the competitive impact of the Creameries acquisition, insofar as it involves the Intermountain and Texas Divisions of the company. These are the areas which were served by each of Creameries' plants or branches. Generally speaking, the areas in which Creameries had its plants and branches conformed to the natural requirements of geography and population distribution. The principal groupings of its competitors

⁷⁸ These data are contained in CX 16-Z 252 which, as previously mentioned, was prepared by respondent and submitted to the Commission in seeking approval of the Creameries acquisition.

were in terms of these geographic areas. There were substantially different groups of competitors serving each of the areas. To the extent that a few of the larger competitors served more than one area, they generally did so from a distributing branch within, or close to such other area.

89. Respondent's position that the Six-State Area is one area of effective competition is based on the current situation, rather than on the market as it existed at the time of the Creameries acquisition.⁷⁹ As the examiner has previously indicated, the acquisition must be initially judged in terms of the market situation which existed when the acquisition took place. However, the examiner is satisfied that even today the area of effective competition does not even remotely approach the broad expanse of the six or the nine-State area proposed by respondent. Respondent's current distribution pattern is essentially the same as was Creameries' in 1953 (R. 3803-3804). While there is testimony that one of the large cooperatives in the Utah area now distributes as far south as Albuquerque, New Mexico, such distribution consists of bulk milk which is sold to another dairy company in Albuquerque (R. 3774). The distribution area of the competitor in question remains essentially northern Utah and the adjacent areas of southeastern Idaho and southwestern Wyoming (R. 3804).

While contending that the entire Six-State Area is one area of effective competition, respondent concedes that the "companies located within the area do not all compete with one another and there are no doubt sub-markets within the Six-State Area" (RPF, p. 123). Not only do *all* of the companies in the area not compete with one another, as respondent concedes, but *most* of them do not. Competition is principally between different groups of companies located in or near the areas proposed by complaint counsel as the areas of effective competition. The areas which respondent concedes may be considered "sub-markets" are the actual areas of effective competition, conforming to the actual groupings of competitors. The fact that respondent does business throughout the entire Intermountain Area and is, therefore, in competition with all of the companies in the Six-State Area, does not, as it contends, transform this broad aggregation of separate markets into one single market area. Nor does the fact that this broad area is removed from the competitive influences

⁷⁹ Brown W. Cannon, the head of respondent's western region, upon whose testimony respondent principally relies, testified that the map delineating the Six-State Area (RX 94) was prepared to reflect the market divisions "[a]s of now" (R. 3766). Mr. Brown testified on May 2, 1962.

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of companies which do business east of the Continental Divide, on the one hand, and from those companies which operate on the Pacific Coast, on the other hand, transform the area into one single market, as respondent argues. If respondent's reasoning were carried to its logical conclusion, all of California would be transformed into one market area since it is removed from the influence of competitive factors pertaining to the companies which operate in the Intermountain Area and in the Pacific Northwest. As previously noted, even respondent does not contend that all of California is one market area.

90. The areas of effective competition, insofar as the Utah Division of Creameries is concerned, are as follows:

(a) The metropolitan area of Salt Lake City and the surrounding communities, including Bountiful and Murray, may be considered a single market area. This area had a population of over 200,000, as of 1950. There were approximately 35 companies distributing milk and/or ice cream within the area (CX 16-Z 252, pp. 63-67; CX 16-Z 230-231). All of these companies had their plants located within the area, except for two ice cream companies which distributed from plants in Ogden located approximately 35 miles north of Salt Lake City. The latter two companies accounted for approximately 3.5% and 1.7%, respectively, of ice cream sales in the Salt Lake City market. Creameries had a milk plant and an ice cream plant in this area, and its distribution from these plants was principally in the Salt Lake City metropolitan area.⁵⁰

(b) The city of Ogden and its environs may be considered another area of effective competition in northern Utah. This area had a population of approximately 80,000 in 1950. Creameries served this area from milk and ice cream plants located in the city of Ogden. There were approximately 15 companies distributing milk and/or ice cream in Ogden and the surrounding communities. All of these companies were located within the area of distribution, except for two Salt Lake City companies affiliated with a national company, which distributed milk and ice cream into the area from plants in Salt Lake City, and a milk company which distributed into the area from the Logan area to the north. These companies accounted for approximately 5.3% of ice cream sales, and 11.1% of milk sales in the Ogden area.

(c) Southwestern Wyoming may be considered as another market area. This includes the counties of Uinta, Lincoln, Sweetwater, Car-

⁵⁰ According to the testimony of Brown Cannon, respondent's western regional manager, respondent's milk and ice cream routes operating from the Salt Lake City plants "don't go out of the greater metropolitan area * * * because we have a distributing branch at Provo, which is south of there, and we take care of the outlying area from Provo" (R. 3804).

bon, and Natrona, of which the principal communities are Evanston, Kemmerer, Rock Springs, Rawlins and Casper. The area is sparsely populated, and the entire population of the five-county area was approximately 85,000 people in 1950. The area was served from Creameries' distributing branch in Rock Springs, which was supplied from Ogden. There were 10 companies serving the area with milk and/or ice cream. All were located within the area except for two ice cream companies which served the area from Ogden. While it may be that this area could be considered part of the Ogden market area, insofar as the ice cream product line is concerned, this would make no significant difference in Creameries' market share.

(d) Provo, Utah, and the surrounding communities, including Orem and American Fork, may be considered an appropriate market area. The area had a 1950 population of approximately 80,000. This is the area served by Creameries' plant in Provo. It was also served by approximately 19 other milk and/or ice cream companies. Most of the companies were located in or around Provo. However, there were a few ice cream companies serving the Provo area from plants located in Salt Lake City or Ogden to the north, and from Richfield to the south. While it may be that the Provo area could be considered as a southern extension of the Salt Lake City market, it appears more appropriate to consider it as a separate market area. However, it would make no practical difference as far as Creameries' market position is concerned, if all of northern Utah were considered a single market area.

(e) Cedar City, Utah, and the surrounding area in southwestern Utah may be considered an appropriate market area. Creameries' Cedar City plant served a large territory in southwestern Utah, which is a resort area (CX 16-Z 62). The area was served by nine other dairy companies, of which four were located in Las Vegas in southeastern Nevada, approximately 185 miles from Cedar City. It may be that southwestern Utah and southeastern Nevada could be considered part of one market area. However, there is no statistical evidence in the record covering the latter area. Since the statistical evidence is limited to the area round Cedar City, it is not inappropriate to consider Creameries' market position in terms of the area principally served by it.

(f) Grand Junction and Delta, Colorado, and the surrounding territory in western Colorado, may be considered an appropriate market area. Creameries served this area with ice cream from its plant in Grand Junction, and with milk from its plant in Delta. There were approximately 11 dairy companies serving Grand Junc-

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tion with milk and/or ice cream. Of these, five also distributed in Delta. The latter community was also served by two additional dairies that did not operate in Grand Junction. All but three of the companies serving the area were located in either Grand Junction, Delta or another of the nearby communities in western Colorado.⁸¹ Complaint counsel apparently regard each of the two principal communities as a separate market area. However, in the opinion of the examiner, it is more appropriate to consider them a single market area.

(g) The area around Cortez and Durango in southwestern Colorado may be considered an appropriate market area. The statistical evidence in the record relates only to Cortez, in which Creameries had a distributing branch. The branch was presumably supplied from Creameries' plants at Grand Junction and Delta. There were five dairy companies distributing milk and/or ice cream in the Cortez area, of which four were located in either Cortez or Durango.

91. Set forth below is a table reflecting Creameries' market shares in the principal markets in which its Utah Division operated.

*Creameries' market shares (milk and ice cream), Utah division, 1952*⁸²

Area	Total milk sales	Creameries'		Total ice cream sales	Creameries'	
		Sales	Percent of area		Sales	Percent of area
Salt Lake City.....	\$12,347,218	\$1,897,218	15.4	\$3,569,202	\$594,202	16.6
Ogden.....	4,499,311	846,311	19.0	1,452,000	260,000	17.9
Provo.....	3,906,296	496,296	12.7	934,894	234,894	25.1
Cedar City.....	2,519,078	584,078	23.2	855,381	155,381	18.2
Southwest Wyoming.....	2,625,000	535,000	20.4	490,000	25,000	5.1
Delta-Grand Junction.....	1,652,525	857,525	51.3	598,235	238,235	39.8
Cortez.....	487,172	117,172	24.1	178,478	48,478	27.2
Division total.....	28,036,600	5,333,600	19.0	8,078,190	1,556,190	19.2

⁸² The above table is based on CX 16-Z 252, pp. 62-65. As previously indicated in footnote 20, this exhibit was prepared by respondent. There is no indication in the record that the sales figures of the other companies, on which the universe figures depend, are based on estimated sales as in the case of the California markets. The examiner assumes, however, that respondent's position with respect to the other areas is the same as that pertaining to California. As previously indicated, the examiner accepts the figures of the other companies' sales, as providing a basis for obtaining a rough approximation of market shares.

As the above table reveals, Creameries was a substantial factor in both product lines in each of the market areas where its Utah Division sold, except for the ice cream product line in Southwestern Wyoming. As the table also reveals, its market share for the Division

⁸¹ There were two companies serving the area with ice cream from Denver, and one serving it with milk from western Utah (CX 16-Z 252, pp. 81, 83).

as a whole (the broadest possible basis for a definition of the geographic market) would not vary significantly from that in the individual markets, except for the Delta-Grand Junction market. Another possible market division, which has previously been suggested, would be one which combined all of northern Utah and southwestern Wyoming into one market area. A computation of Creameries' market share on this basis reveals that its market share in the fluid milk product line would be 16.2%, and that in the ice cream product line would be 17.3%.

92. With one exception, Creameries ranked among the first three companies in market position, in both product lines, in each of the markets which have been found to be the areas of effective competition. In the fluid milk product line it was the second or third ranking company in each market with the exception of Delta-Grand Junction, where it ranked first. In the ice cream product line it ranked first or second in each market with the exception of Southwestern Wyoming, where it ranked last.

93. Unlike California, there were few so-called national companies operating in the territory of Creameries' Utah Division. In fact there were only two such companies, and they distributed in only portions of the territory. One of these was Pet Milk Company, which had two subsidiaries operating in northern Utah. These were Cloverleaf Dairy, which processed and distributed fluid milk, and Colville Ice Cream Company, which manufactured and distributed ice cream. The other national company was Swift & Company, which distributed ice cream in the Delta-Grand Junction area. The Pet subsidiaries were substantial factors in the Salt Lake City and Provo markets, but were relatively minor factors in the Ogden market. In Salt Lake City, Cloverleaf was first in fluid milk sales, with approximately 27% of the market, and Colville was second in ice cream sales, with approximately 12% of the market. In Provo, Cloverleaf was in first place in fluid milk sales, with approximately 51% of the market, and Colville was in third place in ice cream sales, with approximately 10% of the market. Neither company was among the top three ranking companies in the Ogden market. Swift, which was a competitor only in the Delta-Grand Junction area, was not among the top three companies.

94. Set forth below is a table reflecting the combined market shares of the top three companies, in the milk and ice cream product lines, in each of the markets in which Creameries' Utah Division operated. As previously mentioned, Creameries ranked among the top three companies in each of these markets, with the exception of the ice cream product line in the Southwestern Wyoming market.

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*Market shares of top 3 companies in Utah, southwest Wyoming, and west Colorado areas, 1952*⁸³

[In percent]

Area	Fluid milk	Ice cream
Salt Lake City.....	67.6	39.8
Ogden.....	77.9	58.3
Provo.....	89.5	49.2
Cedar City.....	74.8	82.5
Southwest Wyoming.....	67.3	61.2
Delta-Grand Junction.....	79.0	88.1
Cortez.....	85.7	94.4

⁸³ The above table is based on CX 16-Z 252. As previously indicated, the market share data for the various companies involved are based on estimated figures and do not purport to be precisely accurate.

While the above figures reveal a high degree of concentration in both the milk and ice cream product lines in a number of the above markets, it should be noted that except for Salt Lake City and Provo, the companies involved were all local companies. Pet's subsidiaries and Creameries accounted for 42% of the milk sold and 39% of the ice cream sold in the Salt Lake City market. The two groups of companies accounted for 63% of milk sales and 35% of ice cream sales in the Provo market. It should be noted, however, that in 1962 Pet sold its interest in its Utah subsidiaries to a local milk producers' cooperative (R. 4656). Aside from the fact that a national company was involved in two of the areas, the examiner does not consider it significant that there was a high degree of concentration in the above markets (a factor stressed by complaint counsel). Except for Salt Lake City, there were a relatively small number of companies engaged in distributing milk and/or ice cream in these markets, so that it is not surprising to find that the top three or four companies accounted for a high percentage of the sales in the area. For example, in Cortez, where concentration is the highest, there were only five companies selling milk and four selling ice cream (CX 16-Z 252, p. 85).

Idaho Division

95. As previously mentioned, Creameries' Idaho Division distributed milk, ice cream and other dairy products principally in the State of Idaho. However, it also distributed in northwestern Wyoming in the area of Yellowstone National Park, particularly in the summer months (CX 16-Z 78; R. 3802). The Idaho Division operated milk and ice cream plants in Boise and Pocatello, and maintained

distributing branches at Twin Falls and Idaho Falls (CX 16-Z 70-80; CX 16-Z 218). As has been mentioned in connection with the Utah Division, complaint counsel contended that the areas served by the various plants and branches are the appropriate geographic market areas, while respondent contends that the entire Intermountain Area, including Texas, is the appropriate market area. The areas which the examiner considers to be the appropriate areas for purposes of measuring market shares, concentration and competitive impact are as follows:

(a) Ada, Owyhee, Elmore, Canyon, Gem, Payette, Boise, Washington, Valley and Adams Counties are an appropriate market area. These counties, in southwestern Idaho, are the areas served by Creameries' milk and ice cream plant in Boise. There were approximately 20 dairy companies distributing milk and/or ice cream in this area. Substantially all of them were located in Boise or in one of the nearby communities (CX 16-Z 252, pp. 48-51).

(b) Bannock, Power, Oneida, Franklin, Bear Lake, and Caribou Counties are an appropriate market area. These counties in southeastern Idaho are the areas served by Creameries' milk and ice cream plants in Pocatello. There were approximately 12 milk and/or ice cream companies serving this area. Substantially all of the companies serving the area with milk were located within this portion of Idaho. However, several companies served the area with ice cream from Ogden and Salt Lake City in the northern portion of Utah (CX 16-Z 252, pp. 53-55).

(c) Twin Falls, Cassia, Jerome, Minidoka, Lincoln, Gooding, Camas, and Blaine Counties are an appropriate market area. These counties in southern Idaho are the areas served by Creameries' distributing branch in Twin Falls. The branch sold ice cream, but not fluid milk. The ice cream was supplied from the company's Boise plant (CX 16-Z 79). There were approximately six companies selling ice cream in the area served by Creameries' Twin Falls branch, all but one of which were located in the area. The one exception was Pet's Colville subsidiary, which sold into the area from Salt Lake City (CX 16-Z 252, pp. 56-58).

(d) Bingham, Bonneville, Jefferson, Madison, Teton, Fremont, Clark, Butte, Custer, and Lemhi Counties are an appropriate market area. These counties in southeastern Idaho are the areas served by Creameries' Idaho Falls distributing branch. This branch sold both milk and ice cream, which were supplied from Creameries' Pocatello plant, approximately 50 miles to the south (CX 16-Z 78). There were approximately eight other companies selling milk and/or ice

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cream in the area, all of which operated plants or branches within the area (CX 16-Z 252, pp. 60-61).

96. Set forth below is a table reflecting Creameries' market shares in the above market areas (CX 16-Z 252, pp. 47-61). The markets are designated by the name of the city in which Creameries' plant or branch was located.

Creameries' market shares (milk and ice cream), Idaho division, 1952

Area	Total milk sales	Creameries'		Total ice cream sales	Creameries'	
		Sales	Percent of area		Sales	Percent of area
Boise.....	\$3,832,268	\$441,718	11.5	\$2,792,410	\$555,130	19.9
Pocatello.....	2,146,211	148,401	6.9	633,557	276,477	43.6
Twin Falls.....	2,075,000	None	-----	639,879	265,514	41.5
Idaho Falls.....	2,384,945	108,670	4.6	674,178	348,698	51.7
Division total.....	10,438,424	698,789	6.7	4,740,024	1,445,819	30.5

As the above table reveals, Creameries was a substantial factor in the ice cream product line in the Idaho markets. In the Boise market it was the second ranking company after a local company which accounted for approximately 45% of the ice cream sales in the area. In the other three markets it was the top ranking company in ice cream sales. As the table also reveals, Creameries was not a significant factor in the milk product line, except in Boise, where it was the third ranking company after two local companies. The only so-called national company selling milk or ice cream in the territory covered by Creameries' Idaho Division was Pet's subsidiary, Colville Ice Cream Company. Colville sold in the Pocatello area where it was the fourth ranking company, with approximately 12% of ice cream sales, and in the Twin Falls area where it was the third ranking company, with approximately 15% of ice cream sales.

El Paso Division

97. The El Paso Division, which operated under the name of Price's Creameries, Inc., distributed milk, ice cream and other dairy products in West Texas and southeastern and southern New Mexico. In Texas it operated a milk and ice cream plant at El Paso and a distributing branch at Alpine. In New Mexico it operated plants at Roswell, Portales, Las Cruces, and Carlsbad, and distributing branches at Hobbs, Deming and Artesia. Set forth below are the geographic areas which the examiner considers to be the areas of effective competition,

insofar as the El Paso Division is concerned. Essentially, these are the areas served by each of Creameries' plants or branches.

(a) El Paso, Culberson and Hudspeth Counties, in the extreme western portion of Texas, are an appropriate market area. These counties were served with milk and ice cream by Creameries' plant in El Paso. The area was served by approximately 15 milk and/or ice cream companies, all of which were located within the area (CX 16-Z 252, pp. 87-89).

(b) Pecos, Brewster, Presidio, and Jeff Davis Counties, to the east and south of the El Paso area, are an appropriate market area. This is the area served with milk and ice cream by Creameries' distributing branch at Alpine, which received its products from El Paso. The area was served by six companies, all of which had a plant or distributing branch within the area (CX 16-Z 252, p. 91). This area might also be considered as an extension of the El Paso marketing area, but it would make no practical difference as far as the issues in this proceeding are concerned.

(c) Dona Ana, western Otero, and Sierra Counties are an appropriate marketing area. This area in southern New Mexico is the area served by Creameries' plant at Las Cruces in Dona Ana County (CX 16-Z 35). The Las Cruces plant processed milk, but not ice cream. It received its ice cream from Creameries' El Paso plant. The area was served by approximately nine dairy companies selling milk and/or ice cream. Of the five companies selling milk, four were located in or close to the area and one distributed into the area from a plant in Albuquerque. Of the eight companies distributing ice cream in the area, the four with the largest volume did so from plants or branches within the area (CX 16-Z 252, pp. 93-94).⁸⁴ Several of the companies distributed ice cream into the area from El Paso. An alternative market division would be to consider this three-county area as part of the El Paso market, insofar as the ice cream product line is concerned. However, a division on this basis would not have a significant effect on Creameries' market share percentages in the area.

(d) Hidalgo, Luna and Grant Counties may be considered an appropriate marketing area. This area in southwestern New Mexico is the area served by Creameries' distributing branch at Deming in Luna County. The Deming branch was supplied with milk from Creameries' plant at Las Cruces, and with ice cream from the plant

⁸⁴ Although The Borden Company, one of the companies distributing ice cream in the area, is referred to as having an El Paso address, it apparently had a distributing branch at Las Cruces (CX 409).

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at El Paso. There were only three companies serving the above area, all having a plant or distributing branch within the area (CX 16-Z 252, p. 96). An alternative market division would be to consider this area part of the same area as that served by the Las Cruces plant. However, a market division on this basis would not significantly affect the issues in this proceeding.

(e) Chaves, Lincoln, and northeastern Otero Counties are an appropriate market area. This area in south central New Mexico is the area served by Creameries' milk plant at Roswell in Chaves County. The plant received its ice cream from Portales. There were approximately five dairy companies supplying the area with milk and/or ice cream. All of them had a plant or distributing branch within the area (CX 16-Z 252, p. 98). This area could also be considered as part of the same market as that served by the Portales plant. However, a market division on this basis would not significantly affect the issues in this proceeding.

(f) Curry and Roosevelt Counties are an appropriate market area. These two counties in eastern New Mexico are the area served by Creameries' ice cream plant at Portales in Roosevelt County. The plant received its milk from Roswell. There were seven dairy companies supplying the area with milk and/or ice cream, of which five had a plant or branch located within the area, while two served the area from western Texas (CX 16-Z 252, p. 100).

(g) Southern Eddy County in southeastern New Mexico and Reeves County in Texas are an appropriate marketing area. This is the area served by Creameries' milk plant at Carlsbad in Eddy County. The area was served by six dairy companies with milk and/or ice cream. All were located within the area (CX 16-Z 252, p. 102).

(h) Northern Eddy County and eastern Otero County are an appropriate market area. This is the area in southeastern New Mexico served by Creameries' distributing branch at Artesia in northern Eddy County. The branch was supplied with milk from Carlsbad and with ice cream from Portales. There were three companies supplying the area with milk and/or ice cream. All of them did so from a plant or branch within the area (CX 16-Z 252, p. 104).

(i) Lea County in southeastern New Mexico and Gaines, Yoakum, Andrews and Winkler Counties in western Texas are an appropriate market area. This is the area served by Creameries' distributing branch at Hobbs in Lea County. This branch received its milk from Carlsbad in adjacent Eddy County, and its ice cream from Portales in adjacent Roosevelt County. There were approximately 12 dairy companies serving the area with milk and/or ice cream (CX 16-Z

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252, pp. 106-107). The majority served the area from plants and/or branches located within or near the area. Four or five served the area from more distant points in Texas. However, the majority of the milk and ice cream distributed within the area was supplied by companies having a plant or branch located within the area or in one of the adjacent counties.

98. Set forth below is a table reflecting Creameries' market shares in each of the above markets served by its El Paso Division, in both the fluid milk and ice cream product lines (CX 16-Z 252, pp. 86-107). For convenience, the areas are designated by the name of the city in which Creameries' plant or branch serving the area was located.

Creameries' market shares (milk and ice cream) El Paso division, 1952

Area	Total milk sales	Creameries'		Total ice cream sales	Creameries'	
		Sales	Percent of area		Sales	Percent of area
El Paso, Tex.....	\$6,038,148	\$2,474,548	41.0	\$1,549,203	\$820,203	52.9
Alpine.....	225,828	148,128	65.6	90,758	56,758	62.5
Las Cruces, N. Mex.....	749,411	429,611	57.3	265,307	187,607	70.7
Deming.....	400,330	111,180	27.7	167,098	115,238	69.0
Roswell.....	1,298,075	741,075	57.1	513,037	233,037	45.4
Portales.....	913,529	227,679	24.9	365,759	92,259	25.2
Carlsbad.....	1,429,462	645,462	45.2	398,500	180,055	45.2
Artesia.....	553,105	238,105	43.0	145,959	95,959	65.7
Hobbs.....	1,894,550	783,000	41.3	565,540	145,540	25.7
Division total.....	13,502,438	5,798,788	42.9	4,061,161	1,926,656	47.4

As the above table reveals, Creameries was a very substantial factor in both the milk and ice cream product lines, in almost every one of the market areas in which it operated. Even if geographic market lines were ignored, it was a very substantial factor throughout the territory where the El Paso Division sold. Under any conceivable consolidation or redefinition of markets in the areas where it sold in Texas and New Mexico, it was a substantial factor in both product lines. Creameries was the top ranking company in both product lines in each of the geographic market areas discussed above, except in Deming, where it was first in ice cream but second in milk, and in Portales where it was second in both milk and ice cream.

99. There were three other so-called national companies operating in various portions of the territory in which Creameries' El Paso Division sold. These were Borden, Swift, and Foremost. Swift operated in only three of the above areas and was a relatively minor factor, accounting for approximately 4% or less of ice cream sales in

such areas, except in the area served by Creameries' Hobbs branch where Swift was the third ranking company with approximately 17% of ice cream sales. Borden served seven of the above market areas with ice cream, and served four of them with milk. In the milk product line, it was the fourth ranking company in both El Paso and Portales (with approximately 10% and 12%, respectively, of these markets), and was the second ranking company in Hobbs (with approximately 11% of milk sales in that area). It was a more important factor in the ice cream product line, being among the top three companies in five of the above markets. It was the second ranking company in the El Paso, Alpine and Carlsbad areas, with approximately 21%, 37% and 36%, respectively, of these markets. In the El Paso area, Borden and Creameries together accounted for approximately 73% of ice cream sales; in the Alpine area they accounted for substantially all of the ice cream sold in the area; and in the Carlsbad and Las Cruces areas they accounted for approximately 80% of ice cream sales. Borden's ice cream sales accounted for approximately 16% of the sales in the territory in which Creameries' El Paso Division operated, although Borden did not distribute in the entire area. Foremost Dairies and a company which it acquired in 1952, Tennessee Dairies, distributed milk in various portions of Creameries' territory in southeastern New Mexico and western Texas. Foremost was the third ranking company in milk sales in the Hobbs area, with approximately 10% of the area's sales. Tennessee Dairies was among the top four milk companies in the Alpine and Hobbs areas, with approximately 7% and 9%, respectively, of the milk sold in these markets, and was the fifth ranking milk company in the El Paso area with approximately 7% of the sales in that area. Foremost and Tennessee accounted for approximately 7% of the milk sales in the entire territory in which Creameries' El Paso Division sold.

Recent Trend in Market Shares

100. The record contains no evidence of market share trends, in terms of the geographic areas which the examiner has found to be the appropriate market areas in the Intermountain region. The evidence offered by complaint counsel was limited mainly to Creameries' market shares in these markets at the time of the acquisition. However, respondent offered statistical evidence of such trends in terms of the broad six-state area proposed by it, viz, the States of Texas, New Mexico, Arizona, Nevada, Utah and Idaho. While, as previously indicated, the examiner does not consider the six-state area to be the appropriate market area within which to measure the competitive:

impact of the acquisition of Creameries' three divisions in the Inter-mountain area, the figures offered by respondent are useful as providing some indication of the trend in its position since the acquisition. According to these figures, Creameries accounted for 4.5% of fluid milk and cream marketed in the six-state area in 1952 (RX 126), and 6.2% of frozen desserts marketed in the area in 1950 (RX 145). In 1960 respondent's sales from the plants acquired from Creameries accounted for 4.95% of milk and cream and 6.01% of frozen desserts marketed within the area. The latter figures do not, however, include respondent's sales from the plants of two other large dairies which it acquired in Texas and Arizona, viz, Boswell Dairies of Fort Worth acquired in 1958, and Associated Dairy of Arizona acquired in 1956.⁸⁵ If the sales of these two plants (which lie within the six-state area) are included, respondent's market shares in the six-state area in 1960 would be 7.76% in fluid milk and cream (RX 125), and 7.46% in frozen desserts (RX 145).

101. Complaint counsel, while contending that the six-state area is not an appropriate market area, nevertheless, argue that if respondent's market shares in the larger area are to be considered, they should be considered in terms of those portions of the territory which respondent's plants actually served, rather than in terms of the entire six-state area. The statistical evidence introduced by complaint counsel on rebuttal, which is limited to the counties actually served by respondent's plants acquired from Creameries, Boswell, and Associated in the six-state area, discloses that respondent's 1960 market share in fluid milk was 21.8%, rather than 7.76% as proposed by respondent (CX 432-I). In the frozen dessert product line, its market share in 1960 was 23.0%, as compared to 7.46% proposed by respondent (CX 432-G).

Other Acquisitions

102. In addition to respondent's acquisition of Creameries' Utah, Idaho and El Paso Divisions, there have been a number of other acquisitions within this area by so-called national companies. In 1954 respondent acquired Lester Ice Cream Co. of Hobbs, New Mexico, and Yellowstone Dairy of Casper, Wyoming. Lester served portions of the area in which Creameries' Hobbs branch distributed, and accounted for approximately 6% of fluid milk sales and 18% of ice cream sales in the area (CX 16-Z 252, p. 106). Its share of the market, together with Creameries', gave respondent approximately 47% of the fluid milk business and 44% of the ice cream business in

⁸⁵ The fact pertaining to these two acquisitions are hereinafter discussed.

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the area. Yellowstone Dairy was a substantial factor in the southwestern Wyoming area served by Creameries' distributing branch at Rock Springs. In 1952 it was the first ranking ice cream company and the third ranking milk company in the area, accounting for approximately 20% of ice cream sales and 18% of fluid milk sales. It, together with Creameries, which was the second ranking milk company, accounted for approximately 38% of milk sales. Other acquisitions in the Intermountain Area include National Dairy's acquisition of Plains Creamery, which served portions of the area served by Creameries' Hobbs branch; Borden's acquisition of Frymuth Dairy, which served the El Paso and Las Cruces areas; and Foremost's acquisition of Banner Creamery, which served areas in Texas and New Mexico (CX 426-Z 69, 27).

Counterbalancing this trend, respondent cites the departure from the market of Pet Milk Company, a so-called national company. As previously mentioned, in recent years Pet sold out its business in the Utah-Idaho area to a local cooperative, Federated Milk Producers Association (R. 4656). This leaves respondent as the only so-called national company selling in the Utah-Idaho area.

c. *Honolulu Division*

103. Creameries' Honolulu Division operated under the name Dairymen's Association, Ltd. The divisional headquarters was in Honolulu on the island of Oahu, where the company operated milk and ice cream plants. It also had distributing branches at Schofield Barracks and Kaneohe on the island of Oahu. It had another processing plant at Hilo on the island of Hawaii, and a distributing branch in the Kona district of that island. The Division also operated a dairy farm at Honolulu. Dairymen's distributed its products under the names Dairymen's Velvet and American Hostess ice cream and Dairymen's milk (CX 16-Z 217).

104. As previously mentioned, the Honolulu Division accounted for 27% of Creameries' net sales in 1952 (CX 143, pp. 6-7). It was also the most profitable of Creameries' operating divisions. In 1952 its earnings before taxes were \$529,506 (CX 16-Z 214). In 1952 the Division sold 5,633,928 gallons of milk and 902,819 gallons of ice cream (CX 16-Z 206). Its profit on sales of milk in 1949 (the latest full year for which such figures are available on a product basis) was \$333,545, and its profit on sales of ice cream was \$273,130 (CX 16-Z 117).

105. Complaint counsel contend that the island State of Hawaii is the appropriate geographic market area in which to weigh the com-

petitive impact of Creameries' acquisition, insofar as the latter's Honolulu Division is concerned. Unlike the other areas in which Creameries operated, respondent raises no issue concerning the geographic scope of this market area. Prior to the acquisition respondent did not operate in Hawaii. Creameries was by far the most important, if not the dominant, factor in the dairy business in the Hawaiian market. Practically all of the milk business in the then Territory of Hawaii was concentrated on the island of Oahu, with Creameries' Dairymen's subsidiary accounting for approximately 60% of all milk distributed on that island (CX 16-Z 3). Through its own dairy farm it was able to supply approximately 11% of the fluid milk requirement of its Honolulu plant (CX 16-Z 6). In addition, it had access to the milk produced by an important association of dairy farmers, for which it acted as exclusive processing and sales agent (CX 16-Z 275-277). There were only three other milk processors and distributors of any consequence in the Hawaiian Islands (CX 16-Z 3). These companies accounted for approximately 30% of the milk produced on Oahu. The smallest of these, Campos Dairy, which accounted for approximately 6% of the market, was owned by Foremost Dairies. In October 1953, Foremost also acquired the largest of Dairymen's competitors, viz, Moanalua Dairy Ltd. and its subsidiary Rico Ice Cream & Milk Co., which accounted for approximately 20% of the milk produced on Oahu. Thus, by the end of 1953 respondent and Foremost, together, accounted for about 85% of fluid milk produced and distributed on Oahu.

106. Creameries' Hawaiian subsidiary had over 50% of the ice cream business on the island of Oahu. There were only six other competitors of any size selling ice cream on Oahu (CX 16-Z). The largest two of these, Moanalua Dairy and its subsidiary Rico Ice Cream Co., accounted for about 25% of the ice cream produced on the island. As previously mentioned, these two companies were acquired by Foremost in October 1953. Thus, by the end of 1953 respondent and Foremost accounted for around 75% of the ice cream produced and distributed on Oahu. The only other ice cream business of any size in the then Territory of Hawaii was at Hilo and on the Kona Coast, both on the island of Hawaii (CX 16-Z). Creameries' sales on that island were between 100,000 to 120,000 gallons annually. Its only competitor on the island, Dahl-Cro-Ma, Ltd., trading as Blue Bonnet Ice Cream Co., had an annual volume of between 50,000 to 60,000 gallons (CX 16-Z 9). Thus, Creameries had about two-thirds of the business on the island of Hawaii and Blue Bonnet had about one-third. In December 1954 respondent acquired Blue

Bonnet, giving it control of practically all the ice cream business on the island of Hawaii.

C. Boswell Dairies

The Acquisition

1. Beatrice acquired all of the outstanding capital stock (amounting to 5,040 shares) of Boswell Dairies, a Texas corporation, on March 1, 1958, pursuant to an agreement dated January 31, 1958. Respondent acquired Boswell's stock in exchange for 70,000 shares of Beatrice's common stock, capitalized at \$29.00 a share, or a total consideration of \$2,030,000, which was the equivalent of the book value of Boswell's capital stock as of the date of acquisition. The agreement provided that Boswell would continue as an operating subsidiary of respondent, and that its stock would be carried on respondent's books as an investment at the cost thereof (CX 309-C, p. 1).

2. Boswell was organized as a Texas corporation in 1928 to take over the dairy business originated by the Boswell family. It was principally engaged in the sale of milk and ice cream, but also distributed cottage cheese, butter, cream and ice cream mix. Its plant was located in Fort Worth, Texas. It operated both a milk processing plant and an ice cream manufacturing plant in adjacent buildings in Fort Worth. It sold milk products both at wholesale and retail home delivery, and sold frozen products predominantly at wholesale. It had 78 retail milk routes, 32 wholesale milk routes, 17 combination wholesale milk and ice cream routes and 6 ice cream routes. It owned an insulated and mechanically refrigerated truck fleet and related automotive equipment (CX 309-C, p. 7).

3. Boswell's net sales in 1957 were \$7,106,909. Its net income was \$396,694 before taxes and \$191,694 after taxes. It had an earned surplus, as of the end of 1957, of \$1,440,923. Its total assets, as of December 31, 1957, were \$2,691,977. Its total current assets were \$801,351, compared to current liabilities of \$614,233 (CX 309-C, pp. 8-9). Respondent concedes that Boswell was a "viable, well-operated independent company" (Findings, p. 160).

4. Boswell purchased substantially all of its supply of raw milk from members of the North Texas Producers Association. All of the milk suppliers to Boswell were located within the State of Texas (CX 309-F, p. 1). During the 12-month period prior to its acquisition, Boswell purchased butter and cottage cheese curd from a company in Springfield, Missouri. Such products were purchased on a delivered basis and were transported to Boswell's plant in Fort

Worth in the seller's own trucks. After delivery, the cottage cheese curd was further processed and packaged in Boswell's plant (CX 309-D). The record does not disclose the volume or degree of regularity of purchases of butter and cottage cheese curd from Springfield, Missouri.

Market Conditions

5. Boswell's main distribution area was in the city of Fort Worth and surrounding Tarrant County. However, it also sold in 17 other nearby counties, the most distant delivery point being Cisco, which is approximately 100 miles west of Fort Worth. Boswell sold in Dallas County to the east of Fort Worth, but not in the city of Dallas itself (CX 309-C, p. 7; CX 309-E, p. 1). Respondent did not sell any dairy products in Boswell's territory. Its closest plants were at Oklahoma City, 200 miles to the north, and at El Paso, 600 miles to the west. There were at least 32 other dairy companies selling in some or all of the areas served by Boswell. This included four so-called national companies, viz, Borden, Carnation, Foremost and Swift. These companies distributed a full line of dairy products, except for Swift which distributed only frozen dairy products (CX 309-E, pp. 1-2). Also competing with Boswell in the area were a number of independent Texas companies of relatively substantial size, including Cabells, Inc., Lamar Creamery Co., Inc., Metzger Dairies, Oak Farms Dairies, Ltd., Schepps Milk Co., and Vandervoort's Inc. (RX 147-B, C).⁸⁶

6. There is some question as to what should be considered to be the proper geographic market area in terms of which to determine the probable competitive impact of the Boswell acquisition. Although Boswell's "main distribution" area was in the city of Fort Worth and surrounding Tarrant County (CX 309-C, p. 7), complaint counsel introduced no market share data with respect to this area, and make no contention that this is the area of effective competition. Rather, complaint counsel assert that the relevant market in which to consider the Boswell acquisition is "generally that covered by the North Texas Federal Milk Market Order" (Reply, p. 14). It should be noted, however, that the Federal Milk Market Order (FMMO) covered 16 counties in North Texas, in only six of which Boswell did busi-

⁸⁶ Complaint counsel assert that Cabells and Oak Farms "are not independents but are subsidiaries of Southland Corporation of Dallas, Texas." There is nothing in the record to establish that Southland is a national dairy company. The mere fact that a company has multiple plants does not make it a national company, or mean that it is not an independent dairy.

ness.⁸⁷ Likewise, of the 18 counties in which Boswell did business, only six were covered by the North Texas FMMO. Despite this discrepancy, the Boswell acquisition must be considered mainly in terms of the North Texas FMMO area since it is the only area for which the record contains reliable statistical data. Such data (which were introduced by respondent) relate only to the fluid milk line of commerce, there being no market share data in the record pertaining to the ice cream product line.

7. In 1957, the year before it was acquired by respondent, Boswell accounted for 10.63% of the fluid milk sold in the North Texas FMMO area. This represented a decline from the year 1956, when its market share was 11.23%. Following its acquisition by Beatrice in early 1958, Boswell's market share continued to decline slightly and reached 10.27% in 1960 (RX 136-137). While, as previously mentioned, there were three so-called national companies distributing milk in Boswell's territory, the statistical evidence as to concentration relates to the market shares of only two of these companies, plus that of Boswell. Such evidence (which was introduced by respondent) discloses that in 1952 Borden, Foremost and Boswell, together, accounted for 47.7% of the fluid milk sold in the North Texas FMMO area. By 1960, the combined share of these three companies (Boswell having since been acquired by respondent) had declined to 41.5%. It further appears that in 1952 the combined market share of the six large independent milk companies previously named was 38.6% of the fluid milk sold in the North Texas FMMO area, and that by 1960 the share of these six companies had increased to 44.4%. The market share of all other companies doing business in the North Texas FMMO area (exclusive of the nine companies above mentioned) was 13.7% in 1952 and 14.1% in 1960 (RX 147-A and B).

8. While complaint counsel apparently concede that the North Texas FMMO area is the appropriate market area (Reply, p. 14), and rely on the statistical evidence introduced by respondent as establishing that Borden, Foremost and respondent accounted for 41.5% of the milk sold in this area in 1960 (Findings, p. 186), they nevertheless contend that respondent's market share in the area served by it was between 18 to 20%, rather than 10.27% (as the statistical evidence pertaining to the North Texas FMMO area in-

⁸⁷ A map of milk marketing areas under Federal Orders as of November 1, 1961, is in evidence as CX 428. The map does not specify the counties which are actually included in each Order area. Such specification does, however, appear in an official publication of the U.S. Department of Agriculture, entitled "Milk Marketing Areas Under Federal Orders." Official notice is taken herein of the specification of counties included in Federal Milk Market Order areas as appearing in this publication, which was issued June 1963 and bears the number AMS-504.

dicates). Except for respondent's own sales, the figures relied upon by complaint counsel are not based on actual sales figures, as are those introduced by respondent, but on "estimated" sales derived from the "estimated" population and alternative per capita consumption rates in the area served by Boswell (CX 455). Such market share computation for 1960 likewise does not take into account the estimated population and sales in an area of ten counties into which respondent expanded after the Boswell acquisition (CX 442-X). At best, the data relied upon by complaint counsel provide a very rough estimate of respondent's post-acquisition market share in Boswell's territory, and cannot be compared with any earlier year to determine whether respondent's market share increased or decreased following the acquisition.

Other Acquisitions

9. In addition to acquiring Boswell and the El Paso Division of Creameries, respondent acquired one other dairy company in Texas, viz, Palestine Creamery Co. of Palestine, Texas.⁸⁸ Palestine Creamery was acquired in March 1960, and sold both milk and ice cream. In 1959 its sales of fluid milk products were approximately \$142,000 and its ice cream sales were \$140,000 (CX 372-K). Palestine was a partnership, not a corporation, and complaint counsel concede that the record fails to establish it was engaged in interstate commerce. Respondent's subsidiary, Boswell, did not compete with Palestine in the sale of fluid milk, but did sell ice cream in a portion of Palestine's territory (CX 372-O).

10. Seven large national companies, viz, Arden, Beatrice, Borden, Carnation, Foremost, Fairmont, and National have acquired approximately 85 dairy concerns in Texas since 1929, of which 28 were acquired since 1950 and 11 were within Boswell's territory (CX 426-Z 69 to 72).⁸⁹ The number of milk plants in Texas has declined from 518 in 1950 to 194 in 1960 (CX 409 and 412). Of the 324 plants which ceased operating after 1950, 310 had a volume under 800 gallons a day or were generally small plants in the "no volume listed" category. (See p. 496, *supra*.) The number of ice cream plants in Texas declined from 207 in 1950 to 111 in 1960 (CX 409 and 412). Of the 96 plants which ceased operating since 1950, 95 had an annual

⁸⁸ Complaint counsel contend that respondent also acquired another company in the dairy field, Quality Frozen Foods Co. of Odessa, Texas, which it is claimed was a "distributor of frozen desserts." The record discloses that Quality sold "frozen foods only" and "absolutely no dairy products" (CX 123-D).

⁸⁹ Complaint counsel contend that there were a larger number of acquisitions made by the national companies. Counsel have erroneously counted as separate companies, the multiple plants of a single company.

volume of under 250,000 gallons or were generally small plants in the "no volume reported" category. (See p. 499, *supra*.)

State "Market" Shares

11. In 1954, the year after its acquisition of Creameries' El Paso Division, respondent's share of the production of frozen desserts in the State of Texas was 2.3%. In 1957, the last year for which such data appears in the record, its share of production of frozen desserts in Texas was 2.1%. The three national companies with the largest shares of production of frozen desserts in Texas in 1957 were: Borden with 12.8%, Foremost with 9.5%, and Carnation with 7.3%. The combined share of frozen dessert production in 1957 of respondent, Borden, Foremost, Carnation, Arden and Fairmont was 34.2% (CX 456-L).⁹⁰

12. In 1958, the year in which it acquired Boswell, respondent accounted for 4.1% of the value of shipments of bottled fluid milk in Texas. The three national companies with the largest shares of milk shipments in Texas were: Borden with 27.2%, Foremost with 11.3%, and Carnation with 7.9%. The combined share of milk shipments of respondent, Borden, Foremost, Carnation and National was 50.8% (CX 425-F). In the frozen dessert product line respondent accounted for 3.6% of the value of shipments of frozen desserts in Texas in 1958. The three national companies with the largest shares of frozen dessert shipments were: Borden with 14.4%, Foremost with 7.1% and Carnation with 5.9%. The combined share of the value of shipments of respondent, Borden, Foremost, Carnation and Swift was 36.3% (CX 425-D).⁹¹

D. *Associated Dairy Products Company*

The Acquisition

1. Respondent acquired all of the assets and business of Associated Dairy Products Company, a Delaware corporation, on October 1, 1956, pursuant to an agreement dated September 11, 1956. The consideration paid for Associated's assets and business was the transfer to it of 15,948 shares of respondent's stock (to be rateably distributed

⁹⁰ The above percentages should not be taken as precise indications of any company's State "market" position, since they include frozen desserts produced in Texas and shipped to other states. For example, respondent made substantial shipments to New Mexico from its El Paso plant.

⁹¹ As indicated at footnote 6, p. 489, *supra*, respondent contends that market shares based on value of shipments are overstated since the universe figures do not include shipments of small processors. Likewise, the shipment figures include shipments from Texas plants to other states, and are therefore not a precise indicator of any company's market position in Texas.

among Associated's stockholders), and the assumption by respondent of Associated's liabilities remaining as of December 31, 1956. At the time of the transfer, respondent's common stock was valued at \$45.00 a share, or a total of \$717,660 for the 15,948 shares paid to Associated. The value of the stock consideration was approximately \$100,000 more than the book value of Associated's net assets (CX 308 A, B and F).

2. Associated was engaged in the processing and distribution of dairy products, principally fluid milk, at wholesale, in the State of Arizona. Its executive offices and processing plant were located in Glendale, Arizona, approximately seven miles from Phoenix. It also maintained branch offices at Bisbee, Coolidge, Miami, Tucson and Superior, all in Arizona. The plant at Glendale processed Grade A fluid milk, and manufactured milk products, including butter, cheese, ice cream mix, condensed skim milk, powdered skim milk and casein. The company operated 60 trucks for the delivery of its products. At the time of the acquisition it had approximately 150 employees (CX 309-F, p. 9).

3. Associated's net sales in the year ending December 31, 1955, were \$3,947,526. In the preceding year, its net sales were \$4,211,644. Its net income, before taxes, was \$135,351 in 1955 and \$145,523 in 1954. Its net income after taxes was \$68,385 in 1955 and \$74,402 in 1954 (CX 308-H, p. 7). For the six months ending June 30, 1956, its net sales were \$2,038,134. During the same period, its net income before taxes was \$106,624 and its net income after taxes was \$50,179 (CX 308-F, p. 10).

4. All of Associated's sales were made within the State of Arizona (CX 308-H, p. 1). Its purchases of raw milk were made entirely from a producers' association, all of whose members were located in the vicinity of Phoenix, Arizona (CX 308-I, p. 1). During the 12-month period preceding its acquisition, Associated purchased bulk butter and plastic cream from a company in Los Angeles. The record discloses that "some or all of said products may have originated in states other than Arizona but all of said purchases were made on the basis of delivered (sic) to Associated's plant at Glendale" in trucks owned or operated by the seller. Associated processed and packaged such butter and used the plastic cream as an ingredient in the manufacture of ice cream mix (CX 308-G). The record does not disclose the volume of purchases of bulk butter and plastic cream, or the degree of regularity of such purchases, or the amount thereof which actually originated outside the State of Arizona.

Market Conditions

5. Associated distributed the dairy products produced by it, at wholesale, in parts of the following Arizona counties: Maricopa, Pima, Pinal, Gila, Santa Cruz and Cochise. It also made distribution through independent distributors in the additional counties of Coconino, Yavapai and Navajo. None of respondent's plants or those of any of its subsidiaries sold any milk products in the area served by Associated. Respondent's closest plant was in El Paso, approximately 415 miles to the east. However, there were at least 26 dairy companies which sold milk products in some or all of the areas served by Associated. Eleven of these companies sold only at retail (home delivery), while the rest sold at wholesale or at wholesale and retail. Included among Associated's competitors were the following so-called national companies: Carnation, Borden and Arden (CX 308-H, pp. 1 and 2).

6. Complaint counsel contend that the area of effective competition with respect to the Associated acquisition is "generally that area covered by the Central Arizona Federal Milk Order * * *, but since Associated distributed throughout the populated portion of the state * * *, Arizona is a relevant market" (Reply, p. 14). Included within the Central Arizona Federal Milk Marketing Order (FMMO) were the counties of Maricopa, Pima, Pinal and Cochise, which were also part of Associated's territory. This was the most populous area in the State, and includes the cities of Phoenix and Tucson.⁹² The Order area also included several counties which were not part of Associated's territory. However, these were relatively sparsely populated areas.⁹³ The Central Arizona FMMO area may, therefore, be considered to be an appropriate market area since it was substantially coterminous with a sizeable portion of Associated's territory. However, since Associated and its distributors sold in five other counties in central and north central Arizona not covered by the FMMO, and since these counties together with those in the Order area comprise the bulk of the population in Arizona, the State as a whole may also be considered to be an appropriate market area.⁹⁴

7. Complaint counsel introduced no pre-acquisition market share data for Associated in either the Central Arizona FMMO area or the State of Arizona as a whole. The only statistical evidence intro-

⁹² These four counties had a population of 1,046,882, out of a total State population in 1960 of 1,302,161 (CX 429).

⁹³ The Order area included the additional counties of Yuma, Graham and Greenlee, with a combined population of 71,785 in 1960.

⁹⁴ Associated's distribution area had a 1960 population of 1,192,198 out of a total State population of 1,302,161.

duced by them involves post-acquisition market data for the State as a whole, pertaining to respondent and the other so-called national companies. The market data introduced by respondent also is in terms of the State as a whole, but includes Associated's pre-acquisition market share as well as respondent's share following the acquisition. The latter data, which the examiner accepts as reasonably reliable, disclose that Associated's 1955 market share of fluid milk and cream sales in Arizona was 11.22% and that respondent's 1960 market share in the same area was 8.39% (RX 123).⁹⁵

8. Following respondent's acquisition of Associated, there were four so-called national companies selling milk in Arizona, viz, respondent, Carnation, Borden and Arden. In 1958 the shipments of these four companies represented 71.5% of the value of shipments of bottle fluid milk and cream in Arizona. The individual percentages of these companies were: Carnation 38.5%, Borden 20.1%, respondent 9.0%, and Arden 3.9% (CX 425-F). Neither respondent nor its predecessor, Associated, distributed frozen desserts in Arizona. However, there were four national companies which did so, viz, Carnation, Arden, Swift and Borden. In 1958 the shipments of these four companies represented 88.3% of the value of shipments of frozen desserts in Arizona (CX 425-D).

9. Associated was the only acquisition made by respondent in Arizona. However, there have been approximately 15 other dairy acquisitions in Arizona by the so-called national companies since 1929. Of these, five were made since 1950 (CX 426-T). Associated was the largest of the companies acquired in Arizona. Between 1950 and 1960 the number of plants distributing fluid milk in Arizona declined from 78 to 25 (CX 409 and CX 412). Of the 53 plants which ceased operating, all had a volume under 800 gallons daily, or were in the "no volume listed" category. (See p. 496, *supra*.) The number of independent fluid milk companies processing 1,600 gallons a day or over has declined from seven to six between 1953 and 1961 (RX 161-E). Between 1950 and 1960, the number of plants distributing ice cream in Arizona has declined from 23 to 16 (CX 409 and 412). Of the seven plants which have ceased operating since 1950, six had a

⁹⁵ The statistical data introduced by respondent were prepared by Dr. David A. Clarke of the University of California (R. 4135). The universe figures were derived from U.S. Department of Agriculture figures (RX 122). Associated's and respondent's sales are based on actual sales figures. While the universe figures are computed figures, their substantial accuracy is confirmed by their close comparability with the official figures of sales in the Central Arizona FMMO area. The 1960 market share figure also compares closely with the market share figure of 8.25% contained in the statistical data introduced by complaint counsel, which is computed from per capita consumption and population figures in Associated's distribution area (CX 452).

volume under 250,000 gallons annually or were in the "no volume reported" category (See p. 499, *supra*).

E. Greenbrier Dairy Products Company

The Acquisition

1. Respondent acquired the business and assets of Greenbrier Dairy Products Company, a West Virginia corporation, on January 1, 1955, pursuant to an agreement dated December 21, 1954. The consideration paid for the transfer was approximately \$600,000 (CX 20-S, T). As part of the same transaction, Trans-Mountain Motors, Inc., an affiliate of Greenbrier, sold to Commercial Vehicle Rental Co., an Illinois corporation, certain trucks, machinery, cabinets and equipment for a total consideration of \$640,755, which was guaranteed by respondent (CX 20-U). The latter equipment was later leased to respondent by Commercial Vehicle Rental (R. 1163).

2. Greenbrier was engaged in processing and distributing, at wholesale, a full line of milk and ice cream products. Its milk processing and ice cream manufacturing was done at a plant in Beckley, West Virginia. It had a plant for receiving raw milk at Lewisburg, and operated distributing branches at Logan, Charleston and Lewisburg (CX 20-Z 67, 99, pp. 2-4). Its affiliate, Trans-Mountain Motors, which was owned by the same family interests that owned Greenbrier, was engaged in the leasing of trucks and tank trailers to Greenbrier (CX 20-Z 99, Sched. 14). Greenbrier's net sales were \$3,483,895 in the year ending December 31, 1953, and \$3,776,272 in the preceding year. For the nine-month period ending September 30, 1954, its net sales were \$2,319,739. Its net income before taxes was \$58,210 in 1953, and \$69,672 in 1952. For the nine months ending September 30, 1954, its net income before taxes was \$3,380. Its net income after taxes was \$22,710 in 1953, and \$31,672 in 1952 (CX 20-Z 50, 51). Greenbrier's total assets were \$777,341 as of September 30, 1954, and Trans-Mountain's were \$203,086 (CX 20-Z 47, 48). Milk and ice cream constituted the principal products sold by Greenbrier, with milk accounting for the major part of its sales. In 1953, out of total gross sales of \$3,530,902, its sales of milk were \$2,820,028 and its sales of ice cream were \$584,677, with sales of miscellaneous products amounting to \$121,195 (CX 20-Z 99, p. 2).

3. Greenbrier's sales of dairy products were made entirely within the State of West Virginia (CX 20-Z 67). Its supply of raw milk was obtained from a four-county area in West Virginia and received at its Lewisburg plant (CX 20-Z 99, p. 2). During 1954 Greenbrier purchased certain dairy products or ingredients thereof from four

out-of-state suppliers, as follows: It purchased from a supplier in Staunton, Virginia, 200 gallons of cream at a cost of \$543 and 279,500 pounds of milk powder at a cost of \$58,344. The cream was used in manufacturing ice cream and other dairy products. It purchased from a supplier in Philadelphia, Pennsylvania, 72,000 pounds of milk powder at a cost of \$11,017. The milk powder was used in the manufacturing of ice cream and other dairy products. It purchased from a supplier in Marietta, Ohio, 10,300 gallons of cream at a cost of \$25,182. The cream was used for the manufacture of ice cream. In all of the foregoing instances, the products purchased by Greenbrier were delivered by the out-of-state supplier to Greenbrier's plant at Beckley. It also purchased from a supplier in Blue Ash, Ohio, 169,635 pounds of bulk dry cheese curd at a cost of \$20,104. The cheese curd was processed into cottage cheese and packaged at Greenbrier's Beckley plant. The cheese curd was purchased f.o.b. the supplier's plant (CX 20-Z 112, CX 133-B), but the record does not indicate the method of its delivery.

Market Conditions

4. Greenbrier's principal distribution area included Beckley, Charleston, Logan, Lewisburg, and the surrounding territory in central and southern West Virginia. During the middle of 1954 it also began to distribute in the Clarksburg area, in the northern part of West Virginia (CX 20-Z 99, p. 4; CX 20-Z 101). Respondent did not compete with Greenbrier except in the towns of White Sulphur Springs and Lewisburg in southeastern West Virginia, where respondent sold a "small amount" of frozen products from its plant in Washington, D.C. and Greenbrier distributed frozen products from its Lewisburg branch (CX 20-Z 67). There was no competition between the companies in the fluid milk product line. There were approximately 15 other companies competing with Greenbrier in central and southern West Virginia (CX 20-Z 105; CX 20-Z 99, pp. 3-4). With one exception (Fairmont Foods' Imperial Division), none of these companies sold in competition with Greenbrier in the Clarksburg area and none of the companies in the latter area distributed in southern West Virginia.

5. Complaint counsel contend that the relevant market area in which to weigh the impact of the acquisition is "the distribution area of Greenbrier including most of the southern half of West Virginia * * *, but also including the Clarksburg area." Counsel further contend that the distribution area of each of Greenbrier's branches "is also a relevant sub-market" (Reply, p. 14). It is respondent's con-

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tention that the area of effective competition is the entire area of West Virginia south of Charleston, which respondent designates as the "Charleston-Beckley-Bluefield marketing area" (Findings, p. 154). This, in general, is the area in which Greenbrier distributed except that it includes Bluefield in the extreme southern portion of West Virginia, in which Greenbrier did not sell. Respondent's position that the entire Charleston-Beckley-Bluefield area is one marketing area is based on the fact that it is a homogeneous area which is removed from the influences of the other principal markets in West Virginia, each of which is covered by a Federal Milk Marketing Order. Thus, the extreme northern part of West Virginia around Wheeling is part of the Wheeling FMMO, which also includes a portion of Ohio; the area around Clarksburg was established as the Clarksburg FMMO area shortly after respondent acquired Greenbrier; and the area around Huntington and Parkersburg in the western part of West Virginia is included in the Tri-State FMMO.

6. In the opinion of the examiner, the individual communities which complaint counsel designate as the sub-markets are, for the most part, too small to be considered as separate market areas. A number of the companies operating in these areas distributed in more than one of the individual communities. Thus, the four principal companies selling in Charleston, viz, Greenbrier, Valley Bell, Blossom and Imperial (Fairmont Foods) also distributed in Lewisburg and Beckley. Greenbrier and Imperial also distributed in Logan. Except for Charleston, with a population of 73,500, and Beckley with a population of 19,000, the other areas are too minute to be considered economic market areas. Lewisburg, for example, had a population of 2,200 and Logan had a population of 5,000. On the other hand, the examiner considers the area proposed by respondent as too large to be deemed an appropriate market area. While Charleston or a combination of Charleston and Beckley may be considered as appropriate market areas, Bluefield does not appear to appropriately fall within the same market area as these two cities. Except for Foremost Dairies, whose Southern Maid subsidiary sold in both Beckley and Bluefield, there is no evidence that any of the other companies operating the Bluefield area sold in Beckley or Charleston, or that Charleston or Beckley companies sold in Bluefield. In line with respondent's argument that the Charleston-Beckley-Bluefield area is removed from the influences of the FMMO's which are applicable in West Virginia, it may be noted that an FMMO was established for the Bluefield area in 1956, thus indicating that it is not part of the same economic milieu

as Charleston and Beckley.⁹⁶ It is, accordingly, concluded that the area around Charleston, or Charleston and Beckley including Logan, may be considered as appropriate market areas for weighing the competitive impact of the Greenbrier acquisition.

7. The only market-share data in the record are in terms of either the individual communities which complaint counsel assert are appropriate sub-markets, or the entire Charleston-Beckley-Bluefield area which respondent contends is the proper market area. In the Charleston area, Greenbrier was either the third or fourth ranking company, with approximately 15% of fluid milk sales. The first and second ranking companies were Valley Bell Dairy and Blossom Dairy. Fairmont's Imperial Division ranked as either third or fourth along with Greenbrier. In Beckley, Greenbrier was the first ranking company, with an estimated 60% of the fluid milk market. Valley Bell and Blossom were the second and third ranking companies. In Logan, Greenbrier was likewise the first ranking company, with approximately 60% of the market. Fairmont's Imperial Division was second and Guyan Creamery was third. In Lewisburg, Greenbrier was the first ranking company, with approximately 65% of fluid milk sales. Reconverte Ice & Produce Co. was second and Valley Bell and Blossom were third and fourth. In none of the above areas do the market shares of Greenbrier's competitors appear from the record. There is likewise no indication in the record of Greenbrier's market share in the ice cream product line, except that no estimate could be made because its ice cream sales were "so small" (CX 20-Z 105). The record does not disclose Greenbrier's or respondent's market position in ice cream in the Lewisburg-White Sulphur Springs area, the only area in which they competed. In the Charleston-Beckley-Bluefield area, proposed by respondent as the appropriate market, Greenbrier accounted for 16.0% of fluid milk sales in 1954. In 1960, after the acquisition, respondent's share in this area had declined to 14.4% (RX 144-A).

8. There is no market share data in the record in terms of the Charleston-Beckley area, which more nearly conforms to what the examiner considers as the appropriate market area in this instance. However, in view of the fact that Greenbrier's share in the broader Charleston-Beckley-Bluefield market proposed by respondent was

⁹⁶ It may be noted that in the *Foremost Dairies* case, Docket No. 6495, April 30, 1962 [60 F.T.C. 944, 1067], in which the examiner had held the Bluefield area to be an appropriate market area, the Commission ruled that "the relevant market area should also include the Appalachian area." The Bluefield FMMO area was merged into the Appalachian FMMO area in 1961. This area does not include Charleston, Beckley or Logan.

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16% in 1954, it seems evident that it must have had a substantially larger share in the smaller Charleston-Beckley (including Logan) market, particularly when it is noted that in Beckley and Logan Greenbrier was the first ranking company with 60% of the sales in these communities. The record does not disclose Greenbrier's market share in the Clarksburg area, except that its order of magnitude was around 2% or possibly less than 1%.⁹⁷

9. As indicated above, respondent's milk market share in the entire Charleston-Beckley-Bluefield area declined from 16.0% to 14.4% during the period from 1954 to 1960. While the area covered by these statistics is somewhat broader than that which the examiner regards as the appropriate geographic market area, there is no reason to believe that respondent's relative position in the smaller market would be significantly different in 1960 than that in the three-city area. Using the Charleston-Beckley-Bluefield area as a basis for comparison, it may be noted that the combined market share of respondent's Greenbrier Division, Fairmont's Imperial Division and Foremost's Welch Milk Co., was 30.5% in 1960. This compares with 30.7% for these plants in 1951. The plants of the four large independent companies (Valley Bell, Blossom, Leatherwood and Tebay), processing an average of 8,539 gallons a day, accounted for 48.2% of the Charleston-Beckley-Bluefield market in 1951 and 50.1% in 1961.⁹⁸ The plants of nine independent companies processing an average of 1,463 gallons a day accounted for 21.1% of the area in 1951 and 19.4% in 1960 (RX 156-A).

Other Acquisitions

10. In addition to its acquisition of Greenbrier, respondent acquired two other companies in the southern West Virginia area. On May 1, 1955, respondent acquired Kanawha Ice Cream Co., a West Virginia corporation, for a consideration of \$83,500 (CX 31 A-D). Kanawha sold only ice cream and its distribution area was limited to Charleston and its environs. Respondent sold no frozen products in the area in which Kanawha distributed, although it did sell milk through its Greenbrier Division (CX 31-R). The record does not disclose what Kanawha's market share was in the Charleston area. Complaint counsel concede that the record fails to establish Kanawha's engage-

⁹⁷ An official of Clarksburg Dairy, which respondent acquired in August 1955, estimated Greenbrier's market share in the Clarksburg area (after its acquisition by respondent) to be about 2% (CX 33-Z 4). However, an official of respondent testified that when the Clarksburg FMMO went into effect in November 1955, Greenbrier withdrew from the Clarksburg market, at which time it had less than 1% of the area's milk sales (R. 1183).

⁹⁸ Between 1951 and 1960 two of the large independents, Blossom and Tebay, were acquired by Broughton's Farm Dairy, a large Ohio company.

ment in interstate commerce. The other company acquired by respondent was Fayette Bottling & Ice Co., of Montgomery (26 miles southeast of Charleston). Respondent acquired the ice cream portion of Fayette's business on September 11, 1958, for a consideration of \$113,250 (CX 353-L-M). Fayette had shown a loss on its operations from 1953 to 1957, and was advised by the Commission that if the sale of its assets to respondent was effected no action would be taken to challenge the sale (CX 353-C). Complaint counsel concede that the record fails to establish Fayette's engagement in commerce.

F. *Clarksburg Dairy Company*

The Acquisition

1. Respondent acquired all of the outstanding capital stock of Clarksburg Dairy Company, a West Virginia corporation, on August 1, 1955, pursuant to an agreement entered into with Clarksburg's stockholders on July 8, 1955. In exchange for their stock, Clarksburg's stockholders received 12,750 shares of respondent's common stock, which was then selling on the New York Stock Exchange for approximately \$50.00 a share, or a total consideration of approximately \$635,000. The transfer also included the business and assets of Clarksburg's wholly-owned subsidiary, Home Dairy of West Virginia, Inc., a West Virginia Corporation (CX 33 A-M).

2. Clarksburg Dairy and its wholly owned subsidiary, Home Dairy, were engaged in the processing and distributing of milk and cream, cottage cheese, butter and ice cream mix (CX 33-Z 1). Clarksburg Dairy's principal processing plant was located at Clarksburg. It also operated a plant at Elkins, where it processed milk in gallon jugs. Home Dairy's office was located in Fairmont, where it had a distributing branch. It also had a distributing branch at Buckhannon, which had formerly been used as a processing plant (CX 33-Z 12, pp. 3 and 4). Clarksburg Dairy and Home Dairy operated approximately 35 combination wholesale and retail routes out of Clarksburg, Fairmont, Buckhannon and Elkins (CX 33-Z 8, p. 20).

3. For the year ending December 31, 1954, the combined sales of Clarksburg and its subsidiary were \$1,636,409. Sales of the Clarksburg plant represented approximately 60%, or \$973,764, of this combined figure. The net profit before taxes on the combined operation was \$90,252 in 1954, of which \$38,365 represented sales from Clarksburg, and \$51,950 represented sales from Fairmont (CX 33-Z 8, p. 9). Fluid milk products represented the largest volume item of the Clarksburg plant, with sales in 1954 amounting to 952,645 gallons (CX 33-Z 8, p. 16). Out of total sales \$1,636,409 in 1954, sales

at wholesale amounted to \$1,032,460 (CX 33-Z 8, p. 10). The total assets of Clarksburg Dairy and its subsidiary, as of July 31, 1955, were \$1,076,343. Its current assets were \$680,128, and its current liabilities were \$154,405 (CX 33-Z 12, p. 7).

4. Clarksburg Dairy's sales and those of its subsidiary were made entirely within the State of West Virginia (CX 33-Z 1). So far as appears from the record, Clarksburg had only two out-of-state suppliers (CX 133-B; CX 33-Z 16). It purchased its butter requirements from respondent's Cincinnati plant. Such purchases were made f.o.b. Cincinnati and Clarksburg's purchases never exceeded three or four cases (32 lbs. each) per week. It also purchased an aerated cream in cans from a supplier in Ohio. The volume of such purchases was "very small" and was delivered in the seller's truck.

Market Conditions

5. The distribution area of Clarksburg Dairy and its subsidiary consisted of an area in northern West Virginia which included the towns of Clarksburg, Fairmont, Grafton, Weston, Elkins and Buckhannon, and adjacent territories (CX 33-Z 1 and Z 8, p. 10). A small portion of the sales of respondent's Greenbrier Division were made in some of the areas served by Clarksburg Dairy (CX 33-Z 1). The Greenbrier Division sold in Clarksburg and also in the area around Morgantown, which Clarksburg did not serve (CX 33-Z 4). There were 13 other dairy companies serving some or all of Clarksburg Dairy's distributing area, plus a number of small producer-distributors (CX 33-Z 4). The only so-called national company selling in Clarksburg's distribution area, other than respondent's Greenbrier Division, was Fairmont Food's Imperial Division.

6. It is not clear what complaint counsel consider to be the relevant market area in which to weigh the probable competitive impact of the Clarksburg acquisition. However, since the market share data cited by them are in terms of the entire distribution area of Clarksburg Dairy and Home Dairy, it may be assumed that they consider this to be the appropriate geographic area. In general, this is an area in northern West Virginia, which is within a radius of approximately 50 miles from Clarksburg. It includes the principal communities in six counties in northern West Virginia. This area conforms substantially to the boundaries of the Clarksburg FMMO area, which was established in November 1955, three months after the Clarksburg acquisition. The only populous area covered by the Clarksburg FMMO which Clarksburg Dairy did not serve was Morgantown.⁹⁹ Only one dairy from Morgantown (Chico Dairy) sold in

⁹⁹ The population of Morgantown was approximately 25,000, compared to a population of approximately 100,000 for the six principal communities served by Clarksburg Dairy.

Clarksburg Dairy's territory, accounting for approximately 1/2% of the area's sales (CX 33-Z 4). Respondent contends that the relevant market area is that embraced within three FMMO areas, viz, Clarksburg, Wheeling and the Athens District of the Tri-State area (which includes the area around Parkersburg). This position is based on the fact that there were distributors from the other two areas which sold in the Clarksburg area (R. 4047). However, the record establishes that only one distributor from outside the Clarksburg FMMO area sold within the area in more than *de minimis* quantities.¹⁰⁰ It is the conclusion and finding of the examiner that Clarksburg Dairy's distribution area, which was slightly smaller than the Clarksburg FMMO area, is the relevant geographic market area.

7. The market share data offered by complaint counsel, based on market estimates made by a Clarksburg Dairy official shortly prior to the acquisition, disclose that Clarksburg Dairy and Home Dairy accounted for approximately 35% of the sales in the area served by them (CX 33-Z 4).¹⁰¹ The company with the second largest share of the market was Fairmont's Imperial Division, with an estimated 25% of the market. The next three ranking companies accounted for between 5% and 6 1/2% each of the area's sales. All of the other distributors had 3% or less of the market, with respondent's Greenbrier Division having an estimated 2%.¹⁰² While Clarksburg Dairy's market share percentage is an estimated figure, not based on any actual statistical data, the accuracy of its general order of magnitude is confirmed by the market share data introduced by respondent which are based on actual sales data for the FMMO areas. These data disclose that in 1956, the year after respondent acquired Clarksburg Dairy, its sales in the Clarksburg FMMO area represented 29.5% of that area's sales (RX 103).¹⁰³ By 1960, respondent's sales from Clarksburg Dairy's plants had declined to 28.6% of the Clarksburg FMMO area. However, it should be noted that in 1959 respondent had acquired the business of Sanitary Milk & Ice Cream Co. of Mor-

¹⁰⁰ Garvin's Jersey Farms of Wheeling accounted for approximately 6 1/2% of the sales in Clarksburg Dairy's territory (CX 33-Z 4). This is one of the two out-of-area companies specifically referred to by respondent's expert witness as selling within the area (R. 4047). There is no evidence that the other company, Broughton's Farm Dairy of Marietta, Ohio (R. 4049) sold in the Clarksburg area in 1955.

¹⁰¹ It is not clear whether this includes all milk products or is based on sales of fluid milk only.

¹⁰² The estimate made of respondent's sales contains the notation that the major portion of its sales were made from a distribution station in Morgantown, which area Clarksburg Dairy did not serve (CX 33-Z 4).

¹⁰³ The figures introduced by respondent disclose that its sales from Clarksburg Dairy's plants represented 6.6% of the three FMMO areas. The above percentage is computed by comparing Clarksburg Dairy's sales with the sales in the Clarksburg FMMO area only.

gantown (which will be hereinafter discussed). If the sales from Sanitary's plant in Morgantown are included, respondent's sales in the Clarksburg FMMO area (including both the Clarksburg and Morgantown plants) represented 46.8% of that area's fluid milk sales in 1960.

Other Acquisitions

8. In addition to its acquisition of Clarksburg Dairy, respondent made one other substantial acquisition in northern West Virginia.¹⁰⁴ This was Sanitary Milk & Ice Cream Co., a West Virginia corporation, whose business and assets respondent acquired on April 1, 1959 (CX 356-G). The total consideration paid was \$345,949. Sanitary processed milk and cream and manufactured ice cream. In the year 1958 it sold 2,212,896 gallons of milk and 173,362 gallons of ice cream, with its total sales being \$1,500,875 (CX 356-G 8). Respondent concedes that Sanitary "was a viable company" (Findings, p. 180). Sanitary's products were distributed primarily in the city of Morgantown and Monongalia County, but it had some scattered distribution in several other West Virginia Counties (CX 356-C). One of its milk routes made a small portion of its sales in Marion County where respondent sold, and another milk route was in Preston County where respondent operated a milk route. In the ice cream product line, there was some minor competition between Sanitary and respondent in Monongalia and Taylor Counties, where respondent had a maximum of 10 customers (CX 356-D). Complaint counsel concede that the record fails to establish that Sanitary was engaged in interstate commerce.

9. Since 1929 the so-called national companies have acquired approximately 18 companies engaged in the sale of fluid milk or ice cream in the State of West Virginia. Of these, 10 were acquired since 1950 (CX 426-M). Between 1951 and 1961 the number of milk plants in West Virginia has declined from 149 to 66 (CX 409 and 412). Eighty-two of the plants which have ceased operating had a volume under 800 gallons a day or were in the "no volume listed" category. (See p. 496, *supra*.) The number of independent companies in West Virginia processing a minimum of 1,600 gallons a day has remained the same from 1953 to 1961, viz, nine (RX 161-F). The number of ice cream manufacturing plants in West Virginia has declined from 35 to 23 between 1951 and 1961 (CX 409 and 412). Of the 12 plants

¹⁰⁴ Respondent also acquired Lucas Dairy of Grafton, a small milk company with annual sales of about \$65,000 (CX 124-J), for whose business and assets respondent paid \$5,500 (CX 124-A-B). Lucas was not a corporation. Complaint counsel concede that the record fails to establish that it was engaged in interstate commerce.

which have ceased operating, 11 had a volume under 250,000 gallons annually or were in the "no volume reported" category. (See p. 499, *supra*.) The number of independent companies manufacturing a minimum of 250,000 gallons per year has declined from two in 1951 to none in 1961 (RX 161-A).

State "Market" Shares

10. In 1958 (after its acquisition of Greenbrier and Clarksburg Dairy, but before its acquisition of Sanitary) respondent accounted for 11.8% of the value of shipments of bottled fluid milk and cream in West Virginia.¹⁰⁵ The shares of the other three national companies doing business in West Virginia, viz, Borden, Fairmont and Foremost, were 10.0%, 8.2%, and 4.4%, respectively, making a total of 34.4% for the national companies (CX 425-F). In the frozen dessert product line, respondent's 1958 share of the value of shipments of such products (which includes the business which it acquired from Greenbrier and Kanawha Ice Cream Co.) was 7.3%. Four national companies accounted for 81.6% of the value of shipments, with Fairmont having 34.5%, National Dairy 27.0%, and Borden 12.8% (CX 425-E). In 1957 these four companies, plus Foremost, accounted for 75.1% of the production of frozen desserts in West Virginia (CX 456-J). Respondent's share of production in that year was 5.7%, compared to .4% in 1954, the first year when it produced any frozen products in the State.

G. Tro-Fe Dairy Company, Inc.

The Acquisition

1. Respondent acquired Tro-Fe Dairy Company, Inc., on June 1, 1956, pursuant to agreements entered into March 31, 1956 (CX 42 and 43). Tro-Fe consisted of two separate corporations, an Alabama corporation and a Tennessee corporation. Respondent purchased the assets of the Alabama corporation for \$134,000, in payment for its equipment, plus additional amounts for inventory (at cost), pre-paid items (at value) and receivables (at approximate book value). The total amount of the consideration actually paid cannot be determined from the record. The transaction also involved the leasing of real estate, machinery and equipment from the Alabama corporation for a period of 20-25 years at a monthly rental of about \$5,457. From the Tennessee corporation respondent purchased its inventory (at

¹⁰⁵ The reliability of this figure (which is based on official Government figures), as a general indicator of respondent's market position in the State, may be gauged by comparing it with the estimated market shares computed by complaint counsel, based on alternative rates of per capita consumption. Such estimated shares ranged from 8.66% to 13.01% in 1960 (CX 449-A).

cost) and receivables (at approximate book value). It also leased that corporation's building and plant machinery for a period of two years at an annual rental of \$4,000. The total consideration actually paid for the Tennessee corporation cannot be ascertained from the record.

2. The Alabama corporation operated a plant at Gadsden, Alabama, where it was engaged in processing and distributing milk, cream, cottage cheese, ice cream mix and butter (CX 42-Z 4). The Tennessee corporation operated a plant at Lewisburg, Tennessee, where it acted as a "captive" receiving station for the Alabama corporation, of fluid milk received from producers in Tennessee (CX 43-N). Payment to the producers for milk received by the Tennessee corporation was made by the Alabama corporation. Surplus raw milk not used by the Alabama corporation was sold by the Tennessee corporation to other producers in Tennessee and Alabama (CX 42-Z 9). In the fiscal year ending June 30, 1955, the net sales of the Alabama corporation amounted to \$2,953,067. Of this amount, approximately 73%, or \$2,176,000 consisted of sales of fluid milk (CX 42-Z 3, pp. 2-3). The corporation realized a net profit of \$96,698 on its total sales. The total assets of the Alabama corporation, as of June 30, 1955, were \$760,342 (CX 42-Z 3, p. 1). It operated 55 trucks and had approximately 15 wholesale routes and 40 retail routes (R. 983). Respondent concedes that Tro-Fe was "a viable company." The Tennessee corporation handled between 1,300,000 and 1,600,000 pounds of milk per month during 1954 and 1955, of which it shipped between 1,200,000 to 1,500,000 pounds to the Alabama corporation (CX 42-Z 9). Its total assets as of March 31, 1955, were \$95,928 (CX 42-Z 8).

3. The sales of the Alabama corporation were made in an area of approximately 30 miles around Gadsden, Alabama (CX 42-Z 4). Whether the company made any sales in Georgia does not appear from the record. However, as indicated by the above figures, it received substantial shipments of raw fluid milk from Tennessee. Likewise, the Tennessee corporation made substantial shipments of raw fluid milk to Alabama. Respondent concedes that Tro-Fe Dairy was engaged in commerce (Findings, p. 140).

Market Conditions

4. As previously stated, Tro-Fe distributed its milk products in the city of Gadsden and the adjacent territory in northeastern Alabama, within a radius of approximately 30 miles from Gadsden. Respondent's closest plant was at Huntsville, Alabama, approximately 75 miles northwest of Gadsden. The only area where the two companies were in competition was in the towns of Guntersville and

Scottsboro in northeastern Alabama (CX 42-Z 4). Including respondent, there were 14 companies competing with Tro-Fe in some or all of its territories. In addition to respondent, there were two other so-called national companies selling milk products in Tro-Fe's territory, viz, Foremost Dairies and National Dairy's Southern Dairies Division (CX 42-Z 5).

5. As in the case of a number of the other acquisitions, a sharp disagreement exists concerning the metes and bounds of the geographic market area in which to weigh the competitive impact of the Tro-Fe acquisition. However, in contrast to most of the other areas, it is complainant counsel which in this instance urges the widest possible geographic market area, while respondent proposes a narrower market. Complaint counsel contend that the area of effective competition is the entire State of Alabama, based on the fact that Alabama is a "totally controlled State" (Reply, p. 14). Respondent, on the other hand, contends that the State is divisible into four regional market areas, viz: (1) The Anniston-Gadsden market, which includes all of the area north of the Talladega National Forest in the northeastern part of the State; (2) the city of Birmingham and the entire northern and northwestern part of the State, including the Tri-City area (Florence, Sheffield and Tuscumbia), and Huntsville (but not the northeastern area which is part of the Anniston-Gadsden market); (3) the city of Montgomery and the rest of southeastern Alabama, including Opelika, Dothan and Andalusia; and (4) the western and southwestern part of the State, including the cities of Tuscaloosa and Mobile. Respondent concedes that the latter area "may be divided into two separate markets primarily centered around Mobile and Tuscaloosa" (Findings, p. 142). Respondent's position that each of these four or five areas is a separate market is based on the fact that there are no interarea shipments of processed milk between and among the areas, and that they are recognized by the State as separate markets.

6. The examiner does not concur in the basic position of either of the parties. The mere fact that Alabama is a "controlled State," *i.e.*, that milk plants processing in the State must obtain a license from the Alabama Milk Control Board in order to operate, and that the price of milk at the producer and resale levels is controlled by the Board (RX 157-A), does not necessarily require the conclusion that the entire State is a single area of effective competition. California is likewise a controlled State, yet complaint counsel there contended that the local markets were the areas of effective competition. Respondent's position is likewise untenable. The State recognizes the

four areas proposed by respondent as "distinct markets" only "in the sense that the dairies processing in any one of these markets do not distribute into any of the other markets" (RX 157-E). While, as in the case of the California markets proposed by respondent, this may establish the outer limits of broad regional economic areas, it does not preclude a further division of these areas, in terms of the areas in which different groups of companies actually compete. At best, the regional areas are the areas "in which the larger processors distribute their milk" (R. 2350), and it is by no means clear that even these companies distributed throughout the regional markets at the time of the Tro-Fe acquisition, or even today.

7. The examiner finds it unnecessary and inappropriate to make specific findings as to the precise boundaries of all of the geographic markets in Alabama since this proceeding only challenges certain specific acquisitions in the State, as to only three of which the basic jurisdictional facts have been established. Consideration will at this point be limited to defining the geographic area applicable to the Tro-Fe acquisition. Insofar as that acquisition is concerned, it should be noted that the area proposed by respondent comes closer to conforming to the actual area of effective competition than any of the other regional markets proposed by it. The principal communities in the area are: Anniston, Gadsden, Talladega and Sylacauga, with the former two communities accounting for the bulk of the population. Tro-Fe did business principally in Gadsden and Anniston. While it sold as far north as Guntersville and Scottsboro, these were fringe areas. There is no evidence that it sold as far south as Talladega and Sylacauga. There is no evidence that companies in the Talladega and Sylacauga areas sold in competition with Tro-Fe.¹⁰⁰ Based on the record as a whole, it is the conclusion and finding of the examiner that the area of effective competition, insofar as the acquisition of Tro-Fe Dairy is concerned, includes the communities of Gadsden and Anniston and the surrounding towns.

8. As a practical matter, it is of little consequence whether the area of effective competition be regarded as the immediate Gadsden-Anniston area or the entire northeastern region of Alabama since the record contains no evidence of market shares or concentration on either basis. The only statistical evidence introduced by complaint counsel pertains to the State as a whole. While respondent contended that northeastern Alabama was an appropriate market area, it introduced no statistical evidence with respect to such area. The statistical

¹⁰⁰ None of the companies doing business in Talladega and Sylacauga (CX 409, 412; RX 157-B), are listed among Tro-Fe's competitors (CX 42-Z 5).

evidence introduced by complaint counsel for the State of Alabama does not disclose Tro-Fe's pre-acquisition market share, but only respondent's share of fluid milk shipments in 1958, following the acquisition. Such evidence discloses that respondent accounted for 14.6% of fluid milk shipments in the State of Alabama in 1958 (CX 425-F). The only evidence in the record as to Tro-Fe's pre-acquisition market share is the testimony of an official of respondent, who expressed the opinion that Tro-Fe was "one of the largest operators" in its area, and estimated that its market share was "less than 25[%]" (R. 984). However, this testimony is too indefinite and speculative to base any definitive finding thereon as to Tro-Fe's market position in the Gadsden-Anniston area.¹⁰⁷ While, as previously mentioned, respondent and Tro-Fe competed on the fringes of each other's territory, there is no indication as to the extent of either company's sales in the overlap area, or even that such sales were substantial. Likewise, while the record indicates that respondent's milk sales in the over-all area served by its Huntsville plant were substantial, viz, \$2,712,301 (CX 42-Z 13), there is no evidence as to what its relative position was in the area from which it expanded into Gadsden.

Other Acquisitions

9. Respondent originally entered the State of Alabama in 1944 with its acquisition of Decatur Ice Cream & Creamery at Decatur, and Huntsville Ice Cream & Creamery at Huntsville, both in the northern Alabama area (CX 305, p. 1). As of 1951, respondent's only processing plant was located at Huntsville. Between 1951 and 1961 it acquired nine other dairy companies in Alabama, including Tro-Fe Dairy. Five of the acquisitions were in the north Alabama area; one (Tro-Fe) was in the northeast Alabama area; one was in the Tuscaloosa (west Alabama) area; and two were in the southeast Alabama area. The latter two companies will be hereinafter separately discussed since they are the only two companies (other than Tro-Fe), as to which complaint counsel claim to have established the

¹⁰⁷ Complaint counsel cite this witness' testimony as establishing that Tro-Fe had "somewhere around 25% of the sales in its area" (Findings, p. 508). The witness did not so testify. The best answer that he could give as to Tro-Fe's market share, in response to the prodding of complaint counsel, was that it was "difficult to answer" what Tro-Fe's market share was but that "I would say less than 25[%]". The witness' testimony is also ambiguous as to what area he was talking about, viz, whether he was referring to the immediate Gadsden area or the entire Gadsden-Anniston area. For example, while he opined that Tro-Fe was a larger operator in the Gadsden area, he stated that its competitor in the Anniston area, Turner Dairy, "is much larger than Tro-Fe" and that "in the Anniston area they [Turner] would have sold far more, and as a whole they would have sold more" (R. 985).

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necessary jurisdictional facts. Reference will be briefly made at this point to the six dairies which are not hereinafter considered in detail.

10. Of the five companies acquired in north Alabama, none were corporations, and most were very small companies. Dixie Dairy of Florence was acquired in April 1951 for \$20,000 (CX 52-G). Athens Creamery of Athens was acquired in January 1952, for approximately \$12,000 (CX 70-A). White Way Pure Milk Co. of Huntsville, a distributor for another dairy company, was acquired in December 1954 for approximately \$10,000, plus payment for its accounts receivable (CX 108-A-B). Klein Dairy of Cullman was acquired in May 1960 for approximately \$45,000 (CX 375-A-D). Klein was somewhat larger than the other four companies, but was in failing condition, and the acquisition was made with the qualified approval of the Commission (CX 375-P). Brakefield Dairy of Jasper was acquired in July 1960 for approximately \$10,000, following damage to its business by a fire for which it was not insured (CX 380-E). Complaint counsel concede that they have failed to establish the existence of interstate commerce with respect to any of the above acquisitions.

11. Respondent acquired the business and certain of the assets of Delview Dairy, Inc., an Alabama corporation, on March 1, 1961, for \$75,000 (CX 390-A). Respondent also leased Delview's real estate and certain of its machinery and equipment for a period of ten years at a total rental of \$962,000 (CX 390-P, Z 2). Delview processed and distributed milk, cream, cottage cheese and ice cream in Tuscaloosa and certain surrounding counties in western Alabama (CX 390-Z 12). Its net sales in 1960 were \$1,960,990, and its net income after taxes was \$32,081 (CX 390-Z 14, 17). There is no indication in the record as to Delview's relative position in the area in which it operated. Respondent did not sell any dairy products in Delview's territory prior to the acquisition (CX 390-Z 13). Complaint counsel concede that they have failed to establish Delview's engagement in commerce (Findings, p. 514).

12. Since 1929 the so-called national companies have acquired 23 companies distributing milk and/or ice cream in the State of Alabama. Of these, 13 were acquired since 1950 (CX 426). During the period from 1951 to 1961, the number of milk processing plants in Alabama declined from 192 to 68 (CX 409, 412). All but two of the plants which ceased operating had a volume under 800 gallons or were in the "no volume listed" category. (See, p. 496, *supra.*) The number of independent companies processing a minimum of 1,600 gallons of fluid milk daily remained constant between 1953 and 1961,

viz, six (RX 161-F). The number of ice cream plants in the State declined from 54 to 37 between 1951 and 1961 (CX 409, 412). All of the plants which ceased operating had a volume under 250,000 gallons annually or were in the "no volume reported" category. (See p. 499, *supra*.) The number of independent companies manufacturing a minimum of 250,000 gallons annually has declined from 11 to 7 between 1951 and 1961 (RX 161-A).

State "Market" Shares

13. In 1958 four national companies accounted for 33.4% of the value of shipments of fluid milk in Alabama (CX 425-F). Respondent had the largest share among these companies, with 14.6%. This was prior to its acquisition of Dairyland Farms (which will be hereinafter separately discussed) and Delview Dairy, both of which were acquired in 1961. The other three national companies, viz, Foremost, National and Pet accounted for 10.5%, 5.8% and 2.5%, respectively, of the value of shipments of fluid milk. In 1958 four national companies, viz, Foremost, Borden, National and Swift, accounted for 48.4% of the value of shipments of frozen desserts in Alabama (CX 425-D). Respondent's shipments are not included in these figures since the frozen desserts which it sold in Alabama were then being produced at its plant in Nashville, Tennessee. Not until 1959, with its acquisition of Dothan Ice Cream Co. (which will be hereinafter separately discussed), did respondent begin producing ice cream in Alabama.

H. Dothan Ice Cream Company

1. Respondent acquired the assets of Dothan Ice Cream Company on December 31, 1959, pursuant to an agreement dated December 18, 1959 (CX 371-A-W). The agreement was entered into with members of the Parkman family, as partners in Parkman Investment Company (which had formerly been named Dothan Ice Cream Company, also a partnership). The partnership owned all of the capital stock of the following Florida corporations: Dothan Ice Cream Company, Inc.; Supreme Ice Cream Company of Dothan, Inc.; Supreme Ice Cream Company of Montgomery, Inc.; Supreme Ice Cream Company of Panama City, Inc.; Supreme Ice Cream Company of Pensacola, Inc.; Frostie-Boy Vending Company; and Melody Frozen Foods Company. The partnership owned and leased to the above corporations the real estate and equipment used by such corporations in the operation of their respective businesses. The corporation, Dothan Ice Cream Company, Inc., was engaged in the manufacturing

of ice cream and ice cream products in Dothan, Alabama. The other corporations were in the business of distributing the products of Dothan Ice Cream Company, Inc., in their respective areas. Under the agreement, the partners agreed to liquidate the corporations on or before December 26, 1959, and to sell certain of the assets of the partnership and the liquidated corporations to respondent for a consideration in excess of \$1,000,000 (CX 371-B, M). The agreement also provided for the leasing to respondent of the Dothan manufacturing plant and certain real estate in Florida at a total rental of \$217,500 (CX 371-Z 22, 40).

2. The parties are in disagreement as to what it is that respondent acquired. Respondent contends that it acquired a partnership and not any corporations, since the latter had already been dissolved when the transfer of assets actually took place. While not entirely clear from its argument, it is apparently respondent's position that since it acquired the assets of a partnership, rather than those of a corporation, the acquisition does not fall within the purview of Section 7 of the Clayton Act. Complaint counsel contend that the partnership "was formed during the negotiations for sale [and that it] is a clear subterfuge to circumvent the law" (Findings, p. 509). The record does not sustain the position of complaint counsel that the partnership was formed during the negotiations. The partnership existed as far back as the "early 50's," the distributing corporations having been formed in 1957 (R. 3641-42). The manufacturing corporation, however, apparently existed prior to 1957 and actually manufactured the ice cream which the distributing corporations distributed, while the partnership merely owned the real estate used by them (R. 3643). In any event, irrespective of when the partnership was formed, and despite the form of the transaction (in which the transfer of assets was technically made to respondent by the partnership), it is clear that in essence respondent acquired the business and assets of the corporations which were engaged in manufacturing and/or distributing ice cream products. These corporations were still operating when respondent entered into the agreement with the partnership, and the agreement specifically provided for the liquidation of the corporations and the ultimate purchase of their assets by respondent. The consideration paid by respondent was computed in contemplation of its acquiring the business and assets of the corporations.

3. In the year ending December 31, 1959, the net sales of Dothan Ice Cream Co., Inc., amounted to \$1,557,817. The net sales of the four Supreme Ice Cream Company distributing corporations, viz, Supreme

of Dothan, Panama City, Montgomery, and Pensacola, were approximately \$500,000 each. The sales of Melody Frozen Foods and Frostie-Boy Vending were approximately \$1300 and \$3500, respectively. The net income (by way of rents) of the partnership was \$148,000. The consolidated sales and income of the partnership and corporations was \$2,150,953 (CX 371-Z 70). The net profit of all the companies after taxes was \$69,275. The ice cream sales of the companies amounted to approximately 1,100,000 gallons annually (CX 371-Z 73).

4. Dothan Ice Cream Company, Inc., and its affiliated distributing companies sold ice cream in certain portions of the States of Alabama, Florida and Georgia. There is no indication in the record as to where the manufacturing corporation purchased its supply of raw milk and cream. However, respondent concedes that Dothan was engaged in interstate commerce by virtue of its sales of ice cream products (CX 371-Z 73; Findings, p. 106).

Market Conditions

5. Dothan Ice Cream Company, Inc., and its affiliated companies, distributed ice cream at wholesale in 17 counties in southeastern Alabama, in 9 counties in southwestern Georgia, and in 15 counties in northwestern Florida (CX 371-Z 64). Respondent did not sell ice cream or frozen dessert products in any portion of Dothan's distribution area (CX 371-Z 65). Its closest plant was at Nashville, Tennessee, and its distribution area in Alabama included the northern part of the State as far south as the Gadsden area. There were at least 19 companies distributing ice cream products, at wholesale, in various portions of the area served by Dothan and its affiliates (CX 371-Z 65). This included four so-called national companies, viz, National's Southern Dairies Division, Borden's Purity Ice Cream Division, Foremost Dairies, and Swift.

6. Complaint counsel contend that the area of effective competition relevant to the Dothan acquisitions is the entire area of distribution of the manufacturing company and its affiliates in the above-mentioned portions of Alabama, Georgia and Florida (Reply, p. 14). The only apparent explanation of why this is an appropriate market area is the fact that it is the area in which the acquired companies distributed. Respondent contends that the relevant market area is an area which it designates as "Market Area V" and which includes all of Alabama and Mississippi, and portions of Kentucky, Tennessee, Georgia and Florida (RX 82-E; Findings, pp. 103, 106). Respond-

ent's position that this is an appropriate market area is based on the fact that "ice cream manufacturers distributing within that market area [are] independent of and unaffected by ice cream manufacturers located outside of that market" (Findings, p. 103).

7. While it may be, as respondent contends, that manufacturers outside of the area do not sell within it and that manufacturers within the area do not sell outside of it, this does not necessarily require the conclusion that the entire Six-State area is an appropriate market area. These facts merely delineate the outer limits of a broad regional area in which there is no possibility of competition between companies within and without the area. This does not, however, preclude a division of the area into smaller geographic units, based on separate groupings of companies which are engaged in substantial competition with one another and which do not substantially compete with other groupings of companies within the broad area. Respondent's graphic delineation of Area V (RX 81) discloses that there are separate groups of companies which distribute from different focal points within the area, that some companies distribute in only parts of the area and that none of the companies distribute throughout the area from any single distribution point. These facts are confirmed by the testimony of respondent's own witnesses.¹⁰⁸ Within the State of Alabama itself there are at least two different pricing patterns (R. 3627), which suggest that not even that State is a single market. The area proposed by complaint counsel, even though smaller than that proposed by respondent, likewise does not properly delineate the relevant market area. The fact that Dothan operated through different distributing companies and from separate distributing points within the area suggests that the entire area was not one homogeneous market area. A number of the companies with which Dothan competed sold in only portions of Dothan's overall territory.¹⁰⁹ In the absence of more definitive evidence concerning the distribution patterns of Dothan and its competitors, and as to the relative position of these companies within the area or areas within which they distributed, no finding can be made as to what comprises the relevant market or mar-

¹⁰⁸ Prior to its acquisition of Dothan, respondent distributed in only the northern part of Area V (R. 3629). The Dothan companies distributed only in the southern part of the territory. Even the large companies which distributed in most of the area did so from separate plants within the area (R. 3616-18).

¹⁰⁹ Of the companies listed as among Dothan's competitors (CX 371-Z 65), the testimony indicates that Kinnett Dairies, Wells Dairies and Brown Velvet sold in only portions of Dothan's territory (R. 3621, 3623). From the locations of their plants within the area, it seems likely that a number of the other independent ice cream companies sold in only portions of the territory.

kets applicable to the Dothan acquisition. It is clear, however, that neither Area V, as proposed by respondent, nor the entire distribution area of the Dothan companies, as proposed by complaint counsel, are appropriate market areas.

8. Complaint counsel offered no statistical evidence as to Dothan's market position within its distribution area (the market proposed by them) or in any portion thereof. The statistical evidence in the record relates mainly to Area V. Such evidence, which was offered by respondent, discloses that in 1950 (prior to its acquisition of Dothan) respondent accounted for 2.790% of the ice cream produced in Area V. In 1960 (after its acquisition of Dothan) respondent's production share in Area V was 5.794%. Of this share, 1.247% represented the production of the Dothan plant (RX 139-E). Contending that respondent's production share in Area V should be computed in terms of the portion of the area actually served by it, complaint counsel offered rebuttal evidence indicating that respondent's 1960 share of production in the portion of Area V served by it was 10.3%, as compared to 5.79% in the entire area (CX 432-D). While questioning the reliability of the statistical evidence introduced by complaint counsel, respondent offered surrebuttal evidence in terms of the portion of Area V served by the acquired company, rather than in terms of the area which it and the acquired company served.¹¹⁰ Such evidence discloses that respondent's 1960 share of production in Dothan's serving area was 4.72% (RX 165-C).

9. Since respondent's production share in Dothan's territory in the year following the acquisition was approximately 4.7% (a figure which complaint counsel accept as reasonably accurate), it seems apparent that Dothan's pre-acquisition market share in this territory could not have exceeded 5% of the area and was probably less.¹¹¹ It may be that in certain portions of its territory in southeastern Alabama, which may constitute a more appropriate market area than its entire

¹¹⁰ Unlike the statistical evidence introduced by respondent for Area V, in which the universe figure of production in the area is obtained from official U.S. Department of Agriculture sources, the universe figure used by complaint counsel is an estimated figure. Such estimated figure is computed on the assumption that the production in the area served by respondent bears the same ratio to the total production of the area as the population in such area bears to the population of the entire area. While questioning the correctness of such assumption, respondent's statistical evidence offered in surrebuttal is based on the same method, except that the percentage used is based on the population of the area served by Dothan rather than that of the entire area served by respondent.

¹¹¹ Respondent's 1960 production share of 4.7% is based on the production of 1,392,546 gallons in the Dothan plant. The evidence as to Dothan's pre-acquisition production in this plant is that it was of the order of magnitude of 1,100,000 gallons per year (CX 371-Z 73).

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serving area, Dothan's market share exceeded 5%. However, in the absence of evidence as to the proportion of Dothan's business done in the various portions of its territory and the total sales in the area, one can only speculate as to whether this would be so. The record is also lacking in evidence as to the extent of concentration in Dothan's serving area as a whole or at any particular portion thereof.

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

The Acquisition

1. Respondent acquired the business and certain of the assets of Dairyland Farms, Inc., an Alabama corporation, on March 1, 1961, pursuant to agreements dated January 10, 1961 (CX 391-A-Z 42). Included in the transaction were 680 shares of stock of Valdair Creamery, Inc., also an Alabama corporation (CX 391-K). The total consideration paid by respondent was \$581,211, plus a rental of \$990,000 for the leasing of certain real estate and equipment owned by Dairyland, for terms of 10 and 15 years (CX 391-R, Z 13, Z 29, Z 36). By a separate agreement of the same date respondent also acquired the business and assets of Valdair Creamery (CX 391-Z 54). Valdair had 2,000 shares of stock, of which 680 were owned by Dairyland, 120 were owned by three of Dairyland's stockholders, and 200 were owned by a member of the family which controlled Dairyland (CX 391-Z 63). The total consideration paid for Valdair's business and assets was \$425,000 (CX 391-Z 56).

2. Dairyland owned and operated a plant in Opelika, Alabama, in which it processed a general line of fluid milk products and manufactured ice cream. Valdair owned and operated a plant at Shawmut, Alabama, in which it processed fluid milk only. The fluid milk line of products was sold at both wholesale and retail home delivery, and the ice cream products were sold at wholesale only (CX 391-Z 87). Dairyland's net sales in 1958 and 1959 were in excess of \$2,350,000 and \$2,500,000, respectively. Its net profits before taxes were \$79,813 in 1958 and \$120,971 in 1959 (CX 391-Z). Its net sales for the first six months of 1960 were \$1,327,493, of which \$992,218 consisted of milk sales and \$335,274 consisted of ice cream sales (CX 391-Z 51). Its net profit before taxes for the six-month period was \$97,600. Valdair's net sales in 1958 and 1959 were in excess of \$800,000 and \$900,000, respectively (CX 391-Z 66). Its net income from sales in the year ending October 31, 1960, was \$1,050,443, with a net profit before taxes of \$68,729 (CX 391-Z 91).

3. The record does not indicate where Dairyland and Valdair obtained their supply of raw milk or other ingredients. However, both companies distributed fluid milk products and ice cream in at least three communities in western Georgia, as well as in a number of towns in eastern Alabama (CX 391-Z 89). Respondent concedes that they were engaged in interstate commerce (Findings, p. 144).

Market Conditions

4. As mentioned above, both companies distributed fluid milk products and ice cream in a number of communities in eastern Alabama and western Georgia. The Alabama communities included Opelika, Shawmut, Auburn, Alexander City, Tuskegee, Montgomery, Wetumpka and Phenix City. The Georgia communities consisted of West Point, La Grange and Hogansville (CX 391-Z 89). They did not distribute as far south as Dothan. Respondent did not distribute any fluid milk products in the territory of the acquired companies. However, it did sell ice cream, from its plant at Dothan (which it had acquired from Dothan Ice Cream Company in 1959), in several of the Alabama counties in which Dairyland distributed, viz, Elmore and Montgomery. There were at least 14 other dairy companies distributing dairy products in the territory served by Dairyland and Valdair, of which seven distributed milk or milk and ice cream, and six distributed ice cream only. These included three so-called national companies, viz, Foremost, National (Southern Dairies Division) and Borden (Purity Division). The first two companies mentioned distributed both milk and ice cream, while Borden distributed ice cream only (CX 391-Z 90).

5. The respective positions of the parties with respect to what constitutes the area of effective competition relevant to the Dairyland-Valdair acquisition are essentially the same as those heretofore discussed in connection with the Tro-Fe Dairy acquisition (p. 589, *supra*). Complaint counsel contend that the entire State of Alabama is the appropriate market area (Reply, p. 14), while respondent contends that the State is divisible into four market areas, with Dairyland falling into the "southeast market which includes the cities of Montgomery, Opelika, Dothan-Andalusia" (Findings, p. 142). As has been heretofore indicated in connection with the Tro-Fe acquisition, the record does not establish that the entire State is a single area of effective competition. Nor does the record establish that the entire southeastern regional area is the relevant market area. Dairyland did business in only the northern portion of this territory, viz, in the

Opelika-Montgomery area. It did not operate in the southern half of the territory, viz, the Dothan-Andalusia area. Conversely, respondent's principal area of distribution was in the southern part of the territory around Dothan. It distributed no fluid milk products whatsoever in Dairyland's territory, and only "a relatively small amount of ice cream gallonage in the metropolitan area of Montgomery" where Dairyland also sold ice cream (CX 391-Z 90).¹¹² Such evidence as there is, suggests that in the fluid milk product line the southeastern Alabama area was divisible into at least two market areas at the time of the Dairyland acquisition, with the northern market including certain counties in western Georgia. The evidence also suggests the existence of a somewhat broader market in the ice cream product line. However, in the absence of more definitive evidence concerning the distribution patterns and sales volumes of the companies distributing in the area, no finding can be made concerning the relevant market or markets applicable to the Dairyland-Valdair acquisition.

6. As a practical matter, it is of little consequence whether the relevant market be considered to be all of southeastern Alabama, or a portion thereof, or a portion of southeastern Alabama and western Georgia, since there is no statistical evidence in the record on any basis from which Dairyland's market position and the extent of concentration in the area can be ascertained. As in the case of the Tro-Fe acquisition, the only statistical evidence in the record is that pertaining to the shipments of fluid milk by respondent and certain national companies in the State as a whole. Such evidence has heretofore been discussed and need not be repeated.

J. Louis Sherry, Inc.

The Acquisition

1. Respondent acquired the ice cream business and certain of the assets of Louis Sherry, Inc., a New York corporation, on March 1, 1955. The acquisition was made pursuant to an agreement entered into December 20, 1954, under which respondent acquired all of Sherry's assets and property used in the manufacture and distribution of ice cream and frozen desserts, except for its real property and cer-

¹¹² Complaint counsel contend that respondent "sold 1,353,833 gallons of frozen products produced at Dothan, in the seller's [Dairyland's] trade area" (Findings, p. 513). This contention is not supported by the record. The figure cited is that of respondent's sales in the entire territory served by its Dothan plant, consisting of 17 counties in southeastern Alabama, 9 counties in western Georgia and 15 counties in northwestern Florida. This area includes only 2 counties in Alabama where Dairyland sold frozen products (CX 391-Z 89, 92).

tain equipment consisting of ice cream cabinets and trucks (CX 25 A-Z 7). The agreement provided that the ice cream cabinets owned by Sherry would be sold to Anchor Equipment Rental Co., an Illinois corporation, and that its trucks would be sold to Transportation Service & Survey Corp., a New York corporation. The consideration paid by respondent for the assets which it acquired was \$440,379. The consideration paid by Anchor Equipment and by Transportation Service for the assets acquired by them was \$370,000 and \$75,000, respectively (CX 25-Q). Respondent guaranteed that in the event either Anchor or Transportation failed to make payment, it would do so. Respondent subsequently leased from these two companies the equipment acquired by them (R. 691). Simultaneously with the agreement between respondent and Sherry, respondent entered into another agreement with Childs Company, a New York corporation, of which Sherry was a wholly owned subsidiary. The agreement provided that Childs would purchase from respondent all of the requirements of ice cream for the chain of retail restaurants operated by it in the New York metropolitan area and in Pittsburgh, the duration of such commitment being for three years or until Childs had purchased a total of 300,000 gallons (CX 25-Z 45).

2. Sherry's net sales of ice cream and frozen desserts amounted to \$3,242,186 in the year ending December 31, 1953, and \$2,111,577 in the nine-month period ending September 30, 1954. It sustained a net loss on its operations, amounting to \$189,579 in 1953 and \$72,834 in the first nine months of 1954 (CX 25-Z 37). Sherry had current assets, as of September 30, 1954, amounting to \$538,885, and current liabilities of \$398,773 (CX 25-Z 33, 34). Sherry's gallonage sales of ice cream amounted to 900,000 gallons in 1953 and 700,000 gallons in the first ten months of 1954 (CX 25-Z 1). Respondent concedes that Sherry "was a viable independent company" (Findings, p. 105).

3. Sherry's plant was located in Long Island City, New York. It sold ice cream and other frozen desserts in the New York metropolitan area, including certain counties in northern New Jersey and southern Connecticut (CX 25-Z 41; R. 700-702). Respondent concedes that Sherry was "a corporation engaged in commerce" (Findings, p. 105). Respondent leased Sherry's plant for about a year and then consolidated its production with respondent's own plant in Brooklyn (R. 3580).

Market Conditions

4. As mentioned above, Sherry distributed ice cream and frozen desserts in the New York metropolitan area. Respondent sold frozen

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products in substantially the same area as that served by Sherry, except that respondent's territory covered certain additional counties in New Jersey which were not served by Sherry (CX 25-Z 56). While serving the same general area, respondent and Sherry sold different types of ice cream and catered to different types of customers. Sherry's ice cream was sold principally in bulk form under the "Louis Sherry" brand name. Its product was a "high grade catering type of ice cream that was expensively processed," and was typically sold to quality restaurants, drug stores, hotels and other so-called "prestige outlets" (R. 693, 3578; CX 25-K). It did not sell a "popular-price" package ice cream through supermarkets and similar outlets, as did respondent (R. 695). There were approximately 20 companies distributing ice cream in New York City, and approximately 100 in the overall area served by Sherry. A number of these were small companies or distributors for other manufacturers. Among the larger companies operating in the area were Borden and National Dairy (CX 16-Z 252, pp. 113-115; CX 25-Z 42; R. 3685-3690).

5. Complaint counsel contend that the market area relevant to the Louis Sherry acquisition is "the metropolitan New York City area" (Reply, p. 14). It is respondent's position that the appropriate market area consists of the "middle Atlantic States from Metropolitan New York to Norfolk," an area which respondent designates as "Market Areas III and IV," with Area III being the northern part of this coastal region and Area IV the southern part (Findings, p. 104). Respondent contends that the two areas may be considered as one area of effective competition because companies in the Philadelphia, southern New Jersey and Delaware area sell in both areas. However, respondent also recognizes that each area may be regarded as a separate market area. The basis of respondent's position that Areas III and IV, separately or together, are the appropriate market areas in which to consider the impact of the Louis Sherry acquisition is the fact that companies within these areas do not compete with companies doing business to the north, south and west of these areas.

6. Neither respondent's graphic delineation of the areas (CX 75, 80), nor the testimony of its witnesses, supports its position that Areas III or IV, separately or together, constitute appropriate market areas. Even the larger national companies within the area have separate plants and distribution points in the New York City metropolitan area and in the Philadelphia area, to say nothing of additional plants and distributing points further south in the Washington, D.C.-Baltimore area, and in the Richmond and Norfolk areas.

The independent companies serve only portions of Areas III and IV and, to the extent that they serve wider sections of such areas, they do so from separate plants or through independent distributors (RX 75, 80; R. 3572-76, 3528-32). It is the conclusion and finding of the examiner that the New York City metropolitan area is the appropriate market in which to weigh the probable competitive impact of the Louis Sherry acquisition. This is the area in which the acquired and acquiring companies competed and within which most of their important competitors distributed.

7. There is no statistical evidence in the record as to market shares in the New York metropolitan area, as such. However, the record does contain market share data for the somewhat smaller New York City area. Such data is for the year 1952, more than two years prior to the Sherry acquisition, but provides a basis for obtaining some approximation of the market position of respondent, Sherry and the other principal companies, within the New York City area. In 1952 respondent and Sherry accounted for approximately 4.7% and 3.4%, respectively, of the ice cream sold in the New York City area. The two largest factors in the New York City market were Borden and National Dairy with approximately 29.6% and 24.5%, respectively, of the area's ice cream sales. Respondent was the third ranking ice cream company in the market, and Sherry was tied for sixth place with Abbott Dairies, which was later acquired by Fairmont Foods.¹¹³

8. The record does not contain any evidence as to trends in market position in the New York City area since the acquisition of Louis Sherry by respondent. However, there is evidence of trend in terms of the larger market area designated as Market Area III by respondent, which extends from New York to the Philadelphia area. Such evidence reveals that in 1950, prior to the Sherry acquisition, respondent accounted for 1.44% of the ice cream sales in Area III and that in 1960, after the acquisition, respondent's share had increased to 3.50% (RX 139-C). The sales of the acquired company accounted

¹¹³ The above figures and references to market position, are based on CX 16-Z 252, pp. 112-115. As heretofore indicated (p. 31, footnote 20), this exhibit was prepared by respondent in connection with seeking approval of the Creameries acquisition. The figures of respondent's sales are based on its actual sales figures. However, the figures of all other companies are apparently based on estimates made by officials of respondent. While these figures do not purport to be precise, they are accepted, in the absence of countervailing evidence, as giving a reasonable approximation of the market position of these companies.

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for approximately .99% of the ice cream sold in Area III.¹¹⁴ From these figures it is apparent that while respondent's market share in Area III increased by approximately 2% between 1950 and 1960, approximately half of such increase represents the volume which it acquired from Sherry.

9. Since 1929 the so-called national companies have acquired approximately 30 companies selling milk and/or ice cream in the New York City area, including Long Island (CX 426-V, W). Of these, only three or four have been acquired since 1950 (CX 426-W, RX 161-J). The record does not contain data as to the decline, if any, in the number of plants manufacturing ice cream or processing milk in the New York City area. However, it does appear that in the area of New York State which includes New York City and seven counties immediately to the north, the number of independent companies producing a minimum of 250,000 gallons of ice cream a year has declined from 17 to 12 between 1951 and 1961 (RX 161-A, RX 82-C).

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

The Acquisition

1. On June 1, 1960, respondent acquired the business and assets of the Melvern-Fussell Division of Arden Farms Co., a Delaware corporation. Arden Farms was a so-called national dairy company, having its headquarters in Los Angeles, California. The Melvern-Fussell Division had its headquarters in Alexandria, Virginia. Respondent acquired the Melvern-Fussell Division's wholesale ice cream and frozen dessert business, including its equipment, plant and real estate at Alexandria, Virginia, pursuant to an agreement dated May 19, 1960 (CX 376 A-F). The record does not disclose the total consideration paid for the business and assets of Melvern-Fussell, except that it was in excess of \$1,000,000. It included payment for (a) accounts receivable less a reserve for doubtful accounts (the amount thereof being \$192,816 as of May 31, 1960), (b) prepaid items such as taxes and insurance premiums (amounting to approximately \$27,000), (c) real estate and equipment (valued at approximately \$831,000), and (d) inventory at Melvern's cost (CX 376 A-C, G-H). The acquisition included Arden's trade names in the Alexandria area, including "Melvern," "Fussell" and "Supreme," but excluding the name and mark "Arden" (CX 376-A).

¹¹⁴The record does not contain Sherry's 1950 gallonage sales. The above percentage is computed by comparing Sherry's 1953 volume of approximately 900,000 gallons with the total gallonage of Area III, based on U.S.D.A. figures for 1950.

2. The Melvern-Fussell Division manufactured and distributed a full line of ice cream and other frozen products, including ice milk, ice dessert and sherbet. In the calendar year 1959 it sold 1,580,200 gallons of frozen products. Its net dollar sales in that year amounted to \$2,382,833, on which it sustained a loss of \$64,922 (CX 376-L). It likewise sustained losses in the two previous years, 1957 and 1958, amounting to \$104,760 and \$81,096, respectively. In the first five months of 1960, preceding its acquisition by respondent, the Division lost \$66,971 on net sales amounting to \$870,577. The Division had operated at a loss each year that it was in business (CX 376-N).

3. Arden entered the Washington, D.C. metropolitan area in December 1951, when it acquired Fussell-Young Ice Cream Co. (CX 335-A).¹¹⁵ Shortly thereafter, in March 1952, Arden opened a new plant in Alexandria, Virginia, which it built at a cost of approximately \$1,000,000. The plant was designed to manufacture a product known as "Diced Cream" (ice cream packaged in small, individual portions), which Arden had marketed successfully in its principal operation on the West Coast (R. 3544, 3556). However, it was unable to generate enough volume with the sale of diced cream alone to justify its heavy plant expenditure, and decided to expand its operation to a full line of ice cream products. Consequently, it undertook plant modification around 1954, at an additional cost of \$250,000 (R. 3557-8, 3560-1). The plant, nevertheless, continued to operate at a loss, and beginning around 1956 Arden approached a number of dairy companies with a view to disposing of the plant so it could retire from the area (R. 3559). These efforts finally culminated in the sale to respondent in May 1960.

4. Respondent's interest in buying Arden's Alexandria plant and business arose from the fact that it was having difficulty in complying with the health laws at its own plant in Washington, D.C. The plant had been operated for over 30 years in an old building, which had been originally built as a brewery in the late nineteenth century. Complaints had been received from the District of Columbia Health Department, and the plant had been de-certified as a supplier of frozen products to the United States Armed Forces. Because of its age and type of construction, it was not considered practicable to remodel the plant, and respondent decided to close it in the spring of

¹¹⁵ Fussell-Young's address erroneously appears in the exhibit as "Georgetown, Maryland." The company was actually located in the Georgetown section of the District of Columbia (CX 409).

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1960 (R. 3536, 3302-3).¹¹⁶ It was at this point that the decision to purchase the Arden plant was made. After the purchase of the plant in Alexandria respondent sold its Washington, D.C. plant and moved its entire operation in the area over to the Alexandria plant. Prior to its acquisition of the Arden plant, respondent had been losing money in its Washington, D.C. operation. Thus, in the fiscal years ending February 28, 1958, 1959 and 1960, it had lost approximately \$7,000, \$49,000 and \$9,000, respectively, on sales of around \$2,000,000 (CX 393-395).

Market Conditions

5. Arden's Melvern-Fussell Division distributed ice cream and frozen dessert products in the District of Columbia and certain portions of Virginia, West Virginia, Maryland and Pennsylvania (CX 376-I). In Virginia it sold in 23 counties, which were mainly within an area of approximately 75 miles from Washington, D.C., but also included several counties in the Norfolk and Richmond areas. In Maryland, it distributed in a four-county area, located within approximately 65 miles of Washington, D.C. In West Virginia, it distributed in two counties located in the eastern part of the State, approximately 65 miles from Washington, D.C. In Pennsylvania, it supplied the stores of a single customer located in several communities in the southern part of the State just north of the Maryland line. Respondent's area of distribution from its Washington, D.C. plant included most of the areas served by Melvern-Fussell, except for southern Pennsylvania, and also included several counties in Delaware not served by Melvern-Fussell (CX 376-P). There were approximately 40 other companies distributing ice cream and frozen products in some or all of the areas in which respondent and Melvern-Fussell sold (CX 376-J). Included among the competitors were six other so-called national companies, viz, National Dairy, Borden, Pet, Foremost, Fairmont and Swift. However, there were only about 10 companies selling ice cream at wholesale in the immediate Washington, D.C. area. As of 1958, National Dairy and Borden were the only other so-called national companies distributing in the Washington, D.C. area.

6. Complaint counsel contend that the market area relevant to the Melvern-Fussell acquisition is the "metropolitan Washington, D.C.

¹¹⁶ Respondent also had a plant in Baltimore. However, it was engaged principally in the manufacture of ice cream novelties, and because of the location of the plant it was not considered feasible to transfer the manufacture of ice cream from Washington, D.C., to Baltimore (R. 3543, 3304).

area" (Reply, p. 15). Respondent contends that the proper market in which to measure the significance of the acquisition is an area which it describes as "Market Area IV," or a combination of this area and "Market Area III" (Findings, p. 104), which has been previously discussed in connection with the Louis Sherry acquisition (p. 602, *supra*). Market Area III extends from New York City south to the District of Columbia and Area IV extends from Philadelphia to Norfolk, with the area between Washington, D.C. and Philadelphia being included in both areas (RX 75; RX 80). It is the conclusion and finding of the examiner that the metropolitan area of Washington, D.C. is the appropriate area of effective competition. Companies selling north of this area, *e.g.*, in the Philadelphia area, generally do so from separate plants or branches than those from which they distribute in the Washington area. Those selling south of the area generally do so from plants and branches which do not distribute in the Washington, D.C. area. Many of the companies selling in Areas III or IV distribute in only portions of these areas and, in particular, do not sell in the Washington, D.C. metropolitan area, which was the heart of the territory served by Melvern-Fussell's and respondent's Washington-area plants.

7. The only market share data in the record for the Washington, D.C. area are for the year 1952, about eight years prior to the Melvern-Fussell acquisition. It is not clear whether such data include sales for the entire Washington metropolitan area or for only the District of Columbia and its immediate environs. However, it does provide some basis for obtaining an approximation of the market position of the various companies as of 1952. In that year respondent accounted for 22.9% of frozen product sales in Washington, D.C., and Arden (then selling as Fussell-Young) accounted for 5.3% (CX 16-Z 252, pp. 118-120).¹¹⁷ Another company, Melvern Dairies, which Arden later acquired in July 1953 (CX 335-A), accounted for 13.4% of Washington area frozen product sales. The company with the largest share of the Washington, D.C. market in 1952 was National Dairy, whose Southern Dairies and Breyer Divisions together accounted for 43.8% of frozen product sales in Washington, D.C.

8. While the above figures indicate that respondent and the two companies which became Arden's Melvern-Fussell Division, together, accounted for approximately 40% of Washington area sales in 1952, it is by no means clear that they were able to maintain this position up

¹¹⁷ As heretofore indicated (footnote 20), the figures in CX 16-Z 252 of the companies other than respondent are based on estimates of sales.

to the time that the acquisition by respondent took place, approximately eight years later. Thus, the record indicates that the ice cream sales of respondent's Washington plant declined from 1,278,974 gallons in 1952 to 1,143,422 gallons in 1959 (CX 288, 394). Similarly, the record discloses that whereas respondent's share of the production of frozen desserts in Washington, D.C. was 18.0% in 1952 and increased to 24.5% in 1954, by 1957 it had declined to 16.9% (CX 456-H). In 1958 respondent accounted for only 11.1% of the value of shipments of frozen desserts in the District of Columbia (CX 425-D). These figures suggest that respondent had sustained a substantial decline in its relative market position in the Washington area between 1952 and 1958, just prior to the Melvern-Fussell acquisition. As above mentioned, there is no indication in the record as to whether Arden was able to maintain Fussell-Young's and Melvern Dairies' market position in the Washington area.

9. In terms of the market which respondent contends is the most appropriate area of effective competition, viz, Market Area IV (the area between Philadelphia and Norfolk), the record discloses that in 1950 respondent accounted for 3.18% of the ice cream production in the area, and that in 1960 its share had increased to 4.38% (RX 139-D). Melvern-Fussell's share of 1960 production in Area IV was 1.77%.¹¹⁸ From these figures it is apparent that, but for its acquisition of Melvern-Fussell, respondent's relative position in Area IV would have declined between 1950 and 1960, since its increase of 1.20% during this period was less than the share it acquired from Melvern-Fussell.

10. The record discloses that there were approximately six acquisitions of companies distributing milk or ice cream in the Washington area since 1929, by the so-called national companies (CX 426-C; CX 335-A). Of these, three were acquired since 1950. The three companies essentially involve two companies which were in existence prior to 1950, viz, Melvern Dairies and Fussell-Young which were acquired by Arden Farms, and the combined operation which respondent acquired from Arden in 1960.

L. Durham Dairy Products, Inc.

The Acquisition

1. Respondent acquired all of the issued and outstanding capital stock of Durham Dairy Products, Incorporated, a North Carolina

¹¹⁸ Melvern-Fussell's share is computed by comparing its 1959 volume (the latest figure available) with the official figures of the U.S.D.A. for 1960. This is the method used by respondent (Findings, p. 107).

corporation, on March 1, 1953, pursuant to an agreement dated February 27, 1953 (CX 14 A-D). The consideration paid for Durham's stock was 8,646 shares of respondent's common stock, which were capitalized at \$309,805 (CX 144, p. 1). Durham's total assets as of August 31, 1952, were \$455,624, and its total liabilities were \$179,239 (CX 14-E). Its net worth as of the time of the acquisition was certified to be not less than \$276,385 (CX 14-B).

2. Durham Dairy's plant was located at Durham, North Carolina, where it processed and distributed a full line of fluid milk and related products, at wholesale and retail, and also manufactured and distributed ice cream at wholesale. It operated 18 retail milk routes, 6 wholesale milk routes and 3 ice cream routes. It also operated 3 retail dairy stores, which were located in Durham, Chapel Hill and Roxboro (CX 144, p. 10). Durham Dairy's total net sales for the fiscal year ending August 31, 1952, were \$1,544,789, of which \$1,180,968 represented sales of fluid milk products and \$363,821 consisted of sales of ice cream (CX 14-F).

3. Durham Dairy received its supply of raw milk from producers located within a radius of 75 miles of its plant at Durham (CX 14-H), which was located approximately 50 miles from the Virginia State line. Some of Durham's raw milk supply was received from producers in Virginia (R. 677). Durham also purchased dairy products from suppliers in Staunton, Virginia, and Louisville, Kentucky (CX 133-A). Durham's sales were made principally in the State of North Carolina (CX 14-H). However, its sales territory also included one town in southern Virginia (CX 14-Q; R. 680).

Market Conditions

4. Durham Dairy's sales were made principally within a five-county area in north central North Carolina centered around Durham. Its territory included the city and county of Durham; Orange County which is located to the west of Durham and in which the principal towns served were Hillsboro and Chapel Hill; Person County lying to the north of Durham, in which the principal town served was Roxboro; Granville County lying to the northeast of Durham; and part of Chatham County lying southwest of Durham (CX 14-Q, H). Although located only 23 miles from Raleigh, Durham Dairy did not sell in Raleigh. Respondent did not distribute any dairy products in Durham's territory. Its closest plant was located at Norfolk, Virginia (185 miles from Durham), from which respondent distributed butter and ice cream, but not fluid milk. It was not

then engaged in processing and distributing fluid milk in Virginia, North Carolina, Tennessee or South Carolina (CX 14-O). There were 11 other dairy companies distributing milk and/or ice cream in Durham's territory, plus 5 soft ice cream stands which were generally open about six months during the year (CX 14-P, Q). Included among Durham's competitors were three so-called national companies, viz, National Dairy's Southern Dairies Division, Borden and Pet Milk. The latter two companies distributed only ice cream in the territory.

5. Complaint counsel contend that the geographic market area relevant to the Durham Dairy acquisition is the 5-county area in which Durham distributed (Reply, p. 14). Respondent has not proposed any specific area as being the appropriate area of effective competition. Based on the evidence as to the companies which distributed within Durham's sales area, and in the absence of any countervailing evidence, it is the conclusion and finding of the examiner that Durham's distribution area is an appropriate geographic area in which to weigh the competitive impact of the acquisition here under consideration.

6. Of the six companies distributing fluid milk and other milk products in its territory, Durham Dairy was the second ranking company and accounted for 30.5% of such sales. The first ranking company was another Durham-based independent company with 50% of the area's milk sales, and the third ranking company was an independent company having its plant in Raleigh, with 11.7% of the area's sales. The only national company selling milk in the territory was the Southern Dairies Division of National Dairy, which accounted for only 1.8% of the area's milk sales. Of the approximately ten companies selling ice cream products in its area, Durham was the first ranking company with 25.4% of the area's ice cream sales. The second ranking company was another independent company (having its plant in Raleigh), which accounted for approximately 16% of the market. National Dairy's Southern Dairies Division was the third ranking company, with approximately 15.5% of the market. The other two so-called national companies were the fourth and fifth ranking companies, with approximately 8.6% and 7%, respectively, of the market (CX 14-P).

Other Acquisitions

7. In addition to its acquisition of Durham Dairy, respondent also acquired another dairy in the same area. On June 1, 1954, it acquired Durham Road Dairy of Chapel Hill. The consideration

paid for the acquisition was \$40,000, plus a one-year lease of Durham Road's plant for \$1,200 (CX 97 A-C). Durham Road accounted for approximately 4.2% of the milk sales in the territory served by Durham Dairy (CX 14-P). Durham Road was a partnership, and complaint counsel concede that the record does not establish its engagement in interstate commerce (Findings, p. 496). Another North Carolina acquisition made by respondent, but not in the Durham area, was Mitchell Dairy of Fayetteville. Mitchell had been a distributor for respondent and was acquired in April 1957 for approximately \$4,100 (CX 310-C). Mitchell was a partnership, and complaint counsel concede that the record fails to establish its engagement in commerce.

8. Since 1929, the so-called national companies have acquired approximately 33 companies selling milk and/or ice cream in North Carolina. Of these, six have been acquired since 1950. Only three of the acquisitions were made by respondent, all having been made since 1950 (CX 426 E-F).

9. The number of plants processing fluid milk in North Carolina has declined from 264 to 89 between 1951 and 1961 (CX 409, 412). All of the plants which have ceased operating had a volume of under 800 gallons a day or were in the "no volume listed" category. (See p. 496, *supra*.) The number of independent companies in North Carolina processing a minimum of 1,600 gallons daily has increased from 15 to 17 between 1953 and 1961 (RX 161-F). The number of plants manufacturing ice cream in North Carolina has declined from 67 to 45 between 1951 and 1961 (CX 409, 412). With one exception, all of the 12 plants which have ceased operating had a volume under 250,000 gallons annually or were in the "no volume reported" category. (See p. 499, *supra*.) The number of independent companies manufacturing a minimum of 250,000 gallons annually has increased from 7 to 11 between 1950 and 1960 (RX 161-C).

State "Market" Shares

10. In 1950 four so-called national companies (National Dairy, Borden, Pet Milk and Foremost) accounted for 35.4% of the frozen dessert production in North Carolina (CX 456-I). In 1957 five national companies (respondent having by that time entered the ranks of the national companies doing business in North Carolina) accounted for 46.5% of North Carolina production of frozen desserts. National Dairy, with 29.2%, had the largest production share, and respondent with 1.0% had the smallest share. Respondent's 1957 share represented a decline from its share of 1.2% in 1953 when it

first entered the State. The only statistical evidence of State "market" shares in the fluid milk product line is for the year 1958, and is in terms of the value of shipments of that product. In that year, five national companies (National Dairy, Foremost, Pet, Borden and respondent) accounted for 41.6% of the value of shipments of fluid milk in North Carolina (CX 425-F). National Dairy had the largest share with 30.4%, and none of the other companies exceeded 4.0%, with respondent having the smallest share, viz, 2.1%.

M. Westerville Creamery Company

The Acquisition

1. On June 1, 1961, respondent acquired all of the assets and business of Westerville Creamery Company, an Ohio corporation, and Westerville's wholly owned subsidiaries, The Pestel Milk Co. and Belle Center Creamery Co., pursuant to an agreement dated May 20, 1960 (CX 389 A-Q). The consideration paid for the acquisition was 72,000 shares of respondent's common stock, which was then selling at approximately \$58.00 a share, making a total consideration of approximately \$4,175,000. Westerville's total assets, as of December 30, 1960, were \$4,256,000 and its net worth was \$3,565,516 (CX 389-Z 9).

2. Westerville's main plant was located at Covington, Ohio (approximately 20 miles north of Dayton), where it manufactured milk products, including evaporated milk in cans, condensed milk and powdered milk. It had another plant at Westerville, Ohio (approximately ten miles north of Columbus), where it processed fluid milk. It had a third small plant at Delaware (approximately 25 miles north of Columbus), where it manufactured ice cream (CX 389-Z 6). Westerville's total net sales in 1960 amounted to \$13,820,413, and its net income after federal taxes was \$311,748 (CX 398-Z 8). The record contains no breakdown of Westerville's sales on a dollar basis, as between the different product lines handled by it. However, it does appear that its fluid milk and ice cream sales represented "less than 25%" of its dollar sales (CX 398-Z 11). The record also discloses that, on a gallonage basis, Westerville processed 50,000 gallons of fluid milk per week and 75,000 gallons of frozen products per year (CX 389-Z 10).

3. Westerville purchased no raw milk or cream from sources located outside the State of Ohio (CX 389-Z 10). Its sales of fluid milk and ice cream were made entirely within the State of Ohio (CX 389-Z 6). However, its evaporated milk and other concentrated milk products were distributed in much of the eastern United States.

Respondent concedes that Westerville was engaged in interstate commerce in the sale of evaporated and powdered milk products (Findings, p. 181).

Market Conditions

4. Westerville distributed its fluid milk product line in an area consisting of all or portions of the following Ohio counties: Morrow, Delaware, Union, Franklin, Marion and Pickaway (CX 389-Z 6). Essentially, this area includes the city of Columbus (which is in Franklin County) and certain counties lying north of it (except for Pickaway County which is south of Columbus). Westerville distributed ice cream only in Delaware County, where its ice cream plant was located. As mentioned above, Westerville's evaporated milk and other concentrated milk products were sold in much of the Eastern United States. Respondent did not sell fluid milk or ice cream in any of the areas served by Westerville, its closest plant being located at Dayton (approximately 70 miles west of Columbus). However, there were at least 14 other companies selling milk and/or ice cream in various portions of Westerville's territory. The only so-called national company included among its competitors was Borden (CX 389-Z 7). Prior to the acquisition, respondent did not compete with Westerville in the evaporated milk product line since it had never before been engaged in manufacturing this product, the Westerville acquisition representing its initial entry into the business of manufacturing and packaging evaporated milk (CX 389-Z 11).

5. Complaint counsel contend that the Columbus, Ohio metropolitan area, including the counties above mentioned, is the appropriate market area in the fluid milk product line (Findings, p. 14). Respondent has proposed no market area with respect to the Westerville acquisition. It is the conclusion and findings of the examiner that the area proposed by complaint counsel, which is essentially Westerville's distribution area, is an appropriate market area in which to consider the acquisition. There are no precise market share data in the record, based on actual sales in this area. However, based on an estimate of the fluid milk consumed in Westerville's distribution area, it is possible to obtain some approximation of Westerville's market position in the fluid milk product line. Such evidence reveals that Westerville's market share was in the order of magnitude of 8% (CX 446).¹¹⁹ The record contains no market share data with

¹¹⁹ As in a number of other instances previously discussed, the universe figure, on which Westerville's market share is computed, has been obtained by multiplying the area's population by the per capita consumption, as revealed by U.S.D.A. figures. Westerville's sales are derived from its approximate gallonage sales (CX 389-Z 10).

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respect to any of the other companies operating in the area or any indication of the extent of concentration.

6. Complaint counsel have proposed no market area with respect to the ice cream product line, and the record contains no market share data concerning this product line. In the evaporated and condensed milk product line complaint counsel have proposed the "eastern United States" as the appropriate market area (Findings, p. 14). However, there are no market share data in the record for this market area. The only statistical evidence in the record with respect to this product line is for the United States as a whole, and indicates that in 1958 the four largest companies (not identified in the record) accounted for 50% of the value of shipments of concentrated milk products (including evaporated and condensed milk) in the United States (CX 424, p. 11). This represents a decline from the 1954 "market" share of 55% for the four largest companies. Since respondent was not engaged in this product line prior to 1961, it is clear that it was not among the ranks of the "big four." Nor is any claim made that Westerville ranked among the top four companies. On the contrary, it is clear that Westerville did not even rank among the 50 largest companies and that it was one of the smaller factors in the industry.¹²⁰

Other Ohio Acquisitions

7. Since 1950 respondent has acquired 11 other dairy companies in Ohio, in addition to Westerville Creamery. With a few exceptions these were small companies, which were not corporations and as to which it is conceded there is no proof of interstate commerce. The noncorporate acquisitions include: (a) Claggett Dairy of Newark, which was acquired in March 1951 for \$16,000, and was a distributor of respondent's milk products (CX 48); (b) Duncan Dairy of Conesville, which was acquired in October 1951 for \$1,400, and had one milk route (CX 64); (c) Norwalk Pure Milk Co. of Norwalk, which was acquired in May 1952 for \$18,000, had total sales of approximately \$163,000 and was operating at a loss (CX 4); (d) Dayton Ice Cream Co. of Dayton, which was acquired in November 1952 for approximately \$20,000 and had sales of approximately 35,000 gallons of ice cream annually and 100 gallons of milk daily (CX 9); (e) Dunmyer Dairy of Lindsey, which was acquired in

¹²⁰ The total value of shipments of all 149 companies in the concentrated milk industry in 1958 was \$769,552,000, with the top four companies accounting for annual shipments averaging approximately \$96,000,000 each and the top 50 companies accounting for annual shipments averaging approximately \$14,000,000 each. Westerville's total sales of concentrated milk products (which represented 75% of its sales) were approximately \$10,000,000 in 1961.

June 1954 for \$50,000 and had milk sales of approximately 1,200 gallons per day (CX 98); and (f) Spring Grove Dairy of Greenfield, which was acquired in January 1956 for approximately \$8,000 and sold approximately 5,000 gallons of ice cream annually (CX 126; R. 830). It is conceded that the record fails to establish that any of the foregoing noncorporate companies was engaged in interstate commerce.

8. With one exception, the Ohio corporations acquired by respondent were likewise relatively small companies. These include: (a) Gray & White of Tiffin, which was in the butter, eggs and poultry business and was acquired in April 1953 for \$20,000 (CX 15); (b) Linton & Linton, Inc. of Wilmington, whose ice cream business was acquired in October 1953 for \$20,000, and had annual sales of approximately 40,000 gallons (CX 13; R. 777); (c) Grocer's Dairy, Inc., of Dayton, which was acquired in January 1956 for \$65,000 and sold approximately 63,000 gallons of ice cream annually and 750 gallons of milk daily (CX 39); Smith Kool Dairy of Bucyrus, which was acquired in April 1960 for less than \$20,000 and sold approximately 14,000 gallons of milk a month (CX 374); and (e) Lindner Ice Cream Co. of Norwood, which was the only sizeable acquisition and will be hereinafter separately discussed. Complaint counsel concede that the record fails to establish engagement in interstate commerce by Grocer's Dairy and Smith Kool Dairy. The only evidence of interstate commerce as to Linton & Linton is that it purchased some bottled milk from respondent's Cincinnati plant which, in turn, received its raw milk from a milk shed extending into Kentucky. The record contains no evidence as to Linton & Linton's market position in any relevant market. Respondent sold some ice cream in Linton & Linton's distribution area (R. 779), but the record does not disclose its market position in the area. The only evidence of interstate commerce concerning Gray & White is that it may have distributed some indeterminate amount of its products into Pennsylvania (CX 15-O). The only market share data pertaining to it is that its sales of butter amounted to approximately 5% of the butter consumed in the northern Ohio area in 1952 (CX 15-Q). Respondent did not sell any butter in Gray & White's territory (CX 15-K).

9. Since 1928 the so-called national companies have acquired approximately 180 dairy companies in Ohio, of which approximately 21 were acquired after 1950. Most of the companies acquired were very small operators. In over 100 of the transactions the consideration paid was less than \$10,000, and in over 60 it was under \$5,000 (CX 426-Z 19-25).

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10. The number of plants processing fluid milk in Ohio declined from 778 in 1951 to 313 in 1961 (CX 409, 412). Of the plants which have ceased operating, 434 had a volume under 800 gallons daily or were in the "no volume listed" category. (See p. 496, *supra*.) The number of independent companies in Ohio processing a minimum of 1,600 gallons of milk per day has increased from 56 to 75 between 1953 and 1961 (RX 161-E). The number of plants manufacturing ice cream in Ohio has declined from 291 in 1951 to 200 in 1961 (CX 409, 412). All of the plants which have ceased operating had a volume of under 250,000 gallons annually or were in the "no volume reported" category. (See p. 499, *supra*.) The number of independent companies in Ohio producing a minimum of 250,000 gallons of ice cream annually has increased from 18 to 22 between 1950 and 1961 (RX 161-C).

State "Market" Shares

11. While, as in a number of the other areas heretofore discussed, the State is not an appropriate market area as such, market share data in terms of the entire State do provide a useful background in which to gauge the probable impact of acquisitions made in particular market areas within the State. Thus, it appears that in 1958 respondent accounted for 3.9% of the value of shipments of fluid milk in Ohio and 2.8% of the value of shipments of frozen desserts. In that year, the four national companies selling milk in Ohio accounted for 32.0% of the value of shipments of fluid milk, with the two largest, National Dairy and Borden accounting for 14.0% and 12.2% respectively. The five national companies selling frozen desserts in Ohio accounted for 37.7% of the value of shipments of frozen desserts in 1958, with Borden accounting for 19.5% and National Dairy accounting for 12.4% (CX 425-D, F). The record does not afford a basis for comparing the 1958 standing of the above companies with any earlier period, in terms of value of shipments, so as to permit a determination of the trend in market shares. However, in terms of the production of frozen desserts within the State, the record discloses that respondent's 1957 production share of 1.9% represented a decline from its 1950 share of 2.4%. The production share of the national companies, as a group, likewise declined from 38.2% in 1950 to 32.6% in 1957 (CX 456-D).

N. *Lindner Ice Cream Company*

The Acquisition

1. As previously mentioned, Lindner Ice Cream Company is the only sizeable Ohio company acquired by respondent other than

Westerville. Respondent acquired the business and assets of Lindner Ice Cream Company, an Ohio corporation, on June 2, 1956, pursuant to an agreement dated May 31, 1956 (CX 44 A-D). The consideration paid was \$196,800, plus payment for accounts receivable at book value and certain inventory items at cost. The acquisition did not include Lindner's real estate, certain items of personal property and six retail stores operated by it. Lindner's total assets, as of March 31, 1956, were \$284,954. Its current assets were \$106,619 and its current liabilities were \$52,975 (CX 44-I).

2. Lindner operated a plant at Norwood, Ohio, for the manufacture and sale of ice cream and other frozen desserts. Its net sales for the year ending March 31, 1956 were \$481,501, on which it had net earnings after taxes of \$9,058 (CX 44-J). Its annual gallonage sales were 318,329 gallons of ice cream and frozen dessert products (CX 44-C). Lindner had about 175 to 180 customers, some of which were located across the Ohio River in the State of Kentucky (R. 810-12). Respondent concedes in its answer that Lindner was engaged in commerce.

Market Conditions

3. Lindner distributed its frozen products within an area of approximately 13 miles from its plant at Norwood, a community located less than ten miles from Cincinnati. Lindner's distribution area included Cincinnati (CX 44-H). Respondent operated a plant in Cincinnati, from which it distributed frozen products in competition with Lindner. Respondent's distribution area was, however, considerably broader than Lindner's, including not only the city of Cincinnati and Hamilton County (in which the city is located), but seven other counties in southwestern Ohio, 20 counties lying south of Cincinnati in northern Kentucky, and eight counties lying west of Cincinnati in southeastern Indiana (CX 44-L). There were 22 companies distributing frozen products in Lindner's territory. In addition to respondent, the other so-called national companies doing business in the area included Borden, Swift and National Dairy's Frechtling Division.

4. Complaint counsel have not proposed any specific area as being the relevant geographic market (Findings, p. 375). However, since the market share statistics cited by them are in terms of Cincinnati and Hamilton County, it is assumed that they regard this as the appropriate area of effective competition. Respondent's position concerning the appropriate geographic market is likewise not clear (Findings, p. 180). However, it apparently contends that the Lindner acquisition falls within an area which it describes as "Market Area

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II" and which includes the entire States of Ohio, Indiana, and West Virginia, and certain counties in the States of Kentucky, Tennessee, Virginia and Pennsylvania (Findings, pp. 9, 76; RX 82-B, RX 74). As in the case of other such multi-state markets, proposed by respondent, which have been previously discussed, respondent's position that this is the appropriate market is based on the fact that the ice cream manufacturers in the area do not compete with those in the other broad regional areas. This does not, however, preclude a division of the broad regional area into smaller geographic units which conform to the distribution patterns of the companies which actually compete with one another. In the absence of more definitive evidence as to the distribution patterns of the companies doing business in the area in which Lindner and respondent distributed, the metes and bounds of the relevant geographic market area cannot be defined with precision. However, it is clear that it includes at least the city of Cincinnati and Hamilton County, within which both Lindner and respondent distributed, which is the only market for which the record contains any sales statistics.

5. While, as above stated, the market share data in the record pertain to the Cincinnati area, such data are for the year 1952, approximately four years prior to respondent's acquisition of Lindner. In 1952 respondent accounted for approximately 8.3% of the ice cream sold in the Cincinnati market, and Lindner accounted for approximately 5.8% (CX 16-Z 252, pp. 121-124).¹²¹ The company with the largest share of the Cincinnati market in 1952 was National Dairy, which accounted for approximately 23.3% of the area's sales. The company with the second largest share was an independent company, French-Bauer, with approximately 20.4% of the market. Swift was the third ranking company, with approximately 8.7% of the market. There is no evidence that Borden was then doing business in the Cincinnati area.

6. There is nothing in the record to indicate what respondent's and Lindner's market shares in the Cincinnati market were in 1956, when the acquisition took place, nor as to the extent of concentration in the market at that time. Complaint counsel refer to the fact that respondent's sales from its Cincinnati plant in 1956 were \$872,234 (CX 44-L), compared to Lindner's sales of \$488,610. However, this

¹²¹ As heretofore noted, the figures included in CX 16-Z 252 are estimated, except for respondent's own sales. To the extent that respondent's market share percentage is computed from a universe figure which is estimated, it too is not precise.

was for respondent's entire distribution area in Ohio, Kentucky and Indiana which is considerably broader than the Cincinnati market.¹²² In any event, there is no universe figure in the record for 1956, from which either respondent's or Lindner's share of the market can be computed.

7. Respondent operated Lindner's plant as a separate plant until October 1956, when it moved Lindner's equipment to its own plant in Cincinnati and consolidated the two operations. Following the acquisition, respondent lost some of the accounts which Lindner had served and was able to retain approximately 60% of Lindner's original volume (R. 811). Complaint counsel note that in 1957, following the acquisition, the sales of respondent's Cincinnati plant increased by 35%. However, if respondent had been able to retain Lindner's entire volume, its sales would have increased by 55%.¹²³ Complaint counsel further contend that the number of companies selling ice cream in the Cincinnati area between 1952 and 1956 declined by 19. This contention is erroneous since the record establishes that the number of companies distributing ice cream actually increased from 20 to 23 during this period.¹²⁴ With Lindner's acquisition, the number of ice cream companies presumably declined to 22.

8. In terms of the market which respondent contends is the appropriate market area, viz, Market Area II, the record discloses that respondent's share of the production of ice cream in this area increased from 4.06% in 1950 to 6.34% in 1960 (RX 139-B). During this period, respondent acquired not only Lindner, but Clover Dairy (in southwestern Virginia) and Kentucky Ice Cream Company, as well as a number of other smaller ice cream companies lying within Area II. If not for the volume acquired from Clover Dairy and Kentucky Ice Cream, respondent's 1960 share of production in Area II would have been 4.22%, which would represent an increase of only .15% between 1950 and 1960.

¹²² In 1952 respondent's total ice cream sales from its Cincinnati plant were \$798,807 (CX 288), of which \$329,615 was attributable to the Cincinnati area (CX 16-Z 252, p. 122). There is no indication in the record of the proportion of respondent's 1956 sales of \$872,234 (CX 292), which represents sales in the Cincinnati area.

¹²³ In the year prior to the acquisition, respondent's sales were \$878,234 and Lindner's were \$481,501 (CX 44-J, 11). In 1957 respondent's total sales from its Cincinnati operation were \$1,184,871 (CX 293). If it had been able to retain Lindner's volume, its sales would have been \$1,386,733.

¹²⁴ According to CX 16-Z 252, p. 122, there were 20 companies selling ice cream in Cincinnati in 1952. According to CX 44-K, in 1956 there were 22 companies selling in the area, in addition to Lindner. Complaint counsel apparently rely on CX 16-Z 252, p. 125, which is a list of companies distributing *butter*. There is no data in the record for 1956, with which to compare the list of butter companies in 1952. Such a comparison would be irrelevant, in any event, since Lindner was not in the butter business.

O. Community Creamery

The Acquisition

1. Respondent acquired the business and certain of the assets of Community Creamery, a Montana corporation, on April 1, 1960, pursuant to an agreement dated March 10, 1960 (CX 373 A-Q). The consideration paid was \$372,276. The transaction also involved the leasing by respondent of the real estate and certain of the equipment used by Community in its business, for a term of 18 years, at a total rental of \$1,604,000 (CX 373 R-Z 19). By a supplemental agreement dated March 25, 1960, respondent also purchased Community Creamery's 50% stock interest in Community Creamery Transport, also a Montana corporation, for the book value of such stock, plus \$22,500 (CX 373-Z 31). Community Creamery's current assets, as of March 31, 1959, were \$758,454, and its current liabilities were \$140,103 (CX 373-Z 39).

2. Community Creamery processed a full line of dairy products at its plant in Missoula, Montana, including fluid milk and ice cream (CX 373-Z 36). Its net sales for the calendar year 1957 (the last full year for which such figures are available) were \$3,045,420. Its sales for the nine-month period ending March 31, 1959, were \$2,302,829 (CX 373-Z 38). Its net earnings were \$385,614 in 1957 and \$267,884 in the nine months ending March 31, 1959. The record contains no product breakdown on a dollar basis. However, on a weight or quantity basis, the estimated breakdown was as follows: Ice cream, 300,000 gallons per year; fluid milk, 2½ to 3¾ million pounds per month; butter, 500,000 pounds per year; and cottage cheese, 750,000 pounds per year (CX 373-Z 41; CX 459-F, G).

3. Substantially all of Community Creamery's supply of milk was obtained from Montana producers. However, the record indicates that one farmer in Idaho may occasionally have sold a limited and undetermined amount of fluid milk to Community. Community's fluid milk sales were made within the State of Montana. However, one of its customers, an independent distributor in Idaho, purchased packaged fluid milk from Community at its dock in Missoula and resold it in Idaho (CX 459-B). Community's sales to the Idaho distributor amounted to approximately 3% of its fluid milk sales (CX 459-F).

Market Conditions

4. From its plant at Missoula, Community Creamery distributed dairy products in a nine-county area in western Montana (CX 373-Z 36). Respondent had a plant at Great Falls, Montana, from

which it distributed milk and ice cream in a portion of Community's territory (CX 373-Z 37). While respondent distributed fluid milk in a 15-county area and ice cream in a 14-county area in Montana, its fluid milk distribution area overlapped with Creamery's in only one county and its ice cream distribution area overlapped with Community's in only two counties (CX 373-Z 43). The ice cream distributed by respondent was manufactured at its Great Falls plant, but the milk which it distributed was bottled for it by an independent cooperative at Bozeman (CX 373-Z 37). Respondent's distribution area was generally to the north and east of Community's territory. Including respondent, there were 13 other companies distributing milk and/or ice cream in some portion of Community's territory (CX 373-Z 36). All of these companies had their plants in western Montana, except for one company which distributed ice cream from eastern Washington State. Respondent was the only national company distributing in the area.

5. Complaint counsel have proposed the following alternative areas, as the relevant market area: (a) Community's distribution area in western Montana, (b) the so-called "overlap area", *i.e.*, the area in which the distribution areas of Community and respondent coincided, and (c) the entire State of Montana "because it is geographically isolated from the neighboring states" (Reply Findings, p. 14). There appears to be no basis for considering either the narrow "overlap area" or the broad State area as a relevant market. All that appears with respect to the former area is that a portion of both Community's and respondent's sales territory fell within it. There is nothing to indicate that it is an area of effective competition, in the sense that any meaningful aggregation of companies compete within it. With respect to the broad State area, there is nothing to indicate that any significant group of companies distribute throughout the State. The mere fact that the State is "geographically isolated" from other states does not necessarily require the conclusion that it is all one market. The evidence of record indicates that the western portion of Montana in which Community distributed may be considered an appropriate market area. It may be that the area is divisible into several sub-markets, but it is immaterial whether this is done since the record contains no market-share data either for western Montana or any portion thereof.

6. The only market statistics in the record are for the State as a whole. To the extent that any conclusions concerning the acquisition are to be made, they can only be made in the light of the market

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data pertaining to the State as a whole. The record discloses that in 1958, two years before its acquisition of Community, respondent accounted for 24.4% of the value of frozen dessert shipments in Montana (CX 425-D). In the preceding year, 1957, respondent accounted for 24.2% of the production of frozen desserts in Montana (CX 456-M). The record does not disclose Community's share of the value of shipments or of production in Montana. However, based on its estimated annual ice cream sales of approximately 300,000 gallons (CX 373-Z 41), its share of frozen dessert production in Montana would be in the order of magnitude of 9.5%.¹²⁵ After only 11 months of operation of Creamery's plant, respondent's ice cream sales in Montana increased by 28% over 1960 (CX 395-396).

7. There are no precise market share data for the State as a whole in the fluid milk line of commerce, since respondent did not process fluid milk in the State prior to 1960 (purchasing its requirements from another dairy). However, based on its actual sales from its branches at Great Falls and Billings, amounting to \$525,600 in 1958 (CX 393), its shipments would represent approximately 4.4% of the value of fluid milk shipments in Montana.¹²⁶ Other data in the record, based on per capita consumption rates, indicates that respondent's share of milk sales in Montana was somewhere between 4.94% and 6.45% prior to its acquisition of Community (CX 444-B). While this figure is subject to a possible error of as much as 50% (R. 4721-2) it, together with the figure of 4.4% cited above, provides some basis for obtaining an approximation of the relative position of respondent within the State in the fluid milk line. There are, likewise, no precise data concerning Community's position in the State in fluid milk. However, based on the evidence that it had total sales in 1957 of \$3,046,000 (CX 373-Z 38), and that its milk sales were approximately 60% of its total sales (CX 459-H), its milk sales would represent approximately 15.5% of the value of shipments of milk in Montana as of 1958.¹²⁷ After only 11 months of operations of Community's plant, respondent's milk sales in Montana increased by 270% over 1960 (CX 395-396).

Other Montana Acquisitions

8. Respondent acquired three other dairy companies in Montana after 1950, in addition to Community Creamery. Complaint counsel concede that the record fails to establish that any of these companies

¹²⁵ The examiner has used the 1957 State production figure of 3,176,000 gallons (CX 456-M), as the universe figure in computing the above percentage.

¹²⁶ The universe figure of \$11,800,000 is taken from CX 425-F.

¹²⁷ Same as footnote 126.

was engaged in interstate commerce. Two of them were not corporations. The first of the acquisitions was Pioneer Dairy of Great Falls, which was acquired in June 1960, about two months after the acquisition of Community Creamery (CX 377 A-K). Pioneer Dairy, a Montana corporation, distributed milk principally in the city of Great Falls (CX 377-Z 2). Its sales for the year ending June 30, 1960, were approximately \$688,000 (CX 377-Z 5). The second company acquired was Billings Dairy & Creamery of Billings, Montana, a partnership, which was acquired on September 1, 1960 (CX 381 A-N). This company distributed milk and ice cream in an area around Billings. Its net sales for the year ending April 30, 1960, were \$1,540,000 (CX 381-Z 9). The third company acquired was Henne Products Co. of Butte, a single proprietorship, which respondent acquired on May 1, 1961 (CX 386 A-J). Henne was a distributor of the milk and ice cream products of respondent's Community Creamery Division and had formerly been a distributor of Community Creamery (CX 386-Z 14). Its net sales for the year ending August 31, 1960, were \$1,138,577 (CX 386-Z 17).

9. Respondent's fluid milk sales in the fiscal year ending February 28, 1961, increased to 4,302,732 gallons from 804,375 gallons in the previous year, or an increase of 435%. Such increase reflected sales of only 11 months for Community's plant, 9 months for Pioneer's plant, 6 months for Billings' plant, and none of the business acquired from Henne. During the same period its ice cream sales increased to 1,099,922 gallons from 771,777 gallons, or an increase of 42.5% (CX 395-396). Such increase likewise does not give full effect to the gallonage acquired from other companies. Respondent's market share in the fluid milk line in Montana in 1961 may be estimated as being between 26% and 34% (CX 444-B), without the benefit of a full year's operation of acquired plants or companies. Even making the maximum adjustment for possible error which respondent contends exists in these percentage estimates, respondent's State market share would be between 18% and 24% in 1961. During the decade from 1951 to 1961 the number of milk plants in Montana declined from 166 to 61, and the number of ice cream plants from 57 to 52.

P. James S. Merritt Company

The Acquisition

1. On September 3, 1958, respondent acquired certain of the assets (including trucks and ice cream cabinets) of James S. Merritt Company, a Missouri corporation (CX 352 A-B), for a consideration of

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\$55,950. The assets acquired were those used by the seller in the sale of bulk and package ice cream. The transaction did not include that part of the seller's assets and business which was devoted to the production and sale of frozen novelties, other than ice cream. The seller retained and continued to operate its frozen novelty business.

Market Conditions

2. At the time of the acquisition, Merritt distributed its products principally in the Kansas City metropolitan area (CX 352-C). Its sales of bulk and package ice cream products amounted to approximately 400,000 gallons annually (CX 352-A). Respondent distributed only a small amount of ice cream in the Kansas City area from its plant at Sedalia, Missouri. It served four customers in the Kansas City area and its ice cream sales amounted to approximately 10,000 gallons annually (CX 352-B). There were approximately 16 other companies serving the Kansas City area with ice cream. Included in this group were National Dairy, Borden, Foremost, Fairmont and Arden (CX 352 C-D).

3. Complaint counsel contend that the Kansas City metropolitan area is the market area relevant to this acquisition (Reply Findings, p. 14). Respondent contends that the relevant area of effective competition is a multi-State area consisting of Illinois, Iowa, Missouri, Nebraska, Kansas, Oklahoma and portions of Wisconsin, Minnesota and South Dakota, which respondent refers to as "Market Area I" (Findings, p. 77). The fact that manufacturers in this area may not compete with manufacturers in adjacent regional areas is not, as respondent contends, a sufficient basis for concluding that it is an appropriate market area. It is the opinion and finding of the examiner that the Kansas City metropolitan area is the most appropriate market area in which to weigh the competitive impact of the Merritt acquisition.

4. The record contains no market share data from which the market position of respondent or of Merritt in the Kansas City area can be determined as of the time of the acquisition or at any earlier or subsequent period. The record likewise contains no statistical data from which the extent of concentration in this market can be determined. It does appear, however, that since 1950 the so-called national companies have acquired five of the independent companies distributing frozen dairy products in Kansas City (CX 426-Z 50, 51).

Q. *Arden Farms Co. (Linwood Division)*

The Acquisition

1. As previously noted (p. 604), respondent acquired Arden's Melvern-Fussell Division of Alexandria, Virginia, on June 1, 1960,

pursuant to an agreement dated May 19, 1960. By a separate agreement of the same date, respondent also acquired the business and certain of the assets of Arden's Linwood Division, operating out of Kansas City, Missouri (CX 378 A-E). The transfer became effective June 6, 1960. The total consideration paid does not appear from the record. However, it included payment for accounts and notes receivable of approximately \$108,000 and fixed assets amounting to approximately \$237,000. Among the assets acquired by respondent was Arden's Kansas City plant. The plant was old and inefficient, and was closed immediately following the acquisition, its production being transferred to respondent's plant at Sedalia, Missouri (CX 378-K).

2. During the calendar year 1959, Arden's Linwood Division sold 655,569 gallons of ice cream and other frozen desserts, its net dollar sales amounting to \$844,965 (CX 378-I). The Linwood Division sustained a loss in two of the four years from 1957 to 1960, the amount of its profit in the two profitable years being small. Its net profit in 1959 was \$4,213. In the preceding year, 1958, it sustained a loss of \$1,608, and in the period from January 1, 1960, to June 5, 1960, it lost \$1,961.

3. The Linwood Division sold its products principally in the Kansas City metropolitan area, including Kansas City, Missouri, and the adjoining suburbs in the State of Kansas (CX 378-G). Complaint counsel contend that Arden's Linwood Division was engaged in commerce by virtue of its sales in Kansas. No issue is raised by respondent concerning the acquired company's engagement in commerce.

Market Conditions

4. As mentioned above, Linwood's principal distribution area was in the Kansas City metropolitan area. However, it also served some portions of northern and central Missouri (CX 378-G). Respondent distributed ice cream and frozen products in competition with Linwood from its plant in Sedalia, Missouri. There were approximately 30 other companies selling ice cream and other frozen dessert products in various portions of Linwood's distribution area (CX 378 G-H). Included in this group were such national companies as National Dairy, Borden, Foremost, Fairmont and Swift. Complaint counsel contend that the Kansas City metropolitan area is the appropriate geographic market in which to measure the competitive impact of the Linwood acquisition. As in the case of the Merritt acquisition, respondent contends that the multi-State area which it describes as "Market Area I" is the appropriate market area. It is the conclusion and finding of the examiner that the Kansas City

metropolitan area is the most appropriate area in which to weigh the competitive impact of the Linwood acquisition.

5. The record contains no statistical data from which the market shares of the acquired and acquiring companies, or the extent of concentration in the Kansas City area, can be determined. All that appears is that Linwood's volume in that area was approximately 600,000 gallons in the period just prior to its acquisition (CX 378-K). While respondent's sales from its Sedalia plant were 1,842,233 gallons in the fiscal year ending February 28, 1961 (CX 378-M), the record does not disclose what part of this volume represented sales in the Kansas City area.¹²⁸ It does appear that in 1958, just prior to its acquisition of Merritt, respondent served four customers in the Kansas City area, with a total volume of approximately 10,000 gallons annually (CX 352-D). In September 1958, it acquired Merritt's bulk and package ice cream business, with a volume of approximately 400,000 gallons annually (CX 352-A). However, in the absence of evidence as to the total volume of frozen products sold in the Kansas City area, it is not possible to determine either Linwood's or respondent's market share in the Kansas City metropolitan area.

R. *Gateway Creamery Company*

The Acquisition

1. Respondent acquired the business and certain of the assets of Gateway Creamery Company, a Missouri corporation, on October 6, 1954, pursuant to an agreement dated September 28, 1954 (CX 19 A-D). The consideration paid was \$120,000. Gateway processed and distributed milk, cream, cottage cheese, ice cream and other frozen desserts (CX 19-Z 14). The record does not disclose what its total dollar sales were. However, it does appear that its annual milk sales were approximately 500,000 gallons and its annual ice cream sales were approximately 190,000 gallons in the three-year period prior to its acquisition (CX 19-Z 17, 19).

Market Conditions

2. Gateway distributed its milk products within a radius of 18 miles from its plant at Joplin, in southwestern Missouri (CX 19-Z 14). Its distribution area included Galena, Kansas (CX 19-Z 18). Gateway distributed its ice cream products in a larger area, including not only the Joplin area, but Pittsburg and Oswego, Kansas; Vinita, Oklahoma; and Springdale, Arkansas (CX 19-Z 14). Respondent sold

¹²⁸ The Sedalia plant distributed its products in a 38-county area in central and western Missouri, and in a 3-county area in eastern Kansas (CX 378-M).

milk and frozen products in the same general area as Gateway. However, its distribution area was much broader than that of the acquired company (CX 19-Z 25). The milk and frozen products sold by respondent were produced at its Sedalia plant. There were approximately 28 other companies distributing milk or ice cream in various portions of Gateway's territory (CX 19-Z 15). Among the other national companies selling in Gateway's territory were National Dairy, Foremost and Swift.

3. Complaint counsel contend that the geographic market relevant to the Gateway acquisition is Gateway's distribution area "in and around Joplin in southwestern Missouri" (Reply Findings, p. 15). Respondent does not propose any specific geographic market with respect to the fluid milk product line. It proposes the multi-State "Market Area I," discussed above, as the appropriate market in the ice cream product line (Findings, pp. 76-78, 80). It is the conclusion and finding of the examiner that the area around Joplin, Missouri, is an appropriate geographic market in which to weigh the competitive impact of the Gateway acquisition in the fluid milk product line. The area relevant to the ice cream product line is somewhat broader, but cannot be determined precisely on the basis of the limited evidence in the record. In any event, since the record contains no market share data for the ice cream product line in either the Joplin area or in any broader area around Joplin, it is unnecessary to attempt to delimit precisely the geographic market relevant to the ice cream product line.

4. The record contains no precise market share data for the fluid milk product line. However, based on the estimated population and per capita milk consumption in its distribution area, Gateway's share of the Joplin market may be estimated as being of the order of magnitude of 11% to 13% (CX 454). Although, as mentioned above, respondent distributed fluid milk in Gateway's territory, the record contains no evidence as to its market share either in Gateway's territory or in the much broader area in Missouri, Kansas and Oklahoma in which respondent distributed.¹²⁹ The record contains no statistical data from which concentration in the relevant milk market can be determined. As previously mentioned, the record likewise contains no statistical data from which market shares or concentration in the ice cream product line can be determined in Gateway's distribution area or any portion thereof.

¹²⁹ Respondent's milk distribution area included 5 counties in Missouri, 8 counties in Kansas and 17 counties in Oklahoma (CX 19-Z 25).

Other Missouri Acquisitions

5. In addition to its acquisition of Merritt, Linwood and Gateway, which were corporations claimed to be in commerce, respondent acquired eight other Missouri companies, which were either not corporations or which complaint counsel concede were not engaged in commerce. With two or three exceptions, these were very small companies and were acquired for a nominal consideration. The non-corporate enterprises acquired by respondent in Missouri were: Latta Ranch Dairy, Welcher Ice Cream Company, McAllister Brothers Creamery Co., Harris Dairy, John N. Costello Company, and Steele's Ice Cream Company. Only in the case of Costello and Steele is it contended that the non-corporate acquired companies were engaged in commerce. Costello was the largest of these companies, being acquired for a consideration of \$369,000 (CX 113-A). It sold a frozen dessert, known as Mellorine, in St. Louis and adjacent territory (CX 113-V). While the record indicates that in 1952 (some two or three years prior to the Costello acquisition) respondent had approximately 10% of the St. Louis ice cream market (CX 16-Z 252, p. 138), there is no evidence as to Costello's share of the market in either 1952 or at the time of its acquisition. The record contains no evidence of market shares or concentration in the case of the other company claimed to be in commerce, viz, Steele's Ice Cream Company.

6. The two corporations acquired by respondent in Missouri were Central Dairy Inc. of Columbia, and Bluff City Dairy Inc. of Hannibal, with respect to both of which complaint counsel concede that interstate commerce has not been proven. Central Dairy was acquired by respondent in October 1959 for a consideration of approximately \$76,000 (CX 362-D). While Central was a substantial factor in a number of the communities around Columbia, Missouri, where it distributed milk, ice cream and cottage cheese (CX 362-F), it had operated at a loss in four out of the five years prior to its acquisition by respondent, with its losses totalling almost \$100,000 (CX 362-G). The sale by Central to respondent was made after Central had been advised by the Commission that it contemplated no proceeding to declare the sale illegal (CX 362-L). Bluff City Dairy was acquired by respondent in July 1961 for a consideration in excess of \$25,000 (CX 388-A). Bluff City was a substantial factor in the fluid milk product line in the area around Hannibal, Missouri, where it distributed (CX 450). Respondent distributed only de minimis quantities of dairy products in Bluff City's territory (CX 388-O). The record does not disclose its over-all market position in the area.

7. Since 1925, six so-called national companies have acquired approximately 75 dairy companies in Missouri. Sixteen of these acquisitions were made since 1950, with respondent accounting for 11 of them (CX 426-Z 50-52). The number of milk plants in Missouri has declined from 321 to 126 between 1951 and 1961 (CX 409, 412). Substantially all of the plants which ceased operating had a volume under 800 gallons a day or were small plants in the "No Volume Listed" category. The number of ice cream plants in Missouri has declined from 111 to 84 between 1951 and 1961 (CX 409, 412). Except for three plants, all of the plants which ceased operating had a volume of less than 250,000 gallons annually or were in the "No Volume Reported" category.

State "Market" Shares

8. Respondent operates milk and ice cream plants at Sedalia, St. Joseph and St. Louis. The distribution area of the St. Louis plant is primarily in Illinois and Indiana (CX 440-D). In 1950 respondent accounted for 10.1% of the frozen desserts produced in the State of Missouri. By 1957 its share of production in the State had increased to 13.8% (CX 456-F). The record contains no data as to respondent's market position in the State in the fluid milk product line prior to 1958. In that year respondent accounted for 2.1% of the value of shipments of fluid milk in Missouri (CX 425-F). Five national companies accounted for 41.2% of the value of shipments of fluid milk in the State of Missouri in 1958, with National Dairy and Foremost Dairy having the largest shares, viz, 17.6% and 12.1%, and respondent having the smallest share among the national companies. In the frozen dessert product line, respondent accounted for 15.8% of the value of shipments in Missouri in 1958 (CX 425-D). Six national companies accounted for 41.5% of the value of frozen dessert shipments in that year, with respondent having the largest share.

S. Valley Creamery Company, Inc.

The Acquisition

1. On May 10, 1956, respondent (through its wholly owned subsidiary Russell Creamery Co.) purchased certain of the assets of Valley Creamery Company, Inc., of East Grand Forks, Minnesota. The record does not indicate the State in which Valley Creamery was incorporated. While Valley Creamery processed and distributed a broad line of dairy products, respondent acquired only certain of the assets devoted to the distribution of ice cream and frozen desserts. The consideration paid was approximately \$8,500 for certain trucks and ice cream cabinets, plus the leasing of refrigerated storage space in

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Valley Creamery's plant for two years at a rental of \$300 per month (CX 41 A-C). Valley Creamery's total sales in the 12-month period ending September 30, 1956, were \$553,834, of which 8.8% or \$47,106 represented the sale of frozen products (CX 41-F). Although Valley Creamery sold some frozen products at wholesale, most of its sales were made through its own retail stores.

2. Respondent made the acquisition of Valley Creamery's ice cream business in order to obtain more suitable storage space for its distributing branch at Thief River Falls. Valley Creamery agreed to lease storage room in its plant at East Grand Forks to respondent on condition that respondent would take over its small wholesale ice cream distribution (CX 41-F). Following the acquisition, respondent operated its former Thief River Falls distribution from the Valley Creamery plant.

Market Conditions

3. Valley Creamery distributed frozen products in the towns of East Grand Forks, Crookston, and Red Lake Falls in Minnesota, and in an area in North Dakota bounded by Lakota, Langdon, Hamilton and Grand Forks (CX 41-G). Respondent sold no dairy products in the area served by Valley Creamery, except for one account in Red Lake Falls and one in Crookston, Minnesota (CX 41-D). There were five other dairy companies distributing frozen products in Valley Creamery's territory. Complaint counsel have proposed no geographic area as the relevant market area. The record contains no statistical data from which the market shares of the acquired and acquiring companies, or the extent of concentration, in any area served by Valley Creamery can be ascertained.

Other Acquisitions

4. In addition to acquiring Valley Creamery's ice cream business, respondent acquired three other companies in Minnesota. Two of these companies were corporations with respect to which complaint counsel concede that the record fails to establish engagement in commerce. These were Bay View-Zenith Dairies, Inc., and Excel Ice Cream Company, Inc. Bay View, which processed and distributed fluid milk products within the city of Duluth, was acquired in November 1960 for a consideration of \$50,000 (CX 382 A-G). Bay View's annual sales during the period from 1957 to 1960 were between \$390,000 and \$370,000, on which it sustained losses of between \$18,000 and \$10,000 annually (CX 382 J-O). The record contains no data as to Bay View's market position in the Duluth area. Prior to the acquisition, respondent did not sell in Duluth. Excel Ice Cream Com-

pany manufactured ice cream and distributed both milk and ice cream within a radius of 25 miles from Hutchinson, Minnesota. It was acquired on May 1, 1961, for a consideration of approximately \$28,000 (CX 385-A). Excel's annual sales were around \$100,000, on which it sustained a loss in each of the five years prior to its acquisition, except for 1961 when it showed a profit of \$315.00 (CX 385 I-L). The record contains no data as to Excel's market position. Respondent sold frozen products to only two accounts in Excel's trade area (CX 385-H).

5. The third company acquired by respondent in Minnesota was Russell Creamery Co., a Minnesota corporation, which respondent acquired March 1, 1955 (CX 28 A-I). The acquisition actually involved Russell and four affiliated companies, one a corporation and the other three partnerships (CX 29 A-H; CX 125 A-K). Russell Creamery was engaged in the manufacture and sale of frozen desserts in the area of Brainerd, Minnesota. The other corporation, Brainerd Dairy Inc., was engaged in the processing and distribution of fluid milk products in the Brainerd area. The three partnerships, all known as Russell Creamery Co., were engaged, respectively, in the manufacture and sale of ice cream and milk products in the area of Superior, Wisconsin, and in the distribution of ice cream manufactured by the Russell corporation, in Bemidji and Fergus Falls, Minnesota. The consideration paid for the two corporations was 6,670 shares of respondent's stock (valued at approximately \$50 a share), and that paid for the partnership assets was \$700,000 (CX 28-F, 29-F, 125-E). The combined sales of all companies in 1953 was in excess of \$2,500,000, on which they realized a profit of \$235,000 (CX 28-Z 31). Complaint counsel concede that none of the corporations was engaged in commerce, and that only the Wisconsin partnership (which sold in several Minnesota towns) was in commerce. Prior to this acquisition respondent was not engaged in the sale of dairy products in Minnesota or in any portion of Wisconsin served by Russell (CX 125-Z 52). The record contains no market share data for any of the Russell companies.

State "Market" Shares

6. In 1958 respondent accounted for 0.3% of the value of shipments of fluid milk and 4.0% of the value of shipments of frozen desserts in Minnesota (CX 456 D, F). Three national companies accounted for 7.3% of the value of shipments of fluid milk, with respondent having the smallest share. Four national companies accounted for 25.9% of the value of shipments of frozen desserts, the

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top two companies accounting for 10% each, respondent being the third ranking company. In terms of the production of frozen desserts in Minnesota, respondent's share increased from nothing prior to 1954 to 2.9% in 1957 (CX 456-F).

T. A. L. Brumund Company

The Acquisition

1. Respondent purchased the business and assets of A. L. Brumund Company, an Illinois corporation, on October 1, 1951, for a consideration of approximately \$73,000 (CX 2 A-Z 2). The transaction also involved the leasing of a portion of Brumund's premises at a rental of \$100.00 a month. Brumund was engaged in processing and distributing fluid milk products and ice cream (CX 2-Z). Its total annual sales were approximately \$500,000. The record contains no breakdown of its sales, as between fluid milk products and ice cream products.

Market Conditions

2. The record is not entirely clear as to Brumund's distribution area. There is evidence that its sales were made entirely in Lake County, Illinois (CX 2-Z). However, since three of the ice cream cabinets which it sold to respondent were located in Wisconsin (CX 2-G, H), it seems likely that it had a few ice cream customers in that State. The extent or regularity of such extra-State sales do not appear from the record. Respondent sold fluid milk and ice cream in Brumund's territory from its plant in Waukegan. However, its distribution area was much broader than that of Brumund, including Lake, McHenry and Cook Counties. Its sales in this area in the fiscal year ending February 28, 1951, amounted to \$1,837,269, of which \$1,485,728 involved milk products and \$351,487 involved frozen products (CX 2-Z 6). So far as appears from the record, the only other national companies distributing in Brumund's territory in 1951 were National Dairy and Borden, with the former distributing only frozen products (CX 195-E, pp. 3, 17).

3. Complaint counsel have proposed no specific area, as being the appropriate geographic market area in which to weigh the impact of the Brumund acquisition. The record contains no statistical data for Lake County as a whole, which was Brumund's area of distribution. The only market data in the record is for the Waukegan-North Chicago area in Lake County. Such data consists of a consumer survey conducted by respondent in August 1951, and is based on interviews with 557 families (CX 195-E, p. 5), constituting less than 5%

of the population of the area.¹³⁰ The survey does not disclose actual quantities purchased by those interviewed, but merely the brands which they purchased. According to the survey, 22% of those interviewed purchased respondent's brand of milk in their homes and 16% purchased Brumund's brand. Approximately 45% purchased the brand of a local cooperative. Of those interviewed who purchased milk from the retail stores, respondent's brand accounted for 12% of such purchases and Brumund's brand 4%. In the ice cream product line, the survey discloses that of purchases made through retail stores, respondent's brand accounted for 11% and Brumund's 9% (CX 195-E, pp. 1, 3, 17). A later survey conducted by respondent in February 1955, following its acquisition of Brumund, reveals that of those interviewed 28.4% had purchased their home delivered milk from respondent, as compared to 38% which had purchased milk from both respondent and Brumund in 1951; similarly, purchases of respondent's brand of ice cream through stores had declined to 12% from the 20% which it and Brumund together accounted for in 1951 (CX 195, pp. 5, 24).

Other Illinois Acquisitions

4. Respondent acquired 12 other dairy companies in Illinois. With a few exceptions, these were very small companies, for which the consideration paid was around \$10,000 or less. In this category were: Fairfield Ice & Coal Co., Bianucci Ice Cream Co., Callison Dairy, Hanson's Dairy, Buchanan Farms, Inc., Home Dairy, Strandsdale Farm Products, and Schuyler Dairy. Among the slightly larger companies, which were acquired for considerations ranging from \$22,500 to \$68,000, were Midvale Dairy Farm, Wilson Ice Cream Co., and C. E. Thompson Company. Except for Buchanan and Thompson, none of the above-named companies were corporations, and complaint counsel concede that the record fails to establish that any of them was engaged in commerce. The only really sizeable company acquired in Illinois was John N. Costello Company, which was not a corporation but which it is contended was engaged in commerce. As previously mentioned in connection with the Missouri acquisitions, Costello had a plant in St. Louis, but the company also sold frozen desserts in the central Illinois area from a plant in Mendota, Illinois

¹³⁰ According to the testimony of respondent's president, the number of persons interviewed in consumer surveys conducted by respondent generally averaged less than 5% of the population of the various areas (R. 330). The record does not disclose what percentage of the population in the Waukegan-North Chicago area was interviewed in 1951. However, in a survey conducted by respondent in 1955, in which 620 families were interviewed, this was estimated to be one out of every 29 families, or 3.4% of the families in the area (CX 195, pp. 5, 10).

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(CX 113-E). Costello's frozen dessert "Mellorine" had a substantial degree of consumer acceptance in various Illinois towns (CX 215, 244, 279).

State "Market" Shares

5. In 1958 respondent accounted for 7.0% of the value of shipments of fluid milk in Illinois and 8.7% of the value of shipments of frozen desserts (CX 425-D, F). Three national companies accounted for 19.4% of the value of shipments of fluid milk and four national companies accounted for 41.0% of the value of shipments of frozen desserts. Respondent was the second ranking company among the national companies in fluid milk shipments and the third ranking company in frozen dessert shipments. In the frozen dessert product line, respondent's share of production in the State of Illinois declined from 8.6% in 1950 to 7.5% in 1957 (CX 456-D).

U. *Lagomarcino-Grupe Company*

The Acquisition

1. By agreement dated July 18, 1952, respondent acquired the ice cream business conducted at the Davenport, Iowa, branch plant of Lagomarcino-Grupe Company, an Iowa corporation (CX 7 A-D). The consideration paid by respondent was \$35,000. The seller's principal business consisted of the distribution of produce, and its main plant was at Burlington, Iowa (CX 7-O). It sold to respondent only the ice cream department of its branch plant at Davenport, the assets acquired by respondent consisting principally of ice cream cabinets, trucks and several items of plant equipment (CX 7-M). Lagomarcino sold approximately 107,000 gallons of frozen products in 1951, and its dollar sales amounted to approximately \$150,000 (CX 7-O).

Market Conditions

2. Lagomarcino distributed frozen products principally in the Tri-City area of Rock Island and Moline, Illinois, and Davenport, Iowa. Its distribution in Iowa extended into the adjacent territory in Scott and Clinton Counties (CX 7-K). Respondent was distributing frozen products in the same general area as Lagomarcino from its branch plant at Davenport, Iowa. The frozen products distributed by respondent were manufactured in its plant at Des Moines (CX 7-O). Respondent's distribution area included five additional counties in Iowa, and one additional county in Illinois, other than those where Lagomarcino distributed (CX 7-N). There were 11 other dairy companies distributing frozen products in Lagomarcino's territory, including three national companies, viz, National Dairy, Borden and Swift (CX 7-K).

3. Complaint counsel have proposed no specific geographic area, as being the appropriate market area in which to measure the competitive impact of the Lagomarcino acquisition. The record contains no market share data for the Tri-City area or any other area in the State of Iowa, except for the State as a whole. The statistical data for the State of Iowa will hereinafter be discussed, following consideration of the only other corporate acquisition in Iowa claimed to be engaged in commerce.

V. *Clinton Ice Cream Company*

The Acquisition

1. Respondent acquired the business and certain of the assets of Clinton Ice Cream Company, an Iowa corporation, on September 2, 1955, pursuant to agreement dated August 23, 1955 (CX 35 A-C). The consideration paid by respondent was \$9,400, plus an unspecified sum for usable inventories and accounts receivable. The assets acquired by respondent consisted principally of ice cream cabinets, trucks and certain items of plant equipment. The acquired company sold approximately 76,000 gallons of ice cream and other frozen products annually (CX 35-H).

Market Conditions

2. Clinton Ice Cream Company manufactured ice cream and other frozen products at its plant in Clinton, Iowa, which it distributed principally in the town of Clinton. However, it did sell to one small account each in the towns of Albany and Fulton, Illinois (CX 35-I). Respondent served a portion of Clinton's territory from its Davenport, Iowa, branch. It made no sales in Clinton itself, which was the acquired company's principal distribution area. However, respondent did serve one or two accounts in Albany and Fulton, Illinois, in which Clinton sold. There were seven other companies serving portions of Clinton Ice Cream Company's territory, including the national companies, National Dairy and Borden (CX 35-F, I).

3. Complaint counsel have proposed no specific geographic area as being the appropriate market area in which to measure the competitive impact of respondent's acquisition of Clinton Ice Cream Company. The record contains no statistical data for any area in the State of Iowa, other than the State as a whole. Such data is hereinafter discussed.

Other Iowa Acquisitions

4. In addition to Lagomarcino-Grupe and Clinton Ice Cream Company, respondent acquired 12 other dairies in Iowa. Only one of these companies was a corporation and only one was in commerce (the lat-

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ter not being a corporation). With one or two possible exceptions, the companies acquired were minute in size, and the consideration paid was under \$10,000. Among the companies acquired were: Farmers Creamery, Naber & Son Dairy, Letner Dairy, Springbrook Dairy, Red Oak Dairy, Miller-Hansen Dairy, Inc., George C. Kruse Homemade Ice Cream Co., Patzner Dairy, Royal Ice Cream Co., Squire Ice Cream Co., Shomont Ice Cream Co., and Kirchoff Ice Cream Co. The only corporation among these was Miller-Hansen Dairy, as to which complaint counsel concede the record fails to establish engagement in commerce (Findings, p. 235). Squire Ice Cream Company involves the only one of the above acquisitions concerning which complaint counsel claim to have established commerce, but it was not a corporation. The consideration paid for Squire was \$9,000 (CX 115-A). The only company for which any sizeable consideration paid was Shomont Ice Cream Co., for which respondent paid approximately \$100,000 (CX 112-A). Shomont was not a corporation and complaint counsel concede that they have failed to establish its engagement in commerce (Findings, p. 240).

State "Market" Shares

5. In 1958 respondent accounted for 3.9% of the value of fluid milk shipments and 14.7% of the value of frozen product shipments in the State of Iowa. Four national companies accounted for 24.6% of the value of shipments of fluid milk, Borden having the largest share with 10.0% and respondent being the third ranking company. Four national companies accounted for 42.8% of the value of shipments of frozen products, Borden having the largest share with 25.0% and respondent being the second ranking company (CX 425-D, F). In the frozen product line respondent's share of production in the State of Iowa increased by 1.8% from 14.2% in 1950 to 16.0% in 1957 (CX 456-F).

W. Andalusia Dairy Company

The Acquired Company

1. On June 10, 1952, respondent acquired the business and certain of the assets of the branch plant operated at Beaver Falls, Pennsylvania, by Andalusia Dairy Company, an Ohio corporation (CX 5 A-F). Andalusia Dairy's main plant was at Salem, Ohio, and it operated a branch plant at Alliance, Ohio (R. 607, 609). These plants were not included in the sale to respondent. The consideration paid by respondent was approximately \$50,000, which covered the acquisition of Andalusia's delivery trucks, ice cream cabinets, accounts receivable, inventory, and milk and ice cream routes operated from

the branch plant at Beaver Falls. Andalusia's milk sales were approximately \$150,000 a year and its ice cream sales were approximately \$200,000, its annual ice cream gallonage being approximately 40,000 gallons (R. 617). Andalusia's sales from its Beaver Falls branch were made entirely within the State of Pennsylvania. However, it received its supply of raw milk principally from Ohio (R. 610, 636).

Market Conditions

2. Andalusia Dairy distributed milk, ice cream and other dairy products from its Beaver Falls plant in the towns of Beaver Falls, Rochester and adjacent territory in north central Beaver County. Respondent sold in competition with Andalusia Dairy's Beaver Falls branch from its own plant in Pittsburgh. However, respondent's distribution area covered a much wider area than Andalusia's territory, including 15 counties in western Pennsylvania (CX 5-J). The record does not disclose the names or total number of companies which distributed in Andalusia's territory. However, it does appear that there were approximately 16 companies located in Beaver County in 1952 (CX 16-Z 106, p. A-2).

3. Complaint counsel have not proposed any specific area as being the appropriate geographic area in which to weigh the competitive impact of the Andalusia Dairy acquisition. It is not clear, therefore, whether complaint counsel contend that the portion of Beaver County in which Andalusia Dairy distributed is the appropriate geographic market, or whether they contend that the entire western Pennsylvania area in which respondent distributed is the appropriate market. The only area for which there is any statistical data in the record is a 13-county area in western Pennsylvania, which the State of Pennsylvania, for purposes of price controls on milk, designates as the "Pittsburgh Milk Marketing Area, Area No. 2." In 1952 the 130 companies doing business in this area, and for which the State maintained statistics, reported net sales of \$105,217,119 (CX 16-Z 106, p. A-9). Assuming that respondent's milk sales for the calendar year 1952 were substantially the same as its sales for the fiscal year ending February 28, 1952, viz, \$8,091,688 (CX 5-J), respondent would have approximately 7.6% of the western Pennsylvania milk market. Andalusia's milk sales of approximately \$150,000 would represent .001% of the market. The sales of the top 11 companies accounted for approximately 69% of the area's sales.

Other Acquisitions

4. In addition to Andalusia Dairy, respondent acquired three other companies distributing milk and/or ice cream in the western Penn-

sylvania area. These were small companies, none of which was a corporation. The first of the acquisitions was P. Calistri & Sons, which was acquired in June 1952, for a consideration of approximately \$74,000 (CX 80-A). This company was engaged in the manufacture and distribution of ice cream in the area of Charleroi, Pennsylvania. The record contains no data as to its market position. Complaint counsel concede that the record fails to establish the company's engagement in commerce. The other two companies, Pettibon Dairy of Rochester, Pennsylvania, and Drinkmore Dairy of Aliquippa, Pennsylvania, were acquired in August 1953. They were owned by the same individuals and were acquired for a consideration of approximately \$82,000 (CX 91-A). The milk sales of both companies amounted to approximately \$200,000 in the first six months of 1953, and their ice cream sales amounted to approximately \$58,000 in the same period (CX 91-C). These companies distributed their products principally in the towns in which their plants were located (CX 91-M). However, they did purchase raw milk from farms in Ohio (R. 649). The record contains no data as to their market position in the areas in which they distributed.

State "Market" Shares

5. Respondent's dairy product sales in Pennsylvania are confined to the western counties around Pittsburgh. Respondent's market position in this area in the fluid milk line has been discussed above. The record also contains data reflecting its relative position in the State as a whole, in both the fluid milk and frozen product lines. In 1958 respondent accounted for 2.5% of the value of shipments of fluid milk in Pennsylvania and 1.5% of the value of shipments of frozen desserts (CX 425-D, F). Four national companies accounted for 23.0% of the value of fluid milk shipments, with respondent having the smallest share. Four national companies accounted for 45.3% of the value of frozen dessert shipments, with National Dairy and Foremost together accounting for 41.0%, and respondent ranking a poor third. In terms of the production of frozen desserts in Pennsylvania, respondent's share in 1957 was 2.0%, compared to 1.8% in 1950 (CX 456-C).

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

The Acquisition

1. On May 1, 1953, respondent acquired the ice cream business of Coca-Cola Bottling Company of Clifton Forge, Inc., a Virginia corporation (CX 11 A-G). The latter conducted its ice cream business

under the name of The Peerless Creamery. Peerless distributed milk as well as ice cream (R. 849). Respondent acquired only the ice cream portion of the Peerless business, including certain of the equipment at Peerless' plants in Clifton Forge and Covington, Virginia. The consideration paid was \$69,000, plus the leasing of space in the seller's plant in Covington for a period of ten months at \$200 a month. Peerless Creamery manufactured approximately 125,000 gallons of ice cream and sherbets in 1952, and its dollar sales were approximately \$183,000 (CX 11 A-B). It had approximately 325 customers.

Market Conditions

2. Peerless Creamery distributed frozen products in the towns of Clifton Forge and Covington and the adjacent territory in Allegheny, Bath and Highland Counties, Virginia, and in the towns of White Sulphur Springs and Lewisburg, West Virginia (CX 11-I). Respondent, whose closest plant was in Washington, D.C., had a distributing branch at Staunton, Virginia, from which it sold frozen products in competition with Peerless in the towns of Goshen and Brownsburg, Virginia (CX 11-I; R. 856). There were eight other companies selling in portions of Peerless' territory. Included among these companies was the Imperial Ice Cream Division of Fairmont Foods and two subsidiaries of National Dairy. Among the independent companies competing with Peerless were: Greenbrier Dairy of Beckley, West Virginia, which respondent acquired in December 1954; Kay's Dairy of Roanoke, which respondent acquired in January 1955; and Clover Dairy of Roanoke, which respondent acquired in March 1961.

3. Complaint counsel have proposed no specific area, as being the appropriate geographic market in which to consider the competitive impact of the Peerless acquisition. Such evidence as there is suggests that the appropriate market is considerably larger than Peerless' distribution area, and would include an area in southwestern Virginia extending from Staunton to Roanoke, and a portion of southeastern West Virginia. However, in the absence of more definitive evidence concerning the distribution patterns of the companies doing business in the area, it is not possible to make an informed determination concerning the metes and bounds of the relevant market. The record contains no reliable statistical evidence as to market shares in any specific market. The only evidence in the record as to market position is the testimony of the manager of respondent's Washington, D.C. plant to the effect that Peerless had "pioneered" in the ice cream business in its area, probably having 100% of the business originally, and estimating that it had "in the area of 80% of the volume in the area"

when it was acquired "although I don't have any proof." Fairmont's Imperial Division was estimated to be in second place, with "perhaps five percent * * *. Maybe, it was as high as ten" (R. 848).

Other Acquisitions

4. As mentioned above, respondent acquired three other companies distributing ice cream in Peerless' territory. The facts relating to the acquisition of Greenbrier Dairy in December 1954 have heretofore been discussed in detail (*supra*, pp. 578-582). The next acquisition made by respondent in the area was the wholesale ice cream business of Kay's of Roanoke, Inc., which was acquired by respondent in January 1955 for a consideration of \$19,500 (CX 22-A). Kay's ice cream sales amounted to approximately \$42,545, and consisted of about 36,500 gallons (CX 22-J). Complaint counsel concede that the record fails to establish Kay's engagement in commerce (Findings, p. 468). The third company acquired in the area was Clover Creamery Co., Inc., of Roanoke, which was acquired by respondent on March 1, 1961, for a consideration of 30,220 shares of respondent's stock, valued in excess of \$50 a share (CX 383 B-D). Clover distributed a full line of dairy products, including milk and ice cream. In 1960 Clover sold 5,000,000 gallons of milk and 1,000,000 gallons of ice cream, its total net sales amounting to \$6,892,321 (CX 383-Z 43). Clover was a substantial factor in the fluid milk product line in the area served by it (CX 445), but the record does not disclose its position in the ice cream product line. Complaint counsel concede that the record fails to establish Clover's engagement in commerce (Findings, p. 469). Respondent, which has continued to operate the Clover plant, concedes that Clover was a "viable independent" (Findings, p. 94).

Y. *Ritzmann Ice Cream Company, Inc.*

The Acquisition

1. On June 7, 1959, respondent acquired the business and certain of the assets of Ritzmann Ice Cream Company, Inc., an Indiana corporation (CX 357-N). The consideration paid was \$27,580. The acquisition did not include Ritzmann's plant (CX 357-A). Despite its name, Ritzmann processed and distributed milk, as well as ice cream. Its net sales in 1957 and 1958 were \$153,673 and \$144,318, on which it sustained losses of \$7,572 and \$8,743, respectively (CX 357-L). In terms of the two principal products distributed by it, in 1958 Ritzmann sold 66,129 gallons of milk for \$63,484 and 40,929 gallons of ice cream for \$66,237 (CX 357-N). In response to a petition which it submitted to the Federal Trade Commission prior to the acquisition (CX 357 C-G), Ritzmann was advised that the Commission did not

contemplate any proceeding to declare the sale illegal if Ritzmann sold its assets to respondent (CX 357-H).

Market Conditions

2. Ritzmann distributed milk primarily in the town of Lawrenceburg and the immediate vicinity in Dearborn County, Indiana. It distributed ice cream in Dearborn and six other counties in southeastern Indiana, and had a small amount of distribution into the State of Ohio (CX 357-I). Respondent operated two routes from its plant in Cincinnati which sold some ice cream in the area served by Ritzmann. An independent distributor also sold respondent's milk products in the area served by Ritzmann (CX 357-J). There were seven other companies distributing milk and/or ice cream in Ritzmann's territory. Complaint counsel have proposed no specific area as the appropriate geographic market or markets for weighing the competitive impact of the Ritzmann acquisition. The record contains no market share or concentration data, other than for the State of Indiana as a whole.

Other Acquisitions

3. Respondent acquired 13 other dairy companies in Indiana, in addition to Ritzmann. With a few exceptions, these were small non-corporate businesses, and complaint counsel concede the record fails to establish that any of them were engaged in commerce. Among the small companies acquired by respondent were: Benton County Dairy, Modern Dairy, O'Neill Dairy, Richard L. Franson, Paulus Dairy, Princeton Dairy, Phillips Ice Cream Co., Nance's Creamery, Inc., Indiana Ice & Fuel Co., Heckaman's Ice Cream Co., and Elkhart Ice Cream Co. Among these only Nance's and Elkhart were corporations.

4. The largest dairy acquired by respondent in Indiana was Eskay Dairy Company, Inc., of Fort Wayne. Eskay Dairy Company, Inc., an Indiana corporation, was acquired on May 1, 1955, in exchange for 14,364 shares of respondent's common stock, with a value in excess of \$50 a share (CX 32-F). Eskay, which was engaged in processing and distributing milk products, had total sales in the year 1954 of \$2,111,177, of which 90% represented sales of fluid milk (CX 32-X). Its net earnings on such sales were \$38,799. Eskay's total assets in 1954 were \$837,059 (CX 32-W). Eskay sold entirely within the city of Fort Wayne and adjacent territory in Allen County. Respondent did not sell any fluid milk products in the area served by Eskay (CX 32-Z 7). Complaint counsel have proposed no specific market area with respect to the Eskay acquisition. Since complaint counsel concede that the record fails to establish Eskay's engagement in com-

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merce, the examiner finds it unnecessary to determine what the relevant geographic market was. The record does disclose that in the immediate Fort Wayne area in which it distributed, Eskay accounted for approximately 33-35% of the area's sales (CX 32-Z 12). In the somewhat broader area included in the Fort Wayne FMMO, it accounted for 17.7% of the area's sales (RX 35-C). In the northern Indiana area, which respondent contends is the appropriate geographic market, Eskay accounted for 2.85% of the area's milk sales in 1954 (RX 35-J).

5. The only other sizeable Indiana company acquired by respondent was Covalt Dairy Company, Inc., whose business and part of whose assets respondent acquired in July 1960, for a consideration in excess of \$350,000 (CX 379 A-H). The transaction also involved the leasing of Covalt's plant at an annual rental of \$15,000. In the fiscal year 1960 Covalt sold 1,547,594 gallons of milk for a total of \$1,399,972 (CX 379-I). It sold in the city of Muncie and surrounding towns. Respondent had an ice cream plant in Muncie, but did not process or sell milk in the area prior to the Covalt acquisition. Covalt was a substantial factor in the Muncie area (CX 432-Q). In the northern Indiana area it accounted for 1.72% of milk sales (RX 35-I). Complaint counsel concede that the record fails to establish Covalt's engagement in commerce.

State "Market" Shares

6. In 1958 respondent accounted for 5.3% of the value of fluid milk shipments and 8.0% of the value of frozen dessert shipments in the State of Indiana (CX 425-D, F). Respondent and Borden, together, accounted for 18.6% of the value of fluid milk shipments in 1958. Respondent and three other national companies accounted for 47.2% of the value of shipments of frozen desserts. Borden was the first ranking company in frozen dessert shipments with 23.7%; National Dairy ranked second with 14.3%; and respondent was the third ranking company. In terms of its share of production of frozen desserts within the State of Indiana, the record discloses no improvement in respondent's position between 1950 and 1957. In 1950 it accounted for 8.9% and in 1957, 8.5% (CX 456-D).

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

The Acquisition

1. On August 12, 1952, respondent acquired from Farmers Equity Co-operative Creamery Association, Inc., a Nebraska corporation, 62 ice cream cabinets for a consideration of \$13,800 (CX 8-A). Farmers

Equity, a farmers' cooperative with headquarters in Alliance, Nebraska, had operated a small plant at Sheridan, Wyoming, which they had closed because it was unprofitable (CX 8-H). The record does not disclose how it disposed of the assets other than the ice cream cabinets which were sold to respondent. The ice cream cabinets were located on the premises of various customers which the cooperative had theretofore supplied. It undertook to advise these customers that the cabinets had been sold to respondent (CX 8-A). Farmers Equity had distributed a full line of dairy products in Sheridan, Wyoming, and adjacent territory. Its frozen product gallonage sales amounted to approximately 30,000 gallons annually (CX 8-F).

2. Complaint counsel contend that Farmers Equity was engaged in commerce "by virtue of the fact that it was a Nebraska corporation doing business in Wyoming" (Findings, p. 533). Although the record indicates that Farmers Equity's sales were made in "Sheridan, Wyoming and adjacent territory" (CX 8-F), there is evidence that one of the cabinets sold to respondent was located on the premises of a customer in Garryowen, Montana (CX 8-A). However, the amount and regularity of frozen products sales to such customer does not appear from the record.

Market Conditions

3. As mentioned above, Farmers Equity distributed frozen products in Sheridan, Wyoming and adjacent territory. Respondent sold in competition with Farmers Equity from the Sheridan branch of its plant in Billings, Montana (CX 8-H). However, respondent's distribution area was considerably broader than Farmers Equity's, covering 11 counties in Wyoming and 11 in Montana (CX 8-G). There were four other companies distributing frozen products in Farmers Equity's sales area. The only other national company among its competitors was Fairmont Foods (CX 8-F).

4. Complaint counsel have proposed no specific area as being the relevant geographic market. In the absence of more definitive evidence of the distribution patterns of the other companies selling in the area, it is not possible to make an informed determination as to the metes and bounds of the appropriate market area. The only market share data in the record is for the State of Wyoming as a whole. Such data reveals that Farmers Equity produced approximately 4% of the frozen desserts in the State (CX 456; CX 8-F). Since respondent had no facilities for the production of frozen desserts in the State of Wyoming, it is not possible to determine its relative position in the State.