be a defense in any enforcement proceeding instituted hereunder for respondents to establish that said personnel have actually been trained at the factory of the manufacturer of the product;

(5) The products sold by respondents will last a lifetime or will never require painting or maintenance, for the life of the structure on which applied, or misrepresenting in any manner the efficacy, durability or efficiency of respondents' products;

(6) Any of respondents' products or installations are guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed;

(7) Persons will receive a gift of a specified article of merchandise, or anything of value: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that the item referred to as a gift was in fact delivered to each eligible person.

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

IN THE MATTER OF

DABROL PRODUCTS CORPORATION ET AL.

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

Docket 5656. Complaint, Oct. 25, 1949—Decision, Oct. 17, 1966

Order modifying a cease and desist order dated December 29, 1950, 47 F.T.C. 791, requiring a processor of lubricating oil to cease advertising and selling its product without disclosing that it is re-refined or reprocessed, by ordering such disclosure be made on the front panel or panels of the container.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER TO CEASE AND DESIST

The Commission on December 29, 1950 [47 F.T.C. 791], having issued its order to cease and desist against respondents herein providing at paragraphs 4 and 5 as follows:

4. Advertising, selling or offering for sale any lubricating oil, previously used for lubricating purposes, without disclosing such prior use to the purchaser or potential purchaser, either directly or by appropriate statement to that effect on the container.

5. Packaging previously used lubricating oil for others for resale to the purchasing public in containers which do not clearly and conspicuously disclose such prior use.

And the Commission having on August 11, 1966, served upon respondents its order to show cause why this proceeding should not be reopened and paragraphs 4 and 5 be amended and paragraph 6 added as set forth in the Commission's order to show cause, and

Respondents having failed to file an answer to the Commission's order to show cause within the period provided in the Commission's rules, and

The Commission being of the opinion that the public interest will be best served by reopening the proceeding herein and modifying its order of December 29, 1950,

It is ordered, That this proceeding be, and it hereby is, reopened and the Commission's order of December 29, 1950 [47 F.T.C. 791], be, and it hereby is, modified by substituting the following paragraphs 4 and 5 for the correspondingly numbered paragraphs in its order to cease and desist of December 29, 1950, and adding the following paragraph numbered 6 to that order to cease and desist:

4. Advertising, offering for sale or selling, any lubricating oil which is composed in whole or in part of oil which has been reclaimed or in any manner processed from previously used oil, without disclosing such prior use to the purchaser or potential purchaser in the advertising and sales promotion material, and by a clear and conspicuous statement to that effect on the front panel or front panels on the container.

5. Packaging previously used lubricating oil for others for resale to the purchasing public in containers which do not clearly and conspicuously disclose such prior use on the front panel or front panels on the container.

6. Representing in any manner that lubricating oil composed in whole or in part of oil that has been manufactured, reprocessed or re-refined from oil that has been previously used for lubricating purposes, has been manufactured from oil that has not been previously used.

Commissioner Elman not concurring.

IN THE MATTER OF

SUPREME FOOD PRODUCTS COMPANY, INC., ET AL.

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

Docket 8699. Complaint, July 19, 1966—Decision, Oct. 19, 1966

Consent order requiring a Philadelphia, Pa., food freezer corporation, to cease using false pricing, savings and quality claims and other deceptive practices in selling its food, freezers and freezer food plans.

COMPLAINT

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

PARAGRAPH 1. Respondent Supreme Food Products Company, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at 4246–4250 Market Street in the city of Philadelphia, State of Pennsylvania. It also has done business under the names of Supreme Frozen Food Company, Foremost Products Co., and Foremost Food Service.

Respondent Benjamin Jay Berman is an individual and officer of Supreme Food Products Company, Inc. He formulates, directs and controls the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of freezers, food and freezer food plans to members of the purchasing public.

PAR. 3. In the course and conduct of their business respondents now cause, and for some time last past have caused, the aforesaid

freezers and food to be shipped from their aforesaid place of business in the State of Pennsylvania, and from the various places of business of their suppliers located in the State of Pennsylvania, to members of the purchasing public located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said freezers and food in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said food and freezer food plans, by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of food as the term "food" is defined in the Federal Trade Commission Act; and have disseminated, and caused the dissemination of advertisement concerning the said food and freezer food plans by various means, including but not limited to those aforesaid, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of freezers, food and freezer food plans in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. By means of advertisement disseminated as aforesaid and by the oral statements of sales representatives, respondents have represented, directly or by implication:

1. That purchasers of their freezer food plan can buy their usual food requirements and a freezer for the same or a less amount of money than they have been paying for food alone.

2. That purchasers of respondents' freezer food plan will save enough money on the purchase of their food to pay for the freezer thereby receiving a freezer free of charge.

3. That the totals shown in respondents' sales contracts include all charges the purchaser must pay.

4. That respondents' regular and usual food prices are those charged for the initial order of food.

5. That purchasers can obtain all of their food needs through respondents' freezer food plan.

6. That all the food products sold by respondents are nationally advertised brands.

7. That the freezers sold by respondents are "frost free."

8. That all meats sold under respondents' freezer food plan are United States Government inspected and graded "choice."

9. That purchasers of respondents' freezer food plans have but one payment per month to make covering both food and freezer.

10. That the initial food order supplied by the respondents will last purchasers four months.

11. That purchasers can become members of respondents' freezer food plan on a trial basis.

12. That purchasers of the aforesaid freezer food plan can sign blank contracts and notes with the assurance that when such instruments are filled in the terms and conditions and amounts as set forth therein will be the same as agreed upon and disclosed at the time of the sale.

PAR. 6. In truth and in fact:

1. Purchasers of respondents' freezer food plan cannot buy their usual food requirements and a freezer for the same or a less amount of money than such purchasers have paid for food alone.

2. Purchasers of respondents' freezer food plan do not save enough money on the purchase of their food to pay for the freezer and in fact must purchase and pay for said freezer.

3. The totals in respondents' sales contracts do not include all charges the purchaser must pay. Finance charges are later added to the amount which the purchaser must pay.

4. Respondents' regular and usual food prices are not those charged for the initial order of food. Respondents use lower than normal prices in the initial food order to induce purchasers to become members of their freezer food plan. On subsequent food orders customers pay the normal higher prices for food and the purported savings which induced purchasers to become members of the freezer food plan are no longer available.

5. Purchasers cannot buy all of their food needs through respondents' freezer food plan.

6. All the foods sold by respondents are not nationally advertised brands.

7. Freezers sold in connection with respondents' freezer food plan are not frost free, but accumulate frost and require manual defrosting.

8. All meats sold under respondents' freezer food plan are not United States Government inspected nor are they all United States Government graded "choice."

9. Purchasers of respondents' food plan are required to make two monthly payments, one for food and one for the freezer.

10. In many instances the initial food order supplied by re-

spondents will not last for four months but lasts for a substantially shorter period of time.

11. Purchasers of respondents' freezer food plan cannot enroll in such plan on a trial basis. The contracts entered into and promissory notes signed by them are noncancellable and irrevocable and they are bound by the terms thereof.

12. All the terms and conditions are not disclosed at the time of sale. In many instances when contracts and notes which have been signed in blank are filled in, the terms, conditions or amounts as set forth therein were not the same as agreed upon and disclosed at the time of the sale.

Therefore, the advertisements referred to in Paragraph Six were, and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act, and the statements and representations referred to in Paragraph Six were, and now are false, misleading and deceptive.

PAR. 7. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition in commerce, with corporations, firms and individuals engaged in the sale of freezers, food and freezer food plans.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said representations were and are true, and into the purchase of substantial quantities of freezers, food and freezer food plans from respondents by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of the respondents, as herein alleged, including the dissemination by respondents of false advertisements as aforesaid, were and are all to the prejudice and injury of the public and the respondents' competitors, and constituted, and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act, and in violation of Sections 5 and 12 of said Act.

DECISION AND ORDER

The Commission having issued its complaint on July 19, 1966, charging the respondents named in the caption hereof with viola-

tion of the Federal Trade Commission Act, and the respondents having been served with a copy of that complaint; and

The Commission having duly determined upon motion certified to the Commission that, in the circumstances presented, the public interest would be served by waiver here of the provision of Section 2.4(d) of its rules that the consent order procedure shall not be available after issuance of complaint; and

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

The Commission having considered the aforesaid agreement and having determined that it provides an adequate basis for appropriate disposition of this proceeding, the agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered:

1. Respondent Supreme Food Products Company, Inc., is a corporation organized, existing and doing business under by virtue of the laws of the State of Pennsylvania with its office and principal place of business located at 4246–4250 Market Street in the city of Philadelphia, State of Pennsylvania.

Respondent Benjamin Jay Berman is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

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

ORDER

PART I

It is ordered, That respondents Supreme Food Products Company, Inc., a corporation, and its officers, trading under its own name or as Supreme Frozen Food Company, Foremost Food Products Co., or Foremost Food Service or under any other trade name or names, and Benjamin Jay Berman, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other

device, in connection with offering for sale, sale or distribution of freezers, food or freezer food plans in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication that:

1. Purchasers of their freezer food plan can buy their usual food requirements and a freezer for the same or a lesser amount of money than they have been paying for said food requirements alone.

2. Purchasers of their freezer food plan will save enough money on the purchase of their usual food requirements to pay for the freezer.

3. Food prices charged by respondents for the initial order are respondents' regular and usual price for each such item: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that said initial prices are respondent's regular and usual prices for each such item at the time of the initial order.

4. Purchasers can obtain all of their food needs through respondents' freezer food plan.

5. All of respondents' food products, or any category thereof, are nationally advertised brands: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that all such products, or any category thereof, are nationally advertised brands in conformity with the representation made.

6. The freezers sold by respondents are frost free: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that such freezers are frost free.

7. The meat sold by respondents is either United States Government inspected or graded: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that the meat so described has been inspected or graded in conformity with the representation made.

8. That purchasers have but one payment to make covering both food and freezer: *Provided, however,* That it shall be a defense in any enforcement proceeding

instituted hereunder for respondents to establish that only one payment is required for both food and freezer.

9. Any quantity of food ordered by the purchaser will be sufficient to last such purchaser any stated or specified period of time: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that any representation in the foregoing respect constituted a bona fide estimate by respondents' representative of the purchaser's food requirements for the stated period of time based upon information secured in good faith from the purchaser.

10. Purchasers can become members of respondents' freezer food plan on a trial basis.

B. Misrepresenting in any manner the prices or the grade or quality of food sold by respondent or the savings realized by purchasers of respondents' food, freezers or freezer food plans.

C. Inducing purchasers to sign any contract to purchase, promissory note or other instrument which does not at the time of signing contain all the terms and conditions of the transaction and the total charges which the purchaser must pay.

PART II

It is further ordered, That respondents Supreme Food Products Company, Inc., a corporation, and its officers, trading under its own name or as Supreme Frozen Foods Company, Foremost Food Products Co., or Foremost Food Service, or any other trade name or names, and Benjamin Jay Berman, individually and as an officer of said corporation and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with offering for sale, sale or distribution of food, or any purchasing plan involving food, do forthwith cease and desist from:

1. Disseminating or causing to be disseminated any advertisement by means of United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any of the representations or misrepresentations prohibited in Paragraphs A, B and C of Part I of this order.

2. Disseminating or causing to be disseminated any adver-

tisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any food or any purchasing plan involving food in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any of the representations or misrepresentations prohibited in Paragraphs A, B and C of Part I of this order.

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

IN THE MATTER OF

BY-PRODUCTS INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket C-1131. Complaint, Oct. 19, 1966—Decision, Oct. 19, 1966

Consent order requiring a Connerly Springs, N.C., buyer and seller of floor coverings made from textile waste to cease misbranding and falsely guaranteeing the fiber content of its products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that By-Products Inc., a corporation, and D.B. Tate, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent By-Products Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina.

Respondent D. B. Tate is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. The respondents are engaged in the buying and selling of floor coverings made from textile waste. The respondents have their office and principal place of business at Connerly Springs, North Carolina.

PAR. 2. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondents have been and are now engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported, and caused to be transported, after shipment in commerce, textile fiber products either in their original state or contained in other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited, thereto, were floor coverings with labels which: set forth the fiber content as "25% Acrilan Acrylic, 25% Nylon, 25% Cotton, 25% Undetermined Fiber, Content Textile By Products" whereas, in truth and in fact, said product contained substantially different fibers and amount of fibers.

PAR. 4. Certain of said textile fiber products, were further misbranded in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products with labels which failed:

1. To disclose the true generic names of the fibers present; and
2. To disclose the correct percentage of such fibers.

PAR. 5. The respondents have furnished false guaranties that their textile fiber products were not misbranded or falsely invoiced in violation of Section 10 of the Textile Fiber Products Identification Act.

PAR. 6. The acts and practices of the respondents as set forth above were and are in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, and constituted and now constitutes unfair methods of competition and unfair and deceptive acts or practices, in commerce, under the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent By-Products Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its office and principal place of business located at Connerly Springs, North Carolina.

Respondent D. B. Tate is an officer of said corporation and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents By-Products Inc., a corporation, and its officers, and D. B. Tate, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States of textile fiber products; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber products, which have been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, after shipment in commerce of any textile fiber products, whether they are in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

A. Misbranding fiber products by:

1. Falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of constituent fibers contained therein.

2. Failing to affix labels to such textile fiber products showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

B. Furnishing false guaranties that textile fiber products are not misbranded or falsely invoiced under the provisions of the Textile Fiber Products Identification Act.

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

IN THE MATTER OF

ABINGTON SHOE COMPANY ET AL.

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

Docket C-1132. Complaint, Oct. 21, 1966—Decision, Oct. 21, 1966

Consent order requiring two affiliated Boston, Mass., manufacturers of men's shoes to cease deceptively representing their shoes as official, regulation or surplus United States Navy footwear.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Abington Shoe Company, a corporation, Jade Footwear Company, a corporation, and Herman Swartz and Sidney Swartz, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Abington Shoe Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts, with its office and principal place of business located at 171 Camden Street, Boston, Massachusetts.

Respondent Jade Footwear Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Masschusetts, with its office and principal place of business located at 171 Camden Street, Boston, Massachusetts.

Respondents Herman Swartz and Sidney Swartz are officers of said corporate respondents. They formulate, direct and control the acts and practices of said corporate respondents including the acts and practices hereinafter set forth. Their business address is the same as that of respondent Abington Shoe Company.

The aforesaid respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacturing, offering for sale, sale and distribution of footwear, including men's shoes which closely re-

semble in appearance shoes issued to members of the United States Navy, which are sold to dealers and others for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, said shoes, when sold to be shipped from their place of business in the State of Massachusetts to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of shoes of the same general kind and nature as those sold by respondents.

PAR. 5. The said shoes sold and distributed by respondents, in the course and conduct of their business as aforesaid, closely resemble the shoes issued and furnished to members of the United States Armed Forces in color material, pattern and style. Respondents also cause to be affixed to said shoes certain markings, writing and phrases respecting their manufacture, construction, inspection and specifications.

Typical and illustrative are the following:

GENUINE U.S. NAVY LAST
U.S. NAVY LAST
INSPECTED BY #203.

PAR. 6. Through the use of the terms "U.S. NAVY" in conjunction with the other statements and representations set out above, respondents represent, and have represented, directly or by implication:

1. That said shoes are official, regulation or surplus United States Navy shoes and are manufactured in accordance with United States Navy or Government specifications.

2. That said shoes are inspected by United States Navy or Government inspectors and approved as meeting United States Navy or Government specifications.

PAR. 7. In truth and in fact:

1. Said shoes are not official, regulation, surplus United States Navy or Government shoes and are not manufactured in accordance with Navy or Government specifications.

2. Said shoes are not inspected by United States Navy or Government inspectors and are not approved as meeting United States Navy or Government specifications.

Therefore, the statements and representations set forth in Paragraphs Five and Six hereof were and are false, misleading and deceptive.

PAR. 8. By selling and distributing to dealers and others said shoes having affixed to them the markings, writings and phrases hereinabove described, respondents furnish to such dealers and others, the means and instrumentalities by and through which they may mislead and deceive the purchasing public as to the origin, type, construction, manufacture and quality of their said shoes.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' product by reason of said erroneous and mistaken belief.

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

DECISION AND ORDER

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

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

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

1. Respondent Abington Shoe Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts, with its office and principal place of business located at 171 Camden Street, Boston, Massachusetts.

Respondent Jade Footwear Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts, with its office and principal place of business located at 171 Camden Street, Boston, Massachusetts.

Respondents Herman Swartz and Sidney Swartz are officers of said corporations and their address is the same as that of said corporations.

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

ORDER

It is ordered, That respondents Abington Shoe Company, a corporation, and Jade Footwear Company, a corporation, and their respective officers, and Herman Swartz and Sidney Swartz, individually and as officers of said corporate respondents, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of footwear in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that said footwear is official, regulation or surplus United States Navy or Armed Forces footwear or is manufactured in accordance with United States Navy or Government specifications.

2. Representing, directly or by implication, that said footwear has been inspected by United States Navy or Government inspectors or has been approved by said inspectors as meeting United States Navy or Government specifications.

3. Misrepresenting in any manner the parties, organizations, firms or corporations for whom said footwear was manufactured, or the specifications for or inspection of said footwear.

4. Furnishing or otherwise placing in the hands of retail-

ers of said products, or others, any means or instrumentalities by or through which they may mislead and deceive the public in the manner or as to the things hereinabove prohibited.

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

IN THE MATTER OF

PARENTS' MAGAZINE ENTERPRISES, INC., ET AL.

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

Docket C-1133. Complaint, Oct. 25, 1966—Decision, Oct. 25, 1966

Consent order requiring a New York City publisher of a magazine for parents to cease deceptively representing that its "Commendation Seal" awarded to its advertisers is based on evaluation of the advertisers' products by independent individuals, laboratories, or organizations.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Parents' Magazine Enterprises, Inc., a corporation, and George J. Hecht, Allison R. Leininger, and Edward A. Sand, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Parents' Magazine Enterprises, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 52 Vanderbilt Avenue, in the city of New York, State of New York.

George J. Hecht is chairman of the board, Allison R. Leininger is chairman of the executive committee, and Edward A. Sand is

president, of the corporate respondent. These individuals direct, formulate and control the acts, practices and policies of the corporate respondent, including those hereinafter referred to. Their business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in publishing various periodicals and magazines, and in the distribution and sale thereof to retailers for resale to the consuming public and directly to the consuming public. Among such publications is a magazine known as "Parents' Magazine."

Respondents are also engaged in the issuance of a seal of commendation to manufacturers who advertise in "Parents' Magazine."

PAR. 3. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of magazines and periodicals of the same general kind and nature as that sold by respondents.

PAR. 4. In the course and conduct of their business in connection with the sale and distribution of "Parent's Magazine" respondents now cause and for some time last past have caused, said magazine to be delivered to purchasers thereof, located in the various States of the United States other than the State of publication and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said publication and related enterprises in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of their business and for the purpose of inducing advertisers to advertise their products and services in the said "Parents' Magazine" and for the purpose of inducing the purchase of the various products and services advertised therein, respondents have engaged in the following acts and practices:

Respondents with certain qualifications and requirements hereinafter set forth, offer to various advertisers in said "Parents' Magazine" the use of a seal which is circular in shape, and contains the language:

COMMENDED BY PARENTS' MAGAZINE as advertised therein

In each issue of said magazine there appears the following:

WHAT THE PARENTS' MAGAZINE SEAL MEANS

Products eligible for Parents' Magazine Commendation Seal are awarded the seal only after Parents' Magazines' technical staff and/or medical consultants have studied them and the claims made for them. The largest independent, diversified testing laboratory in the United States is employed on an annual retainer to do whatever tests are required.

Upon the granting of the use of commendation seal by respondents, advertisers in "Parent's Magazine" are entitled to display the commendation seal in advertisements placed in said magazine, and to use said seal elsewhere on and in connection with the products or services which have been awarded the commendation seal.

PAR. 6. By and through the use of the aforesaid commendation seal, and the above quoted statements, respondents have represented, directly or by implication, that "Parents' Magazine's" commendation seal is awarded to only those products or services that have been evaluated by qualified technicians, medical experts or an independent testing laboratory and found to fulfill all claims made for such products or services in Parents' Magazine advertisements.

PAR. 7. In truth and in fact the aforesaid commendation seal is not awarded to only those products or services that have been evaluated by qualified technicians, medical experts or an independent testing laboratory and found to fulfill all claims made for such products or services in Parents' Magazine advertisements. Some products or services are awarded the aforesaid commendation seal solely on the recommendation of "Parents' Magazine" staff members who are not qualified technicians or medical experts or on the basis of tests and reports submitted by the applicant for the seal, or on the basis of an editorial staff decision based on the reputation of the applicant.

Further, an advertising contract between the respondents and advertisers in said magazine is a condition precedent to any consideration for the awarding of the seal of commendation.

Moreover, respondents, by granting the seal of commendation to advertisers of products and services in said magazine place in the hands of said advertisers an instrumentality whereby such advertisers are enabled to mislead or deceive the consuming public.

Therefore, the statements and representations as set forth in Paragraphs Five and Six hereof were and are false, misleading and deceptive.

PAR. 8. The use by respondents of the aforesaid false, mislead-

ing and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true and into the purchase of substantial quantities of the products and services advertised therein displaying the commendation seal by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent Parents' Magazine Enterprises, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 52 Vanderbilt Avenue, in the city of New York, State of New York.

Respondents George J. Hecht, Allison R. Leininger and Edward A. Sand are officers of said corporation and their address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the sub-

ject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Parents' Magazine Enterprises, Inc., a corporation, and George J. Hecht, Allison R. Leininger and Edward A. Sand, individually and as officers of said corporation, and respondents' officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the solicitation of advertising, distribution of any publication, or the awarding of their commendation seal, or other similar device, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any award, seal or other commendation is granted, made or presented on the basis of evaluations or tests of products or services by individuals, laboratories or organizations to determine the quality or merits of such products or services or the validity of the claims made therefor: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted for violation hereof for respondents to affirmatively establish that the award, seal or other commendation has been granted, made or presented (1) on the basis of good faith evaluations by employees of or consultants retained by respondents, whom respondents have reason to believe in good faith are qualified to determine the quality or merits of such products or services and the validity of the claims made therefor, or (2) on the basis of good faith evaluations by employees of or consultants retained by respondents, whom respondents have reason to believe in good faith are qualified therefor, of tests of products or services made by employees of or consultants retained by respondents whom, or individuals, laboratories or organizations which, respondents have reason to believe in good faith are qualified to determine the quality or merits of such products or services and the validity of the claims made therefor.

2. Granting, making or presenting any award, seal or other commendation which represents, directly or by implication, or which enables the recipient thereof to represent, directly or by implication, that any product or service receiving it has been evaluated or tested by individuals, laborator-

ies or organizations to determine the quality or merits of any such product or service or the validity of the claims made therefor: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted for violation hereof for respondents to affirmatively establish that the award, seal or other commendation has been granted, made or presented (1) on the basis of good faith evaluations by employees of or consultants retained by respondents, whom respondents have reason to believe in good faith are qualified to determine the quality or merits of such products or services and the validity of the claims made therefor, or (2) on the basis of good faith evaluations by employees of or consultants retained by respondents, whom respondents have reason to believe in good faith are qualified therefor, of tests of products or services made by employees of or consultants retained by respondents whom, or individuals, laboratories or organizations which, respondents have reason to believe in good faith are qualified to determine the quality or merits of such products or services and the validity of the claims made therefor.

3. Failing to clearly disclose in connection with any statement in respondents' publications with respect to an award or other commendation conferred upon a particular product or service, the basis upon which such commendation was made, including the disclosure of the fact, when such is the case, that the evaluations or tests have been made, in whole or in part, by non-technical and/or non-medical persons; or misrepresenting in any manner the qualifications or training of those making respondents' evaluations or tests.

4. Misrepresenting in any manner the basis upon which respondents' awards, seals or commendations are granted.

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

IN THE MATTER OF

DAYCO CORPORATION

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

Docket 7604. Complaint, Oct. 1, 1959—Decision, Oct. 27, 1966

Order modifying a cease and desist order of August 5, 1964, 66 F.T.C. 423, against a Dayton, Ohio, automotive parts manufacturer by vacating the price discrimination provision, pursuant to a remand order of the Court of Appeals, Sixth Circuit, 362 F. 2d 180 (8 S.&D. 327), and enforcing the prohibition against resale price fixing.

ORDER MODIFYING ORDER TO CEASE AND DESIST

Respondent having filed in the United States Court of Appeals for the Sixth Circuit a petition to review and set aside the order to cease and desist issued herein on August 5, 1964 [66 F.T.C. 423]; and that court on June 17, 1966 [8 S.&D. 327], having issued its opinion and on July 5, 1966, having issued its order affirming and enforcing the portion of the order to cease and desist issued pursuant to Section 5 of the Federal Trade Commission Act; and vacating the portion of the order to cease and desist issued pursuant to Section 2(a) of the Clayton Act; and the court having remanded this matter to the Commission for further proceedings consistent with the court's opinion; and the Commission, having concluded after due consideration that no further proceedings are warranted:

It is ordered, That the order to cease and desist in this matter be, and it hereby is, modified to read as follows:

> *It is ordered,* That respondent, Dayco Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device in, or in connection with, the sale or distribution of automotive parts and related products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:
>
> > Putting into effect, continuing or maintaining any merchandising or distribution plan or policy under which agreements or understandings are entered into with resellers of such products which have the purpose

or effect of fixing, establishing, or maintaining the prices at which such products may be resold.

It is further ordered, That Count I of the complaint be, and it hereby is, dismissed.

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

IN THE MATTER OF

JEROME FRIEDMAN FURS, INC.

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

Docket C-1134. Complaint, Oct. 27, 1966—Decision, Oct. 27, 1966

Consent order requiring a New York City furrier to cease misbranding, falsely invoicing, and falsely advertising its fur products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Jerome Friedman Furs, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Jerome Friedman Furs, Inc., is a corporation with its office and principal place of business located at 5th Avenue at 47th Street, city of New York, State of New York.

Respondent is a retailer of fur products and leases the fur department in E. J. Korvette, a department store located at the same address.

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

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled or otherwise falsely or deceptively identified with respect to the name of the country of origin of furs contained in such fur products, in violation of Section 4(1) of the Fur Products Labeling Act.

Among such misbranded fur products, but not limited thereto, were fur products labeled to show the country of origin of furs used in such fur products as "Canada" when the country of origin of such furs was, in fact, Norway.

PAR. 4. Certain of said fur products were misbranded in that they were falsely and deceptively labeled to show that fur contained therein was natural, when in fact such fur was pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 5. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products which failed:

1. To show the true animal name of the fur used in the fur product.

2. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.

3. To show that the fur product was composed in whole or in substantial part of paws, tails, bellies, or waste furs when such was the fact.

PAR. 6. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not la-

beled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

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

(b) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in handwriting on labels, in violation of Rule 29(b) of said Rules and Regulations.

(c) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth in the required sequence, in violation of Rule 30 of said Rules and Regulations.

(d) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth separately on labels with respect to each section of fur products composed of two or more sections containing different animal furs, in violation of Rule 36 of said Rules and Regulations.

PAR. 7. Certain of said fur products were falsely and deceptively invoiced by the respondent in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and Rules and Regulations promulgated under such Act.

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

1. To show the true animal name of the fur used in the fur product.

2. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.

3. To show the country of origin of imported furs used in the fur products.

PAR. 8. Certain of said fur products were falsely and deceptively invoiced with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products which were invoiced as "Broadtail" thereby implying that the furs contained therein

were entitled to the designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designation.

PAR. 9. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

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

(b) The term "Persian Lamb" was not set forth on invoices in the manner required by law, in violation of Rule 8 of said Rules and Regulations.

(c) The term "Dyed Mouton Lamb" was not set forth on invoices in the manner required by law, in volation of Rule 9 of said Rules and Regulations.

(d) The term "Dyed Broadtail-processed Lamb" was not set forth on invoices in the manner required by law, in volation of Rule 10 of said Rules and Regulations.

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

PAR. 10. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly, in the sale, and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements, but not limited thereto, were advertisements of respondent which appeared in issues of the Daily News, a newspaper published in the city of New York, State of New York.

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

1. To show the true animal name of the fur used in the fur product.

2. To show that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.

PAR. 11. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondent falsely and deceptively advertised fur products in that certain of said fur products were falsely and deceptively identified with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(a) (5) of the Fur Products Labeling Act.

Among such falsely and deceptively advertised fur products, but not limited thereto, were fur products advertised as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designation.

PAR. 12. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondent falsely and deceptively advertised fur products in violation of the Fur Products Labeling Act in that the said fur products were not advertised in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "Dyed Broadtail-processed Lamb" was not set forth in the manner required, in violation of Rule 10 of the said Rules and Regulations.

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

PAR. 13. Respondent in introducing, selling, advertising, and offering for sale, in commerce, and in processing for commerce, fur products; and in selling, advertising, offering for sale and processing fur products which have been shipped and received in commerce, has misbranded such fur products by substituting thereon, labels which did not conform to the requirements of Section 4 of the Fur Products Labeling Act, for the labels affixed to said fur products by the manufacturer or distributor pursuant to Section 4 of said Act, in violation of Section 3(e) of said Act.

PAR. 14. The aforesaid acts and practices of respondent, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

Decision and Order

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

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

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

1. Respondent Jerome Friedman Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 5th Avenue and 47th Street, city of New York, State of New York.

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

ORDER

It is ordered, That respondent Jerome Friedman Furs, Inc., a corporation, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Falsely or deceptively labeling or otherwise identifying any such fur product as to the country of origin of furs contained in such fur product.

2. Representing directly or by implication on labels that the fur contained in any fur product is natural when the fur contained therein is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

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

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

5. Setting forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in handwriting on labels affixed to fur products.

6. Failing to set forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder on labels in the sequence required by Rule 30 of the aforesaid Rules and Regulations.

7. Failing to set forth separately on labels attached to fur products composed of two or more sections containing different animal fur the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder with respect to the fur comprising each section.

B. Falsely or deceptively invoicing fur products by:

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

2. Setting forth on invoices pertaining to fur products any false or deceptive information with respect to the

name or designation of the animal or animals that produced the fur contained in such fur product.

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

4. Failing to set forth the term "Persian Lamb" in the manner required where an election is made to use that term instead of the word "Lamb."

5. Failing to set forth the term "Dyed Mouton Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb."

6. Failing to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb."

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

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

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

2. Falsely or deceptively identifies any such fur product as to the name or designation of the animal or animals that produced the fur contained in the fur product.

3. Fails to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb."

4. Fails to set forth the term "natural" as part of the information required to be disclosed in advertisements under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur

products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

It is further ordered, That respondent Jerome Friedman Furs, Inc., a corporation, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, sale, advertising or offering for sale, in commerce, or the processing for commerce, of fur products; or in connection with the selling, advertising, offering for sale, or processing of fur products which have been shipped and received in commerce, do forthwith cease and desist from misbranding fur products by substituting for the labels affixed to such fur products pursuant to Section 4 of the Fur Products Labeling Act labels which do not conform to the requirements of the aforesaid Act and the Rules and Regulations promulgated thereunder.

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

IN THE MATTER OF

NED R. BASKIN DOING BUSINESS AS HOLLYWOOD FILM STUDIOS

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

*Docket 4902. Complaint, Feb. 8, 1943—Decision, Oct. 28, 1966**

Order reopening and modifying a cease and desist order, 47 F.T.C. 913, of January 26, 1951, against a Hollywood, Calif., photographic portrait studio by adding certain paragraphs which extend coverage of the order to prints, snapshots, negatives, slides, and color slides, and requiring respondent to make a clear disclosure of the prices for its coloring services.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER TO CEASE AND DESIST

The Commission, on January 26, 1951 [47 F.T.C. 913], having issued its decision and order to cease and desist against respondent herein in this matter; and

*This order was vacated by the Commission on December 30, 1966, p. 1851 herein; cease and desist order of January 26, 1951, 47 F.T.C. 913, 928, was modified on May 10, 1968.

The Commission, on September 14, 1966, having served upon respondent its order to show cause why this proceeding should not be reopened and the order modified by adding certain paragraphs therein set forth; and

Respondent not having responded to such order to show cause within the period provided in the Commission's Rules; and

The Commission being of the opinion that the public interest will be best served by reopening the proceeding herein and by modifying its order to cease and desist dated January 26, 1951:

It is ordered, That the proceeding herein be, and it hereby is, reopened and the Commission's order to cease and desist of January 26, 1951 [47 F.T.C. 913], be, and it hereby is, modified to read as follows:

It is ordered, That the respondent, Ned R. Baskin, an individual trading under the name of Hollywood Film Studios, or trading under any other name, and his agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of plain or colored photographs, or enlargements thereof, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, directly or by implication, that any photograph or enlargement, colored or black and white, framed or unframed, will be made and delivered for a stipulated price, unless such photograph or enlargement will in fact be made and delivered for the stipulated price without the imposition or attempted imposition of any condition not clearly disclosed in the representation.

(2) Representing, directly or by implication, that any offer is for a limited time only, when such offer is not in fact limited in point of time, but is made by respondent in the regular course of business.

(3) Using the words "free" or "given," or any other word or term expressly or impliedly importing a like meaning, in advertising, to designate, describe, or refer to any article of merchandise which is not in fact a gift or gratuity or which is not given without requiring the purchase of other merchandise or the performance of some service inuring directly or indirectly to the benefit of the respondent.

(4) Using the name "Hollywood Film Studios," together with pictures of motion picture celebrities, on letterheads or in advertising matter; or otherwise representing that the

respondent has any connection whatsoever with the motion picture industry.

It is further ordered, That respondent Ned R. Baskin, an individual doing business as Hollywood Film Studios, or under any other name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the advertising, furnishing, offering for sale, sale or distribution of photographs, photographic enlargements, photographic coloring or enlargement services, or any other products or services in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering to furnish any photograph or any enlargement of a picture, photograph, print, snapshot, negative, slide, color slide, or similar article, either free of cost or for any stated amount or compensation,

   (a) unless the offered photograph or enlargement is in every instance furnished upon the request therefor, when accompanied by the stated amount or compensation, if any, and

   (b) unless the negative, slide or photograph forwarded pursuant to the offer is returned simultaneously with the offered photograph or enlargement, and

   (c) without the imposition or attempted imposition of any condition, and

   (d) without first sending to the requesting person any form of communication offering to sell respondent's coloring services or any other services.

2. Offering to furnish a black and white photograph or enlargement of a picture, photograph, print, snapshot, negative, slide, color slide, or similar article, either free of cost or for any stated amount or compensation, unless in immediate conjunction with such offer, in letters of equal size and prominence, the disclosure is made that the offered photograph or enlargement is black and white.

3. Requesting information for having any photograph, enlargement, or similar article colored, in any advertisement or in any other form of communication, unless in each instance in which such request for information is made

   (a) there is clear and conspicuous disclosure that forthcoming is an offer to sell respondent's coloring services and

(b) there is clear and conspicuous disclosure of the full amount of respondent's charge for such coloring services.

4. Misrepresenting in any manner the terms of any offer or the services provided by respondent.

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

IN THE MATTER OF

MID-LAND ADVERTISING COMPANY ET AL.

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

Docket C-1135. Complaint, Nov. 3, 1966—Decision, Nov. 3, 1966

Consent order requiring an Omaha, Nebr., distributor of miscellaneous merchandise to cease making deceptive claims as to surveys, contest, prizes, free merchandise, savings, and value, in advertising its products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Mid-Land Advertising Company, a partnership, and James L. Swanson and Lowell Growcock, individually and as copartners trading and doing business as Mid-Land Advertising Company, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Mid-Land Advertising Company is a copartnership comprised of the subsequently named individuals who formulate, direct and control the acts and practices of the said partnership, including the acts and practices hereinafter set forth. The principal office and place of business of respondents is located at 5011 Underwood, in the city of Omaha, State of Nebraska.

Respondents James L. Swanson and Lowell Growcock are indi-

viduals and copartners trading and doing business as Mid-Land Advertising Company with their principal office and place of business located at the above stated address.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of household appliances, books, tools and other merchandise to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their place of business in the State of Nebraska to purchasers thereof located in various other States of the United States and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their merchandise, the respondents and their salesmen and other representatives have made numerous statements and representations to prospective customers, orally and otherwise, with respect to their said products and the methods employed by them in promoting the sale thereof.

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

1. That respondents are conducting a survey and that prospective customers' names will be entered in a drawing or contest to be held in connection with the survey.

2. That prospective customers have won prizes in a drawing or contest and must make an appointment with one of the respondents' representatives in order to receive such prizes.

3. That customers are specially selected in order to promote the sale of respondents' products.

4. That customers are receiving reduced prices or a "special introductory offer" in order to promote the trade names of merchandise sold by respondents and that savings are thereby afforded to purchasers from respondents' regular prices.

5. That customers making an initial purchase from the respondents may thereafter purchase their merchandise at a 50% discount from the respondents' regular prices.

6. That when customers purchase one item from the aforesaid dealers, other items are awarded to such customers as a gift or "at no extra cost" or that they are "free."

PAR. 5. In truth and in fact:

1. The respondents are not conducting a survey and prospective customers' names are not entered in a drawing or contest to be held in connection with a survey or otherwise. Respondents are only seeking information about prospective customers' appliance needs and credit ratings which is used by respondents as a basis to determine whether an attempt shall be made to sell such customers merchandise.

2. Persons do not win prizes at drawings or any other type of contest but are so notified because such persons appear to be good prospects for the sale of merchandise. Appointments are made with prospective customers only for the purpose of selling them merchandise.

3. Respondents' customers are not especially selected. On the contrary, said merchandise is available to anyone with money or credit rating to take advantage of it.

4. Respondents' customers do not receive reduced prices or a "special introductory offer" but are afforded the same prices at which said respondents sold their merchandise in the past and savings are not thereby afforded to such purchasers.

5. Customers making purchases from respondents will not thereafter be able to buy merchandise at a 50% or any other substantial discount from said dealers' regular prices.

6. Customers of the aforesaid respondents do not receive additional merchandise as a gift or "at no extra cost" or "free," but the price of any additional items of merchandise is included in the price that such customers pay for the major or principal item sold by said respondents, and the major item required to be purchased has never been sold separately in substantial quantities at such prices.

Therefore the statements and representations set forth in Paragraph Four are false, misleading and deceptive.

PAR. 6. In the course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of their said merchandise, the respondents circulate among the consuming public leaflets and other data containing retail pricing representations.

Typical and illustrative of the aforesaid representations are the following:

WALTHAM
Sea Fall
Value $69.50

[Picture of the watch]

Air—way
Sanitizor
"88"
Value $259.85

[Picture of the assembled machine and the separate parts]

"7" HEAVY DUTY POWER SAW
Value
$59.50

[Picture of the saw]

PAR. 7. Through the use of the aforesaid representations, and others similar thereto but not specifically set forth herein, respondents have represented, directly or indirectly, that said stated prices, accompanied by the word "VALUE" are not appreciably in excess of the highest prices at which substantial sales of such merchandise have been made in the recent regular course of business in the trade area where such representations are made.

PAR. 8. In truth and in fact:

The aforesaid stated prices accompanied by the word "VALUE" are appreciably in excess of the highest prices at which substantial sales of such merchandise have been made in the recent regular course of business in the trade area where such representations appeared.

Therefore, the aforesaid representations as set forth in Paragraphs Six and Seven hereof were and are false, misleading and deceptive.

PAR. 9. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of houseware products of the same general kind and nature as that sold by respondents.

PAR. 10. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' said appliances, books, tools and other merchandise.

PAR. 11. The aforementioned acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent Mid-Land Advertising Company is a partnership, with principal office and place of business located at 5011 Underwood, Omaha, Nebraska.

Respondents James L. Swanson and Lowell Growcock are individuals and copartners trading and doing business as Mid-Land Advertising Company with their principal office and place of business located at the above stated address.

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

ORDER

It is ordered, That respondents Mid-Land Advertising Company, a partnership, and James L. Swanson and Lowell Growcock, individually and as copartners trading and doing business as Mid-Land Advertising Company, or under any other name, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of household appliances,

books, tools or any other articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication:

1. That they are conducting a survey, drawing or contest in connection with the sale of merchandise.

2. That prospective customers' names will be entered in a drawing or contest held in connection with a survey.

3. That prospective customers have won prizes or "free" merchandise: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that such customers have in fact won prizes or free merchandise in a bona fide contest or drawing.

4. That prospective purchasers of any merchandise sold by respondents are especially selected.

5. That any offer or price constitutes an introductory offer or price or representing that any price is a special price unless such price constitutes a reduction from the price at which such merchandise has been sold or offered for sale by respondents in the recent, regular course of their business; or misrepresenting, in any manner, the savings available to purchasers.

6. That customers making initial purchases from respondents will thereafter be able to buy merchandise from respondents at a 50% discount or at any other substantial discount from respondents' regular prices.

7. That any item of merchandise which is sold or offered for sale in conjunction or combination with other merchandise as a gift or without extra cost is free.

B. Using the word "Value" or any word or words of similar import to refer to any amount which is appreciably in excess of the highest price at which substantial sales of such merchandise have been made in the recent regular course of business in the trade area where such representations are made; or otherwise misrepresenting the price at which such merchandise has been sold in the trade area where such representations are made.

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

IN THE MATTER OF

STAR OF SIAM ET AL.

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

Docket C-1136. Complaint, Nov. 8, 1966—Decision, Nov. 8, 1966

Consent order requiring a Lakewood, Calif., corporation to cease misrepresenting the nature and composition of its imitation pearls.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Star of Siam, a corporation, and Ben A. McOsker and A. C. Novick, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Star of Siam is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 3625 Industry Avenue in the city of Lakewood, State of California.

Respondents Ben A. McOsker and A. C. Novick are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of jewelry to retailers for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their place of business in the State of California to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their imitation pearls, the respondents have made numerous statements and representations in advertisements appearing in newspapers and magazines of general circulation, and in pamphlets and other literature disseminated to retailers and others, respecting the nature and composition of their imitation pearls.

Typical and illustrative of the aforesaid statements and representations, but not all inclusive thereof, are the following:

> They are NACREATED . . . owing primary obligation to the oyster for repeated coatings of its own substance around a mother-of-pearl core.
> The glow from within, thus produced, can be approached by no other imitation.
> Nature has served . . . man has improved . . . and every woman has benefited.
> The price is unbelievably low.

* * * * * * *

THE NEW POLISH OF
PEARLS BY STAR OF SIAM

Hand crafted the Rolls-Royce way—beautifully . . . pure mother-of-pearl dipped nineteen times in lustre mined from oysters. These are "nacreated" pearls by Star of Siam . . . glowing product of man's infinite artistic skill . . . .

* * * * * * *

Pearls lighting the scene—new "nacreations" by Star of Siam.

* * * * * * *

. . . a scoop neckline with the allure of Star of Siam "nacreated" pearls. About $50.

* * * * * * *

ONE TOUCH OF NACRE makes all women kin. The satiny feel of pearls, their deep and subtle glow, do wondrous things to the female psyche. Could the oyster have sensed this potent spell when first it lavished beauty on a grain of sand? Certainly the people at Star of Siam knew it when they found a way to duplicate the oyster's secret, when they hand coated pure mother-of-pearl beads with magic Nacre to create a new treasure.

* * * * * * *

Is there a Raffles about? Tempt him with Star of Siam's lovely, deep glow. Clever as he is, he'll never know they're NACREATED . . . that some crafty hand fashioned them—coating upon coating—from materials gifted by the sea.

* * * * * * *

A LOVELY NEW BREED OF PEARLS

The story of these ravishing new pearls starts in the U.S. with the Mississippi River's very best mollusk shells which are gathered up and flown to Japan. There, they are ground into little beads, each to become the heart of a beautiful new kind of pearl. Instead of being inserted in an oyster to get its coating of nacre (the cultured pearl way), the bead is dipped in a nacre liquid made by man from scrapings off the shimmering insides of oyster shells; it's dipped nineteen times till the pearl reaches a perfect glow. The most successful oyster would take three years to do this—a much more expensive proposition; and that's why these new pearls cost substantially less than cultured ones. By Star of Siam. 30″ single strand of 10 mm pearls, $103.50; . . .

* * * * * * *

Nature, Nacre and Pig—Toes

Star of Siam "Nacreations" result from a union of effort by nature and man. They are jewels, as surely as any other which nature has created in the rough and man has improved upon. The first steps in their creation are exactly the same as those for the creation of cultured pearls. Only in the final stages does man take over, and the product he prepares for the market is chemically virtually identical with cultured pearls.

* * * * * * *

Pearl Seeds

In quiet, serene workshops a painstaking process begins; a process identical in the production of nacreated and cultured pearls. . . .

Nacre is Mother-of-Pearl

In "Nacreation," the nacre found on the interior of oyster shells is scraped off, finely powdered, and suspended in an inert liquid binding agent. This viscous, pastelike liquid is then, in effect, essence of pearl. It is chemically virtually identical to perfect natural or cultured pearls.

The beads are dipped, slowly and carefully, into this shimmering essence, then dried. Nineteen times the dipping and drying process is repeated, depositing nineteen nacreous coats of translucence upon the pearl beads.

* * * * * * *

Characteristically, man has found a better, shorter, less expensive way to achieve the highly similar result. "Nacreation" is not really much different from the work of the oyster. It is almost identical and just as painstaking, but far less time-consuming. It is also subject to perfect quality control.

. . ."Nacreation" should be considered a fourth category. It is man-made, therefore is neither a "natural pearl" nor a "cultured pearl." Since, however, it uses the same organic materials the oyster itself uses, it does not resemble "simulated" pearls and is superior in appearance to "cultured" pearls.

PAR. 5. By and through the use of the word "Nacreated," and by and through the use of the above-quoted statements and representations, and others of similar import and meaning but not specifically set out herein, the respondents represent and have represented, and place and have placed in the hands of others the

means and instrumentalities of representing, directly or by implication, that their "Nacreated" pearls:

1. Are man-made pearls, or are created pearls, or are synthetic pearls, or are a new kind of pearl;

2. Are coated with or are dipped in the oyster's own substance, lustre mined from oysters, essence of pearl, nacre or mother-of-pearl;

3. Are different in composition from and are superior to all other imitation pearls;

4. Are a duplication of the oyster's secret; or that their process duplicates the oyster's function in producing cultured or natural pearls;

5. Are chemically virtually identical to natural or cultured pearls, and are created by a process which is identical with that of cultured pearls;

6. Are superior in appearance to cultured pearls.

PAR. 6. In truth and in fact respondents' "Nacreated" pearls:

1. Are not man-made, created or synthetic pearls, and they are not a new kind of pearl; they are imitation pearls;

2. Are not coated with or dipped in the oyster's own substance, lustre mined from oysters, essence of pearl, nacre or mother-of-pearl;

3. Are not different in composition from and are not superior to all other imitation pearls;

4. Are not a duplication of the oyster's secret; nor does their process duplicate the oyster's function in producing cultured or natural pearls;

5. Are not chemically virtually identical to natural or cultured pearls, and they are not created by a process which is identical with that of cultured pearls;

6. Are not superior in appearance to cultured pearls.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. By and through the use of the aforesaid practices respondents have placed and now place in the hands of others the means and instrumentalities whereby they may mislead and deceive the purchasing public as to the nature and composition of their imitation pearls.

PAR. 8. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of imi-

tation pearls of the same general kind and nature as those sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief.

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

DECISION AND ORDER

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

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

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

1. Respondent Star of Siam is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 3625 Industry Avenue, in the city of Lakewood, State of California.

Respondents Ben A. McOsker and A. C. Novick are officers

of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Star of Siam, a corporation, and its officers, and Ben A. McOsker and A. C. Novick, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of imitation pearls, or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "Nacreated," "Nacreations," or any other words or terms of similar import or meaning, as a name for or to describe or refer to imitation pearls.

2. Using the word "Pearls," or any other word or term of similar import or meaning, as a name for or to describe or refer to imitation pearls, unless such word is immediately preceded with equal conspicuousness by the word "Imitation" or "Simulated."

3. Representing, directly or by implication, that their imitation pearls:

(a) Are man-made pearls, are created pearls, or are synthetic pearls, or are a new kind of pearl;

(b) Are coated or are covered with or are dipped in the oyster's own substance, lustre mined from oysters, essence of pearl, nacre or mother-of-pearl; or using any other word or term of the same import or meaning as descriptive of or with reference to imitation pearls;

(c) Are different in composition from or are superior to all other imitation pearls;

(d) Are a duplication of the oyster's secret; or that their process duplicates the oyster's function in producing cultured or natural pearls;

(e) Are chemically virtually identical to cultured or natural pearls, or are created by a process which is identical with that of cultured pearls; or

(f) Are superior in appearance to cultured pearls or to natural pearls.

4. Misrepresenting, in any manner, or placing in the hands of others the means or instrumentalities of misrepresenting, the composition, nature or identity of coating, covering, ingredients or elements, method of manufacture, creation or production, or the characteristics or qualities of imitation pearls or any other imitation or synthetic product or of any precious or semi-precious stone.

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

IN THE MATTER OF

DEAN FOODS COMPANY ET AL.

ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 8674. Complaint, Dec. 22, 1965—Decision, Nov. 14, 1966

Order requiring a large producer of packaged milk and other dairy products in the Chicago area, to divest itself of the assets and properties of a former major competitor which it acquired in Dec. 1965 and to refrain from further acquisition in the dairy industry without prior Commission approval for the next ten years.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-name respondents have violated Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 18, 45, and that a proceeding in respect thereof would be to the interest of the public; issues this complaint, stating its charges as follows:

I

DEFINITIONS

1. For purpose of this complaint, the following definitions are applicable:

(a) "Packaged milk" consists of bottled milk and other packaged milk and related products, such as whole milk, skim milk, cream, half and half (usually packaged in cardboard cartons), whipped topping with a butter-fat base (usually packaged in aerosol cans), and whole milk in bulk cans for hotels, restaurants or institutions. This definition corresponds to Bureau of Census Standard Industrial Classification (S.I.C.) product code 20262.

(b) "The Chicago Area" consists of Cook, DuPage, Lake, Kane and Will Counties, Illinois, and Lake County, Indiana. This area corresponds to the Chicago Federal Milk Marketing Order Area administered by the Department of Agriculture.

II

RESPONDENT

2. Respondent, Dean Foods Company (hereafter "Dean"), is a corporation organized and existing under the laws of the State of Illinois, with its office and principal place of business at 3600 River Road, Franklin Park, Illinois.

3. Dean, directly and through various wholly owned subsidiaries, is a large regional producer of packaged milk, other dairy products and nondairy food products. The company operates nine dairy products plants, seven other food processing plants, and a number of sales offices. Its products are distributed in parts of Illinois, including the entire Chicago Area; parts of Kentucky, Michigan, Tennessee, and Wisconsin; and substantially the entire States of Arkansas and Indiana. In 1964, Dean had sales of $73 million, total assets of $25 million, and net income of $2.8 million before taxes. Dean is approximately the twelfth largest dairy company in the United States.

4. Dean is a profitable and growing company. Since 1959, Dean's sales have grown at an average rate of 7% per year. Dean's net income after taxes has been consistently high in the past five years, averaging 9.5% to 13.5% of net stockholder investment. The recent rapid growth of Dean has been accomplished principally by acquisitions of other dairy and nondairy companies. Although Dean's total sales increased by $21.6 million between 1959 and 1964, the sales of the companies acquired by Dean in that period exceeded $23.5 million.

Since 1960, Dean acquired the following dairy products companies:

Acquired Company	Year Acquired	Annual Sales at Time of Acquisition
Sunshine Dairy Co., Lafayette, Ind.	1960	$3,000,000
Forest Hill Dairies, Memphis, Tenn.	1960	6,000,000
Shady Lane Dairy, Alpena, Mich.	1964	300,000
Kalamazoo Creamery, Kalamazoo, Mich.	1964	1,200,000
Liberty Dairy, Big Rapids, Mich.	1965	3,000,000

5. Dean is and for many years has been engaged in "commerce" within the meaning of the Clayton and Federal Trade Commission Acts.

III

BOWMAN DAIRY COMPANY

6. Respondent, Bowman Dairy Company (hereafter "Bowman"), is a corporation organized and existing under the laws of the State of Illinois, with its office and principal place of business at 140 W. Ontario Street, Chicago, Illinois.

7. Bowman, directly and through various subsidiaries, is a large regional producer of packaged milk and other dairy products. The company operates eight packaged milk plants, three ice cream manufacturing plants, three other dairy products processing plants, and a number of distribution facilities and sales offices, including eight distribution branches in the Chicago Area. It distributes its products in parts of Illinois, Wisconsin, Iowa, Michigan, Ohio, Indiana and Kentucky, but the bulk of its packaged milk sales are made in the Chicago Area. In 1964, Bowman had sales of $77.6 million total assets of $27.2 million, and a net income of $347,000 before taxes. Bowman is approximately the eleventh largest dairy company in the United States.

8. For many years, Bowman has been the largest or second largest seller of packaged milk in the Chicago Area. In 1964, it enjoyed 16% of such sales. Recently, however, Bowman has experienced operating losses and its sales in the Chicago Area have declined, despite the fact that its operations in other areas have consistently yielded profits and have shown steady increases in sales volume. On October 9, 1965, in an attempt to retain its position in the Chicago packaged milk market, Bowman acquired Capitol Dairy Company, a Chicago firm with annual sales of $9 million.

9. Bowman is and for many years has been engaged in "commerce" within the meaning of the Clayton and Federal Trade Commission Acts.

IV

TRADE AND COMMERCE

A. *Generally*

10. The packaged milk industry consists of dairies primarily engaged in the processing of fresh whole milk for the manufacture of bulk and packaged milk. The value of the shipments of packaged milk in the United States amounted to $4.1 billion in 1963. Packaged milk represents approximately 83% of the value of shipments of all fluid milk, the remainder being composed of bulk shipments. Packaged milk represents approximately 44% of the value of shipments of all dairy products.

11. Packaged milk is sold by dairies (i) to retail food stores for resale, (ii) to institutions, (iii) direct to homes, and (iv) to jobbers. Sales by dairies to retail stores and institutions represent "wholesale" sales. Sales by dairies directly to homes represent "retail" sales. Sales made by dairies through jobbers subsequently involve primarily retail sales.

12. The dairy industry is composed of a few very large national and regional concerns and a large number of very small ones. Since World War II, large national and regional dairy companies have acquired hundreds of independent dairy companies. Significant technological changes in the dairy industry have tightened the competitive pressure on the smaller producers, made efficient operation an increasingly expensive proposition in the dairy industry and have caused a high mortality rate among small dairies. For the foregoing reasons, between 1958 and 1963, the number of packaged milk processing establishments in the United States decreased from 5,816 to 4,624, or at an average rate of decrease compounded annually, of over 4%, even though packaged milk sales rose during this period at an average rate, compounded annually, of approximately 1%.

13. Concentration at the national level in the production and sale of packaged milk and other dairy products has reached formidable levels. In 1958, the eight largest companies had 31% of the value of shipments of packaged milk in the United States. Acquisitions subsequent to 1958 and continuing declines in the number of independent dairies indicate that the level of concentration is rising.

14. Increasing barriers to entry in the packaged milk industry, increasing levels of concentration (resulting largely from acquisitions by large national and regional dairy companies), and the consequent decline in the total number of dairy companies, have increased the importance of preserving significant regional competitors like Bowman, which are the firms best able to offer competition to the large national companies.

15. The absorption and elimination of significant regional dairies by acquisition and merger has an adverse competitive effect beyond the direct elimination of actual or potential competition between the acquired and acquiring firms—particularly where the acquiring company is strong in a number of other markets. The Commission's experience with the dairy industry, and other industries, requires it to take notice that a firm strongly entrenched in a number of markets may thereby be able to engage in deep, sustained and discriminatory price cutting in selected markets to the detriment of weaker competitors. In the hands of a powerful firm, able to sustain selective price cuts for so long as may be necessary to insure against a loss of trade, the Commission has found such price cutting to be a potent weapon for repulsing new competition and preventing expansion of smaller rivals.

B. *The Chicago Area*

16. The Chicago Area is one the the largest markets in the United States for the consumption of packaged milk. The Chicago Area is also the largest consumer market in the United States which is regulated under a Federal Milk Marketing Order.

17. The four largest dairy companies in the Chicago Area account for some 43% of the sales of packaged milk. The remaining dairy companies in the Chicago Area are vastly inferior in size to the Big Four and enjoy individual market shares which are much smaller.

18. In 1964, Bowman was the largest or second largest distributor of packaged milk in the Chicago Area, with 16% of all sales. Bowman's acquisition of Capitol Dairy Company in October of 1965 further increased its already formidable market position in the Chicago Area.

19. In 1964, Dean was the third or fourth largest distributor of packaged milk in the Chicago Area, with approximately 7.2% of all sales. Dean's share of packaged milk sales in the Chicago Area has risen substantially since 1960, when its share was only 5.8%.

20. Wholesale packaged milk sales, especially sales to supermarkets, are highly sought after by dairy companies in the Chicago Area. Because such business is highly profitable, supermarket chains are regarded as choice outlets, particularly because of the practice of handling such accounts on an exclusive, or full requirements, basis. On the other hand, retail home-delivery sales, because of increasing delivery costs and a decreasing number of customers per route, are regarded by dairy companies as the less desirable segment of the packaged milk market in the Chicago Area.

21. In 1963, four large grocery chains controlled 52% of grocery store sales in the Chicago Standard Metropolitan Statistical Area (Cook, DuPage, Kane, Lake, McHenry and Will Counties, Illinois), and a like percentage of packaged fluid milk sales made by grocery stores in the Chicago Area. These four grocery chains control a significantly larger share of supermarket sales and of packaged fluid milk sales by supermarkets in the Chicago Area. Each of the four largest companies in the Chicago Area is the exclusive supplier of packaged milk to one of the four largest grocery chains in the Chicago Area. Smaller dairy companies thereby are effectively excluded from supplying the majority of the supermarket, or choice outlet, business in the Chicago Area.

22. Dean supplies the largest grocery chain in the Chicago Area, as well as other grocery store and other wholesale accounts in the Chicago Area. Bowman supplies the third or fourth largest grocery chain in the Chicago Area, as well as other grocery store and other wholesale accounts in the Chicago Area.

V

VIOLATIONS CHARGED

23. On December 13, 1965, Dean and Bowman entered into an agreement. This agreement provides that Bowman sell to Dean all of its plants and equipment; accounts receivable; inventories; leases and leasehold interests; the name "Bowman" and other trademarks and trade names; "the benefit of all relationships with customers and suppliers"; all customer and supplier lists; and various other tangible and intangible assets. The physical transfer of these assets from Bowman to Dean is scheduled to take place on January 3, 1966.

24. The effect of Dean's acquisition of Bowman may be to lessen competition substantially and tend to create a monopoly in violation of Section 7 of the Clayton Act, and the contract and

combination by which Dean and Bowman undertook to eliminate the independent competition of Bowman is in unreasonable restraint of trade and commerce, and may hinder or have a dangerous tendency to hinder competition unduly, thereby constituting an unfair act and practice in commerce, in violation of Section 5 of the Federal Trade Commission Act, in that:

(a) Actual or potential competition in the sale and distribution of packaged milk in the Chicago Area will be eliminated or prevented;

(b) Dean, a major competitive factor in the sale and distribution of packaged milk in the Chicago Area, will eliminate Bowman, another major competitive factor in the sale and distribution of packaged milk in the Chicago Area;

(c) Concentration in the sale and distribution of packaged milk in the Chicago Area will be increased and deconcentration will be prevented;

(d) The restraining influence on non-competitive behavior in the sale and distribution of packaged milk in the Chicago Area, which existed by reason of the independent operation of Bowman, will be eliminated;

(e) The acquisition will contribute to the over-all trend toward concentration in the sale and distribution of packaged milk in the United States, described in Paragraph 13, thereby tending to bring about the adverse competitive effects described in Paragraph 15;

(f) The emergence or growth of smaller packaged milk companies in the Chicago Area will be retarded, discouraged or prevented;

(g) The members of the consuming public, in the Chicago Area and throughout the United States, will be denied the benefits of free and open competition in the sale and distribution of packaged milk.

Mr. Richard H. Stern, Mr. Peter Jeffrey, Mr. Tom M. Schaumberg, Mr. Mark W. Haase, and *Mr. William Farmer* for the Commission.

Mr. Hammond E. Chaffetz, Mr. William R. Jentes, and *Mr. Donald G. Kempf, Jr., Kirkland, Ellis, Hodson, Chaffetz, & Masters,* Chicago, Ill., for respondent Dean Foods Company.

Mr. L. Edward Hart, Mr. John Paul Stevens, and *Mr. Donald E. Egan, Rothschild, Hart, Stevens & Barry,* Chicago, Ill., for respondent Bowfund Corporation (formerly Bowman Dairy Company).

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

SEPTEMBER 7, 1966

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The complaint herein was issued on December 22, 1965, and with reference to the violations charged it states:

23. On December 13, 1965, Dean and Bowman entered into an agreement. This agreement provides that Bowman sell to Dean all of its plants and equipment; accounts receivable; inventories; leases and leasehold interests; the name "Bowman" and other trademarks and trade names; "the benefit of all relationships with customers and suppliers"; all customer and supplier lists; and various other tangible and intangible assets. The physical transfer of these assets from Bowman to Dean is scheduled to take place on January 3, 1966.

24. The effect of Dean's acquisition of Bowman may be to lessen competition substantially and tend to create a monopoly in violation of Section 7 of the Clayton Act, and the contract and combination by which Dean and Bowman undertook to eliminate the independent competition of Bowman is in unreasonable restraint of trade and commerce, and may hinder or have a dangerous tendency to hinder competition unduly, thereby constituting an unfair act and practice in commerce, in violation of Section 5 of the Federal Trade Commission Act, in that:

(a) Actual or potential competition in the sale and distribution of packaged milk in the Chicago Area will be eliminated or prevented;

(b) Dean, a major competitive factor in the sale and distribution of packaged milk in the Chicago Area, will eliminate Bowman, another major competitive factor in the sale and distribution of packaged milk in the Chicago Area;

(c) Concentration in the sale and distribution of packaged milk in the Chicago Area will be increased and deconcentration will be prevented;

(d) The restraining influence on noncompetitive behavior in the sale and distribution of packaged milk in the Chicago Area, which existed by reason of the independent operation of Bowman, will be eliminated;

(e) The acquisition will contribute to the over-all trend toward concentration in the sale and distribution of packaged milk in the United States, described in Paragraph 13, thereby tending to bring about the adverse competitive effects described in Paragraph 15;

(f) The emergence or growth of smaller packaged milk companies in the Chicago Area will be retarded, discouraged or prevented;

(g) The members of the consuming public, in the Chicago Area and throughout the United States, will be denied the benfits of free and open competition in the sale and distribution of packaged milk.

On December 30, 1965, the Commission initiated proceedings against the respondents in the United States Court of Appeals for the Seventh Circuit wherein it petitioned for a temporary restraining order and a preliminary injunction to maintain the status quo until the Commission determined the legality of their merger. The Court entered a temporary restraining order, but on January 19, 1966, after hearing, it dismissed the petition and dissolved the temporary restraining order.[1] Thereafter, on the same

[1] Upon application by the Solicitor General on behalf of the Commission to the Supreme Court of the United States, Mr. Justice Clark, after consulting the other members of the Court, entered a preliminary injunction on January 24, 1966, restraining respondents from making any material changes with respect to Bowman's corporate structure or the assets purchased. This order provided that Dean might sell Bowman's retail home delivery routes upon terms and conditions acceptable to the Commission, but that any milk supplied by Dean to the purchasers of the routes must continue to be delivered under the Bowman label and from former Bowman plants. The Supreme Court granted certiorari on February 18, 1966, and on June 13, 1966 by a five to four decision reversed and remanded the cause to the Seventh Circuit. *Federal Trade Commission* v. *Dean Foods Company*, 384, U.S. 597, 610; 86 S.Ct. 1738, 1746. In accordance with the decision of the Supreme Court, the Court of Appeals held hearings on the Commission's petition for a temporary restraining order. On July 18,

day, the contract was closed and Dean acquired title to Bowman's operating assets.

The answer of respondent Dean, filed on March 1, 1966, denied the material charges of the complaint and asserted that the acquisition would not have any adverse effect on competition since Bowman, because of its operating reverses, would have withdrawn from the dairy business in any event; that Dean's intended resale of the former Bowman home delivery routes to smaller dairies and distributors in the Chicago Area would strengthen competition appreciably; that the acquisition would merely enable Dean to maintain its position as a viable medium-sized regional competitor; that Dean's market share in Chicago would in fact be less following the acquisition than the market share of Bowman alone prior to the transaction; and that rather than increasing concentration the acquisition would actually decrease concentration and increase the share of the market accounted for by the smaller dairies in the area.

Respondent Bowfund, in lieu of answering, moved to dismiss the complaint, principally on the grounds that it did not allege any violation of law by Bowfund and that the Commission was not entitled to relief against a selling corporation. On March 10, 1966, the hearing examiner denied Bowfund's motion to dismiss and the Commission, on March 25, 1966, denied Bowfund's request for permission to file an interlocutory appeal from the hearing examiner's ruling. Thereafter, Bowfund filed its answer denying the allegations of the complaint in all material respects.

On March 10, 1966, counsel for the parties met with the hearing examiner in a reported prehearing conference. As a result thereof, an agreed order was issued which was to control the subsequent course of the proceeding, unless modified to prevent manifest injustice. Each party was required to file a pretrial brief containing (a) a summary of the issues of fact and law; (b) the name and address of each witness whom it intends to call at the hearings, together with a statement of the nature of the witness' testimony; and (c) a list of the documentary exhibits to be offered. Counsel supporting the complaint filed their brief on April

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1966, the Seventh Circuit entered its order providing that, for and during the period of four months commencing from the date of entry of the order, respondents are enjoined from making any material changes "with respect to the capital stock or corporate structure of Bowfund Corporation, or with respect to the assets purchased by Dean from Bowman pursuant to their agreement of December 13, 1965." *Federal Trade Commission* v. *Dean Foods Company*, 7th Cir. No. 15493 (Slip Opinion, July 18, 1966). On the following day, the Court denied Bowfund's motion that it be dismissed out of the proceedings. *Federal Trade Commission* v. *Dean Foods Company*, 7th Cir. No. 15493 (Slip Opinion, July 19, 1966) [356 F. 2d 481 (1966)].

15, 1966, and respondents' trial briefs were filed on May 16, 1966. A further reported pretrial hearing conference was held on May 23, 1966, at which time matters relating to the conduct of the proceeding, and time and place of hearings were discussed and resolved.

Hearings were held in Chicago, Illinois, from June 13 through June 30, 1966 (14 days), and in Washington, D.C., from July 6 through July 8, 1966 (3 days), at which time complaint counsel put in their case and respondent Dean submitted its defense. Although complaint counsel had listed 27 persons as prospective witnesses in their trial brief, they called only 13 witnesses during their case-in-chief and in rebuttal. Of these, six were officials of corporate grocery chains in the Chicago Area,[2] three operated dairy processing or distributing firms in the market,[3] and four were employees either of the Federal Trade Commission or the Department of Agriculture.[4]

Respondent Dean called 17 witnesses during its defense and in rebuttal, including several industry witnesses who had been dropped as witnesses by complaint counsel. These included: (a) the Chairman of Bowman's Board of Directors, the Senior Vice President of the Northern Trust Company of Chicago, which holds the largest block of Bowman's stock, and the Chairman of Arthur Andersen & Co., one of the nation's leading accountants and financial analysts, who reviewed Bowman's substantial operating reverses in recent years and the company's decision to withdraw from the dairy business;[5] (b) the Chairman of the Board of Dean and of the Jewel Companies, Inc., who testified to the decision by Dean's largest customer, accounting for over 60% of its sales in the Chicago Area, to build its own dairy plant for the supply of milk to the Jewel stores and the resulting impact on

[2] Edward J. Davis, Assistant Treasurer and Controller of Jewel Tea Company's Chicagoland stores (Tr. 314 et seq.); Thomas E. Dewey, Vice President, Chicago Division of the Kroger Co. (Tr. 478, et seq.) John Edgar Laughlin, Chicago Regional Vice President of National Tea Co. (Tr. 272, et seq.); Herbert A. Loeb, Chairman of the Board, Hillman's, Inc. (Tr. 183, et seq.); and Walter J. Roney, President, High-Low Foods (Tr. 215, et seq.).

[3] Arnold B. Holin, Director, Country's Delight Milk Products, Division of Certified Grocers of Illinois, Inc. (Tr. 344, et seq.); Jack W. Polivka, President, Willow Farm Products Company (Tr. 430, et seq.); and Joseph J. Riebandt, Secretary, Re-Van Milk Distributors (Tr. 2275, et seq.).

[4] Andrew W. Colebank, Federal Milk Marketing Administrator, Chicago, Illinois Marketing Area (Tr. 514, et seq.); Arnold Danielson, Economist, Federal Trade Commission (Tr. 732, et seq.); Melbourne C. Steele, Chief, Division of Accounting, Bureau of Restraint of Trade, Federal Trade Commission (Tr. 2610, et seq.); and Scott A. Walker, Economist, Bureau of Economics, Federal Trade Commission (Tr. 882, et seq.; Tr. 2316, et seq.).

[5] Francis H. Kullman, Jr., Chairman of the Board, Bowman Dairy Company (Tr. 1616, et seq.); Donald H. McLucas, Senior Vice President, Northern Trust Company (Tr. 1934, et seq.); and Leonard Spacek, Chairman of Arthur Andersen & Co. (Tr. 1821, et seq.).

Dean's competitive position in the Chicago market;[6] (c) the stipulated testimony of an economist with the Department of Agriculture, whose statistics showed a marked decline in concentration in the Chicago milk market in recent years; [7] and (d) the Executive Secretary of the Associated Milk Dealers, representing substantially all the Chicago dairies, the General Manager of the largest association of milk producers serving Chicago, the Chairman of the Board of a large independent retail grocers' cooperative, and seven officials from both large and small dairy processors and distributors.[8]

On June 24, 1966, after the close of complaint counsel's case-in-chief, and before respondents put in their defense, respondent Bowfund presented a motion for dismissal of the complaint as to said respondent on the ground that no evidence had been introduced showing any violation by or right to relief against Bowfund. The hearing examiner elected to defer ruling thereon until the close of the case for the reception of evidence. On July 8, 1966, after all of the evidence was in, the hearing examiner granted Bowfund's motion to dismiss. This ruling is now on appeal to the Commission. Respondent Bowfund called no witnesses in connection with its defense, but its counsel did actively participate throughout the hearings.

SUMMARY OF THE LEGAL AND FACTUAL ISSUES

The principal issue presented in this proceeding is whether the evidence established that the effect of the acquisition of Bowman's dairy assets by Dean "may be substantially to lessen competition, or to tend to create a monopoly" in the sale of packaged milk in the Chicago Area within the proscription of Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act. On this issue, the decisions of the Supreme Court in the merger field, beginning with *Brown Shoe Co.* v. *United States*,

[6] Sam E. Dean, Chairman of the Board, Dean Foods Company (Tr. 1965, et seq.) and George L. Clements, Chairman of the Board and Chief Executive Officer, Jewel Companies, Inc. (Tr. 2223, et seq.); see also Raymond K. Esmond, Vice President in Charge of Production, Dean Foods Company (Tr. 1528, et seq.).

[7] Alden C. Manchester, Economist, U. S. Department of Agriculture (Tr. 1609, et seq.).

[8] Fred Nonnamaker, Executive Secretary of the Associated Milk Dealers (Tr. 2187, et seq.); A. L. McWilliams, General Manager of Pure Milk Association (Tr. 2132, et seq.); Anthony C. Karlos, Chairman of the Board of Grocerland Cooperative (Tr. 1913, et seq.); Donald M. Hemb, Chairman of the Board, Elgin Milk Products Company and Honey Hill Creamery Company (Tr. 936, et seq.); James Kraml, Sr., President, Kraml Milk Company (Tr. 1688, et seq.); Ernest R. Ludwig, President and General Manager of Ludwig Milk Company (Tr. 1708, et seq.); Joseph J. Oberweis, President of Oberweis Dairy (Tr. 1511, et seq.); Roy Quinlan, President, Glenora Farms Dairy (Tr. 605, et seq.); Walter Schaub, Chairman of the Board of Scot Lad Foods and President of its Meadowmoor Dairy Division (Tr. 1760, et seq.); and Jeff Schiff, an independent dairy vendor (Tr. 2298, et seq.).

370 U.S. 294, 325, (1962), and ending with *United States* v. *Pabst Brewing Co.*, 16 L. Ed. 2d 765 (1966), together with the Commission's decisions having particular applicability to the dairy industry, provide the major legal guidelines.

There can be little doubt under these precedents that if this case involved *only* the question of whether a firm such as Dean, with about 8% of the Chicago packaged milk market, could purchase a firm such as Bowman, with about 11% of that market, the acquisition would run afoul of the anti-merger laws. The respondents do not contend otherwise. It cannot be concluded from this, however, that, simply because complaint counsel have made out a *prima facie* case, further inquiry into the competitive effects of the acquisition is at an end and that the sole question remaining is, as complaint counsel urge, whether Bowman meets the prerequisites of a "failing company."

It is true that the Supreme Court has indicated that a horizontal merger between two firms enjoying the pre-acquisition market shares of Dean and Bowman is "inherently" suspect and raises "an inference" that the effect of the acquisition may be substantially to lessen competition. *United States* v. *Philadelphia Nat. Bank*, 374 U.S. 321, 363, 365 (1963). At the same time, the Court has recognized that this inference of illegality may be rebutted by "evidence clearly showing that the merger is not likely to have such anticompetitive effects." *Id.* at 363. The Commission took the same position in *Beatrice Foods Co.*, Trade Reg. Rep., 1963-1965 Transfer Binder, ¶17,244 at p. 22,337 (FTC 1965): "[N]ot every acquisition by a medium-sized firm, in circumstances where no large-scale pattern of acquisition activity is perceivable, is necessarily suspect under the antitrust laws." While the Commission went on to observe that "Such an acquisition would be questionable if it eliminated another medium-sized firm" (*ibid.*), its very use of the term "questionable" confirms that a further examination of the acquisition's probable effects is in order where strong countervailing considerations obtain.

It is evident, therefore, that the market shares enjoyed by Dean and Bowman prior to the acquisition are only the starting point for any analysis of the probable impact of the acquisition. Full consideration must also be given to concentration trends in the market, to the acquisition's effect on the ability of smaller competitors to meet the challenge of their larger rivals, to the consequences of the acquisition for entry into the market—in short, to all of the economic factors which will assist in a prog-

nosis of the acquisition's probable impact on future competitive conditions. As the Supreme Court observed in *Brown Shoe Co.* v. *United States, supra* (at p. 322, n. 38):

Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.

In evaluating the probable competitive effects of the challenged acquisition, the hearing examiner is not precluded, as complaint counsel have contended, from taking into consideration what has transpired since the acquisition's consummation. As the Supreme Court recently remarked in *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965): "The Court of Appeals was not in error in considering the post-acquisition evidence in this case." Accordingly, consideration may properly be given to the effect which Dean's sale of the former Bowman home delivery routes has had not only on Dean's post-acquisition market share, but also on the competitive strength of smaller dairies and distributors in the Chicago Area. In fact, Dean's market share following the sale of these routes provides a far better measure of the impact of the acquisition than the combination of Dean and Bowman's pre-acquisition market shares, since the latter gives an artifically inflated picture of Dean's true position in the market today. This is especially true in light of the fact that Dean's resale of the former Bowman home delivery routes was an integral part of the acquisition plan from the outset.[9]

Similarly, the hearing examiner may properly consider the probable competitive repercussions which will flow from Jewel's construction of its own milk plant and the discontinuance of its packaged fluid milk purchases from Dean. Not only is this an event which will have a profound adverse effect on Dean's continued competitive viability in the Chicago market, it was the prime factor behind Dean's decision to enter into the transaction. It is evident, therefore, that a consideration of the challenged acquisition without reference to the impact of Jewel's vertical integration into the dairy industry, would ignore one of the most signifi-

[9] This conclusion in no way conflicts with the indication in *Brown Shoe Co.* that the parties' "combined share of the immediate post-merger market" is an appropriate guide where the only post-acquisition effect has been normal customer attrition (370 U.S. at 343, n. 70). In this case, far more is involved than the slight decrease in the merging firms' combined market share which normally follows any acquisition.

cant factors affecting the acquisition's probable effect on the market.

Just as post-acquisition evidence may be taken into account in evaluating the probable effects of an acquisition, the testimony of informed industry witnesses, having knowledge of competitive conditions in the relevant market, is a useful guide to its likely impact on competition. Of course, mere expressions of opinion on their part that the acquisition will not bring about anticompetitive results are not controlling. See *United States* v. *Philadelphia Nat. Bank, supra,* at page 367. But where, as was the case in this proceeding, the industry witnesses detailed at length the economic and business factors which afforded "concrete reasons for their conclusions," their testimony may not be discounted. *Ibid.*; see also *Brown Shoe Co.* v. *United States, supra,* at page 344. This is particularly so since their testimony, in addition to indicating that the acquisition would have no probable anticompetitive effects, demonstrates that it has had, and will continue to have, positive benefits for competition in the Chicago Area.

One of the important factors—though far from the only one—which bears upon a determination of the legality of the challenged acquisition is whether Bowman was a "failing company" when it sold its dairy business to Dean. A review of the judicial precedents prior to the Celler-Kefauver amendments to Section 7 in 1950, the legislative history of those amendments and the subsequent court decisions demonstrate that the application of the "failing company" doctrine does not require, as complaint counsel argue, that the seller be in actual bankruptcy, or even facing imminent bankruptcy. A company, such as Bowman, suffering steadily declining sales and significant operating losses, with no hope of rehabilitation in the foreseeable future, is not compelled needlessly to dissipate its assets and to bring ruin upon itself, its employees and its stockholders before being permitted to sell out without fear of Section 7 violation.

The earliest decision recognizing that the sale of assets by a failing company can have no adverse effect on competition is *American Press Ass'n.* v. *United States,* 245 Fed. 91 (7th Cir. 1917). In that case, the Court found no violation of Section 1 of the Sherman Act in the sale of a printing plate plant of the American Press Association to its *only* competitor, the Western Newspaper Union. It stated (at p. 93):

> Since the outbreak of the world war there has been an increasing scarcity of print paper, and mounting prices. Few new country newspapers are being

started; many have reduced their sizes; quite a number have quit. This condition brought the American Press Association's plate business to a loss of over $3,000 a month, which is progressively increasing, and has also made it impossible for that company to build a ready-print business to help bear the overhead. The directors have decided to wind up the plate business as speedily as possible, whatever may be the outcome of the proceeding. They are continuing it at a loss while the question is being determined whether they must dispose of their plate plant as junk, or whether they may sell it as a going concern to the Western Newspaper Union, for the latter is the only probable bidder. No one now outside the business would be likely to buy a demonstrated loss. But to the Western Newspaper Union the plant may have more than junk value.

. . . If the plant be scrapped, two injuries result: One to the public from the destruction of a usable and useful plant; the other to the stockholders of the American company.

Significantly, it was not shown that the seller was either bankrupt or on the verge of bankruptcy.

The Supreme Court's first consideration of the competitive significance of a sale by a failing company was in *United States* v. *U.S. Steel Corp.*, 251 U.S. 417 (1920). There, the Court excluded U.S. Steel's acquisition of Tennessee Coal and Iron from a monopolization charge under Section 2 of the Sherman Act on the basis of testimony that the seller's property was "nearly worthless to them, nearly worthless to the communities in which it was situated, and entirely worthless to any financial institution that had the securities the minute that any panic came, and that the only way to give value to it was to put it in the hands of people whose possession of it would be a guarantee that there was value to it." As the Court put it (at pages 446–47), "what was the Corporation to do with the Property? Let it decay in desuetude or develop its capabilities and resources?"

It was in *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291 (1930), however, that the Supreme Court gave the "failing company" doctrine its first developed statement as an exception to Section 7, stating (at page 302):

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

transaction as a violation of law, as this court suggested in *United States* v. *U.S. Steel Corp.*, 251 U.S. 417, 446–447, would "seem a distempered view of purchase and result." See also *American Press Ass'n.* v. *United States*, 245 Fed. 91, 93–94.

While the facts in *International Shoe Co.* v. *Federal Trade Commission, supra,* showed the acquiring firm was in a deficit position and there was fear of involuntary liquidation, it is significant that the Court's articulation of the doctrine speaks neither of bankruptcy nor of imminent bankruptcy, but only of the "grave probability of a business failure." It is also significant that the Court relied on *American Press Ass'n.* v. *United States, supra,* where the seller was not on the verge of bankruptcy. In addition, the Court was careful to emphasize that the judgment of the officers and stockholders concerning the financial and operating plight of the acquired concern was to be preferred over government "experts," stating (at pages 301–302):

> It was suggested by the court below, and also here in argument, that instead of an outright sale, any one of several alternatives might have been adopted which would have saved the property and preserved competition; but; as it seems to us, all of these may be dismissed as lying wholly within the realm of speculation. . . . [Furthermore] as between these . . . other alternatives, and the alternative of a sale such as was made, the officers, stockholders and creditors, thoroughly familiar with the factors of a critical situation and more able than commission or court to foresee future contingencies, after much consideration, felt compelled to choose the latter alternative. There is no reason to doubt that in so doing they exercised a judgment which was both honest and well informed; and if aid be needed to fortify their conclusion, it may be found in the familiar presumption of rightfulness which attaches to human conduct in general.

Between the *International Shoe Co.* decision and the 1950 amendment of Section 7, the only federal case dealing with the failing company defense was *Beegle* v. *Thomson*, 138 F. 2d 875, 881 (7th Cir. 1943), *cert. den.*, 322 U.S. 743 (1944), where the Court commented: "A firm closing out its business because of financial difficulties may sell its plant even to a competitor without violating the Anti-Trust Law." Once again, the doctrine was stated in terms falling far short of bankruptcy or imminent bankruptcy.

When the Celler-Kefauver amendments to Section 7 were proposed, they contained no explicit recognition of the "failing company" doctrine. Accordingly, there was considerable concern during the legislative hearings and debates as to what would be the applicability and scope of the failing company defense under Sec-

tion 7 if amended. The statements by the proponents of the legislation on these points are, therefore, highly instructive.[10]

During the Senate hearings, Representative Celler, one of the principal architects of the proposed legislation, was asked the following question by Senator Donnell:

> Let me propound an illustrative case to you and ask you about this. Suppose that you had a company yourself. I want to make it large enough so that it comes within the possibility of infringing competition in a section of the country, and I do not want to make it so large that I am imputing monopolistic purposes to it. Suppose that you own the company, you and your family, built it up over a period of years. I remember in St. Louis the Murphy family built up the Murphy Truck Co., and it fell into hard financial condition. Suppose that you had a section of the country for its clientele, and were providing a section of the country with its products, just like that company did in St. Louis, all down through the Southwest, I think, or some considerable territory. Suppose that your company would become in failing circumstances, and you wanted to sell your assets, sell the physical assets of that company to some other concern.
>
> Now, the questions I want to ask you: First, how could you be sure, without some prior litigation of some kind, how could you be sure, or the purchasing company be sure, that they could safely acquire your assets of that company; and in the second place, would it not work a hardship on a company in failing circumstances if it could not sell its assets to some other company, but simply had to sit quietly by and watch those assets disintegrate by the condition of trade and economic condition that confronted the company? *Hearings Before Subcommittee of the Senate Judiciary Committee on H.R. 2734*, 81st Cong., 1st Sess., 79 (1950).

Specifically referring to the language from *International Shoe Co.* v. *Federal Trade Commission, supra*, Representative Celler replied: "The present act and my bill would have no application whatsoever to a corporation in a failing or bankrupt condition." *Id.* at 79–80. Senator Donnell next asked:

> May I call your attention in what you have read there to this very significant language. The Court there is talking about, and I quote—
>
> "a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss."
>
> Let me modify the illustration that I gave you to this extent. Suppose that this company that you and your family had built up over a period of years did not already experience the situation of resources so depleted and the prospect of rehabilitation so remote that the company faced the grave probability of a business failure, but suppose your board of directors should meet and should come to the conclusion that all signs pointed to that very condi-

[10] The Senate Hearings and Report which are referred to hereafter were specifically relied on by the Supreme Court in its own reading of the Congressional intent concerning the "failing company" defense. See *Brown Shoe Co.* v. *United States, supra*, at page 319, n. 34.

tion resulting in the course of the next year or two if your company went on. Do you think you would be perfectly safe in selling, and do you think the corporation that bought would be perfectly safe in buying the physical assets when this case here only applies to a case or only specifies a case where the resources had already become so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure? *Id.* at 80.

Once again, Congressman Celler replied that the acquisition would fall within the "failing company" defense, this time placing reliance on the *American Press Ass'n.* case as well as the *International Shoe Co.* case:

Representative CELLER. If that corporation in that tottering circumstance came to me and asked me as counsel to recommend it, and gave me a good fee, I would recommend the sale of those assets or the stock to the larger corporation, and I would say they would not run afoul of the statute. There are other cases; we did not quote all of the cases involved here.

Senator DONNELL. You quoted the strongest one you could find.

Representative CELLER. The Press Association case is very strong, too.

Senator DONNELL. It is cited in this.

Representative CELLER. That would clearly indicate that that would not be a violation of law. *Ibid.*

Finally, Senator Donnell returned to the theme of the *International Shoe Co.* case that the judgment of the management and shareholders concerning the condition of the selling corporation should control over the views of government "experts":

Senator DONNELL. I take it that we would agree that there are cases in which the board of directors of a company might honestly think that if that company kept on for two or three or more years it will go broke, whereas somebody else, some expert, we will say, with the FTC or perhaps some other body, some other person not connected with the Commission might say, "Why, you gentlemen are all wrong; your prosperity is just around the corner, and if you will hold you will make money." Now, suppose that that situation was brought to you as counsel for the corporation, with a board of directors fearful, and with other people saying you are going to come out all right. What would you say then? Would they be safe in going ahead, and how could you find out whether you would be safe without litigation to determine the fact under this bill?

Representative CELLER. I admire your imagination conjuring up all of these different kinds of cases.

Senator DONNELL. They are not improbable at all.

Representative CELLER. I cannot conceive of the probability of such kind of case. If it arises and there is a difference of opinion between the board of directors, there would be that difference of opinion, I suppose among the members of the Federal Trade Commission also, and they would not take action. *Id.* at 81.

When the bill was reported out, the Senate Report also adopted the position that the acquired firm need not be in bankruptcy or

on the verge of bankruptcy for the "failing company" doctrine to apply; it is sufficient that the seller is "heading in that direction":

The argument has been made that the proposed bill, if passed, would have the effect of preventing a company which is in a failing or bankrupt condition from selling out.

The committee are in full accord with the proposition that any firm in such a condition should be free to dispose of its stock or assets. The committee, however, do not believe that the proposed bill will prevent sales of this type.

The judicial interpretation on this point goes back many years and is abundantly clear. According to decisions of the Supreme Court, the Clayton Act does not apply in bankruptcy or receivership cases. Moreover, the Court has held, with respect to this specific section, that a company does not have to be actually in a state of bankruptcy to be exempt from its provisions; it is sufficient that it is heading in that direction with the probability that bankruptcy will ensue. S. Rep. 1775, 81st Cong., 2nd Sess., 7 (1950).

In their reading of the Celler-Kefauver amendments to Section 7, the courts have also recognized that Congress did not intend that the acquired concern need be faced with imminent bankruptcy. The Supreme Court observed in the *Brown Shoe Co.* case, *supra,* that the "supporters of the amendments indicated that it would not impede, for example, a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market, nor a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market" (page 319). Later in the opinion (at page 346), the Court referred to some of the "mitigating factors" which might validate an acquisition "such as the business failure or the inadequate resources of one of the parties that may have prevented it from maintaining its competitive position."

Particularly pertinent here is *United States* v. *Gimbel Bros.,* 202 F. Supp. 779 (E.D. Wis. 1962), where the Court denied the government's motion for a temporary injunction against Gimbel's acquisition of the Schusters department stores in Milwaukee. Although Gimbel's was the largest department store chain in Milwaukee, with affiliations throughout the nation, and Schusters the second largest, the Court found no merit in the government's Section 7 claims. The Court noted, among other things (at page 780), "that Schusters' business has been declining in recent years, that it has been necessary for Schusters to close one of its stores, and that some of its other stores are far from being in a healthy condition." These facts, along with the showing that competition

would actually benefit, as here, from the sale, led the Court to conclude that no violation of Section 7 could be established. Significantly, the government did not appeal the *Gimbel* decision and the case was subsequently dropped.

The government also took no appeal from the decision in *United States* v. *Ling-Temco Electronics, Inc.,* 1961 CCH Trade Cases 78,621 (N.D. Tex. 1961), which held that Ling-Temco's acquisition of Chance-Vought did not violate Section 7. As in the *Gimbel Bros.* case, *supra,* the Court emphasized the evidence of operating "reversals and sharply declining sales, profits and employment" (p. 78,640). To the same effect, see *Northwest Airlines, Inc.* v. *C.A.B.,* 303 F. 2d 395 (D.C. Cir. 1962), where the Court responded to an argument, similar to that advanced by complaint counsel in this case, that the United-Capital Airlines merger did not meet the strict standards of the "failing company" doctrine, stating (at page 402): "We think we need not try to fit this problem as we have it into ready-made doctrinaire styles or sizes; the matter is clear enough on the face of the facts and the statute."

In sum, these cases demonstrate that Section 7 of the Clayton Act is not offended by the acquisition of a company, such as Bowman, the continued operation of which as a viable competitor was no longer feasible. Nor is there any necessity, merely because the stockholders have other assets, for them to subsidize a losing business in a fruitless effort at resuscitation. Only recently, the Assistant Attorney General in Charge of the Antitrust Division of the Department of Justice approved a merger of three large New York newspapers under the "failing company" doctrine, notwithstanding the fact that one was owned by a well-known multimillionaire and the two others were affiliated with large and successful newspaper chains (BNA Antitrust & Trade Regulation Report, p. A–25, April 6, 1966).

On August 8, 1966, the parties filed proposed findings, and on August 23, 1966, filed replies thereto. The hearing examiner has given consideration to the proposed findings filed by the parties hereto, and all findings of fact and conclusions not hereinafter specifically found or concluded are herewith rejected.

For the purpose of expediting all further proceedings at all levels with a view to issuing a final order in the administrative proceeding on or before November 18, 1966, in compliance with the order entered by the Court of Appeals for the Seventh Circuit, on July 25, 1966, the Commission entered an order herein which di-

rected, among other things, that the hearing examiner file his initial decision on or before September 9, 1966.[11] The order can be complied with without difficulty due to the completeness, clarity, and accuracy of the proposed findings submitted on behalf of respondent Dean, which reflect the views of the hearing examiner and can be employed in the preparation of the initial decision. Upon consideration of the entire record herein, the hearing examiner makes the following findings of fact and conclusions:

FINDINGS OF FACT

The Respondent Dean Foods Company

Respondent Dean Foods Company is an Illinois corporation with its principal place of business at 3600 North River Road, Franklin Park, Illinois (Complaint, Par. 2; Dean Ans., Par. 2). Dean's principal business is the processing and distribution of dairy products, which in 1965 accounted for approximately 85% of its total sales. It also manufactures and sells a limited line of convenience foods, such as pickles, relishes, cranberries and prepared meat and salad dishes (Dean, Tr. 1966–67). Although Dean is a publicly held corporation, the top management remains with members of the Dean family, who started the company in 1924 (Dean, Tr. 1966; CX 42 B).

The original company, called The Dean Evaporated Milk Company, was organized in 1924; in 1929 the name was changed to Dean Milk Company; and in 1961 it became the Dean Foods Company. In the early years, its activities were confined to the Rockford, Illinois area, and "basically, the company was not in the fluid milk business in an important way until it began to deliver milk in Chicago in 1939" (Dean, Tr. 1966). While Dean's business has not remained as heavily concentrated in the Chicago Area as was true of Bowman, its sales in that market nevertheless still account for a significant portion of its total sales.

From the outset, Dean's customers in the Chicago Area have been confined almost exclusively to retail grocery stores, restaurants and institutions, with no sales being made through home delivery. In the counties of Cook and DuPage, Illinois, over 75%

[11] The order of the Commission also provided "that, in the event either or both sides should file notice of appeal from the initial decision, the following briefing schedule shall govern and shall apply also with respect to the appeal from the hearing examiner's dismissal of the complaint as to Bowfund Corporation: The parties shall submit their respective briefs on or before October 11, and their answering briefs, if any, on or before October 28, 1966, at which date oral argument shall be heard in the matter."

of Dean's total fluid milk sales are currently made to the Jewel Tea Company, the largest retail grocery chain in the area. In the greater Chicago market, these sales are somewhere in excess of 60% (Dean, Tr. 1967–1972; Walker, Tr. 1336–39). Due to the shift of milk purchasing from home delivery to retail grocery stores and to the growth of Jewel in the Chicago Area, Dean has expanded its sales in the Chicago Area at a modest rate over the years. Its share of total packaged milk sales in the area rose from 7.1% in 1960 to 8.3% in 1965 (RX 26, 36). Despite this, Dean dropped from the 4th to the 5th largest dairy serving the Chicago market (Walker, Tr. 1351–52).

Notwithstanding Dean's past growth, its management became concerned several years ago about the adverse effect on the company's future which would result from the accelerating trend on the part of corporate and cooperative retail grocery chains to integrate vertically into the dairy business and supply their own milk needs. The impact of this trend is particularly severe on Dean because of its heavy commitment to sales to such firms. At present the nation's second largest corporate chain processes substantially all of its own packaged milk; the third largest, a substantial portion; and the largest has a milk plant under construction. Following the lead of these larger firms, many smaller operators have also undertaken to build their own milk plants. In Chicago, the largest cooperative of independent grocers operates its own dairy, which ranks sixth among all dairies, and the ninth largest dairy in the market is owned by a large midwestern wholesale and retail grocery complex. In an effort to counter the adverse impact of this trend toward vertical integration on Dean's dairy business, its management has endeavored during the recent past to diversify into nondairy food lines, and to broaden its base of operations outside of Chicago (Dean, Tr. 1968–1970; Walker, Tr. 1320–1334; RX 36).

Outside the Chicago Area, Dean operates packaged milk processing plants in Flint and Big Rapids, Michigan; Rochester, Indiana; Louisville, Kentucky; Memphis, Tennessee; and Conway, Arkansas. It operates plants for the processing of other dairy products and of convenience foods in Belvedere, Pecatonica, Rockford, and Palatine, Illinois; Eaton Rapids, Michigan; Indianapolis, Indiana; and Green Bay and Wisconsin Rapids, Wisconsin (CX 4 A and B). During the period 1960 through 1965, Dean's sales on a consolidated basis increased from $63.1 million to $87.4

million and its net income after taxes increased from $961,469 to $1,760,117 (CX 42 L).

The Respondent Bowfund Corporation (Formerly Bowman Dairy Company)

Respondent Bowfund Corporation is an Illinois corporation with its principal place of business at 201 North Wells Street, Chicago, Illinois. It presently acts as an investment fund, with its assets in government bonds, marketable securities and cash (CX 35 E, F; Complaint, Par. 6; Bowfund Ans., Par. 6).

Until January 19, 1966, the corporate name of Bowfund was Bowman Dairy Company. Effective that date, its articles of incorporation were amended to change its name from Bowman Dairy Company to Bowfund Corporation (CX 35 E). Bowman's principal business was the processing and distribution of dairy products. In addition to its dairy operations, Bowman had a substantial investment portfolio which it managed (CX 28; RX 9 A-H).

Bowman's dairy business developed in the days when milk was distributed primarily through home delivery directly to the housewife's door. During the 1920's, Bowman rose to become the leading dairy in the Chicago Area. With the shift of consumer tastes to purchasing milk through retail grocery stores rather than through home delivery, a development which will be detailed more fully later, Bowman's fortunes went into a steady decline (Kullman, Tr. 1618–19). In recent years, Bowman's sales in the Chicago market dropped from $56.8 million in 1960 to $43.4 million in 1965; its share of packaged fluid milk sales declined from 16.2% to 11.3%; and its operating losses mounted from $197,459 to over $1 million (RX 2, 25, 36).

In addition to Bowman's Chicago operations, it had packaged milk processing plants in Racine and Tomah, Wisconsin; Davenport, Iowa; Saginaw, Michigan (2); Columbus, Ohio; and New Albany, Indiana. Plants for the processing of other dairy products were located in Kenosha, Chippewa Falls, DeForest, Deerfield, and Janesville, Wisconsin, and in Cleveland, Ohio (CX 22). On a combined basis, these operations had shown an increase in sales and profits during recent years (CX 106 D). However, on an individual basis, nearly half had suffered either operating losses or sales declines between 1964 and 1965 (RX 6, 7). Furthermore, Bowman's results outside Chicago were insufficient to offset the sales declines and operating losses within the Chicago Area. During the period 1960 through 1965, Bowman's overall sales from

all operations fell from $86.5 million to $75.6 million, and it suffered a net operating loss for the six-year period of $520,899 (RX 3).

Because of the reverses which Bowman had suffered in its dairy operations, Bowman had been engaged in a partial liquidation of its dairy business during recent years. In Chicago, alone, it had closed six bottling plants, disposed of ten sales distribution branches, and sold its home office property (Kullman, Tr. 1625–26). The income derived from these liquidations, together with the nonoperating income derived from the dividends and capital gains on the company's marketable securities had been used to offset the company's operating reverses. Even with the inclusion of this non-operating income, Bowman's over-all earnings after taxes on a consolidated basis declined from $256,000 in 1960 to a loss of $178,000 in 1965 (CX 106 C).

Jurisdiction

At the time of the challenged acquisition on January 19, 1966, respondents Dean Foods Company and Bowfund Corporation were engaged in commerce within the meaning of the Clayton and Federal Trade Commission Acts (Complaint, Pars. 5 and 9; Dean Ans., Par. 5; Bowfund Ans., Par. 9).

The Challenged Acquisition

On December 13, 1965, Dean and Bowman entered into a "Purchase Agreement" for the sale of Bowman's operating dairy assets to Dean. Excluded from the sale were Bowman's marketable securities and cash (CX 34 A through Z–4). The sale, originally scheduled to be closed on January 3, 1966, was consummated on January 19, 1966. Subject to certain adjustments, Dean paid $5.6 million for Bowman's operating assets, which had been carried on the latter's books at about $19.1 million. Additionally, Dean assumed Bowman's accounts payable and long-term debt of approximately $6.9 million, making Dean's total commitment for the purchase $12.5 million (CX 35 E-G).

Since the consummation of the acquisition, the former Bowman Dairy business has been conducted by Dean, subject first to a stay entered by Mr. Justice Clark on January 24, 1966, and thereafter subject to a preliminary injunction entered on July 18, 1966, by the United States Court of Appeals for the Seventh Circuit which is to remain in effect for a period of four months from the entry of the order. The terms of the stay and of the preliminary

injunction are identical and provide that the respondents are enjoined from making any material changes either with respect to the capital stock or corporate structure of Bowfund or with respect to the assets purchased by Dean, including the operations and policies affecting these assets, other than changes made in the ordinary course of business.

One exception was made in the stay and the preliminary injunction. Dean was permitted to dispose of Bowman's home delivery routes in the Chicago Area, which had constituted about 50% of its dollar sales in that market, upon terms and to purchasers acceptable to the Federal Trade Commission. Since the issuance of the stay on January 24, 1966, Dean has resold all of the former Bowman home delivery routes to smaller dairies and distributors in the Chicago Area and each sale was submitted to and approved by the Federal Trade Commission (Dean, Tr. 1989–1990). In making the sales of the home delivery routes, Dean agreed with the Commission to attempt to persuade the purchasers to continue to buy their milk under the "Bowman" label and from the former Bowman plants. Consistent with this agreement, Dean presently supplies about 30 per cent of the milk requirements of the purchasers of the routes (Dean, Tr. 2087).

Notwithstanding Dean's best efforts to maintain the Bowman business since the acquisition, $1,189,925 of Bowman's retail grocery, restaurant, and institutional accounts in the Chicago Area have been lost to competitors, including three of Bowman's fifteen largest accounts (RX 34 A, B). Additionally, eleven "master-vendor" accounts, whose 1965 sales totaled $1,053,000, have been lost (RX 35). There have also been eighteen key management employees who have left to take other positions (RX 33). During the first three months of 1966, the former Bowman operations acquired by Dean suffered a loss of $278,566, and these losses are expected to continue (Dean, Tr. 2010–2023; RX 13).

The Relevant Section of the Country

Counsel supporting the complaint and respondent Dean stipulated that "the 'Chicago Area' is a relevant section of the country or geographic market in which to evaluate the probable competitive effects of Dean's acquisition of certain Bowman assets. The 'Chicago Area' shall be taken to include generally, Lake, Cook, DuPage, Kane [and] Will Counties" (Tr. 264). Although complaint counsel stated on several occasions both prior to and during the hearings that he did not agree that the Chicago Area was

the only relevant geographic market, he at no point indicated what other specific markets or submarkets should be considered in evaluating the acquisition's probable effects on competition. His trial brief stated that the Chicago Area was the only market for which counsel "will offer detailed structural evidence" and that "detailed proof of the anticompetitive effects of the acquisition will be limited to the Chicago packaged milk market" (pp. 2, 5). During the hearing, he presented no testimony concerning the probable effects of the acquisition in markets outside Chicago. Moreover, the brief filed by the Commission in the Supreme Court proceedings represented that "There appears to be no dispute that packaged milk is the relevant line of commerce and the Chicago area the relevant section of the country in which to test the competitive effects of the acquisition" (Brief for the Federal Trade Commission, p. 31).

The proposed findings submitted by complaint counsel for the first time presented figures purporting to reflect the respondents' share of market in certain Midwestern states and to argue that this constituted some evidence of the probable competitive effect of the acquisition (Counsel's Prop. Fdgs. 91–98). However, this is the very type of structural evidence which counsel's trial brief indicated he would not rely on and under the terms of the prehearing order entered by the hearing examiner, counsel was precluded from "introduc[ing] any testimony or exhibits which have not been referred to in his Trial Brief." Moreover, counsel, himself, conceded during the hearings that he had no evidence with respect to the probable effects of the acquisition in markets outside Chicago beyond a map showing the general locations where Dean and Bowman marketed their dairy products (Tr. 2384).

Despite complaint counsel's reference to statistics showing state market shares, they did not propose a finding that any state or group of states is a relevant section of the country in which to evaluate the probable competitive effects of the challenged acquisition. The Commission's staff economist acknowledged that he knew of no market for packaged milk in the general Midwestern area that is defined by the "happenstance of a state's geographic boundaries" (Walker, Tr. 921–22). Rather, he testified that the markets in which packaged milk is sold are delineated by the general boundaries of large metropolitan areas or other communities where the consumption of milk occurs. Such areas cover only a small part of a single state's geographic expanse, as is true for example of the Chicago Area, or small portions of several states,

as is true for example in the Quad Cities area of western Illinois and eastern Iowa (Walker, Tr. 922, 923).

Based on all the evidence, it is found that the relevant section of the country in which to evaluate the probable effects of the acquisition challenged in this proceeding is the Chicago Area, which includes generally Lake, Cook, DuPage, Kane, and Will Counties, Illinois.

Although the Chicago Area is found to be the relevant section of the country and these findings are accordingly confined largely to that market, due account has been taken of the limited evidence which was offered relating to other geographic areas in evaluating the probable competitive effects of the acquisition. Account has also been taken of the Commission's accumulated experience concerning the dairy industry in general and especially of the factual conclusions and findings reached by the Commission in its prior merger decisions. Notwithstanding the useful industry background which these decisions provide, the determination of the probable impact of the acquisition must, in the final analysis, be made on the basis of the evidence relating to the Chicago Area, the only section of the country concerning which significant and meaningful economic evidence was offered. Furthermore, if the acquisition challenged in this proceeding cannot be shown to have any probable and substantial adverse effect on competition in the Chicago Area, where complaint counsel concentrated their attack, there is no basis for concluding that the acquisition would have any probable anticompetitive effects in any other section of the country.

The Relevant Line of Commerce

Counsel supporting the complaint and respondent Dean stipulated that " 'packaged milk' is a relevant line of commerce or product market in which to evaluate the probable competitive effects of Dean's acquisition of certain Bowman assets. 'Packaged milk' shall be taken to include generally milk, skim milk, buttermilk, flavored milk, flavored milk drinks, yogurt, sour cream and sour cream products labeled Grade A, cream [and] any mixture in fluid form of cream and milk or skim milk" (Tr. 264). Complaint counsel's trial brief indicated that "packaged milk" was the only product market for which they would offer "detailed structural evidence" (p. 2) and, as noted heretofore, the Commission took the position before the Supreme Court that there was "no dispute that packaged milk is the relevant line of commerce."

At the hearings and in their proposed findings, however, complaint counsel contended that the sale of packaged milk at "wholesale" constituted a separate line of commerce (Counsel's Prop. Fdg. 78). Counsel did not define exactly what was to be included in "wholesale" sales—sometimes appearing to include sales to all types of retail grocery stores and sometimes only to those supermarket chains which counsel regarded as "choice" (compare Counsel's Prop. Fdgs. 81 and 116). The evidence, taken as a whole, does not support complaint counsel's contention that the sale of packaged milk at "wholesale," under either definition, constitutes a separate line of commerce.

Knowledgeable industry witnesses testified that all dairies, whether distributing packaged milk through home delivery or to retail grocery firms, are essentially competing for the favor of the housewife. As the President of Meadowmoor Dairy, one of Chicago's leading dairies, testified: "[W]e feel that we are competing with a total consumer food dollar for milk sales, whether it be delivered to the home or out of the store. . . . [W]e have found that where they have aggressive home delivered drivers it affects the sales in the store materially" (Schaub, Tr. 1766; see also, *e.g.*, Ludwig, Tr. 1711; Dean, Tr. 1967). Because of this competition, there are daily shifts in customers between home delivery and retail grocery stores (Quinlan, Tr. 636; Ludwig, Tr. 1712).

The competition in the sale of milk through home delivery and to retail grocery stores includes vigorous price competition (Kraml, Tr. 1690; Nonnamaker, Tr. 2192). Changes in price to the customer, either on home delivery or at the store, affect prices generally and bring customer shifts from one point of purchase to the other (Laughlin, Tr. 301–302). Price competition between the two methods of delivery is so intense that many dairies offer special discounts to home delivery customers which make their prices comparable to or below store prices (Oberweis, Tr. 1515–16, 1523; McWilliams, Tr. 2163; Ludwig, Tr. 1723; Quinlan, Tr. 626–27). To the extent that prices to home delivery customers are, on average, slightly higher than prices out of the store, this is merely an offset to the greater convenience enjoyed by the customer who receives the milk at her doorstep (Laughlin, Tr. 302; Oberweis, Tr. 1516–17).

Any variations which may exist between the types of packaged milk products sold to retail grocery stores as opposed to home delivery customers were shown to be *de minimis* (Polivka, Tr. 465).

Within any particular type of packaged milk product, no difference was shown to exist between the physical characteristics of the product distributed through home delivery or sold to retail grocery stores. There is also no important difference in the production facilities employed in the processing and bottling of the milk. Glass containers, as well as paper cartons, are used in the packaging of milk sold both to home delivery and store customers (CX 71). Insofar as distribution is concerned, many dairies were shown to distribute products not only to home delivery customers but to grocery stores as well (Kraml, Tr. 1688–89; Ludwig, Tr. 1710). Likewise, many vendors distribute packaged milk to both types of customers (Dean, Tr. 2033). In fact, many dairies and vendors operate "mixed" routes, distributing to home delivery and store purchasers and using the same delivery equipment and personnel (CX 71). Even where a dairy distributes primarily either to home delivery customers or to retail grocery stores, it considers all dairies to be its competitors (compare Quinlan, Tr. 609, with Dean, Tr. 1967).

The differences which exist between the number of stops on a home delivery as opposed to a store route, the method of compensating route drivers, and the volume and frequency of deliveries to home delivery versus store accounts, while having an impact on the relative distribution costs to the two types of customers, do not in any way immunize home delivery sales from the competition of sales to retail grocery stores or vice versa. On the contrary, the very fact that home delivery distribution costs are higher has stimulated competition between the two and has resulted in a significant shift of customers from home delivery purchasing to store purchasing.

The fact that the Department of Agriculture and the Bureau of Census compile statistics showing the volume of sales to home delivery customers and to retail grocery store customers does not, as complaint counsel urge (Counsel's Prop. Fdg. 76), suggest a finding that the two represent separate lines of commerce. Statistics are also compiled on the volume of sales in gallon and half-gallon containers, in glass and in paper containers, etc. (CX 71). In fact, if the statistics compiled by the Department of Agriculture show anything it is the difficulty of drawing ready lines of demarkation between so-called "wholesale" and "retail" sales: "Two aspects of milk distribution in this area make the assembling of precise information on the type of distribution difficult and some estimates were made by handlers to obtain this data. Several handlers sell

fluid milk products to 'vendors' who distribute them to their own retail and wholesale customers. The amounts of products distributed to homes and wholesale accounts were known or obtained for some of these routes, while estimates were made for other routes. Also, some handlers operate 'split' routes which serve both types of customers and in some instances the breakdown of these sales was estimated. Therefore, resulting figures must be treated as approximations" (CX 71).

The only witness who expressed an opinion that the sale of packaged milk at "wholesale" constituted a separate line of commerce was one of the Commission's Staff economists (Walker, Tr. 1169–1171). He at no point, however, specified the economic or practical considerations which would warrant treating such sales as a separate sub-market. Furthermore, the same witness had previously given an affidavit, filed in the Court of Appeals proceeding, in which he had stated that "the proper product market or line of commerce in which to evaluate the probable effects of this acquisition is, I believe, packaged milk (fluid milk in bottles or cardboard cartons) and closely related products, such as skim milk, cream, etc." His affidavit made no mention of a separate market limited to sales of packaged milk at "wholesale" (Walker, Tr. 1171–72).

There is even less basis for treating the selected supermarket chains which complaint counsel denominate as "choice" accounts as a separate line of commerce. As the industry witnesses pointed out, whether a store account is "choice" or not does not depend upon whether it is operated by an independent grocer or a large national corporate firm. Since competition in the retail grocery business is on an essentially local basis, supermarkets run by a capable operator can compete on equal terms with the largest national chains, especially when the independent grocer is affiliated with one of the numerous cooperative or voluntary wholesale groups in the Chicago market (Roney, Tr. 238; Holin, Tr. 402–407). Indeed, the Certified Grocers cooperative, through its retail members, has a larger market share and has grown more rapidly in the Chicago Area than such a national firm as Kroger (Dewey, Tr. 503–504; Holin, Tr. 409). These independent retail grocery accounts are considered by dairy firms as "choice" accounts for which there is vigorous competition (Schaub, Tr. 1765). Furthermore, whatever minor differences may exist in the delivery of milk to retail grocery accounts as contrasted with home delivery accounts, none was shown to exist between sales to

a supermarket affiliated with a multi-unit corporate chain and one operated by a smaller chain or single-store independent.

On the basis of all of the evidence, it is found that the relevant line of commerce is the sale of packaged milk, which includes generally milk, skim milk, buttermilk, flavored milk, flavored milk drinks, yogurt, sour cream and sour cream products labeled Grade A, cream and any mixture in fluid form of cream and milk or skim milk. It is found that the purported distinction between "retail" and "wholesale" sales of packaged milk, whether the latter is taken to include retail grocery stores or selected supermarket chains, is artificial and unrelated to commercial and economic realities. There is no important industry recognition of sales to retail grocery stores or to supermarket chains as a separate economic entity; there are no peculiar characteristics to the milk distributed to retail grocery stores or to supermarket chains as opposed to that distributed on home delivery routes; there are no significant differences in production or distribution facilities; there are no differences in the type of vendors used; and, though there are some price differences, prices out of store and on home delivery routes are very sensitive to price changes by the other.[12] Notwithstanding the fact that the sale of packaged milk as a whole is found to be the relevant line of commerce, due account has been taken in evaluating the probable competitive effects of the acquisition of the impact, if any, which the sale of the Bowman assets to Dean may have had or be likely to have on the sale of packaged milk to retail grocery firms and supermarket chains.

THE PROBABLE EFFECTS OF THE ACQUISITION

A. *The Acquisition Did Not Eliminate Bowman as a Viable Competitor Since Its Operating Reverses Had Been So Severe Prior to the Sale That Its Dairy Business Was in a Failing Condition and Would Have Been Liquidated in Any Event*

The evidence in this proceeding establishes beyond question

[12] See *Brown Shoe Co.* v. *United States*, *supra*, where the Court stated that the relevant line of commerce "may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors" (at p. 325). Also contrast *United States* v. *Continental Can Co.*, 378 U.S. 441, 455 (1964), where the Court found minor price differentials of little significance where "price is only one factor in a user's choice" with *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 276 (1964), where the Court found that aluminum conductor was a separate line of commerce for the reason that "aluminum and copper conductor prices do not respond to one another."

that Bowman's dairy business immediately prior to its sale to Dean was in failing circumstances, and that the prospect of its rehabilitation was, to say the least, in gravest doubt. As will be detailed in the findings which follow, the company had been suffering steadily declining sales in recent years and significant operating losses. The company's operating plight was particularly acute in the Chicago Area where steadily mounting losses had resulted in a severe drain on the company's resources and had required a partial liquidation of its plant, property and equipment. Faced with this situation, Bowman's management and shareholders determined to sell its operating assets to Dean, the only available purchaser, in order to avoid what they fairly concluded would have been an otherwise disastrous fate. Absent the sale, Bowman had concluded that a complete liquidation of its dairy business was the only alternative, the result of which would have been substantial injury to the stockholders and to the communities where its plants were operating.

1. Bowman's operating plight was primarily attributable to an historical shift in the distribution of dairy products from home delivery to sales through retail grocery stores

One of the principal factors leading to the decline in Bowman's fortunes was the historical change in the distribution pattern of dairy products. Prior to the 1920's, dairy products were distributed by means of home delivery routes, particularly in large urban centers (Walker, Tr. 1276; Kullman, Tr. 1619). During that era, Bowman developed the largest home delivery business in Chicago (*ibid.*). At its zenith, Bowman had over 2200 retail routes in the Chicago Area and was a healthy and profitable dairy company (Kullman, Tr. 1619).

As the Commission's economist acknowledged, increasingly during the 1920's and 1930's retail stores began to replace home delivery as the primary means of distributing dairy products (Walker, Tr. 1277; Kullman, Tr. 1619). This trend away from home delivery continues today, with the result that this mode of distribution has been drying up (Walker, Tr. 1277–78; Kullman, Tr. 1619). Indeed, the Commission's economist admitted that to some extent the decline of the home delivery milk business was analogous to the decline of the buggy whip industry in earlier times (Walker, Tr. 2609). The following table shows the decline in Bowman's Chicago home delivery business during the years 1960–1965 (Spacek, Tr. 1831, 1855–56; RX 5):

Bowman Dairy Company
Net Sales, Chicago Retail and
Mixed Divisions

Year	Net Sales
1960	$25,831,484
1961	24,281,876
1962	24,264,061
1963	21,745,922
1964	19,977,623
1965	19,393,261
Average Annual Decline In Sales	($1,287,644)

Bowman was late in seeking to adapt itself to this change in the pattern of milk distribution (Kullman, Tr. 1620; Hemb, Tr. 941). Instead of seeking to secure a foothold in the expanding distribution of dairy products to retail stores, Bowman for many years continued to concentrate its efforts on protecting and preserving home delivery distribution. This was due in part to Bowman's heavy investment in the home delivery business which it felt it must protect. It was also reluctant to enter into costly price-cutting battles with the other dairies for the growing—but still relatively small—store distribution business. For one thing, any attempt to secure store accounts by submitting a low bid would also have tended to reduce the retail home delivery price structure where Bowman had the vast bulk of its sales. These factors explain why Bowman did not get into the distribution of dairy products to retail grocery stores on the ground floor (Kullman, Tr. 1620–21).

By the time Bowman did make serious efforts to build its wholesale distribution, other dairies were already firmly entrenched with the larger accounts. Bowman made a number of attempts to secure these accounts through competitive bidding, but was largely unsuccessful. Present suppliers were frequently given the opportunity to match any bid submitted to Bowman. In 1965, for example, Bowman sought to secure the A & P account in Chicago, but lost out to Borden, even though it cut its bid to what management believed was the competitive minimum (Kullman, Tr. 1621; Hager, Tr. 153). The Executive Secretary of the Associated Milk Dealers, whose membership includes substantially all of the dairies in the Chicago Area, testified, "I know that the Bowman Company is as aggressive in their sales policy as anybody

else but they were ham strung because they were in the retail business" (Nonnamaker, Tr. 2207). Even the Commission's economist admitted that he had no facts which would lead him "to believe that Bowman was less than fully aggressive in trying to get this wholesale end of the business once it did begin to search out that kind of business" (Walker, Tr. 1286–87).

Bowman's inability to build a substantial volume of sales to grocery stores in the Chicago Area handicapped it in a number of ways. As the Commission's economist acknowledged, the cost of distributing milk on home delivery routes has steadily mounted relative to the cost of distributing milk on wholesale routes (Walker, Tr. 1296; Kullman, Tr. 1621). He stated that there had been increases both in "the cost of labor for retail routes" and in "the distances the drivers have to drive between stops" (Walker, Tr. 1296–97). By contrast, the stores and supermarkets being built today are large volume operations, with the result that dairy companies distributing primarily to such accounts are able to use large trucks which dispose of their entire load in a relatively few stops. As the Commission's economist pointed out, "[A] man on a wholesale route can deliver 3600 pints [or quarts] with relatively few stops and relatively few miles, and the retail man will be lucky to deliver 600 pints and spend a lot of time and miles doing it" (Walker, Tr. 1298). Dairies, such as Bowman, with extensive home delivery routes, suffer not only from the fact that their deliveries are being made to a large number of housewives with very small individual requirements, but also from the fact that, as more housewives switch from home delivery to store purchasing, the distance between home delivery stops is constantly increasing. In Bowman's case, its routes dropped from a high of 2200 to well below 500, and further consolidation of routes had become almost impossible (Kullman, Tr. 1621–1622).

Bowman's contract with the Teamster's Union was another important factor contributing to the steadily mounting costs of its home delivery business. Little allowance was made by the union for the fact that the home delivery route man could not deliver nearly as much milk as the wholesale route man. Almost equal pay was required, with the result that labor costs on a home delivery route were about five times as much per quart as on a wholesale route (Kullman, Tr. 1622). The Commission's economist testified that a wholesale driver can deliver "five to six times as much" milk as a retail driver (Walker, Tr. 1298). Addition-

ally, the union requirement that older men remain and younger men be discharged in any consolidation of routes tended to lock Bowman in with its oldest and often times least productive drivers (Kullman, Tr. 1622). Finally, the relatively high base pay and relatively low commission rate for securing additional volume greatly reduces the drivers' incentive to attempt to secure new customers for his route (Schaub, Tr. 1770–72).

The Executive Secretary of the Associated Milk Dealers, who was one of the bargaining representatives for the Chicago Area dairies, stated quite frankly that "the retail business was being murdered by the union." He added, "I have never seen the union come forward in my life with any kind of program that wanted to save the retail business" (Nonnamaker, Tr. 2207, 2220).

Testimony by operators of smaller home delivery dairies indicated that they were not as adversely affected as Bowman. Small dairies frequently enjoy certain competitive advantages over a larger dairy, such as lower management and other overhead expenses and a closer personal relationship with their drivers (Oberweis, Tr. 1517–18; Nonnamaker, Tr. 2194–96; Kullman, Tr. 1622). As one of the small dairymen testified, "My salesmen work harder for me, I believe, than Bowman Dairy salesmen ever worked for them" (Oberweis, Tr. 1517–18). These advantages enabled them to operate home delivery routes successfully even though Bowman could not.

The larger dairies having a home delivery business (such as Borden and Hawthorn-Mellody) also enjoyed advantages over Bowman. With this large store volume to fill their plants, they have been able to eliminate their less efficient home delivery routes completely and preserve only those with high volumes and relatively low costs. Bowman, on the other hand, had about 50% of its volume in the wholesale business. Unless added wholesale volume could be secured, any attempt to trim Bowman's routes, as Borden and Hawthorn-Mellody had done, would have meant running its Chicago Area plant (at River Forest, Illinois) at less than 50% capacity, with the result that the cost per unit of milk would have risen sharply (Kullman, Tr. 1622–23).

2. Bowman's problems were not confined either to home delivery or to Chicago—the company was also suffering difficulties in many of its other operations

Bowman's problems did not lie only in its Chicago home delivery business. Because of its late entry into retail grocery store

distribution, the store accounts it did secure were predominantly of the small "Ma and Pa" variety. As the retail food business has trended toward fewer but larger stores, many of these Bowman outlets went out of business (Kullman, Tr. 1623). As the Commission's economist observed, the decline in the number of smaller stores would adversely affect a dairy having its wholesale business primarily with such stores (Walker, Tr. 1304). He also admitted that a dairy whose wholesale volume was predominantly with smaller stores would be at a "disadvantage efficiency-wise versus a dairy company that had its wholesale volume with larger stores" and that the dairy would face problems "somewhat related to those which a dairy might have if it had all retail home delivery customers" (Walker, Tr. 1303–1304).

While Bowman had its largest volume of sales and its most pressing difficulties in the Chicago market, substantial operating and financial difficulties also existed in a number of its plants in other areas. It is more than likely that the situation would have deteriorated further in the future. Most of Bowman's plants were old, overcrowded, and in need of modernization. The most recently built was over 20 years old. Bowman did not have a planned program of upgrading its operations and little money had been spent on new equipment designed to cut overhead and labor costs and to improve quality. Refrigerated storage rooms were too small to maintain adequate inventories. In most of its plants Bowman lacked the clean-in-place pipeline systems that most of the other dairies have adopted as a means of controlling sanitation. Bowman's bottling and refrigerating equipment was, for the most part, out of date and inefficient. Most Bowman plants did not have the automatic casers, automatic stackers, and palletized transportation systems required for an efficient dairy operation (Kullman, Tr. 1624, 1668; Esmond, Tr. 1531–1541).

The only plant in which Bowman had made significant capital improvements in recent years was the River Forest plant, where Bowman carried out a million dollar modernization program in 1964. Notwithstanding the modernization, the plant had sustained a loss in 1965 and further losses were anticipated. The failure of the River Forest modernization attempt to restore Bowman's Chicago operations to a profitable basis was particularly discouraging to Bowman's management. They felt the company should not pump large amounts of money into plant modernization when there appeared to be no chance that it would enable the company to get an adequate return on the investment. At the

same time, the failure to modernize left Bowman's other plants at an increasing competitive disadvantage (Kullman, Tr. 1624–25).

As a result of the fact that, with the one exception of its River Forest plant, Bowman did not re-invest money in its plants, they had become rundown and inefficient and had excessive operating costs (Kullman, Tr. 1625; Esmond, Tr. 1531–1540). As the following table shows, five of Bowman's divisions suffered net operating losses during 1965 (Spacek, Tr. 1831–32; 1856–59; RX 6):

Bowman's 1965 Loss Operations

Division	*Net Operating (Loss)*
Chicago, Illinois	$ (1,015,270)
Saginaw, Michigan	(70,217)
Cleveland, Ohio	(53,562)
Parade Products, Inc.	(17,064)
Tomah, Wisconsin	(11,470)

In addition, the Chairman of Arthur Andersen & Co. testified that some of the divisions that were not in the red were only profitable "by a hair" and "for all practical purposes are break even operations." For example, Bowman's New Albany, Indiana division was able to report a profit of only $6,406 in 1965 despite sales of $3,651,214, for a return on sales of less than two-tenths of one percent (Spacek, Tr. 1857–58; RX 11, 12).

In addition, Bowman's sales were declining in a number of its operations outside Chicago. Mr. Spacek noted that "even some of those divisions that are making profits have declining sales and is the signal of danger" (Tr. 1859). As the following table shows, seven of Bowman's divisions suffered a decline in sales during 1965 (Spacek, Tr. 1831–32; 1859; RX 7):

BOWMAN'S 1965 OPERATIONS WITH DECLINING SALES

Division	1964 Trade Sales	1965 Trade Sales	Decline
Chicago, Illinois	$46,596,008	$43,357,668	($3,238,340)
Bowman Dairy Sales Co.	8,540,463	8,003,453	537,010
Terre Haute, Indiana	1,116,937	1,063,445	53,492
Forest Milk	1,311,952	1,271,327	40,625
Tomah, Wisconsin	555,020	525,134	29,886
Frosty Products	484,372	461,364	23,008
Iowana	3,274,847	3,262,598	12,249

The losses and declining sales outside Chicago underscored the fact that many of the company's difficulties in Chicago were also

present in other areas of the company's operations (Spacek, Tr. 1859).

3. There was no reasonable basis on which Bowman's dairy business could have been rehabilitated

During recent years, Bowman's management had done all within its power to find an internal solution to the company's problems. In an effort to secure a larger retail grocery store volume, Bowman had submitted bids which had been reduced to what management believed was the competitive minimum (Kullman, Tr. 1621); retail routes had been consolidated (Kullman, Tr. 1622); production facilities had been combined (Kullman, Tr. 1627); a million dollar modernization program was carried out in the River Forest plant (Kullman, Tr. 1624); a determined effort had been made to persuade some of the smaller dairies to switch to a solely distributing role and to allow Bowman to bottle for them (Nonnamaker, Tr. 2202–2206); and, as one member of the collective bargaining committee for the Chicago dairies testified (Schaub, Tr. 1768):

> I sat shoulder to shoulder with them for over 25 years at labor negotiations, and I saw Francis Kullman—I don't want to be dramatic—but I saw him break down in tears pleading with the union that if the continuity of economic impositions on the home delivery was going to continue, that they would destroy the largest single employer the union had; namely, Bowman.

The record offers no support for the speculations of the Commission's economist that Bowman's difficulties were attributable to poor management. The witness, himself, conceded that, except for his own testimony, "no individual has said that this was bad management." In fact, he had to agree that there was testimony directly to the contrary (Walker, Tr. 2476–79). For example, Mr. Walter Schaub, the President of Meadowmoor Dairy, who had been in the Chicago market for over 30 years, stated that Bowman's management "had been held in regard nationally by the National Milk Foundation, by anyone in the dairy industry, as truly dairy leaders" (Tr. 1767). Likewise, the Senior Trust Office for the Northern Trust Company of Chicago stated that "Bowman's management had been and were attempting to do all within their power to rectify the operating difficulties the company was undergoing" and that the bank was "satisfied that the management was good management" (McLucas, Tr. 1938).

Despite the vigorous efforts of management to find an internal solution to Bowman's problems, sales continued to decline and

losses continued to mount. The decline in home delivery sales, union problems, and geographic customer dispersion made further consolidation of retail routes very difficult. And a combination of production facilities was out of the question since the continuing decline in sales had already forced the company to close all of its Chicago area bottling plants except River Forest (Kullman, Tr. 1627).

Contrary to the opinion of the Commission's economist, there is no indication that if Bowman had disposed of its home delivery routes before the sale to Dean, the improvements in the River Forest plant would have enabled it to make its Chicago operation profitable (Walker, Tr. 2463). Despite the plant modernization program, Bowman's Chicago losses, though reduced slightly in 1965, still exceeded $1,000,000 (CX 53E). As several witnesses indicated, a sale by Bowman of its retail routes would have reduced the capacity of Bowman's River Forest plant to well below 50% and the cost per unit of milk would have increased substantially, thus leading to increased losses rather than to a turning around of the company (Kullman, Tr. 1623; Dean, Tr. 2017, 2113; Esmond, Tr. 1543–45). That Bowman's failing condition was not likely to improve is also confirmed by the operating results of the former Bowman facilities under the stay imposed on Dean. Notwithstanding Dean's sale of the home delivery routes, the former Bowman operations loss was $278,556 during the first three months of 1966 (Dean, Tr. 2011). Production as a percent of capacity at the River Forest plant rapidly declined with the sale of the routes and production costs have risen sharply (Dean, Tr. 2017–19).

4. The sale to Dean was the only alternative to a liquidation of Bowman's dairy business

Faced with the prospect of further sales declines and continued operating losses, with no reasonable expectation of improvement, Bowman's management concluded that "realistically it had only two choices: sell out or adopt a program of self liquidation. . . . that the best course was to try to find an immediate buyer rather than to work out a piecemeal liquidation during the course of the next few years" (Kullman, Tr. 1627).

Bowman's management recognized, from casual discussions which it had had with several other dairies over the years, that there were few, if any, companies which would be interested in purchasing Bowman's operations. Management also realized that

publicity concerning its desire to sell out would lead to the raiding of Bowman's accounts by other dairies and the loss of customers seeking a more certain future source of supply. Nevertheless, management did discuss a possible sale of Bowman's dairy operations with Carnation, Fairmont, Consolidated Badger, Southland Corporation, and others (Kullman, Tr. 1628, 1643–1650). In each case, management was informed that the prospective buyer was not interested in acquiring Bowman (*ibid.*). Bowman's management was unable to attempt discussions with National Dairy, Borden, Beatrice or Foremost because of the restrictions which had been imposed on their activities by the Federal Trade Commission (Kullman, Tr. 1628, 1649).

Bowman also made efforts to find a buyer outside the dairy industry. A management consultant, which Bowman's management had hired, had talked to the Rockefeller interests about a possible acquisition, but again, these talks were not fruitful (Kullman, Tr. 1628, 1651). Bowman's investment banker, Lehman Brothers, had also investigated the possibility of selling to a non-dairy company but had advised Bowman's management that there would be no company that would be interested in purchasing Bowman for other than liquidating purposes, and that the price would probably be extremely low (Kullman, Tr. 1628, 1654).

In this state of affairs, Bowman's management approached Dean Foods Company (Kullman, Tr. 1628–29). When Dean was contacted about a possible purchase in early 1965, it expressed no interest (Dean, Tr. 1985, 2108–2109). It was only when Dean became convinced that its largest customer in the Chicago Area, the Jewel Tea Company, was planning to build its own dairy plant and terminate its fluid milk purchases from Dean, that Dean's management was willing to give serious consideration to Bowman's proposal (Dean, Tr. 1986–88). Even then Dean was willing to pay no more than two-thirds of the company's net worth shown on its balance sheet (Kullman, Tr. 1629). When an executive of one of the other Chicago dairies was informed of the purchase price at the proceeding and asked by complaint counsel what its significance was, he replied, "I think that that purchase price is shockingly low for the Bowman Dairy Company and would only be a distress sale. . . . National Dairy sought and offered over $50 million . . . . about two years prior to the F.T.C.'s restrictions on National Dairy" (Schaub, Tr. 1786). Nevertheless, this offer was the only reasonable offer that Bowman could secure and, accordingly, management decided to accept it (Kullman, Tr. 1629).

Despite the representation in complaint counsel's trial brief (p. 4) that he would introduce evidence to show that Dean was not the only available purchaser for Bowman's dairy operations, no such evidence was offered. The alternative purchaser, Wanzer Dairy, which the Commission had originally suggested to both the Court of Appeals and the Supreme Court as being available, was never called although its president was listed in complaint counsel's trial brief as a prospective witness. The Commission's economist testified that he knew of no one, except Dean, who might be interested in acquiring Bowman's operations (Walker, Tr. 2468).

If Bowman had been unable to sell to Dean, Bowman shareholders controlling a sufficiently large percentage of its stock to effect their desires indicated that they would have sought a liquidation of Bowman's dairy operations (Kullman, Tr. 1629). Now that the sale has been consummated, if Bowfund were compelled to take back the former Bowman assets, it would also immediately carry out the earlier decision to liquidate (McLucas, Tr. 1945; Kullman, Tr. 1680). Bowfund's board of directors has already adopted a formal resolution to that effect (McLucas, Tr. 1945).

It is evident, therefore, that even if the acquisition to Dean were prohibited, Bowman would not remain as a competitor in the dairy industry. There is no indication that such a liquidation would have any benefits to competition over a sale to Dean. The Commission's economist acknowledged that were Bowman's dairy operations to be liquidated, the larger dairies would make an immediate effort to secure Bowman's customers. He also recognized that these larger dairies would have many advantages over smaller dairies in securing the Bowman accounts (Walker, Tr. 1638). Accordingly, there is no assurance that smaller dairies and distributors in the market would have secured as much business as has occurred through Dean's resale of the Bowman home delivery routes to such smaller firms (Dean, Tr. 1988–1993). Moreover, under any circumstances, there would have been one less competitor in the market.

5. Bowman's dairy business was in a failing condition at the time of the acquisition

The evidence clearly establishes that Bowman's dairy business was in a failing condition at the time of the sale; that its operations had been depleting the company's resources in recent years; and that the management and shareholders reasonably and prop-

erly concluded that unless they either sold out or liquidated, a continuance of Bowman's dairy operations would bring ruin and eventual bankruptcy to the corporation. This finding is amply supported by testimony from respected financial analysts, the company's Chairman of the Board and industry witnesses, whose conclusions are entitled to far more weight than the opinions expressed by the Commission's accountant who, at complaint counsel's direction, had made only a partial analysis of Bowman's financial records.

Respondent Dean called as a financial analyst Mr. Leonard Spacek, the Chairman of Arthur Andersen & Co., one of the world's leading accounting firms. Mr. Spacek is a member of all of the national societies in the accounting profession, is a Certified Public Accountant in approximately 15 to 20 States, helped create and has served on the Accounting Principles Board of the American Institute of Certified Public Accountants, and was recognized by the Commission's own accountant to be "very highly regarded in the accounting profession" (Spacek, Tr. 1821–24; Steele, Tr. 2688). The witness had devoted an expanding portion of his time to advising his firm's clients with respect to not only accounting, but financial, operating and management decisions as well. Bowman had been a client of Arthur Andersen since 1927 and in recent years Mr. Spacek had given special personal attention to Bowman because it was one of the clients "that are in what we call operating or financial difficulties and these deserve and must receive special attention in the manner in which their problems are corrected" (Spacek, Tr. 1821–27).

Mr. Spacek testified that, based on the financial and operating data of Bowman which he and his firm had compiled:

> We had concluded in recent years that because of the history of losses and because of the attempts to terminate those losses or to curtail them or to eliminate them, that it was impossible to continue the operations of the dairy divisions in the manner in which they had been conducted heretofore and that they had to be either disposed of, liquidated, or readjusted in one way or another to stop the continuous drain on the companies' resources, which would only lead eventually to bankruptcy or to loss of the entire operation. In other words, there was a continuing dissipation of assets that could not go on without bringing disaster to the company's operations, and it required such attention that some definite action had to be taken, and the history of it was such that it could not be resolved by hoping, say that better times for improvement would come through normal operating procedures (Tr. 1833–34).

Among the data which Mr. Spacek pointed to in support of this conclusion were the following figures showing that for the company as a whole, sales had declined from $86,477,911 in 1960 to

$75,602,431 in 1965 and that, while Bowman had operating profits during some of these years, for the six-year period as a whole "the company had a net bleeding from operations of $86,816 per annum" (Spacek, Tr. 1831, 1852–53; RX 3):

BOWMAN DAIRY COMPANY AND SUBSIDIARIES
SALES AND NET OPERATING PROFIT OR (LOSS)

	Trade Sales	Net Operating Profit or (Loss)
1960	$ 86,477,911	$ 418,867
1961	82,835,515	(126,877)
1962	80,850,960	86,194
1963	77,813,577	55,874
1964	77,605,416	(699,488)
1965	75,602,431	(255,469)
Total Decline	(10,875,480)	
Average Annual Decline	(2,175,090)	Average Annual Loss (86,816)

Mr. Spacek noted that, on a comparable basis with preceding years, Bowman's 1965 net operating loss is understated by approximately $250,000 because of the company's failure to make any contributions to the employees' pension fund after January 1965. Had the company continued in operation, such contributions would have been necessary to retain key employees (Tr. 1829, 1853–54; CX 53 G).

Mr. Spacek also pointed to figures showing that approximately 60% of Bowman's sales were concentrated in the Chicago Area, and that it was in this market that the company's sales decline and operating losses had become most severe. As the following table reveals, sales in Chicago had declined during the six-year period 1960 through 1965 by "over $13 million" and "the decline was continuous for each of the years involved." In addition, losses had increased from $197,459 in 1960 to $1,015,271 in 1965. "The average loss for this 6-year period was $783,167" (Spacek, Tr. 1830, 1848–1850; RX 2):

BOWMAN'S DECLINING SALES AND
MOUNTING LOSSES IN CHICAGO

	Trade Sales	Net Operating Losses
1960	$ 56,796,962	$ (197,459)
1961	53,089,958	(678,127)
1962	52,207,120	(618,315)
1963	48,993,885	(617,841)
1964	46,596,008	(1,571,989)
1965	43,357,668	(1,015,270)
Total Decline	(13,439,294)	
Average Annual Decline in Sales	(2,687,859)	Average Annual Loss (783,167)

Again, Mr. Spacek noted that, on a comparable basis with preceding years, the net operating loss for 1965 is substantially understated because of the company's failure to make any contributions to the employees' pension fund after January 1965 (Spacek, Tr. 1850–51).

According to Mr. Spacek, Chicago was "the place where the company was bleeding to death . . . and it had so indicated over a long period of time that corrective actions could not stop it. And, certainly, there would be no purpose in continuing on with a process that will eventually dissipate and destroy the company" (Tr. 1852). Mr. Spacek observed, however, that the difficulties which Bowman was experiencing in Chicago were "also applicable to other areas of the operations" (Tr. 1859).

Mr. Spacek called attention to the fact that in 1965 five of Bowman's operations had suffered operating losses and that two of the other divisions were in the black only by "a hair" and "for all practical purposes are break even operations" (Tr. 1857–58). He also pointed out that seven of its operations had suffered sales declines between 1964 and 1965 (Tr. 1831–32, 1859). In drawing attention to those areas where Bowman's problems were the most pressing, the witness did not ignore the several Bowman operations outside Chicago that had been moderately successful in recent years. Mr. Spacek specifically stated that his selection of "this information was not to in any way deny the existence of any other financial information that existed in these companies but to show that this—the future of this company and its continued existence is completely in jeopardy with the operations that have been conducted for so long a period at a loss operation" (Tr. 1872; see also, Tr. 1829–1830, 1840–41, 1852–54, 1856, and 1859).

It is true that on a combined basis Bowman's operations outside Chicago had shown an 8.6% increase in sales between 1960 and 1965 (Complaint Counsel's Prop. Fdg. 59). However, on an individual basis, nearly half had suffered sales declines between 1964 and 1965 (RX 7). Furthermore, notwithstanding any sales gains outside Chicago, the company as a whole had suffered a 12.6% sales decline between 1960 and 1965, once more indicating, as Mr. Spacek observed, "that for all practical purposes the Chicago division was overwhelmingly the most important" (Tr. 1854).

It is also true that Bowman's operations outside Chicago, on a combined basis, had been profitable in recent years (Complaint Counsel's Prop. Fdg. 57). However, it is again significant that between 1964 and 1965 those profits dropped by over 12%, that a

number of individual operations suffered losses and that, notwithstanding any contribution to earnings from the operations outside Chicago, Bowman still suffered a company-wide operating loss in 1965 (*ibid.*; RX 6). Furthermore, during the first quarter of 1966, the number of loss operations outside Chicago increased to seven (RX 13).

Mr. Spacek also gave careful attention to the significance of the slight over-all profit which Bowman had reported in four of its last six years as a result of non-operating income from dividends, interest and gains on the sale of property and securities. An analysis of this minimal profit only serves to underscore Bowman's failing condition. In 1964, for example, Mr. Spacek noted that Bowman reported an over-all profit of $318,921, despite a net operating loss of $699,488 (Tr. 1853, 1862–63). Bowman's financial statements (CX 53 D) reveal, however, that Bowman was able to convert its net operating loss into this inappreciable over-all profit only because it had disposed of plant, property and equipment for a capital gain of $783,415. In effect, Bowman's property, plant and equipment were being liquidated to offset the company's net operating losses. Mr. Spacek felt it particularly significant, therefore, that Bowman, in 1965, had suffered an overall loss of approximately $178,000:

> [T]his is a consequence of what you might say is the inevitable result of a continuing loss operation. Eventually the losses will consume the company and this is the process of cannibalization or cannibalizing the company through the method of having the losses dissipate the company's assets. As we call it in the jargon of accounting, the cannibalization of the company's assets because it is merely consuming those assets as it goes along and will eventually have devoured them all and go into bankruptcy. The only question is one of time (Tr. 1866–67).

Additionally, a substantial portion (approximately $430,000) of the capital gains and dividends from Bowman's investment portfolio in marketable securities and government bonds had also been used to offset the company's losses from its dairy operations in 1964 (CX 53 D).

Mr. Spacek was clearly correct in pointing out that any income derived from sales of plant, property and equipment or from outside investments "has nothing to do with operating the company" as a dairy business (Tr. 1863). For this reason, he properly separated Bowman's return from its operations from its non-operating earnings in evaluating Bowman as an operating dairy concern. Mr. Spacek pointed out that Bowman's holdings of

marketable securities and of plant, property and equipment "are exactly the same as savings to an individual and as savings to an individual they do not justify conducting ones operations or ones livelihood on the basis that dissipates those funds" (Tr. 1872). Bowman could not "by using those funds assure the continuance of the operation that is losing the funds unless there is an opportunity to correct the causes of the loss and therefore these funds that are on hand are merely an accident of good management in the years gone by of allowing them to accumulate but it serves no purpose either to—to the consumer or the customers, the employees, the company, the stockholders or the public at large to continue an operation that merely dissipates those funds for no purpose nor is there any reason why this company or its stockholders should subsidize from an operating point of view a losing operation. That is not different for Bowman Dairy than it is for any other company. No company can long survive that and it is an act of mismanagement or imprudence to continue that because it is bad for the economy because it is a wasteful operation" (Spacek, Tr. 1872–73).

Other testimony concerning Bowman's straitened operating condition and need for disposition or liquidation was given by Mr. Donald McLucas, a Senior Vice President with the Northern Trust Company of Chicago (McLucas, Tr. 1934). The Northern Trust Company had for many years acted as financial advisor to an elderly widow who had controlled the largest block of Bowman stock (approximately 21%). When she died in August 1965, the Northern Trust Company, in its fiduciary capacity as coexecutor of her estate, had undertaken an analysis of the estate's assets including the Bowman stock, to determine the anticipated investment income which could be expected. It carefully considered all of the various alternatives that were open to Bowman (McLucas, Tr. 1935–1940).

As one alternative, the Northern Trust considered continuing Bowman's existing dairy operations without substantial additional investment. "It is an old corporation in Chicago and is a highly regarded one, but based on their past history we concluded that that was not advisable—an advisable alternative. It would not be prudent to continue an asset that has been losing money" (McLucas, Tr. 1941). In addition, Mr. McLucas testified that from the "examinations we made, we were satisfied it was not going to turn around" (Tr. 1951).

The Northern Trust also evaluated the Dean offer which was

under consideration in the Fall of 1965. It found that, if the offer were accepted, it could take the funds generated and, even investing them at a conservative rate of return, secure a return which would be approximately three times as great as that which it was currently receiving from Bowman. Moreover, the Northern Trust recognized the possibility that if operating losses were allowed to continue to eat into investment income, the dividend was likely to be reduced or eliminated (McLucas, Tr. 1939–1941).

The Northern Trust even considered taking Bowman's holding of marketable securities and plowing them into the dairy business, but concluded that these "additional funds would have to earn a return of about twenty-three percent to produce the net income of the equivalent of what could be done under the Dean offer . . . and we just didn't feel that in view of the past record that this is anything that could be conceived" (McLucas, Tr. 1943). Additionally, "to do this would be for the corporation to give up its marketable securities, its only earning assets, which we would not feel would be a prudent thing for a trustee" (McLucas, Tr. 1943).

Like the holder of the company's largest block of stock, Bowman's management was also convinced that the company's dairy business was in a failing condition and that the only alternative to eventual bankruptcy was a sale or self-liquidation. The Chairman of Bowman's Board stated unequivocally that Bowman's operations had "witnessed a marked decline in recent years" (Kullman, Tr. 1618); that "the company's fortunes would most probably become worse instead of better in future years" (*ibid.*); that, in addition to Chicago, Bowman also had "substantial operating and financial difficulties . . . in a number of its other plants" (Kullman, Tr. 1623–24); that "most of Bowman's plants were old, overcrowded and in need of modernization" (Kullman, Tr. 1624); that Bowman's plants "have become run down and inefficient and had excessive operating costs" (Kullman, Tr. 1625); that "Bowman had, in effect, been living off the combination of its depreciation and income from non-dairy investments and the sale of property" (Kullman, Tr. 1625); that it was "unfeasible to think that an internal solution to Bowman's operating and financial difficulties could be found" (Kullman, Tr. 1627); and that Bowman had to "sell out or adopt a program of self-liquidation" (Kullman, Tr. 1627).

The same view was widely held by the industry witnesses who appeared. For example, the Executive Secretary of the Associated

Milk Dealers, comprised of substantially all of the dairies in the Chicago Area, stated that he knew that Bowman was "steadily declining" and in "tough financial straits" (Nonnamaker, Tr. 2194); the General Manager of the farmers' cooperative which supplies most of the Chicago dairies with their raw milk stated that his organization had observed that the Bowman Dairy Company "had been losing business by virtue of the fact that their purchases of milk had been decreased" (McWilliams, Tr. 2136); the President of Ludwig Dairy testified that "I just sort of surmised they [Bowman] had financial problems over the past few years," and that he felt that "their home delivery routes were so small I just assumed they had been losing money on it" (Ludwig, Tr. 1712); and the Chairman of Elgin Milk Products observed that "the whole market has changed and apparently they were not able to change with it. It is very difficult when you have built up an operation like that to pull it back down or turn the corners" (Hemb, Tr. 941; see also, Quinlan, Tr. 609–610; Schaub, Tr. 1767–69; Oberweis, Tr. 1517–1520).

To counter the testimony of Bowman's stockholders, management, financial advisers and competitors that the company's operations were in a failing condition, complaint counsel offered the opinion of one of the Commission's chief accountants, who said, "That the company did not face imminent bankruptcy," and gives his reasons therefor:

> That the company had an ample cash position. It had an unusually large amount of marketable securities which might be termed cash equivalent since they could be turned into cash very readily. The working capital position of the company was very strong. The inventory and accounts receivable did not seem to be unusually large, nor did the current liabilities of the company seem to be out of line, so that on a working capital basis the company was in very good position.
>
> Now the company had, on a consolidated basis, had suffered a loss in 1965, the year 1965, and would have suffered a loss in the year 1964 except for some sale of property at a large profit; but in the year 1961, the company also suffered an operating loss, and was able to come back in the year 1962 and 1963. So, it seems to me that the company possibly could repeat its com[e] back and get into a profitable position.
>
> The company has, as shown by Commission Exhibit 106D, some very heavy losses in the Chicago area, but outside of Chicago has some profitable companies, and they have been able to obtain a favorable income from their operations in the sale, purchase and sale I should say, of marketable securities.
>
> Then, the company has a large surplus, a very substantial surplus which has been maintained—when I talk about a consolidated basis over the six-year period on a very, with very little reduction, and the company has a very

low funded debt, a very low, relatively low funded debt, so that its obligations because of paying off the loan, didn't appear to be unusually heavy.

Taking all these factors together, it seemed to me that the company was in good financial condition, and there was a good opportunity for renewing or turning the company from a deficit operation to a profit making operation, but certainly it wasn't in danger of bankruptcy (Steele, Tr. 2620–21).

On cross-examination, Mr. Steele was asked:

If you looked at this company from an operating standpoint—that is, as a businessman trying to evaluate its operations as a dairy firm—you might reach a different conclusion than if you were really just trying to come up with a conclusion as to whether or not it was solvent. Am I correct? (Tr. 2735.)

He replied as follows:

I think, yes, because there is no getting around the substantial losses in the Chicago Dairy operations, although they had some very profitable subsidiaries, which substantially offset it. And there is some indication, certainly, in the record that maybe a little change in management or a little better thinking could have made the company profitable from the dairy—dairy operations profitable. That went beyond what I was, what I had evaluated, what I had studied. I hadn't gone into that phase of it. I was only concerned with the solvency of Bowman Dairy Company and subsidiaries on a consolidated basis (Tr. 2735).

Mr. Steele added further:

I don't believe I can express an opinion solely on the dairy operations, based on the information that I have obtained from the company (Tr. 2739).

It also became apparent on cross-examination that the Commission's accountant was not in real disagreement with the conclusions of respondent's witnesses that Bowman's eventual bankruptcy was only a matter of time. He agreed with Mr. Spacek's conclusions that "there was a continuing dissipation of [Bowman] assets that could not go on without bringing disaster to the company's operations" (Steele, Tr. 2700); that the history of Bowman's loss operations "was such that it could not be resolved by hoping, say, that better times for improvement would come through normal operating procedures" (Steele, Tr. 2700); that "[e]ventually, the losses will consume the company and this is the process of cannibalization or cannibalizing the company through the method of having the losses dissipate the company's assets . . . it is merely consuming those assets as it goes along and will eventually have devoured them all and go into bankruptcy. The only question is one of time" (Steele, Tr. 2710); and that "it serves no purpose either to" the employees, the company and the stockholders "to continue an operation that merely dissipates those funds for no purpose nor is there any reason why this

company or its stockholders should subsidize from an operative point of view a losing operation" (Steele, Tr. 2715–16). As the witness, himself, summed it up:

I guess he [Mr. Spacek] is probably right in the question of time. In other words, the Chicago operations, the losses in the Chicago operations would eventually eat up the profits from the rest of the business (Steele, Tr. 2711).

Even the opinion of the Commission's accountant that Bowman was in sound financial condition at the time of the acquisition is subject to considerable doubt. The witness conceded that the balance sheet figures showing the working capital ratio, retained earnings, and net worth of Bowman, upon which he had placed considerable reliance, were insufficient data to judge the financial condition of the company. He admitted that he would like to know the current operating situation of the company, whether or not it is making money (Steele, Tr. 2721–22). As a financial analyst, he would also "want to consider the profitableness of the company in relation to the profitableness of the industry" (Tr. 2670). Notwithstanding this, and the fact that his staff annually prepared a report on rates of return for 30 industries, including the dairy industry, he had made no analysis of Bowman's rate of return (Tr. 2669). Yet he recognized that "on any basis on which you would calculate the [Bowman] return on investment in 1965, it would be negative" (Tr. 2673–74). For the six-year period, 1960 through 1965, the average rate of return on stockholders' investment, even including non-operating income, was only about four-tenths of one percent. By contrast, the average rate of return for the dairy companies which his staff had analyzed for the year 1964 was 11.4% (Tr. 2675–77).

The Commission's accountant also agreed that Bowman's return on sales of 11/100ths of one percent even including non-operating earnings was "a very low return, lower than normal" (Steele, Tr. 2737–38, 2743). More significantly, in terms of operating income, Bowman did not earn "one single dime" on the $482 million of sales during the six-year period 1960–1965 (Tr. 2737).

Insofar as the Commission's accountant placed reliance on the relative size of Bowman's retained earnings or "surplus," it is significant that Mr. Spacek stated that "ordinarily we don't even make statistics on that point, because it is so meaningless" (Tr. 1888). Mr. Spacek stressed that "surplus does not gauge [a company's] solvency" (*ibid.*). Solvency is measured by whether the assets in which the company's past earnings were

invested generate funds sufficient to meet its current obligations and pay off its debts.

While Bowman was not in bankruptcy at the time of the sale, Mr. Spacek pointed out that the stockholders' investment shown on the balance sheet was overstated to the extent that the company's "losses have already eaten up a substantial portion of it" (Spacek, Tr. 1861). This dissipation of the stockholders' investment comes from the lack of value that attaches to the company's plant, property and equipment and other assets employed in such losing operations. Thus, while Bowman's plant, property and equipment had been carried on Bowman's books at its cost of $10,477,925 in accordance with accepted accounting principles, the stockholders' investment in those assets "has already been dissipated to the extent of several million dollars representing that portion of the plant property and equipment which cannot be supported by use in these loss operations, and, therefore, that is gone permanently now, so that the $10,477,925 is merely a historical record of what has been and is now in the process of being dissipated" (Spacek, Tr. 1874). In short, to the extent that the stockholders' investment and retained earnings were represented by plant, property and equipment, which was carried on Bowman's books at the original cost, but was actually worth substantially less, the stockholders' investment and retained earnings were overstated. This was confirmed when Bowman sold those assets to Dean and received only a fraction of the figure at which they had been carried on Bowman's books. This, in turn, required Bowman to reduce its stockholders' investment by $6.5 million following the sale (Spacek, Tr. 1879–1881).

The Commission's accountant also seemed to feel it significant that Bowman's working capital ratio had increased during the last several years (CX 106 A). However, he had to acknowledge that a program of partial and continuous liquidation of property, plant and fixtures, such as Bowman had been carrying out in recent years, would result in just such "an increasing working capital ratio" (Steele, Tr. 2626–27).

The weight of the testimony of the Commission's accountant is also considerably reduced by the fact that when asked whether his exhibits were "prepared to enable you to determine whether or not the company was in sound financial condition, or were they prepared for the purpose of supporting the proposition that the company was in financially sound condition?" he admitted: "They were prepared for the purposes of showing that the com-

pany was in sound financial condition and selected by [complaint counsel] for presentation in this hearing" (Steele, Tr. 2649–2650). Moreover, while he claimed that he had "explained rather adequately" what he meant by his "cash flow" exhibit, he acknowledged that he had not prepared an analysis of the source and application of those funds and agreed with an Opinion of the Accounting Principles Board that: "No generalization or conclusion can be drawn as to the significance of the 'cash flow' without reference to the entire flow of funds as reflected in the complete statement of source and application of funds. Adding back depreciation provisions to show the total funds generated from operations can be misleading unless the reader of financial statements keeps in mind that the renewal and replacement of productive facilities required substantial 'cash out-flow' which may well exceed the depreciation provisions . . . . Misleading applications can result from isolated statistics in annual reports of 'cash flow' which are not placed in proper perspective to net income figures and to a complete analysis of source and application of funds" (Steele, Tr. 2685).

The very type of misleading application of "cash flow" statistics criticized by the Accounting Principles Board was made by complaint counsel in their proposed finding that "although Bowman reported a loss in the years 1961 and 1965, Bowman had substantial funds available through its provisions for depreciation in each year from 1960 through 1965. The cash flow, as shown by CX 106E, shows that the company had substantial funds available for improvement or replacement of property or other corporate purposes" (complaint counsel's Prop. Fdg. 63; see also, complaint counsel's Prop. Fdg. 49). As Mr. Spacek pointed out, "When there is an operating loss such as we have had in these principal divisions the depreciation in fact is not earned . . . . We are consuming our own property and receiving nothing for it and thus it is only a matter of time and when the cannibalization kills the operation because it has no more to eat out of and therefore when the money is not set aside or the depreciation is not earned the property cannot return so it really reaches its point of death when that property ceases to be operating" (Spacek, Tr. 1868). In other words, "the operations cannot reimburse the business for the depreciation or the part of the plant that is used up" (*ibid.*). Because of Bowman's heavy operating losses, necessary plant improvements had been curtailed. As the Commission's accountant, himself, recognized, "Bowman Dairy Company obtained absolutely

no net income from its operations, from net operating income" during the past six years taken as a whole (Steele, Tr. 2679–2680). His own exhibit showed that depreciation had declined each year since 1961, which indicated that the company had not been reinvesting in its operating property (CX 106E; Steele, Tr. 2680–81).

Notwithstanding the contrary opinions expressed by the Commission's accountant and economist, the hearing examiner finds that Bowman's management had done all within its power to turn the company around; that these efforts had proved unsuccessful through no fault of their own; and that Bowman's officials and stockholders, thoroughly familiar with the factors of a critical situation and more able than the Commission's "experts" to foresee future emergencies, after much careful consideration, concluded that the company was faced with eventual ruin unless a purchaser for the company's dairy operations could be secured. There is no reason to doubt that in so doing they exercised a judgment that was both honest and well-informed. Quite the contrary; the overwhelming weight of the evidance supports the soundness of the conclusions which they reached.

B. *The Bowman Business Which Dean Has Retained Following the Resale of the Bowman Home Delivery Routes Will Help To Preserve Dean as a Dairy Competitor in the Chicago Area After the Loss of the Jewel Account*

While it was the impossibility of reversing Bowman's financial and operating difficulties that led Bowman to seek a purchaser for its dairy business, it was the threat posed by the loss of the Jewel account to Dean's continued existence as a viable competitor in the Chicago market which led Dean's management to give serious consideration to the acquisition. Such a purchase, Dean concluded, was the only way to avert the disastrous increase in production and distribution costs which would result from the loss of over 60 percent of its Chicago area sales. To the extent that the former Bowman volume which Dean hopes to retain following the resale of the former Bowman home delivery routes offsets the loss of the Jewel account, the acquisition serves to benefit competition by giving Dean the wherewithal to maintain its competitive viability in the sale of packaged milk in the Chicago Area.

1. There is a trend toward vertical integration into dairy processing by cooperative and corporate food chains

Dean has long followed a policy of concentrating its sales of dairy products to retail food stores, restaurants, institutions, and the like. While this distribution pattern has resulted in past increases in sales and earnings for the company, there has been a recent trend by cooperative and corporate food chains to enter into private label programs and the processing of their own milk supplies. This movement toward vertical integration threatens the continued success, and even the continued existence, of dairies such as Dean which sell substantially all of their dairy products to such outlets. Examples of the companies which have followed this accelated trend were given by many of the witnesses, including those called both by complaint counsel and by respondent Dean.

A representative of A & P, called by complaint counsel, testified that A & P already has a milk plant under construction which will supply dairy products to its stores in the Philadelphia Area (Hager, Tr. 153–155). An executive of the Kroger Company, also called by complaint counsel, testified that Kroger had dairy plants in Cincinnati and Indianapolis (Dewey, Tr. 501). The president of Meadowmoor Dairy, which itself had become a part of the Scot Lad wholesale and retail grocery complex, testified that Safeway, the nation's second largest retail grocery chain, operated milk processing plants throughout the country; that the Ralph's Grocery chain had its own dairy operations in Los Angeles; and that Seaway Food Town, a chain of 34 stores in Toledo, Ohio, had opened its own milk processing plants within the last six months. He concluded with the observation that "the trend is toward corporate stores operating their own wholesale facilities in depth, including milk" (Schaub, Tr. 1773–75; see also Dean, Tr. 1968–69; Karlos, Tr. 1919).

The Commission's economist had observed a trend toward retail grocery operators building their own dairy plant to supply their own stores (Walker, Tr. 1320). He traced the historical development of this trend to a number of factors, including the laws in some states fixing milk prices (Tr. 1412–18). He acknowledged, however, that once under way the development of vertically integrated retail grocery-dairy operations has spread to markets throughout the country (Tr. 1320–1334; 1414). Today, each of the three largest corporate chains have their own milk

processing programs well under way. Moreover, in those areas where they do not presently have milk plants, at any time that they feel that the price of milk isn't what they think it ought to be, they are in a position to open up their own dairy plant (Walker, Tr. 1323–24).

Smaller corporate and cooperative chains have followed the lead set by these giant firms. In addition to the firms heretofore noted, the Commission's economist called attention to the examples of Arden-Mayfair and Southland (Walker, Tr. 1326–1331). He particularly noted that the latter firm had been expanding its operations toward the Chicago Area and he expected them to enter the market in the near future (Tr. 1330–31). In Chicago, Certified Grocers, a retail grocery cooperative of approximately 781 independent grocers, acquired the Lake Valley Farms Dairy in 1954 and today supplies about 75 percent of its affiliated stores with their milk needs through its Country's Delight milk division (Holin, Tr. 396, 399). In 1965, the Country's Delight milk operation ranked sixth among all dairies in the Chicago Area (RX 36).

2. Dean's principal customer, the Jewel Tea Company, has decided to open its own dairy plant in the Chicago Area

Following the trend toward vertical integration evident both nationally and in the Chicago Area, the Jewel Tea Company, the largest retail grocery chain in the Chicago Area, has decided to build its own dairy plant and to discontinue virtually all of its purchases of packaged milk items from Dean (Clements, Tr. 2227–29, 2232). Jewel's decision to build its own dairy plant poses an immediate and substantial threat to Dean's continued existence in the Chicago market. Within Cook and DuPage Counties, Illinois, the area served by Teamsters Local Union 753, 75.96 percent of Dean's sales of packaged milk were to Jewel (Schiff, Tr. 2304; Dean, Tr. 1972; see Tr. 2304–2305). While data showing the exact percentage of Dean's sales accounted for by Jewel within the boundaries of the larger Chicago Area are not available, even the Commission's economist agreed that it was at least 61 percent (Walker, Tr. 1338–39). In addition, the Jewel Tea account represents approximately 50 percent of the total production of the Dean plants located in Huntley and Chemung, Illinois, which serve not only the Chicago Area but all of Northern Illinois and parts of Wisconsin (Dean, Tr. 1972–73).

Dean first received an indication that Jewel was considering

building its own plant in the late winter of 1964 or early spring of 1965, when Jewel's executives informed Dean that Jewel was conducting feasibility studies on the matter (Dean, Tr. 1973; Clements, Tr. 2226). During May 1965, Jewel informed Dean that it had concluded its feasibility study and that Jewel's management believed substantial savings could be experienced by Jewel if it operated its own milk plant. Jewel asked Dean if it could come close to Jewel's projected cost figures (Dean, Tr. 1973–75; Clements, Tr. 2226–27). However, after exhaustive studies, Dean concluded in the summer of 1965 that it could not and so notified Jewel. As Mr. Dean stated, "We didn't think that they could experience them, and we knew we couldn't; and even to come close meant that we had to give up all of our advertising, all of our research and development, and a great many things that we think are extremely important to the continued existence of our company" (Dean, Tr. 1974–75).

Only when the Dean management was faced in the summer of 1965 with the clear prospect that Jewel would build its own milk plant did Dean's management consider a purchase of Bowman. As Mr. Dean stated: "[W]e had no interest in the Bowman acquisition until we were completely satisfied that Jewel had decided to build their own facilities" (Dean, Tr. 2109). In fact, Dean had been approached by Bowman on several prior occasions, including the early part of 1965, to buy Bowman's dairy business. On none of those occasions had Dean been interested in the purchase of Bowman with its obvious operating problems (Dean, Tr. 1984–85; Kullman, Tr. 1632–34).

The formal decision by Jewel to build its own dairy plant was reached at a meeting of Jewel's Executive Committee in late January, 1966 (Clements, Tr. 2253). The decision of the Executive Committee was accepted by the full Board of Directors at their March 1966 meeting (Clements, Tr. 2254) and subsequently reported to the company's stockholders in Jewel's Annual Report (RX 22, p. 15), which stated:

> We have also decided to build a fluid-milk plant in Melrose Park. This plant will serve both Jewel and Eisner Food Stores and will utilize the very latest equipment for the most efficient processing, packaging and handling of milk. Methods of automating store orders selection and loading are being studied to assure us of the most efficient techniques for the handling of the finished product. Plant operations are expected to begin begin some time in 1967.

In response to an earlier inquiry by complaint counsel, the President of Jewel also advised the Commission, on February 2, 1966,

that Jewel had definitely decided to build its own dairy plant (Clements, Tr. 2228–29; RX 20, 21).

In addition to notifying its stockholders, Dean and the Commission of its decision to build a dairy plant, Jewel's management has employed a group of architects to draft plans for the plant and let bids for construction which are expected to be received in September 1966. It has hired a skilled dairy plant manager to oversee the construction of the plant and to operate the plant once it has been established. It has applied for the necessary permits for operating a dairy plant from the Chicago Board of Health and it has the land on which the plant will be built (Clements, Tr. 2231).

The finality of Jewel's decision to build its own plant and discontinue the purchase of all but a few packaged milk items from Dean was confirmed by the testimony of Jewel's Chairman of the Board, Mr. Clements (Tr. 2223, *et seq.*). In fact, when asked by complaint counsel on cross-examination whether Jewel would reconsider its decision to build its plant if the cost economies and rate of return on the processing plant were somehow shown to be inaccurate, he stated: "I think that from my evaluation of this plan that long term we should have this plant and we should be operating under our private label and I think the things that you refer to are short term, so that in the long term I think we should be in this position" (Clements, Tr. 2262). This is in line with Jewel's over-all pattern of vertical integration. Jewel has already built plants in many areas to supply its stores with ice cream, candy, coffee, cheese, salads, and bakery products, and is also planning to build a potato chip plant adjacent to its dairy plant in Melrose Park (Clements, Tr. 2265–67).

The testimony of the industry witnesses revealed that it was common knowledge in the Chicago dairy industry that Jewel was going to build its own dairy plant. One dairyman testified that he had been informed by the President of Jewel Tea that Jewel was "committed" to building its own dairy plant (Schaub, Tr. 1776). The general manager of the largest farmer cooperative selling raw milk into the Chicago Area testified that he had already been approached by representatives of Jewel concerning the purchase of raw milk for processing in the latter's dairy plant (McWilliams, Tr. 2134–35; see also, Nonnamaker, Tr. 2211; Karlos, Tr. 1919; Hemb, Tr. 945; Ludwig, Tr. 1717–18, 1735–36).

In the face of this evidence, the Commission's economist nonetheless expressed his belief that Jewel would eventually decide

not to build its own dairy plant (Walker, Tr. 2516–17). His views on this point are nothing more than the purest speculation and entitled to no weight. The witness relied principally on the testimony of the Chairman of Dean that he did not think Jewel would be able to realize as great a profit from their own dairy plant as Jewel anticipated. But Jewel's Chairman testified that even were this true, the plant would be built. Significantly, Dean's Chairman did not have any doubts about Jewel building the plant according to its plans (Dean, Tr. 1984).

3. The loss of Jewel Tea account will have a substantial adverse effect on Dean's operations

If Dean is not allowed to acquire Bowman, the loss of the Jewel Tea account threatens Dean's continued existence as a viable competitor in the Chicago Area. The drop in plant output resulting from the loss of the Jewel account would cause a substantial increase in production costs per unit of milk. As Mr. Dean testified:

> While you can make some economies in the plant when your volume goes down, there is an irreducible minimum on this thing that would just—I would roughly guess, at least, double our plant cost . . . (Tr. 1976).
>
> * * * * * * *
>
> . . . we would, of course, have to substantially reduce our production; and, as I said earlier, it is impossible to reduce your cost down as far as your production might fall . . . . The depreciation is the same whether you are processing a great deal or a small amount, as long as you have the equipment in, and you have building maintenance costs; and all these other items remain essentially the same; and, so, your costs have to reflect a great deal higher per unit cost on a small volume than they do on a large volume. This is, particularly, so when you are experiencing a large volume and have a plant geared to that; and, then, to have the volume taken away from it (Tr. 1980).

As a consequence of the loss of the Jewel volume, Dean's plant in Huntley, Illinois, would probably have to be closed immediately, causing a substantial loss not only to Dean but to the local community as well (Esmond, Tr. 1545–47; Dean, Tr. 1980–81). Costly revisions in the plant and equipment at Dean's plant in Chemung, Illinois, would also have to be made. Even then, production would be well below its present level and there would be a significant increase in production costs per unit of milk (Dean, Tr. 1980-82; Esmond, Tr. 1546).

Dean's distribution costs would also be "enormously increased" (Dean, Tr. 1976). Mr. Dean testified:

> I would hazard a guess that our routes would be less than half of the loads they are now carrying even after consolidation of routes, so, our combined cost of labor on that route, instead of being, say, one and a third cents, might

be, say, two point five or two point eight, or whatever the mathematics would figure out, so, when you lose these figures—big accounts, and, particularly, one that's as concentrated in an area as Jewel is in the Chicago market you can't do it without having an enormous effect on the costliness of your distribution (Tr. 1978).

With this significant increase in distribution costs it would be impossible for Dean to continue to service the large number of independent grocers which it presently services at a price that would be even "remotely competitive" (Dean, Tr. 1976). An executive from a cooperative buying association representing approximately 350 independent grocers in the Chicago Area testified that, as a result, these independent grocers would "suffer a disadvantage" as against the larger chains. He considered the threat to Dean's continued existence as an efficient dairy in the Chicago Area resulting from Jewel's vertical integration to be most unfortunate for the small independent grocers whom he represented since, "Dean first above all sought out to help the independent to try to place a bottle of milk in his stores at a cheaper cost, effect savings and pass the savings on to the independent in order to compete with that chain store who was underselling the independents on milk" (Karlos, Tr. 1920–22).

Industry witnesses shared the belief of Dean's management that the loss of the Jewel account would have a devastating effect on Dean's operations. One of Dean's competitors testified that Dean would be put "out of business . . . . I don't know what they'd have left without it" (Ludwig, Tr. 1717–18, 1743–44). Another stated, "I think it would cause them to go broke," and later added, "I think it would wreck that corporation" (Schaub, Tr. 1778, 1803; see also, McWilliams, Tr. 2136; Hemb, Tr. 945–46; Karlos, Tr. 1920; Walker, Tr. 1342). Indeed, the president of Meadowmoor Dairy stated that if Dean were not allowed to acquire Bowman, "I believe two companies would be destroyed, Bowman and Dean" (Schaub, Tr. 1778).

The industry witnesses were convinced that it would be impossible for Dean to replace the Jewel volume by securing new accounts as the Commission's economist suggested (Schaub, Tr. 1778–79; Ludwig, Tr. 1735–36, 1741–42). When asked why he didn't think Dean would be able to go out and secure added volume to offset the loss of the Jewel account, the president of one local dairy replied: "It doesn't exist." He added that "nobody's going to sit back and let Dean take his stores away from him anymore than I'll let him take them now, or Bowman, or Borden, or

anybody else. If he could have taken them he'd have taken them by now. This market is vigorously competitive; the drivers, the wholesale drivers, are compensated with a high commission, and they would fight vigorously to hold their business no matter what label, whether it's Meadowmoor or Dean or Bowman or Borden. He could never replace that business unless he bought it" by way of an acquisition (Schaub, Tr. 1778–79).

In the face of this evidence, the testimony of the Commission's economist that he believed Dean could offset the loss of the Jewel business through more aggressive bidding was nothing more than surmise. He had to agree that Dean had "in the past been extremely able and aggressive and competitive in the dairy business" (Walker, Tr. 1342). He stated that Dean "is operating efficient plants and he is operating them at the very lowest possible cost" (Walker, Tr. 2457). He stated that the only information he had which even suggested that Dean had not already attempted to secure all the volume of milk sales that it could possibly secure was Dean's failure to submit a bid for A & P's private label business in Chicago (Walker, Tr. 1343). But Mr. Dean later testified that his company had not ever been asked to bid on A & P's private label business, and that had it been asked, it would most certainly have submitted a bid (Dean, Tr. 2080–81). The Commission's economist further conceded that he had no facts which would lead him to believe that Dean could secure any additional volume other than at a loss (Walker, Tr. 1345–46). Indeed, he was frank in acknowledging that he saw no possibility for Dean to replace the full loss of the Jewel account at any time in the immediate future (Walker, Tr. 1346). Moreover, he was certain that Dean's inability to replace the lost Jewel volume would cause both production and distribution costs to increase substantially and would impair Dean's competitive position in the market place (Walker, Tr. 1340, 1342).

4. The Bowman acquisition affords Dean the opportunity to remain competitive

Even combining that portion of Bowman's business which Dean hopes to retain after Jewel opens its own dairy plant may not enable Dean to remain in the Chicago market as a profitable and viable competitor. Dean's production manager stated that, notwithstanding the addition of that portion of Bowman's business remaining after Dean's disposition of Bowman's home delivery business, it will "be a tough spot to be in" (Esmond, Tr. 1548).

He acknowledged that Dean was merely attempting to come up with what it felt was the most efficient operation it could in what is essentially just a bad situation under any circumstances (Esmond, Tr. 1547). As Mr. Dean stated:

The only possible answer, to the replacement of all the tonnage that we knew we would lose when the Jewel Tea Company opened up their own facility was to acquire Bowman. We felt that we could replace on our routes, at least, some of the Jewel business that would be gone with the Kroger and High-Low and other supermarkets that Bowman was serving; and by consolidating the routes, we still wouldn't be as big on a per route unit average as we are at the present time, but it would be a substantial improvement over nothing; and we felt that by combining some of their plants and ours, we could effect some economies so that overall we would recover from such a terrific loss in the best way that was conceiveable to us at the time (Tr. 1987–88).

On all the evidence, it is found that Dean's acquisition of Bowman's dairy operations was not an effort to expand its market share through the elimination of a significant competitor. There is no evidence that Dean's acquisition of Bowman was part of an acquisition program by Dean. Quite the contrary, the weight of the evidence establishes that Dean acquired Bowman only because of a severe threat to the company's continud existance in the Chicago market. By acquiring Bowman, an acquisition which its management had rejected previously on several occasions, Dean was merely attempting to combine a portion of the operations of a company which was in failing circumstances with its own in the hope that this would enable Dean to remain in the market as a viable competitor. Significantly, the Commission's own economist acknowledged that if the acquisition had not taken place when it did, but rather after Jewel had already opened its own dairy plant and terminated its purchases of fluid milk from Dean, he "would hate to try to prove adverse competitive effects" (Walker, Tr. 2492–94).

C. *The Sale of Bowman's Dairy Operations to Dean Has Benefited Smaller Dairies, Contributed to a Reduction in Concentration and Generally Strengthened Dairy Competition in the Chicago Area*

In addition to offering Dean the opportunity to remain as a viable competitor in the Chicago market following the loss of the Jewel account, the acquisition will have other significant benefits for competition generally. The detailed findings which follow es-

tablish that Dean's resale, since the acquisition, of the former Bowman home delivery routes to smaller dairies and distributors in the Chicago Area has already strengthened the competitive position of these smaller firms by giving them the added volume to effect production and distribution economies. This, in turn, will tend both to arrest any decline in the number of existing firms and to promote entry by new firms. Additionally, because of Dean's disposition of the Bowman routes and the imminent loss of the Jewel volume, the acquisition will lead to a further decline in the level of concentration already evident in the Chicago milk market. Finally, there is no evidence that the acquisition has had or conceivably will have any consequential, let alone substantial, adverse effect on any milk supplier, competing dairy, milk buyer, or competition generally.

1. Dean's resale of the former Bowman home delivery routes following the acquisition has strengthened smaller daries

The resale of the former Bowman home delivery routes by Dean since the acquisition has significantly strengthened many smaller dairies and distributors in the Chicago Area by providing them with added volume to effect economies of production and distribution (Quinlan, Tr. 611–13; Kraml, Tr. 1693–94; Walker, Tr. 1376–79). The resale of these routes has resulted in a distribution to smaller dairies and distributors of nearly $20,000,000 of former Bowman sales, representing about 50 percent of its overall Chicago dairy business (Dean, Tr. 2008). As one knowledgeable industry witness put it, the dispersal of this significant amount of sales volume throughout the market has acted as a "transfusion" for the purchasing dairies (Nonnamaker, Tr. 2197).

From the outset of its consideration of the acquisition Dean intended to dispose of Bowman's home delivery routes to smaller dairies and independent vendors who could effectively consolidate the routes into their own operations (Dean, Tr. 1988–1990). Dean has never been engaged in home delivery distribution in Chicago and it had no desire to assimilate Bowman's home delivery business (Dean, Tr. 1988–89). Accordingly, immediately upon receipt of permission by the Supreme Court's stay to dispose of the routes, Dean circularized smaller dairies and independent distributors operating in the area in an effort to sell the routes (RX 18; Tr. 2007). Consistent with the understanding reached with the

Commission, none of the routes was sold to any of the nation's ten largest dairies, and each sale was submitted to the Commission for its approval (Dean, Tr. 1990). The Commission approved each of the sale of the more than 400 routes and, as of June 24, 1966, all of the former Bowman home delivery routes had been disposed of (Dean, Tr. 1989–1992). The dairies which purchased these routes received all of the accounts receivable and usable assets connected with the particular routes, including customer lists, trucks, and supporting distribution equipment (Dean, Tr. 2053–56).

The smaller dairies buying the Bowman routes have benefited through a reduction of both their per unit distribution and production costs. One of the Commission's own dairy witnesses, with forty years of experience in the industry, summed it up in his testimony that "the additional business, regardless of whether it is distribution or in the plant, it would increase the efficiency [of the smaller operators] by leaps and bounds" (Holin, Tr. 412). Another witness stated that with the increased volume, "Unquestionably it will increase their operating efficiency if they run more milk through the same plant. Everything being equal, their cost per unit should be less" (Ludwig, Tr. 1714–15).

The consolidation of the Bowman routes with their existing routes has also enabled the purchasing dairies and distributors to cut distribution costs by giving them "more coverage and more business per route" (Kraml, Tr. 1693). Since the per unit cost of delivery is determined by such factors as travel time between stops and the number of stops per route, the added volume and the increase in customers have reduced these costs significantly (Quinlan, Tr. 611–13; Ludwig, Tr. 1714–15; Hemb, Tr. 948–49). The purchasing dairies have thus been able to strengthen their home delivery distribution by combining the routes into more compact, more efficient delivery operations (Nonnamaker, Tr. 2196–98; McWilliams, Tr. 2138–39; Quinlan, Tr. 611–13, 619–620; Hemb, Tr. 948–49).

2. The acquisition, by strengthening smaller daries, has tended both to arrest and decline in the number of dairy firms and to promote entry

The acquisition's effect of strengthening small dairies will tend to arrest or prevent any decline in the number of dairy firms in the Chicago market which has occurred in recent years (see CX

47–50). The declining number of dairy firms nationally has been a matter of concern to the Commission for some time (see *Beatrice Foods Co.*, 67 F.T.C. 473, 697–734).

The causes for the decline in the number of handlers in the dairy industry are complex. The Commission's *Beatrice* opinion noted that small dairies have been faced with rapid technological change and rising equipment costs due to tremendous advances in milk sanitation, delivery equipment, and the automation of processing and packaging, especially in recent years. Many of the smaller dairies have not been able to keep pace with the industry and have subsequently dropped out of the market or combined with other small dairies into one larger, more efficient handler in order to remain competitive (see, *e.g.* Colebank, Tr. 675–76).

In *Beatrice*, the Commission found that acquisitions by the larger dairy firms had contributed to the decline in the number of handlers on a national basis. Significantly, there was no evidence that the decline in the number of dairies in Chicago is attributable to larger dairies absorbing smaller dairies. The Commission's economist stated that he "would have no way of knowing one way or the other" whether the number of bottling plants in operation in the Chicago Area would be any different if there had been no acquisitions during the past twenty years (Walker, Tr. 1401). What evidence there was established that the dairies which have left the Chicago market recently as a result of acquisitions were largely small dairies which had merged with other small dairies, thus strengthening competition (McWilliams, Tr. 2177–2183). Other dairies had withdrawn from processing to become independent vendors distributing for some processor. This change in status, does not in any way eliminate the operator as a very real competitive factor in the market and was, in fact, a development which the Commission's economist favored (McWilliams, Tr. 2176–77; Holin, Tr. 422–24; Walker, Tr. 2375–78).

Entry into the Chicago market is possible not only through construction of new production facilities within the area, but also through expanded distribution from plants located outside the market. That such entry is practicable is demonstrated by the fact that shipments of milk into the Chicago Area from plants outside the market showed a 550% increase between 1960 and 1965 (Walker, Tr. 1284). The total volume of these outside shipments was larger than the sales of all but the top six firms in the market (CX 79).

It is found, therefore, that by strengthening smaller dairies the

acquisition will tend to arrest the decline in the number of existing firms in the market; that it will permit smaller dairies to expand their operations; and that by providing a place in the market for smaller firms it will promote entry both by new firms building plants in the Chicago Area and by out-of-area plants increasing their sales into the Chicago market.

3. The acquisition has contributed to the declining level of concentration in the Chicago milk market

The acquisition challenged in this proceeding is perhaps unique among merger cases in that, despite the acquisition, the market share of the acquiring firm will be very substantially below that of the combined market shares of the acquired and acquiring firms before the transaction took place. This results from two facts: (a) Dean has already disposed of the former Bowman home delivery routes, which accounted for 50% of the latter's sales in the Chicago market; and (b) Dean will shortly lose the Jewel account, which constituted over 60% of its own sales in the Chicago Area. There is substantial and convincing evidence concerning the effect which these two developments have already had and will have on the share of market which Dean will enjoy following the acquisition, and, in turn, on the level of concentration in the Chicago Area. Further, because of these factors Dean's likely post-acquisition market share cannot be taken to be merely a combination of the pre-acquisition market shares of Dean and Bowman. Since such combination unrealistically ignores Dean's resale of Bowman's home delivery routes and the imminent loss of its principal account, it does not provide a guide to the probable effects of the acquisition.

The most reliable and material statistics reflecting the pre-acquisition market shares of Dean and Bowman are derived from the data developed by the Federal Milk Marketing Administrator during his annual June audit which show their percentage of total sales on routes within the Chicago Area by all dairies serving that market (Colebank, Tr. 684–87). According to these data, Bowman as of June 1965 accounted for 11.3% of the total sales by all dairies (or "handlers") in the Chicago Area and Dean accounted for 8.3%. Their combined market share was 19.6% (RX 36).

Dean's resale of the former Bowman home delivery routes will eventually reduce the share of the former Bowman operations from 11.3% to about 5.6% (Walker, Tr. 1360; Dean, Tr. 2009).

For the present, Dean continues to bottle about 30% of the milk for the purchasers of these routes pursuant to the specific agreement which it entered into with the Commission to that effect. Even if Dean were indefinitely to retain this and Bowman's other volume of business, the share of the market formerly accounted for by Bowman would decline from 11.3% to 7.15% (Walker, Tr. 2363–64). Furthermore, as heretofore pointed out, the former Bowman market share has also been appreciably reduced as a result of the loss of retail grocery store, restaurant, institutional, and master vendor accounts since the acquisition. These lost accounts totaled in excess of $2.2 million of sales in 1965.

Dean's sales to Jewel in the Chicago Area presently constitute a minimum of 60% of its total sales in the market. Even if Dean retains the few miscellaneous packaged milk items which Jewel is not planning to process on its own, Dean will still lose at least 55.4% of its Chicago volume (Walker, Tr. 2503–2506). As a consequence, its share of the Chicago market, absent the acquisition, will drop from 8.1% to 3.7% (Walker, Tr. 2507). With Jewel's construction of its own dairy plant, however, it is probable that Dean will lose the remaining miscellaneous milk items as well. When Jewel bottles its own milk under a private label, other dairies will be in a position more readily to compete with Dean for the remaining Jewel business (Dean, Tr. 2098–2100). Accordingly, it is likely that Dean's market share, without the acquisition, will decline below 3.7%.

It is evident, therefore, that taking into account the resale of the former Bowman home delivery routes and the loss of the Jewel business, Dean's market share, notwithstanding the acquisition, will be only 9.3% or less, compared with the combined pre-acquisition market share of Dean and Bowman of 19.6%. Moreover, even assuming Dean's retention of the bottling for some of the purchasers of the Bowman routes, the decline will be from 19.6% to 10.85% (Walker, Tr. 2507–2508). Thus, Dean's market share, despite the acquisition, will be only about half that enjoyed by Dean and Bowman before the acquisition and below that formerly accounted for by Bowman alone.

The substantial decline in the combined market share of Dean and Bowman following the acquisition will bring about a reduction in the level of concentration in the Chicago market as a whole. Even prior to the acquisition, data compiled by Dr. Alden C. Manchester of the Department of Agriculture from the figures for the Chicago Federal Milk Marketing Order Area (CX 107 B; CX 36; Walker, Tr. 2510–12) showed that the share of the four

largest dairies serving the Chicago market had dropped from 48.2% in 1956, the earliest year for which reliable statistics were compiled, to 43.0% in 1964 (Manchester, Tr. 1609–11A; Walker, Tr. 1371; RX 30 A). Between 1964 and 1965, the level of concentration declined further to 40.3% (RX 36). Following the acquisition, the Commission's own economist calculated that the share of the four largest dairies would decrease to 39.8% (Walker, Tr. 2510–12). Dr. Manchester's statistics also establish that with the further decline in concentration following the acquisition, Chicago will be among the least concentrated of the nation's milk markets (RX 24). The Commission's economist acknowledged that these four companies' concentration statistics are one of the tools upon which economists generally relied (Walker, Tr. 1369). Dr. Manchester did not compile statistics showing the level of concentration for the 8 and 12 largest dairies. However, such statistics were compiled by the Marketing Administrator but were limited to the years 1960 through 1965. Using these data, the Commission's economist calculated that the share of the eight largest would decline from 61.7% as of June 1965 to 57.4% following the acquisition and the share of the top twelve dairies would decline from 71.9% to 67.5% during the same period.

Complaint counsel introduced statistics which showed the value of shipments of packaged milk and related products (Census Product Code 20262) by the fifteen leading dairy companies (other than Capper-Volstead Act cooperatives) during 1963, as follows (CX 85):

	Value of *Shipments* (in millions)	Percent of Total U. S. Value of *Shipments* (cumulative)
Borden	$ 371.6	
National Dairy	357.3	
Beatrice Foods	177.5	
Foremost Dairies	135.7*	24.3 (four leading)
H. P. Hood	92.0	
Carnation	90.9	
Fairmont Foods	73.9	
Safeway	58.6	31.7 (eight leading)
Arden-Mayfair	54.2	
Hawthorn-Mellody	46.1	
Southland	46.0	
Pet Milk	41.7	
Knudsen Creameries	36.8	
Dean Foods	36.2	
Bowman Dairy	29.0	38.4 (fifteen leading)
Total U. S. Value of Shipments (SIC 20262)	$4,285.1	

*Does not include the Southeast and Northeast divisions of Foremost which have since been divested.

The foregoing shows that Dean ranks 14th with a 0.8% share of the market, and Bowman ranks 15th with a 0.7% share of the market. It would seem that national market shares have little significance to an evaluation of the probable effect of the challenged acquisition in the Chicago Area, especially since both Dean and Bowman are dwarfed by the large national dairy firms (CX 85).

4. The acquisition has not had, nor will it conceivably have any adverse effect on any milk supplier, dairy or milk buyer or on competition generally

The testimony adduced at the hearings from witnesses directly connected with the dairy industry in the Chicago Area, whether as raw milk producers, packaged milk processors or distributors, or milk buyers, demonstrates that vigorous and intense competition exists in the sale of packaged milk in the Chicago Area. As one smaller dairy man summed it up, competition is "very, very competitive, and it always has been and I think more so now than ever" (Quinlan, Tr. 608). The testimony further establishes that this competition encompasses (a) price (Clements, Tr. 2265; Holin, Tr. 419; Kraml, Tr. 1690; Ludwig, Tr. 1723; Nonnamaker, Tr. 2191); (b) service (Kraml, Tr. 1690); and (c) product quality and improvements (Nonnamaker, Tr. 2191). With respect to price competition in the market, one informed witness expressed the view that it was more intense today than at any time in the past three decades:

> I believe there's more competition today than there was 25 or 30 years ago. The reason I say that is that I think that the competition for sales now has been increased by the various methods of distribution that have been developed over the years. . . . Now, the prices are all over the lot. You can go down almost any street in Chicago and some will have a big sign in their window that milk is 73 cents a gallon here and someplace it's 79 cents a gallon, . . . these stores and vendors sell milk for whatever they can get. I had a milkman come to my door a couple of months ago, and he told my wife, well, he'd sell the milk at the store price. . . . These people who are in business for themselves, they take whatever price they can get in order to get the business, and the result of that, I'd say, the competition in my experience is probably keener than it has ever been before because of these new elements that have come into the market that didn't exist years ago (McWilliams, Tr. 2162-64).

Significantly, the testimony concerning the vigorous competition existing in the Chicago Area came from witnesses both for the Commission (Holin, Tr. 400; Roney, Tr. 229) and the respondent (Clements, Tr. 2265; Hemb, Tr. 942; Karlos, Tr. 1917-18; Kraml,

Tr. 1695–96; Ludwig, Tr. 1710; McWilliams, Tr. 2146; Nonnamaker, Tr. 2191; Schiff, Tr. 2303). Furthermore, not a single industry witness testified to the contrary.

The testimony of the industry witnesses further showed that the acquisition challenged in this proceeding has not had, nor is it likely to have any adverse effect on competition generally or on any milk supplier, dairy or milk buyer in particular. This testimony came from witnesses for the Commission (Davis, Tr. 330–31; Dewey, Tr. 502; Hager, Tr. 157–58; Holin, Tr. 411, 421–24; Laughlin, Tr. 308–309; Loeb, Tr. 202; Roney, Tr. 240–42) and for the respondent (Hemb, Tr. 943–44; Kraml, Tr. 1695–96; Ludwig, Tr. 1713; McWilliams, Tr. 2138–2140; Oberweis, Tr. 1520–21; Quinlan, Tr. 614–15; Schaub, Tr. 1779–1783). Again, no industry witness testified to the contrary.

Another knowledgeable industry witness was Mr. Walter Schaub, President of Meadowmoor Dairy, who detailed the following reasons he felt the acquisition would benefit competition in the dairy industry:

> I have thought about this, because this is, as I said, a very large move in this marketing area, and I sincerely think that the disbursal of the retail routes to small dealers who have purchased these routes will probably breathe some temporary life into those small dealers until such time that this industry can sit down and hope once again on the anvil of negotiations to pound some sense into these labor contracts. Now, whatever comes out of that is going to naturally affect competition, and it will make it more highly competitive if the union makes a drastic move. We probably then would be interested in going in the home delivery business, and that would be a competitive business. If they don't make it, why, I am sure that the forces of competition by nature and design of this industry, there will be no discernable charge that anybody can say. . . (Schaub, Tr. 1781–82).

The Executive Secretary of the Associated Milk Dealers, representing both large and small dairies in the Chicago Area, summed up his reasons for concluding that the acquisition would strengthen competition in the following terms:

> . . . I think it might have a good effect as far as competition is concerned in that I understand that some of these fellows that I know have bought some of these Bowman routes and this is in a way a kind of transfusion as far as they are concerned and I think it is a good thing for competition. . . . [I]t is a healthy thing for the market and for the maintenance of smaller dealers in business and for the maintenance of competition.
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> * * * * * * *
>
> . . . I do not think it will have any adverse effect on competition (Nonnamaker. Tr. 2197–99).

The witnesses representing retail grocery store firms operating in the Chicago Area were equally explicit in detailing the reasons which supported their conclusion that the acquisition would have no adverse effect on their purchases of packaged milk. For example, the representative of one of the larger corporate chains expressed the view that the acquisition would have no effect since "there are enough suppliers around here that the elimination of one or two of them would not effect" anyone (Dewey, Tr. 511). Mr. Anthony Karlos, the Chairman of Grocerland, an independent retail grocers' cooperative, likewise was of the view that since there are many alternative suppliers in the Chicago Area, there was not even a remote possibility that Dean or any other dairy would be able to charge other than competitive prices:

> . . . right here in this market there are many, many dairies, and they're looking for the business; consequently, they all have to stay rather competitive in their pricing . . . to stay in business.
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> * * * * * * *
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> They are knocking down our doors now in order to service our stores, and we have also given the privilege to many dairies to give them hearings and the courtesy down at our headquarters to listen to their stories. The door is open to everybody. Anybody who has got a better plan or better program—proposal, we are very receptive (Karlos, Tr. 1917–18).

Mr. Karlos strongly supported the acquisition for the reason that it would maintain Dean as an effective independent dairy supplying the Chicago market and that Dean's resale of the former Bowman retail routes had strengthened other independent dairies as well. The strengthening of these independent dairies was particularly important in Mr. Karlos' view because unless such dairies are able to supply low-cost dairy products to independent retail grocers, the latter will be unable effectively to compete with the larger corporate chains which are increasingly integrating vertically into their own dairy operations (Karlos, Tr. 1919–1923).

The representative of the largest farmers' cooperative supplying raw milk to the Chicago market was equally convinced that the acquisition would have no adverse effects:

> Well, as far as the milk price to farmers is concerned, [the acquisition] would have no affect on that. . . . Our price is the same to all dealers large or small. . . . superpool prices are prices that have been established by the cooperative organizations in the Chicago market for raw milk, which is sold to dairy companies in the market. . . . They're established by the dairy farmer representatives determining a price which they feel is competitive with other suppliers of milk in the market and which will bring to the market

an adequate supply of milk. . . . [the acquisition] would not have any particular effect as far as dairy farmers are concerned for the reasons I have already said, because the milk price to dairy farmers is established without regard to whether the dairy companies are large or small. . . . I see no adverse effect from our standpoint (McWilliams, Tr. 2137–2140).

Commenting on the benefit to farmers from the acquisition, he stated:

Well, we felt that to the extent that Dean Milk Company has been an aggressive promoter of milk and dairy products that the market, as a whole, as far as dairy farmers are concerned, would be somewhat improved because of the outstanding promotional job that has been done in the past years by the Dean Milk Company (McWilliams, Tr. 2138).

The only witness to express the opinion that the acquisition challenged in this proceeding might have any possible adverse effect on competition was Mr. Scott Walker, a staff economist employed by the Federal Trade Commission. Although the witness was shown to have considerable theoretical knowledge and general background with respect to the dairy industry throughout the country, it became apparent during the course of his testimony that he had little or no knowledge about the respondents or the Chicago market. Except for his visit to a Chicago dairy nearly two decades ago, he had no first-hand experience of any kind with the distribution of packaged milk in the Chicago Area (Tr. 1265–66). In this connection, Mr. Walker testified:

Q. Have you ever had any experience at all with distributing packaged fluid milk in the Chicago market?

A. I have never had a route in Chicago.

Q. Have you ever had any experience with it?

A. I have been exposed to it. I have gone through some 1948—in 1948 I went through a plant here and discussed it with officials, some facets of the operation in Chicago in 1948, but I don't know anything more than that, so if you ask me—

Q. That's the extent of your experience?

A. Yes (Tr. 1265–66).

He freely conceded that other witnesses were better informed than he about many of the most important aspects of the case (Tr. 1263–1275). In judging the relative objectivity of the witnesses, it may be appropriately observed that the Commission's economist participated in the drafting of the complaint; sat at the counsel table throughout most of complaint counsel's case and advised in the interrogation of witnesses; frequently had to be instructed during his own testimony to answer the questions put to him; and at one point was admonished not to signal answers to a

Commission witness who was on the stand (Tr. 811, 2423–24, 2595–97). The hearing examiner finds that Mr. Walker's testimony is so speculative, theoretical and contrary to the manifest weight of the evidence that it is entitled to little weight in a determination of the issues presented in this case.

CONCLUSIONS

The Commission has jurisdiction to proceed against the acquisition challenged in this proceeding. Respondents Dean Foods Company and Bowfund Corporation (formerly Bowman Dairy Company) were engaged in commerce within the meaning of the Clayton and Federal Trade Commission Acts at the time of the acquisition.

The line of commerce involved in this proceeding is packaged milk. Packaged milk includes generally milk, skim milk, buttermilk, flavored milk, flavored milk drinks, yogurt, sour cream and sour cream products labeled Grade A, cream and any mixture in fluid form of cream and milk or skim milk. A conclusion that any other line of commerce was involved in this proceeding would not affect any of the conclusions which follow concerning the probable effects of the challenged acquisition.

The section of the country involved in this proceeding is the Chicago Area. The Chicago Area includes generally Lake, Cook, DuPage, Kane, and Will Counties, Illinois. A conclusion that any other section of the country was involved in this proceeding would not affect any of the conclusions which follow concerning the probable effects of the challenged acquisition.

The evidence, taken as a whole, fails to establish that the effect of the acquisition by Dean of certain of the assets of Bowman which is challenged in this proceeding may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act. It also fails to establish that the contract entered into between Dean and Bowman for the sale of Bowman's assets is in unreasonable restraint of trade and commerce or may hinder or have a dangerous tendency to hinder competition unduly so as to constitute an unfair act and practice in commerce in violation of Section 5 of the Federal Trade Commission Act.

The acquisition has not eliminated Bowman as a competitive factor in the sale and distribution of packaged milk in the Chicago Area nor will it eliminate or prevent actual or potential competition in the sale or distribution of packaged milk in the Chi-

cago Area. The acquisition will also not eliminate any restraining influence on non-competitive behavior in the sale and distribution of packaged milk in the Chicago Area which may have existed by reason of the independent operation of Bowman. On the contrary, the evidence conclusively establishes that due to the severe operating reverses which Bowman had suffered in recent years, Bowman would have withdrawn as a competitor in the sale and distribution of packaged milk in the Chicago Area whether or not it sold its assets to Dean.

At the time of the acquisition, Bowman Dairy Company was a failing company. Bowman's dairy operations had been suffering declining sales and mounting losses in recent years and there was no prospect that they could be rehabilitated. The company's operating plight was particularly acute in the Chicago Area where steadily mounting losses had resulted in a severe drain on the company's resources and had required a partial liquidation of its plant, property and equipment. These losses in the company's dairy business threatened the corporation as a whole with eventual bankruptcy.

Bowman's failing condition had developed notwithstanding the vigorous efforts of management to reverse the company's declining fortunes in recent years. Its shareholders and officials reasonably concluded that a sale of Bowman's operating assets to Dean was the only realistic alternative to a liquidation of Bowman's dairy business. It was only after exhausting all avenues for continuing its operations and being satisfied that there were none that Bowman negotiated the only sale it could secure.

Dean acquired Bowman only because of the threat to its continued existence as a competitor in the Chicago market which was posed by the decision of its principal customer to build its own dairy plant and to terminate substantially all of its purchases of packaged fluid milk from Dean. To the extent that the Bowman volume which Dean may hope to retain offsets the loss of the Jewel account the acquisition serves the purpose of affording Dean the wherewithal to maintain its position as a viable competitor in the Chicago Area and insuring a strong and healthy middle tier of medium-sized dairy companies capable of offering vigorous competition to the larger national dairy firms.

The emergence or growth of smaller packaged milk companies in the Chicago Area will not be retarded, discouraged or prevented by the acquisition. In fact, Dean's resale of the former Bowman home delivery routes, which represented nearly $20 million

in sales volume or approximately half of Bowman's Chicago operation, to smaller dairies in the market has significantly strengthened these dairies. It has provided them added volume to effect economies of production and distribution and has, as a result, led to a substantial increase in competition in the sale of packaged milk in the Chicago Area. This will, in turn, tend to arrest any decline in the number of dairy processors in the market and stimulate the entry of new dairies. In addition, it will increase the ability of, and opportunities for, smaller dairies to expend their share of the market.

The acquisition will not increase concentration in the sale and distribution of packaged milk in the Chicago Area or contribute to any over-all trend towards concentration in the sale and distribution of packaged milk in the United States. Rather, Dean's resale of the former Bowman home delivery routes, coupled with the loss of Dean's principal customer, will leave Dean with a market share in the Chicago Area of approximately half that which had been accounted for by Dean and Bowman before the transaction and less than that previously held by Bowman alone. The share of the market accounted for by smaller dairies, on the other hand, will significantly increase. The net effect of the acquisition, therefore, will be to contribute further to the already declining level of concentration in the Chicago Area and to establish the Chicago market as one of the least concentrated milk marketing areas in the country.

The acquisition has not had nor is it likely to have any probable adverse effect on any milk supplier, dairy or distributor or milk purchaser or on competition generally in the Chicago Area. Competition, far from being adversely affected, has been and will be substantially benefited by Dean's acquisition of Bowman's operating assets which has led directly to the resale of the former Bowman home delivery routes to smaller dairies and provided an opportunity for Dean to maintain itself as a viable competitor in the Chicago market. Chicago is already one of the most competitive dairy markets in the country. There are a large number of dairy processors and distributors doing business in the Chicago Area and, when compared to other sections of the country, the percentage of sales accounted for by the leading competitors in the market is extremely low. In addition, vigorous price, quality and service competition exists at all levels and can be expected to continue.

There was no evidence offered which would show that the chal-

lenged acquisition will have any probable adverse effect on competition in any geographic market outside Chicago.

Since the acquisition of the operating assets of Bowman Dairy Company by Dean Foods Company has not had and is not likely to have any adverse effect on actual or potential competition in any line of commerce in any section of the country, it did not violate either Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That the complaint herein be, and it hereby is, dismissed.

FINDINGS, CONCLUSIONS AND OPINION OF THE COMMISSION

NOVEMBER 14, 1966

BY JONES, *Commissioner:*

I

On December 22, 1965, the Federal Trade Commission issued a complaint against respondents, Dean Foods Company (herein called Dean) and Bowman Dairy Corporation (herein called Bowman), charging them with violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by reason of a purchase agreement executed by them on December 13, 1965, which provided that Bowman would sell to Dean all Bowman plants and equipment, the Bowman name, all customer and supplier lists and various other tangible and intangible assets. The transfer of assets was to take place on January 3, 1966.[1]

On December 30, 1965, through its General Counsel, the Commission filed an Emergency Petition for Preliminary Injunction, Temporary Restraining Order and Other Relief in Aid of the Jurisdiction of this Court under 28 U.S.C. 1651 in the Court of Appeals for the Seventh Circuit seeking an order enjoining Dean and Bowman from taking any steps to carry out their agreement and from making any changes with respect to Bowman other than those made in the ordinary course of business pending completion of the Commission's adjudication of its complaint.

[1] The major arguments in support of the validity of this acquisition were presented by respondent Dean. Respondent Bowman concentrated its presentation primarily on the propriety of joining Bowman as a party respondent although Bowman also challenged the complaint allegations respecting the validity of the acquisition. The term "respondent" is used primarily throughout this opinion to refer to both respondents unless otherwise indicated.

On January 4, 1966, the Court of Appeals entered a temporary restraining order enjoining the companies from taking any steps to carry out their agreement until five days after the denial of any injunctive relief. On January 19, 1966, without determining the merits of the Commission's petition, the Court denied the Commission's request for an injunction on the ground that the Court had no power to grant the relief requested. The Court also dissolved the temporary restraining order and a few hours later the Dean-Bowman purchase contract was closed and Dean acquired title to Bowman's assets as specified in the purchase agreement.[2]

On January 24, 1966, upon application of the Solicitor General, Mr. Justice Clark, after consulting the other members of the Court, entered an order restraining respondents from making any material changes with respect to Bowman's corporate structure and assets or with respect to Bowman's operations and policies affecting those assets pending decision of the petition for certiorari to be filed by the Solicitor General on behalf of the Commission.[3]

The Supreme Court granted certiorari on February 18, 1966, and on June 13, 1966, issued its decision reversing the decision of the Seventh Circuit and holding that the Commission has standing to seek preliminary relief from the Court of Appeals in the circumstances alleged. The case was remanded to the Court of Appeals for a decision on the merits as to whether preliminary injunction should issue. *Federal Trade Commission* v. *Dean Foods Company*, 384 U.S. 597 (1966).

The Seventh Circuit held a hearing on the Commission's in-

[2] Bowman remained in existence acting as an investment fund for the Bowman assets which had not been transferred to Dean and which consisted principally of Government bonds, marketable securities and cash (CX 35E-F; Bowman's memorandum in support of Motion to Dismiss, filed with Court of Appeals, July 12, 1966; I.D. p. 1169). However, simultaneously with the consummation of the sale, respondent Bowman amended its articles of incorporation to provide for the change of Bowman's corporate name to The Bowfund Corporation (CX 35E). Respondent's original name as it appears in the complaint will be used throughout this opinion.

[3] Under the terms of the stay order issued by Mr. Justice Clark and subsequently reissued in substantially the same terms by the Seventh Circuit, Dean was permitted to sell Bowman's retail home-delivery routes in the Chicago area upon such terms and conditions and to such purchasers as may be acceptable to the Commission. However, the order further provided that "in making such sales and dispositions of Bowman's routes, if the purchasers wish to have Dean supply them with milk or other dairy products, Dean shall attempt to persuade them to purchase such milk or other products under the Bowman label and to supply such milk or products from a processing plant or plants formerly operated by Bowman. In no event shall Dean sell such milk or other dairy products under the Dean label." Stay Order issued by United States Court of Appeals for the Seventh Circuit, July 18, 1966, p. 3. The stay order of the Circuit Court was to remain in effect for a period of four months. (Order, p. 2).

junctive petition on July 13, 1966, and on July 18, 1966, issued its decision granting the Commission's petition for a preliminary injunction on the ground that

> . . . it is reasonably probable that the purchase agreement of December 13, 1965, as amended, between Dean and Bowman may ultimately be determined by the Federal Trade Commission to be in violation of section 7 of the Clayton Act, 15 U.S.C. § 18, and section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1).

The Court entered its order restraining respondents from making material changes with respect to Bowman for a period of four months. On the following day, the Court, by order dated July 19, 1966, denied Bowman's motion that it be dismissed from the proceedings.

Meanwhile, the administrative hearings on this matter had gone forward on June 13, 1966, before Hearing Examiner Walter R. Johnson, and were completed on July 8, 1966. Respondent Bowman (under its new corporate name Bowfund) moved to be dismissed as a party to the proceedings and this motion was granted by the hearing examiner on July 8, 1966.

On September 7, 1966, the hearing examiner filed his initial decision dismissing the complaint against respondent Dean based on his findings and conclusions that the purchase agreement between Dean and Bowman does not violate either Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act.

The hearing examiner found, as the parties stipulated, that the "Chicago Area," defined to include Lake, Cook, DuPage, Kane and Will Counties in Illinois, was a relevant section of the country or geographic market in which to evaluate the probable competitive effect of Dean's acquisition of Bowman's dairy business (I.D. 1171). While noting major reliance on the evidence respecting competitive effects in the Chicago market, the examiner stated that he had taken into account in his decision the evidence offered on this point respecting other geographic areas as well as "the Commission's accumulated experience concerning the dairy industry in general and especially of the factual conclusions and findings reached by the Commission in its prior merger decisions." (I.D. 1173.)

The parties stipulated and the hearing examiner found that "packaged milk" is a relevant line of commerce or product market in which to evaluate the probable competitive effect of the Dean-Bowman acquisition (I.D. 1173). The hearing examiner, however, refused to find, as complaint counsel had contended, that

the sale of packaged milk at wholesale or simply by the choice chain outlets in the Chicago market also constituted a separate line of commerce (I.D. 1174–1177).

The hearing examiner found that in terms of preacquisition shares complaint counsel had made a *prima facie* case against respondents (I.D. 1158) but that the challenged acquisition was perhaps unique among merger cases in that despite the acquisition the market share of the acquiring firm will be very substantially below that of the combined market shares of the acquired and acquiring firms before the transaction took place (I.D. 1211).

He also found that the acquisition did not eliminate Bowman as a competitor because immediately preceding the sale Bowman was in failing circumstances and the "prospect of its rehabilitation was, to say the least, in the gravest doubt" (I.D. 1177–1199). The examiner also found that the Bowman acquisition in fact strengthened competition first, because it enabled Dean to remain viable competitively, which absent Bowman it would not have been able to do because of the projected loss of a major customer which he found accounted for over 60 percent of its Chicago area sales (I.D. 1199–1207); and second, because through the sale by Dean of Bowman's home-delivery routes to smaller dairies, the competitive vitality of these daries has been strengthened (I.D. 1207–1214). Finally, the examiner found, based on the testimony of industry witnesses, that the acquisition would not have any adverse effect on the industry or on competition generally (I.D. 1214–1221).

Complaint counsel have filed an appeal from the hearing examiner's decision vigorously dissenting from all of these findings and conclusions. Complaint counsel argue on their appeal that Bowman was not in any failing condition such as would eliminate it as a competitive factor in this market, that acquisitions are not immune under either Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act by reason of the fact that a company decides to sell its business and that such immunity similarly does not attach when the acquisition was made in order to offset a substantial business loss or where as a result of the acquisition the market shares of the acquired and acquiring company are changed as a result of the sale by the acquiring company of some of the unprofitable portions of the acquired company's business. Complaint counsel urge that the examiner paid insufficient attention to the evidence offered with respect to the competitive impact of the challenged acquisition outside the Chicago area and

argued that the hearing examiner erred in refusing to hold that the wholesale sale of milk in the Chicago market constituted a proper submarket in which to test the impact of respondent's acquisition. Finally, complaint counsel appeals from the hearing examiner's dismissal of Bowman as a party.

On September 23, 1966, Dean moved the Commission for an order dismissing the appeal, allowing the initial decision of the hearing examiner to become the decision of the Commission and disqualifying the members of the Commission from further considering this matter on the ground that the Commission, during the course of its application to the United States Court of Appeals for the Seventh Circuit for a preliminary injunction, made statements inconsistent with respondent's right to an objective, impartial and fair hearing before the Commission as required by Section 7(a) of the Administrative Procedure Act, 5 U.S.C. §1006 (a), and the Due Process Clause of the Constitution.[4]

In addition to their argument that the Commission is disqualified from further considering this matter, respondent urges that the hearing examiner's initial decision be sustained on its merits and specifically argues that the examiner was correct in his findings that Bowman's dairy business was in a failing condition with no alternative but a sale to Dean; that the acquisition will strengthen rather than impair competition and finally that the relevant product market here is the combined sales (at retail and wholesale) of packaged milk and that the only significant geographic market in which the effects of this acquisition should be tested is the Chicago area.

As we read the briefs of the parties, therefore, the following are the points in issue before us on this appeal:

1. Is the Commission disqualified from considering this matter because of statements made by its counsel during the course of their argument in support of the Commission's Emergency Petition for a Preliminary Injunction to stay the acquisition pending adjudication of the Commission's complaint challenging its legality?

2. Did the hearing examiner err in his conclusion that the retail and wholesale sales of packaged milk did not constitute sepa-

[4] By order dated September 29, 1966, the Commission directed complaint counsel to file its answering brief to this motion not later than October 28, 1966, and ordered that any oral argument on this motion as counsel desired to make be made at the same time as oral argument on complaint counsel's appeal from the initial decision of the hearing examiner. Oral argument was heard on October 28, 1966, directed solely to the appeal from the Initial Decision, counsel deciding to rely on their briefs with respect to the motion.

rate lines of commerce within the meaning of Section 7 of the Clayton Act?

3. Did the Dean-Bowman acquisition have the probability of substantially lessening competition at the time of the issuance of the complaint in violation of Section 7 assuming that Bowman was not a "failing company" and are both respondents liable under that Section?

4. Did the sale of a portion of Bowman's business by Dean and its projected loss of a portion of its own business after the merger was consummated affect the probable competitive effects of the merger so as to eliminate any probability of a substantial lessening of competition which might have existed at the time of the consummation of the merger?

5. Was Bowman in such a failing condition that, notwithstanding any anticompetitive effect which might otherwise have flowed from this merger, it could not be said that its acquisition by Dean had the prohibited statutory effect on competition?

6. Did the hearing examiner err in dismissing the complaint against respondents Bowman and Dean under Section 5 of the Federal Trade Commission Act?

If respondents' claim that the Commission is disqualified to consider this matter is justified, that would put an end to the case as far as this Commission is concerned. Accordingly, we will deal with this claim at the outset.

II

Alleged Disqualification of the Commission

Respondent Dean's motion for disqualification rests on seven alleged "statements" and two phrases from statements by counsel representing the Commission, two of which were made by counsel during the course of its two oral arguments and the balance in its two briefs addressed to the Circuit Court of Appeals in support of the Commission's Emergency Petition for a Preliminary Injunction which respondent argues "indicated a predecision" of important factual and legal issues in this case.[5]

[5] This constitutes the second time that respondent has sought to advance this argument in support of it opposition to the Commission action in this matter. In its brief submitted to the Supreme Court Dean argued that the Commission should not have standing to seek an injunction in this type of situation *inter alia* because through the statements made in the Commission briefs and pleadings it had "so committed itself to respondents' guilt" in the proceeding that its ability to adjudicate the case on the merits had been "rendered suspect" (Respondent's Brief to Supreme Court dated March 21, 1966, pp. 19-21).

Mr. Justice Fortas picked up this argument in his dissent, declaring that "In fact, and all

The purported "statements" relied upon by respondent as they actually appeared in the context of counsel's oral argument and brief with the portion of them excerpted by respondent indicated by italics, are as follows:

Respondent's 1st "statement" (Motion, p. 3):

When the facts of this merger are measured against the standards set out in the leading cases, *the conclusion is inescapable that the antitrust laws have been violated* (Brief to Court of Appeals, December 30, 1965,[6] p. 11).

Respondent's 2nd "statement" (Motion, p. 3):

We think, however, that it is proper for the Commission to act by issuing its Section 7 complaint before it is, you might say, too late.

I think that the remedial purpose of this statute would be thwarted, if not defeated, if the Commission were powerless to act until a merger were completed. . . .

I think we can take comfort from the very language of Section 11, the part of it that says, ". . . when the Commission has reason to believe that any person is violating the provisions of Section 7."

We think that Dean and Bowman are right now in the process of violating Section 7. (Transcript, Court of Appeals, Jan. 6, 1966, pp. 12–13.)

Respondent's 3rd "statement" (Motion, p. 3):

In line with the foundation laid by the Supreme Court in *Brown Shoe*, several basic criteria have been formulated in subsequent decisions which guide both the courts and the Commission in their determination of whether a given merger violates Section 7.

Moreover, your Honors, in the instant case the Court is not burdened with the somewhat more complex problems and issues that may arise in connection with a vertical merger and the still more sophisticated problems which may be posed by a conglomerate merger.

Here we deal with a situation in which one competitor swallows up another direct competitor. The instant type of acquisition is known, in Section 7 lingo, as a horizontal acquisition, the least intricate and the most obvious violation of Section 7. What, then, are the tests which the Supreme Court has developed in resolving the question of the illegality of such mergers? The first test is the significance of the two companies in the market in which they conduct their business. (Transcript Court of Appeals, July 13, 1966, pp. 22–23.)

Respondent's 4th "statement" (Motion, p. 3):

realism, [the Commission] must take positions and establish, with sufficient positiveness to overcome strenuous opposition, that the merger * * * is unlawful. There must be Commission conclusions, not merely the views of the staff. Their assertions and necessarily stout advocacy make a mockery of a subsequent quasi-judicial proceeding in which the Commission is supposed objectively to consider the same issues on the basis solely of the record." *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597, 618 (1966). The majority, however, sustained the Court's authority to issue an injunction if supported by the facts and thereby implicitly rejected respondent's contention on this point.

[6] Respondent's motion describes this statement as coming from Commission counsel's brief of July 8, 1966, p. 11. In fact, it was contained in counsel's brief to the Circuit Court of Appeals dated December 30, 1965.

Finally, as we have contended in our main memorandum (pp. 12–14) and as we contend again in this memorandum, *the acquisition by Dean of Bowman constitutes a contract in restraint of trade and as such amounts to a violation of Section 1 of the Sherman Act.* In any event, minimally the contract runs counter Section 5(a) (1) of the Federal Trade Commission Act, 15 U.S.C. §45(a)(1) (1964). (Brief to Court of Appeals July 8, 1966, p. 15.)

Respondent's 5th "statement" (Motion, p. 3):

Last but not least, we stress again, as we did in our main brief (p. 37), it is the burden of Dean to establish that Bowman's financial condition falls within the narrowly-construed affirmative defense of *International Shoe—a defense which Dean cannot hope to sustain.* Certainly, it is not the burden of the Commission to establish the inapplicability of the defense, although we have demonstrated that Bowman was a viable competitor and was nowhere near the conditions specified in *International Shoe.* (Brief to Court of Appeals, July 8, 1966, pp. 24–25.)

Respondent's 6th "statement" (Motion, p. 4):

Obviously, some very cogent reasons dissuaded Dean from urging the affirmative failing-company defense. These reasons clearly emerge from the supplemental affidavit (as they did from the original affidavit) of Melbourne C. Steele, Chief of the Division of Accounting of the Commission's Bureau of Restraint of Trade. They demonstrate that *any Procrustean effort to fit the failing-company doctrine to the instant situation is bound to come to grief* in light of Bowman's over-all healthy financial conditions at the time of acquisition. The question under *International Shoe* is whether Bowman at the time of the acquisition was actually bankrupt or faced imminent bankruptcy. The answer is "No". (Brief to Court of Appeals, July 8, 1966, p. 17.)

Respondent's 7th "statement" (Motion, p. 4):

We submit that these data, which are developed in greater detail by Mr. Steele in his affidavit, evidence that Bowman was nowhere near the state of financial conditions which would bring the company within the narrowly-limited scope of the failing-company defense. Bowman was neither bankrupt, nor did it face imminent bankruptcy. Quite the contrary! *Bowman's overall operations demonstrated it was a viable enterprise.* (Brief to Court of Appeals, July 8, 1966, pp. 19–20.)

The last "excerpts" relied on (and the only ones identified as such by respondent in its motion (p. 4)) concern counsel's references in its July 1966 brief to the Circuit Court to the fact that there appears to be "no price competition" in the Chicago market [7] and that Dean erred in its contention that its largest

[7] The full context in which this phrase appears is as follows:
"Indeed, the facts in *Von's Grocery* suggest that the market was characterized by vigorous competition in view of the declining market shares of the five largest grocery chains, the bankruptcy of three major companies . . . and the increasing sales of the acquired

customer in the Chicago market had "irrevocably committed" itself to building its own dairy plant.[8]

Respondent argues that these "statements" constitute a prejudgment on the part of the Commission on the crucial issues in this case and that they constitute statements which are inconsistent with respondent's right to an objective, impartial and fair hearing as required by Section 7(a) of the Administrative Procedure Act.[9] Our examination of counsel's statements on their face and in the light of the applicable law, convinces us that respondent's motion is without even colorable authority and must be denied.

In evaluating the statements themselves it is essential that they be examined not only in their immediate context but also in the broader context of the argument which counsel was making to the Court.

The purported statements were all made by counsel in the course of their arguments before the Seventh Circuit in support of the Emergency Petition filed by the Commission with the Circuit Court for a preliminary injunction to restrain respondents from consummating their proposed acquisition which the Commission's complaint, filed a few days before the injunction petition, had charged was a violation of law.

Counsel on both sides agreed that the Commission's right to the injunction which it sought rested on its showing to the satisfaction of the Court, first, that the Court had power to issue the injunction, and second, that there was a reasonable probability that the Commission would prevail on the merits on the final hearing

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firm accompanied with a sharp drop of its net profits. Here the losses are accompanied with a decrease in sales. And since there seems to be no price competition in the market, the oligopolistic conditions in the instant case have reached a far more ominous level than in *Von's Grocery* where price battles frequently occurred" (Compl. C. Br. p. 13).

[8] The full context in which this phrase appears is as follows:

"Moreover, neither the affidavit of Sam E. Dean, president of Dean, nor the affidavit of Howard E. Rasmussen, executive vice president of Jewel Tea Co., go beyond the announcement that Jewel Tea contemplates building a milk plant. Indeed, the affidavit of Rasmussen in couched in conditional terms. It states: '* * * in the event such plans *were* carried to completion, Jewel *would* no longer need Dean as its principal milk supplier and *would*, consequently, terminate Dean's relationship as Jewel's major milk supplier.' (Emphasis added.) Nor does it appear that Jewel Tea has irrevocably committed itself to erect the plant." (Emphasis in original.) (Compl. C. Br. p. 21.)

[9] Section 7(a) of the Administrative Procedure Act provides in part:

"The functions of all * * * officers participating in decisions * * * shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, *upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification* of any such officer, the agency shall determine the matter as a part of the record and decision in the case." (Emphasis added.)

It should be noted that respondent did not cast its claim of prejudgment in affidavit form, as required by this Section.

of its complaint. Respondent not only insisted that this was the burden which counsel must carry in order to prevail in its petition, but also contended vigorously throughout both the initial arguments to the Circuit Court and to the Supreme Court in opposition to the Petition and in its subsequent argument to the Circuit Court after the Commission's standing to seek an injunction had been sustained that the injunction must be denied because the Commission could never prevail on the merits.[10]

Counsel representing the Commission made it very clear whenever they were addressing themselves to the merits of the Commission's complaint that their burden was only to demonstrate that there was a reasonable probability that the merger would ultimately be held to be illegal. Thus, in their December 30, 1965, brief filed with the Circuit Court, counsel stated the issue with respect to the merits of the complaint was only whether the merger would "*probably* violate the antitrust laws" (p. 2). In their oral argument before the Court of Appeals on January 6, 1966, Commission counsel referred to "our showing that the merger is *probably* illegal and thus will *probably* be adjudged to violate" the relevant statutes and that it was counsel's "position that these facts make out a *prima facie* case that there is sufficient showing on this basis that a violation of Section 7 and Section 5 will *probably* be found by the Commission" (Transcript of proceedings, pp. 7–8 and 117).[11] In their supplemental brief to the

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[10] In its initial brief to the Seventh Circuit, when respondent was still contesting the jurisdictional basis for the Commission's request, respondent argued:

"Not only is there no jurisdictional basis for this request, but if the case comes before this Court on the merits, the facts are not such as would warrant a finding of any violation. In view of the clear probability that the respondents will ultimately prevail on the merits, the inadequacy of the Commission's legal and factual showing, and the irreparable injury which respondents, and particularly Bowman, would suffer, this Court should, in the exercise of its sound discretion, deny the Commission's request for extraordinary relief.

"Even if the Commission had standing to bring this suit, it could not meet the rigid prerequisites for the issuance of a preliminary injunction. As stated only recently in *United States* v. *Penick & Ford, Ltd., Inc.*, 1965 CCH Trade Cases ¶71,457 (D. N.J. 1965):

"' . . . [T]he Government must prove by clear and convincing evidence that the transaction sought to be prohibited will have a probable substantial anticompetitive effect. In addition to this probability of the lessening of competition there must be presented a reasonable probability of success in proving their case on the merits upon final hearing.' (p. 81, 003)" (Resp. Br. pp. 1–2).

In its supplemental brief to the Seventh Circuit dated June 27, 1966, respondent stated that its argument was directed solely to the demonstration of two points:

"*First*, there was not even a remote possibility that the Commission would be able to establish at a trial on the merits that the sale of Bowman's dairy business to Dean would have any probable adverse effect on competition within the proscriptions of either Section 7 or Section 5. *Second*, the issuance of a preliminary injunction * * * would cause the respondents important and irreparable losses" (Resp. Suppl. Brief, p. 2).

[11] Emphasis added.

Circuit Court filed on July 8, 1966, counsel posed the issue for decision by the Court as follows:

In particular, under *Von's Grocery* the facts presented in the supplemental material establish a *prima facie* case of illegality of the Dean-Bowman merger as well as the likelihood that the administrative complaint will be upheld. (P. 2.) (Emphasis added.)

And finally, in their "conclusion" to their July brief in which most of the allegedly prejudging statements are contained, counsel again emphasized the overall purport of their argument to the Court:

The Commission has established both a *prima facie* case of the illegality of the acquisition by Dean of Bowman and the likelihood that the administrative complaint will be upheld. It is respectfully requested that the petition for a preliminary injunction be granted. (Emphasis added.) (P. 27.)

When the challenged statements of counsel are thus viewed in their overall context it is inconceivable to us that they could be regarded as evidencing prejudgment on the part of the Commission or that they could even convey any appearance of prejudgment such as would invoke the doctrine of disqualification.

The fundamental objective which underlies the doctrine of disqualification is the constitutional imperative of due process which requires "a fair trial in a fair tribunal." *In re Murchison,* 349 U.S. 133, 136 (1955). As the Supreme Court expressed it in the *Murchison* case "fairness of course requires an absence of actual bias in the trial of cases" and in some circumstances even may require an absence of the appearance of bias.[12] The doctrine has also been expressed in statutory form in the Administrative Procedure Act.[13]

The Supreme Court's reference in the *Murchison* case to the presence of "actual bias" is significant. No case has been called to our attention in which the courts have ever imputed taint to one

[12] The Court stated in the *Murchison* case that:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he had an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' *Tumey* v. *Ohio,* 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v. *United States,* 348 U.S. 11, 14." *In re Murchison,* 349 U.S. 133, 136 (1955).

[13] *Supra* note 9, p. 1229.

person because of the statements of another and indeed the cases we have found indicate affirmatively that prejudgment is not constructive and that disqualifying taint will *not* be imputed from one person to another.[14]

The cases in which claims of disqualification have been made against hearing officers (both judicial and administrative) are relatively few in number and the instances in which such disqualification claims have been granted are even fewer.

Thus, disqualification has been ordered in situations where the hearing officers had previously acted in an adversary or investigative capacity with respect to companies and facts which were subsequently involved in a judicial or quasi-judicial proceeding before a body to which such hearing officer had subsequently been appointed.[15] The rationale of these cases was perhaps most clearly expressed in the *Amos Treat* decision in which the Circuit Court for the District of Columbia stated:

> We are unable to accept the view that a member of an investigative or prosecuting staff may initiate an investigation, weigh its results, perhaps then recommend the filing of charges, and thereafter become a member of that commission or agency, participate in adjudicatory proceedings, join in commission or agency rulings and ultimately pass upon the possible amenability of the respondents to the administrative orders of the commission or agency. So to hold, in our view, would be tantamount to that denial of administrative due process against which both the Congress and the courts have inveighed. (*Amos Treat & Co.* v. *Securities & Exchange Commission*, 306 F.2d 260, 266–267 (1962).)

[14] *N.L.R.B.* v. *Kaase*, 346 F.2d 24, 28 (6 Cir. 1965), the Court did not regard as ground for disqualification of the 3-member board considering the *Kaase* case the remarks about the case made by the Board's chairman who did not participate; similarly, there was no suggestion that the remarks of Chairman Dixon held to be disqualifying should also act as disqualification of the other members even though the disqualification was ordered *after* the hearing on the merits before the full Commission (*American Cyanamid et al.* v. *FTC*, 363 F.2d 757 (6 Cir. 1966); *Shaughnessy* v. *Accardi*, 349 U.S. 280 (1955); and *Marcello* v. *Bonds*, 349 U.S. 302 (1955) (views of Attorney General not imputed to his subordinates or agents, particularly in hearing and determining facts on which Attorney General had taken public position, at least in absence of proof of actual knowledge of these views); *Securities & Exchange Commission* v. *R. A. Holman & Co.*, 323 F.2d 284, 286 (D.C. Cir. 1963) (views of staff investigators of registration statement not imputed to supervisor so as to disqualify him from participating in case as Commission member).

[15] *Trans World Airlines, Inc.* v. *Civil Aeronautics Board*, 254 F.2d 90, 91 (D.C. Cir. 1958) (solicitor of Post Office Department who had signed brief in case involving dispute between Post Office and CAB and cast deciding vote in favor of Post Office when case was heard by CAB to which he had subsequently been appointed as member, held disqualified); *American Cyanamid, et al.* v. *FTC*, 363 F.2d 757 (6 Cir. 1966) (prior investigatory role with another body but involving same facts and issues held to disqualify investigator from participation in subsequent agency proceeding involving the same facts to which investigating counsel had subsequently been appointed as member); *Amos Treat & Co.* v. *Securities & Exchange Commission*, 306 F.2d 260, 265 (D.C. Cir. 1962) (staff investigator of facts in issue subsequently appointed a member of the agency, held disqualified to hear the case when it was presented to the agency); but *cf. Safeway Stores, Inc. et al.* v. *F.T.C.*, 366 F.2d 795 (9 Cir. 1966) decided Sept. 14, 1966, (involving similar situation in which disqualification denied).

The cases are very clear, however, that the mere fact that a hearing officer presided over two proceedings involving the identical or substantially identical issue is not grounds for disqualification in the second hearing because the officer had already expressed either an opinion or reached a finding on all or some of the facts in issue in the subsequent hearing.[16] Even where the alleged disqualifying statement was made or judgment rendered in a different type of proceeding or in the course of performing some other statutory duty, the asserted disqualification has been regarded as wholly unwarranted.[17] Thus prior involvement in a case in the same adjudicative capacity does not of itself disqualify an individual from passing on the same adjudicative facts in a subsequent proceeding. In some instances the fact that hearing officers individually or as a body had expressed themselves on the issues in public outside any necessary official framework on the issues has similarly been held not to disqualify them.[18]

Disqualification of hearing officials, whether judges or administrative officers, has also been ordered where actual bias based on evidence of personal animosity or favoritism on the part of the

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[16] *N.L.R.B.* v. *Donnelly Co.*, 330 U.S. 219, 236 (1947) (Court refused to disqualify examiner from hearing case on remand from the Circuit Court because he had presided over first hearing and decided adversely to petitioner); *MacKay* v. *McAlexander*, 268 F.2d 35, 39 (9 Cir. 1959) (hearing officer in deportation proceeding not disqualified from presiding over proceeding on deportee's application for suspension of deportation simply because he had presided over first proceeding or because his judgments on the credibility of the deportee in the first proceeding evidence prejudgment of the record in the second proceeding).

[17] *E.g.*, *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 691–692 (1948) (public position on legality of basing point system contained in FTC official report held not to disqualify Commissioners in subsequent proceedings against individual cement companies engaging in these practices); *Pangburn* v. *C.A.B.*, 311 F.2d 349, 355–356 (1 Cir. 1962) (statutorily required reports on cause of air crash finding pilot error as cause held not to constitute prejudgment by Board in subsequent proceeding to revoke pilot's license); *J. P. Linahan, Inc.*, 138 F.2d 650 (2 Cir. 1943) (Special master not disqualified to preside over reorganization proceeding of the firm because he had made findings adverse to appellants as special master in proceedings begun under involuntary petition); *Clinton Engine Corp.*, 13 Ad. L. 2d 387 (1963) (SEC sustained in its refusal to disqualify itself because in an investigation previously referred to the Attorney General for criminal action it had made judgments on the same facts involved in the instant registration suspension proceedings).

[18] *United States* v. *Morgan*, 313 U.S. 409 (1941) (public statement issued by the Secretary of Agriculture criticizing a Court decision reversing a Department of Agriculture rate order held not to disqualify the Secretary from presiding over new rate proceeding on the assumption *inter alia* that, like a judge, he was "a man of conscience and intellectual discipline capable of judging a particular controversy fairly on the basis of its circumstances" (p. 421)).

Two cases involved agency press releases issued contemporaneously with the filing of proceedings containing expressions on the merits of the proceedings, criticized but held in the circumstances of these cases not to disqualify the agency. *Gilligan, Will & Co.* v. *S.E.C.*, 267 F.2d 461, 468–469 (2 Cir. 1959), *cert. denied*, 361 U.S. 896 (1959); *N. Sims Organ & Co.* v. *Securities & Exchange Commission*, 293 F.2d 78, 81 (2 Cir. 1961); but *cf. Texaco, Inc.* v. *F.T.C.*, 336 F.2d 244 (D.C. Cir. 1964), in which such nonessential public expressions by one individual agency member of opinion specifically referring to the names and practices of respondents to a proceeding simultaneously pending with the agency were held to disqualify him.

adjudicating official was shown to be present.[19] However, it is important to note in this connection that the Courts have refused to regard as evidence of bias or prejudgment any statements reflecting positions or attitudes expressed by decision-making officers where they were founded on or derived from facts which the hearing officer in question learned in the course of his participation in the consideration of the particular matter.[20] Finally, the courts have indicated that disqualification of an entire body should not be ordered where the result would be to render action on the matter impossible.[21]

Respondent's claim of prejudgment on which it has grounded its motion to disqualify the Commission is in our view directly analogous to those cases in which hearing officers have been sought to be disqualified because in the same or analogous proceedings they have taken positions reflecting prejudgment of the very issues involved in the proceeding in which their disqualification was sought. The courts have uniformly refused to entertain any such claims for disqualification.[22] Indeed, in the leading Supreme Court decision on disqualification of administrative officials, *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683 (1948), the Supreme Court expressly assumed for purposes of that case that the entire Commission, prior to filing its complaint had formed an opinion on the legality of the basing point system challenged in the complaint as a result of its prior official investigations. Nevertheless, the Supreme Court held expressly that this did not mean that the Commissioners' minds were irrevocably closed on

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[19] *Berger* v. *United States,* 255 U.S. 22 (1921) ; *Tumey* v. *Ohio,* 273 U.S. 510 (1927) ; *N.L.R.B.* v. *Phelps,* 136 F.2d 562, 564 (5 Cir. 1943).

[20] *Lumber Mutual Casualty Insurance Co.* v. *Locke,* 60 F.2d 35 (2nd Cir. 1932) (Commissioner on U.S. Compensation Commission stated publicly there was no reason to hold a hearing since he already was sufficiently familiar with the facts held not to reflect prejudgment so as to disqualify him and the court held that the hearing subsequently held did afford petitioner a fair trial) ; *United States* v. *Grinnell Corporation, et al.,* 384 U.S. 563, 580–583 (1966) (United States District judge held not disqualified because of statements made during pretrial that defendants would be advised to consider settlement "rather than run the risk of what I would say from what Ihave seen") ; *J. P. Linahan, supra,* note 17, p. 1233.

[21] *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, 701 (1948), where the Court stated that "[h]ad the entire membership of the Commission been disqualified in the proceeding against respondent, this complaint could not have been acted upon by the Commission or by any other government agency." *United States* v. *Morgan,* 313 U.S. 409, 421 (1941) (Supreme Court noted that to disqualify the Secretary might mean that no rate order could issue). *Federal Home Loan Bank Board* v. *Long Beach,* 295 F.2d 403, 408 (9th Cir. 1961), Court held that "a majority of the Board members were without power to disqualify themselves for bias or prejudice," although stating that "possibly an individual member could have done so. The charge of bias and prejudice directed toward the majority of the members of a government agency must give way to the necessity of permitting the agency to perform the functions which it alone is empowered to perform."

[22] See cases cited, *supra,* p. 1233.

the subject of respondent's basing point practices. The Supreme Court concluded that:

> * * * [No] decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court. (pp. 702–703).

Again, in *Pangburn* v. *C.A.B.*, 311 F. 2d 349, 358 (1st Cir. 1962), the court in rejecting a claim that the Board had prejudged the facts in a proceeding to suspend petitioner's pilot rating because it had previously issued a public report in its investigation of the accident, finding that petitioner had committed error as a pilot, made this comment:

> Upon examination of the foregoing cases, we cannot say that the mere fact that a tribunal has had contact with a particular factual complex in a prior hearing, or indeed has taken a public position on the facts, is enough to place that tribunal under a constitutional inhibition to pass upon the facts in a subsequent hearing. We believe that more is required. Particularly is this so in the instant case where the Board's prior contact with the case resulted from its following the Congressional mandate to investigate and report the probable cause of all civil air accidents. If we were to accept petitioner's argument, it would mean that because the Board obeyed the mandate of Section 701, it was thereupon constitutionally precluded from carrying out its responsibilities under Section 609.

Thus, it would seem to be clear that if prior statements made in a wholly different context reflecting positions on the merits of the issues involved in a case will not operate to disqualify the person or body making them, then certainly any such alleged statements made in the course of the identical proceeding could not so operate.[23] Indeed, this was the basis for the Supreme Court's refusal to disqualify Judge Wyzanski in *United States* v. *Grinnell*, 384 U.S. 563 (1966). In that case the Supreme Court stated:

> The alleged bias and prejudice to be disqualifying must stem from an extrajudical source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case (p. 583).

No one has ever suggested that a judge who is sufficiently impressed with a plaintiff's case to issue a preliminary injunction is thereby disqualified from presiding at a trial on the merits.

[23] See cases cited *supra* p. 1233.

N.L.R.B. v. *Kaase*, 346 F. 2d 24, 28 (6th Cir. 1965). Taking respondent's argument literally, that counsel representing the Commission is the Commission and that the statements express an opinion on the issues in the case pending before the Commission, counsel's statements challenged on this motion add up to no more than statements by the Commission made in the course of the same case and as an essential element in the case expressing its opinion that the complaint states a *prima facie* case of sufficient strength to warrant a belief at this stage in the proceeding, without benefit of argument and consideration which will be given it after final hearing, that it will ultimately be held to be proven.[24] As the court said with respect to the Secretary of Agriculture in the somewhat relevant situation which presented itself in *United States* v. *Morgan, supra*, 313 U.S. at 421:

> * * * That he not merely held, but expressed, strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty in subsequent proceedings ordered by this Court. As well might it be argued that the judges below, who had three times heard this case, had disqualifying convictions. In publicly criticizing this Court's opinion the Secretary merely indulged in a practice familiar in the long history of Anglo-American litigation, whereby unsuccessful litigants and lawyers gave vent to their disappointment in tavern or press. Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. Nothing in this record disturbs such an assumption.

Indeed, unless the Supreme Court's decision sustaining the Commission's right to seek an injunction in these circumstances is to be rendered a nullity, the Commission must be entitled to go into the Circuit Court, seek its injunction and sustain its burden of showing that its complaint has a reasonable probability of ultimate success without being fearful that every statement which is made in the course of such showing might be later cited as evidence of its prejudgment of the issues.

What respondent's argument really comes down to is a contention either that the Commission cannot properly be both judge and advocate in the same matter or that its counsel in making its arguments on its behalf must be more careful in its choice of

[24] See *Sterling Drug, Inc.* (Dkt. 8554, May 16, 1963, 1961–63 CCH Trade Reg. Rep. Transfer Binder Par. 16,417) where the Commission rejected a claim that an injunction proceeding previously brought by the Commission indicated that the Commission had prejudged the issues. The Commission noted that in seeking the injunction it had not been required to present evidence sufficient to prove the violation but merely to establish that there was reasonable cause to believe that a violation had taken place.

words and preface each sentence with a phrase such as "it is probable that," or "it is likely that" or "the Commission has reason to believe that." The first interpretation of respondent's contention has consistently been rejected by the courts and by the Administrative Procedure Act.[25]

The second implication of respondent's contention would make a mockery of the advocacy process and would present respondent, who would not be hampered by comparable restrictions, with a substantial unfair advantage. Surely, the right to a fair hearing under the Administrative Procedure Act and the Due Process clause does not turn on the technical form of sentence structure used by Commission counsel in the course of their argument in the appellate court. The administration of justice requires that the attorney for each party in a litigated lawsuit present his case as forcefully and effectively as possible. Commission counsel cannot be effective in their arguments to the Court if they are to be muzzled by the necessity to make constant use of the qualifying phrases which respondent's claims here would require. Moreover, if an attorney for a federal agency is under constant fear that the words in which he chooses to cast his argument may be used as grounds to disqualify the members of the agency which he represents, his effectiveness will be impaired, the Commission's law-enforcement duties severely curtailed and restricted and the cause of justice poorly served.[26]

For the foregoing reasons, we have denied in its entirety respondent's motion for the disqualification of the members of the Commission.

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[25] See 2 Davis, *Administrative Law Treatise*, §§13.02 and 13.10 at pp. 237–240 and authorities cited. Respondent, although not challenging this principle, has placed reliance upon the language of the decision of the Supreme Court *In re Murchison*, 349 U.S. 133, 136 (1955), in which it was held that due process was denied when a Michigan judge served in effect as the grand jury in a proceeding out of which the contempt charges arose and then presided at the contempt hearing. The courts, however, have differentiated between the combination of inconsistent functions by an administrative agency (as opposed to the individuals therein) and the combination of inconsistent functions by a judge. Thus, it is well settled that a combination of investigative and judicial functions within an agency does not violate due process. *Pangburn* v. *C.A.B.*, 311 F.2d 349 (1st Cir. 1962); *Belizaro* v. *Zimmerman*, 200 F.2d 282 (3rd Cir. 1952); *United States ex rel Catalano* v. *Shaughnessy*, 197 F.2d 65 (2nd Cir. 1952).

[26] The policy considerations underlying the desirability of giving discretion to the Commission counsel to express their viewpoints to the best of their ability are similar to those which form the basis for the rule in many, if not all, jurisdictions that an attorney's statements in litigation may not be the subject of a libel action. The rationale of this rule was articulated by Judge Clark in *Bleecker* v. *Drury*, 149 F.2d 770, 771 (2nd Cir. 1945), who stated: "Fearless administration of justice requires, among other things, that an attorney have the privilege of representing his client's interests, without the constant menace of claims for libel"; or, as Mr. Justice (then Judge) Cardozo declared, "There is no room in such matters for any strict or narrow test. Much must be left to the discretion of the advocate." *Andrews* v. *Gardiner*, 224 N.Y. 440 (1918).

III

The Dairy Industry, Respondent's Market Position and the Circumstances Surrounding the Acquisition Challenged Here

A. *The Dairy Industry in the United States*

As respondents have noted, this case can best be understood and evaluated against the background of developments in the dairy industry over the last several decades.[27]

In the past, mergers played a dramatic role in the transformation of the dairy industry in the United States from an industry composed of relatively small, single-unit local independent dairies into an industry in which the large national and regional dairies predominate.[28] The growth of the eight largest dairies in the industry as of 1961 was attributable in large measure to their acquisition of their smaller local competitors.[29] Four of these companies were challenged by the Commission by reason of their extensive dairy company acquisitions, and divestiture orders were obtained by the Commission against each of these companies.[30]

Summarizing the Commission's study of all of the evidence respecting these merger activities in the dairy industry, the Commission in its opinion in *Beatrice* concluded that while the dramatic technological changes in the processing and distribution of milk

[27] In its Proposed Findings of Fact and Conclusions dated August 8, 1966, respondent noted that it was appropriate to take account of "the limited evidence which was offered relating to other geographic areas in evaluating the probable competitive effects of the acquisition . . [and] of the Commission's accumulated experience concerning the dairy industry in general and especially of the factual conclusions and findings reached by the Commission in its prior merger decisions" (Resp. PFF par. 199). This finding was adopted substantially *in haec verba* by the Hearing Examiner in his Initial Decision (I.D. 1173) from which respondent does not appeal.

[28] *Report of the Federal Trade Commission on the Sale and Distribution of Milk*, 75th Congress, 1st Sess., House Document No. 95, 1937. *Report of the Federal Trade Commission on the Merger Movement*, 1948. *Federal Trade Commission Report on Corporate Mergers and Acquisitions, May 1955*. Staff of H.R. Select Comm. on Small Business, *Mergers and Superconcentration—Acquisitions of 500 Largest Industrial and 50 Largest Merchandising Firms*, Nov. 8, 1962, 87th Cong., p. 26.

[29] The reports cited in note 28 above, point out the important contribution of mergers to the growth of Borden, National Dairy Products, Foremost and Beatrice, and describe in detail the mergers made by Borden and National Dairy Products during the 1940–47 merger movement. In our opinion in *Beatrice Foods Company*, FTC Dkt. 6653 (3 Trade Reg. Rep., Para. 17, 244) (April 26, 1965) [67 F.T.C. 473], we noted that the evidence in that case disclosed that the eight largest dairy companies had made a total of 1900 acquisitions since 1905, of which 500 had been made in the period from 1951 to 1961. (Our further citations to this opinion are to the copy of the opinion issued by the Commission.) See our opinion in *Foremost Dairies*, Dkt. 6495, 60 F.T.C. 944, 1052–1059 (1962).

[30] *Foremost Dairies, Inc.*, FTC Dkt. 6495, 60 F.T.C. 944 (1962) (order consented to on March 5, 1965 after Opinion and findings entered by the Commission); *National Dairy Products Corp.*, FTC Dkt. 6651 (January 30, 1963) (consent order prior to litigation) [62 F.T.C. 120]; *Borden Co.*, FTC Dkt. 6652 (April 15, 1964) (consent order prior to litigation) [65 F.T.C. 296]; and *Beatrice Foods Company*, FTC Dkt. 6653 (final order issued December 10, 1965) [68 F.T.C. 1003].

may have dictated the demise or absorption of many marginal local dairy companies, it in no sense can be said to have dictated the rise of vast national multi-plant dairy companies.[31]

The Commission found that the cumulative effect of the acquisitions which it had challenged in its four dairy company cases was to have transformed each of these companies from medium-sized dairies to one of the four national leaders of the industry and the disappearance from the industry of solid viable dairy companies capable of offering strong competition in their various markets. The Commission also concluded from its review of the structure and dynamics of this industry as revealed in the records of these cases that:

(1) Concentration has already reached formidable proportions in local areas, which are the economically relevant markets in which to measure competition in this industry;

(2) The prospects of survival for small firms, and the conditions for entry of new small-business competitors into the industry and its markets, have worsened. There are relatively few firms outside of the leading eight which can be rated as really strong competitors under present market conditions;

(3) The leading firms have been embarked on an extensive and far-reaching program of acquisitions, the result of which has been to increase concentration still further and speed the exit of the independents;

(4) No showing has been made that these acquisitions (at least those that have taken place since 1950) were necessary for the leading dairies to achieve the economies of scale made possible by the industry's technological revolution, or that the acquired companies could not have achieved such economies through merger with firms much less powerful, well-entrenched, and geographically far-flung than the big eight. (*Beatrice Foods Company*, Opinion p. 714.)

In *Beatrice* the Commission noted that in view of these concentration developments which had already taken place among the eight leading dairy companies, in the future it would be "the medium-sized and large dairy firms [which] must be relied on as the source of actual and especially potential competition in this industry." (*Beatrice Foods Company, supra*, p. 728.) The Commission pointed out that a cardinal objective of its merger policy would be directed against acquisitions by the major companies which "have tended to retard the emergence of a strong and healthy middle tier of medium-size dairy companies capable of offering vigorous competition to the giant firms," (*Beatrice Foods Company, supra*,

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[31] This conclusion would seem to be borne out by the fact, conceded by all, that the marketing of milk and milk-products is primarily a local or regional operation (*Beatrice Foods Company, supra*, p. 710).

p. 729). By the same token, the Commission stated that another objective of its merger policy in the dairy industry would be

> * * * to prevent the repetition of the pattern of growth through acquisition whereby the firms which now dominate the industry achieved their positions of leadership. If the Commission were to sit idly by while firms now in, say, the $40 million to $60 million range engaged in acquisition programs calculated or likely to make them as large as the present respondent, the results would be the rapid transformation of the industry into one completely dominated by a handful of giant firms and far less competitive than at present. Accordingly, just as the Commission, in the *Foremost* case, challenged a series of acquisitions which transformed the respondent from a medium-sized, to a very large dairy company, so any similar program of acquisitions undertaken by a medium-sized member of the industry should receive close scrutiny by the Commission (*Beatrice Foods Company*, Opinion p. 729).

While noting that not all acquisitions by medium-sized companies would be suspect under the antitrust laws, acquisitions which would be regarded as questionable would be those which eliminated another medium-sized firm since such firms are few and are a critical source of actual and potential competition in this industry.[32]

Between 1958 and 1963, the number of establishments processing fluid milk fell from 5,828 to 4,619 (CX 65N). The rate of disappearance between 1953 and 1958 was substantially the same as between 1958 and 1963, thus this declining trend has neither been halted nor reversed. In 1963 the top four dairy companies were estimated to account for about 24.3 percent of the value of packaged milk shipments and the top eight companies accounted again for approximately 31.7 percent of these shipments nationally (CX 85).

It is against this overall industry background that the instant

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[32] The Commission pointed out that:

"Where, however, the acquired firm is small (say with sales of less than $10 million), other factors must be considered. If the merger is conventionally horizontal in character and eliminates a significant competitor, it will probably be unlawful. The same will be true if one of the firms has a position of strength in a concentrated market and the other firm is a significant potential competitor in that market.

"Congressional policy as expressed in Section 7 will be best served in this industry if merger activity is channeled toward the smaller firms. Certainly mergers between firms too small to achieve the economies of scale made possible by the technological revolution in the dairy industry or to function as strong, effective competitors and penetrate into new markets are lawful. Mergers between such firms may be a method of strengthening the competitive process in this industry. Section 7 does not prevent the exit through merger of firms too small to be viable. To be sure, where a small firm is acquired by a very large or even one of the moderately large multi-market dairy companies, the result may be to impair competition; such a merger is unlawful. But if the same small firm is acquired, rather, by another reasonably small firm, the merger is likely to result not in a weakening, but in a strengthening, of the competitive structure of this industry; such a merger is clearly lawful." (*Beatrice Foods Company*, Opinion p. 730).

acquisition by Dean of the operating assets of Bowman must be viewed.

B. *The Respondents*

Both Dean and Bowman are substantial companies engaged in the processing and distribution of dairy and non-dairy products.

As of 1965, Dean's consolidated dairy and non-dairy sales amounted to $87.4 million, representing an increase of 38% over its 1960 sales of $63 million. Dean's dairy sales accounted for approximately 85% of its total sales. Dean operates 13 dairy processing plants plus five distribution branches and two sales offices in six Midwestern states, including Illinois, is engaged exclusively in the wholesale sale of these products and does not do any retail business (CX 4a-b; I.D. 1168). Prior to 1965 Dean had acquired several dairy companies with total dairy sales amounting to $14.15 million (CX 1 (a)-(b); I.D. 1167–1169; CX 42(b), CX 83H-N, CX 84H, Tr. 1966).

Bowman's consolidated dairy and non-dairy sales amounted in 1965 to $75.6 million representing a decrease of 13% from its 1960 sales of $87 million (I.D. 1169–1170). Bowman operates 14 dairy processing plants plus 9 distribution branches and two sales offices in 6 Midwestern states which are either the same states or are contiguous to the states in which Dean has processing facilities (CX 22, CX 32).[33] Bowman's business in Chicago involves both retail and wholesale accounts. Its Chicago business is reported to constitute about 57.4% of its total business. (RX 11, CX 102.)

Between 1951 and 1965 Bowman had made several acquisitions of dairy companies accounting for a total dairy sales volume of $17.58 million (CX 83 L and CX 84L). Bowman's latest acquisition was of Capitol Dairy, with sales in excess of $3.67 million, which was purchased for $367,000 in order to acquire additional delivery routes. (Tr 1626-27.)

In the 3-state area in which both operate (Illinois, Indiana and Michigan), Bowman accounted in 1963 for 3.22% of sales of processed packaged milk and related products with a sales volume of $17.4 million, while Dean's share, totaling a volume of $24.2 million, represented 4.46 percent of shipments in this area (CX 65Z3,

[33] Both Dean and Bowman have dairy processing facilities in Illinois, Michigan, and Indiana. Bowman also has facilities in Wisconsin, Iowa, and Ohio (CX 22). Dean has plants in Tennessee, Kentucky, and Arkansas (CX 4a-b). Their markets, however, overlap to a greater extent than their production facilities so that they compete in the same market or markets in 5 states (Illinois, Indiana, Wisconsin, Michigan, and Kentucky) (CX 32).

CX 26, CX 52B, Compl. Counsel Appendix to Appeal Brief, App. C-1 C-2).[34]

In Illinois, alone, Dean and Bowman accounted for 6.57% and 5.48% respectively of packaged milk and related shipments, or a combined percent of 12.05 (CX 65Z3, CX 26).

Considering the Chicago market by itself, for which the bulk of the detailed market statistics was introduced, as of June 1965, Bowman ranked first among fluid milk processors in that market, accounting for 11.3% of the sales in the Chicago market, while Dean ranked fifth, accounting for 8.3% (RX 36).[35]

In 1953 the top 4 dairy companies accounted for 40% of the Chicago market. This percentage rose to a high of 48% in 1956 and 1957. By 1959 the share of the top 4 had declined to 45% (RX 30a-b).

From 1960 to 1964 the share of the top 4 was stabilized around 42 to 43 percent despite a drop in Bowman's share of 2.4%. The shares of the top 8 and top 12 increased during this period, in dicating a trend toward concentration among the other large dairies which the decline of Bowman could not offset (Table I).[36]

The share of the top 4 declined 2.6% from 42.9% to 40.3% which was accounted for by Bowman's decline the 2.5% in the year. Concentration continued among the fifth to twelfth companies sufficient to offset the decline in Bowman. Dean's share, for example, increased 1.2% from 7.1% to 8.3% between 1964 and 1965 while remaining quite stable from 1960 to 1964 (Table I).

In brief, the market share of the top 4 was constant between 1960 and 1964 but fell from 1964 to 1965 primarily because of the decline of Bowman. The shares of the top 8 and top 12 increased over the period 1960 to 1965.

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[34] In the four states in which CX 32 indicates that the markets of Dean and Bowman do not overlap, Dean accounted for 9.5% of the total value of shipments in Tennessee and Arkansas for 1963 ($85.5 million out of $898.2 million) and Bowman for 0.9% of the total value of shipments in Ohio and Iowa ($2.9 million out of $334.3 million). (CX 65Z3, CX 26, CX 52B, Complaint Counsel's Appendix to Appeal Brief, Appendix C-1).

[35] The Chicago market as found by the examiner (I.D. 1176–1177) and stipulated to by respondents (Tr. 264) comprises Lake, Cook, DuPage, Kane and Will Counties in Illinois and corresponds to that area in Chicago covered by Federal Milk Marketing Order No. 30 (Tr. 269–71). It is variously referred to in the record as the Order 30 market, the "in-area" market, etc. We will refer to it in this opinion as the Chicago market.

[36] In the computations of the 1960 and 1964 data of Table I we use CX 107 rather than RX 30a-b. Respondent's exhibit is limited to the top 4 and gives figures for the month of March. The Commission's exhibit gives data for the top 8 and top 12 as well as for the month of June. The 1965 data are taken from RX 36 and offer data for top 4, top 8, and top 12—all for the month of June. CX 107 is deemed more compatible with RX 36 than is RX 30a-b. The use of RX 30a-b does raise the market share of the top 4 from 42.4 for 1960 to 43.6 and from 42.9 for 1964 to 43.0. The shares of Bowman and Dean are unchanged for 1960 and 1964 by the use of CX 107.

TABLE I

	June 1960	Change	June 1964	Change	June 1965
Bowman	16.2%	−2.4%	13.8%	−2.5%	11.3%
Dean	7.1	0	7.1	+1.2	8.3
Top 4	42.4	+0.5	42.9	−2.6	40.3
Top 8	58.1	+4.4	62.5	−0.8	61.7
Top 12	67.3	+3.9	71.2	+0.7	71.9
Source	CX107		CX107		RX 36

As of November 1965 Dean accounted for approximately 13.5% of the Chicago in-area wholesale market as distinguished from the combined wholesale and retail market. Complaint counsel calculated Dean's share at 15.5% on the assumption—which would maximize Dean's market share—that all out-area sales were wholesale (CX 87A–B). Respondent attacked complaint counsel's calculations and suggested instead that all out-area sales be considered retail, which would minimize Dean's share of the wholesale market and reduce it to 10.9% and Bowman's share to 7.4% (Tr. 1121 ff). We do not believe that either assumption of counsel can be definitively supported, although there are good reasons to believe that the bulk of the out-area sales are wholesale in nature.[37]

Our study of the record leads us to the conclusion that the most accurate estimate of Dean's share of the wholesale market can be reached by assuming that out-area sales are divided between retail and wholesale in the same proportion as they are divided for on-route sales in which wholesale sales are 63.3% of on-route sales (CX 71). On the basis of this assumption Dean's share is 13.5% of the wholesale market.

On the basis of the same assumption as to the composition of out-area sales adopted above, Bowman's share of the wholesale market is 9.1% or 10.5%, depending upon whether we assume that 50% (Tr. 2086) or 58% of Bowman's in-area sales are wholesale (*infra*, p. 1267).[38] Under these circumstances it is reasonable to assign Bowman 10% of the Chicago wholesale market.

Thus, as of the date of the acquisition, the level of concentration in these Chicago markets as a result of the Bowman-Dean acquisition increased as follows:

[37] It is easier to ship long-distance to wholesale accounts than it is to service retail routes and customers at long distances. Retail routes are probably concentrated predominantly in the metropolitan or in-area sector where the population is located (Tr. 1204–5).

[38] We use the procedure set forth in CX87(A) (first method for Bowman) and assume that out-area sales are divided between wholesale and retail as are on-route sales.

	(Dean-Bowman)		Top 4	Top 8	Top 12
Pre-Acquisition Chicago [39] (combined retail and wholesale)	8.3	11.3	40.3	61.7	71.9
Pre-Acquisition Chicago [40] (wholesale)	13.5	10.0	(not available)		
Post-Acquisition Chicago [41] (wholesale)	23.5		(not available)		
(combined retail and wholesale)	19.6		48.6	64.8	(not available)

C. *The Dean-Bowman Acquisition*

The record indicates that during the 6-year period prior to Dean's acquisition of Bowman, the Bowman company had encountered a series of business reverses [42] which it had been engaged in stemming.

Thus, the hearing examiner found that "during recent years" Bowman had made strenuous efforts to find an internal solution to its business reverses. According to the examiner's findings, Bowman, in order to increase its grocery-store volume, pared its bids down to what management considered its competitive minimum, consolidated its retail routes and combined various of its production facilities (I.D. 1184).

Bowman's ex-president, Francis Kullman, testified that this consolidation process had been going on since 1950 and had resulted in the closing of seven bottling plants, ten sales divisions, one ice cream plant and the sale of various garages and other properties (Tr. 1625–1627).[43]

In 1964 Bowman began a million-dollar modernization program of its River Forest milk plant in Chicago which was completed sometime in the late summer or early fall of 1965 (Tr. 1624–1625, 1640, 1664–1665; *cf.* I.D. 1182). Bowman's president testified that

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[39] RX 36.

[40] See *supra.* p. 1243.

[41] The pre-acquisition figures portrayed in this column are calculated as of the day when the merger was consummated. It should be noted that respondents argue that these market shares in fact declined in the post-acquisition period defined to take in the period down through July 1966 and as projected for 1967. This argument will be discussed below at pp. 1261–1273.

[42] Bowman's exact financial and business condition is discussed in detail below at p. 1272 ff. *infra.*

[43] The record indicates that 4 sales of properties took place in the 1960–65 period. In 1961 the company sustained a capital loss of $260,645 on the sale of non-operating property (CX 95e), in this case the sale of a bottling plant which had been closed in 1960 (Tr. 2682). Sales of property resulted in capital gains of $783,415 and capital losses of $89,894 in 1964 and in capital losses of $219,026 in 1965 (RX 9d).

the result of this modernization program was to make River Forest a very efficient and modern plant (Tr. 1665).

According to Mr. Kullman, during the 6-year period from 1960 through 1965, and indeed as early as 1953, Bowman had from time to time had conversations with various other dairy companies looking toward partial consolidation of its various bottling plants with those of other dairies either with the view to Bowman doing the bottling for other plants or by arranging for them to do the bottling for Bowman.[44] The effect of such arrangements on the participating dairies would be to effect cost reductions through the consolidation of processing facilities, while at the same time continuing independently in the distributive end of the business in those areas.

One gains the impression from Mr. Kullman's testimony that these conversations were casual and even in some cases occasioned by chance meetings between Bowman's management and their counterparts in other companies at industry conventions and the like.[45] There is no suggestion in Mr. Kullman's testimony that Bowman's management considered any of these conversations as part of any crash program to sell Bowman's business or indeed that they reflected any sense of urgency on the part of management that Bowman's business situation was such that drastic and immediate action of some kind was necessary. Mr. Kullman never once indicated that he felt any compulsion about the need to succeed in any of the feelers which the company had been putting out from time to time to sell or consolidate certain of the company's bottling plants or milk routes (See Tr. 1630–1682).

Bowman had had these same types of conversations with Dean as early as 1953 and again in 1959 (Tr. 1633–34). Around 1963 Bowman approached Dean to see if they would do some bottling for Bowman at their Indiana plant (Tr. 1985). This idea was dropped until late 1964 or early 1965 at which time Bowman put

[44] For example, prior to 1965, Bowman had discussed the sale of one of its subsidiaries, its Cleveland ice cream plant, with National Dairy and Hawthorn-Mellody (Tr. 1674) and the sale of its small facility at Tomah, Wisconsin with a small firm in Iowa (Tr. 1655). In addition, Bowman had had some discussions with Beatrice and Carnation about the possibility of bottling for Bowman in Louisville, Kentucky so that Bowman would not have to operate its nearby New Albany, Indiana plant (Tr. 1670).

[45] Bowman talked with the Carnation Company on this basis in 1962 and had received a directly negative answer sometime prior to 1965 (Tr. 1645-1646). Discussions with Fairmount and Consolidated Badger had gone on in 1965, but according to Kullman, Bowman and Badger "couldn't work that out" (Tr. 1646–7).

With respect to his Consolidated Badger talks, Kullman stated that difficulties had arisen from Badger's side but that he believed "they could have worked it out." However, the talks eventually ceased in the fall of 1965 because as Kullman put it, "both parties recognized that they wouldn't get anywhere" (Tr. 1648).

out an inquiry to Dean to see if they would do some bottling for Bowman at Dean's Kentucky plant (Tr. 1985).[46] In some locations Bowman's facilities were more modern than Dean's and its thinking in approaching Dean had consistently been along the lines of some type of consolidation (Tr. 1640). The first serious conversation, as Mr. Kullman put it, took place in March 1965 with reference to the possibility of "putting together" some bottling plants of Dean's and Bowman's (Tr. 1637, 1638). The proposal which Bowman had in mind was to sell some of Bowman's plants to Dean (Tr. 1639). This would have been quite in line with Bowman's policy which it had been pursuing over the years since 1950 to raise its efficiency and cut its costs by consolidating its routes and its plants (Tr. 1643). Mr. Kullman claimed at the hearing that a merger had always been in the back of his mind in his approaches to Dean (Tr. 1639). However, in other parts of the testimony it is clear that it had not been contemplated by Bowman's management at the time of the original approach to Dean in March that it would sell out its business to Dean or in fact to anyone (Tr. 1633, 1984–1988; *cf.* Tr. 1641–1643).

In late winter or early spring one of Dean's most important wholesale customers, the Jewel Tea Co., advised Dean that it was conducting feasibility studies on the possibility of building its own milk plant in place of purchasing its milk requirements from Dean (Tr. 1973; I.D. 1201–1202).

On May 15, 1965, Jewel had informed Dean that its milk plant feasibility studies were completed. Dean was supplied with a copy of these studies. Jewel asked Dean to verify the figures and advise if it could come close to Jewel's projected cost figures. Apparently Jewel's studies showed significant economies over its supply arrangement with Dean (Tr. 1973–1975; 2225–2227). However, Dean could not recall either its own costs in supplying Jewel or the costs which Jewel had projected for itself in supplying its own needs (Tr. 2063–67). For the next month and a half, that is, until about the first of July, Mr. Dean, President of Dean, testified that his company had spent time and effort on some projections of various kinds and came to the conclusion "it just wasn't to the best advantages of—best outlook for our company

[46] Bowman's Kentucky plant had been very inefficient and the effect of this proposal would contemplate that Bowman would continue to distribute its milk in this area but would be able to cut its high production and processing costs by arranging with Dean to undertake this phase of the business (Tr. 1638–1672).

to try and be competitive with the cost they had projected in this feasibility study" (Tr. 1974).

At this point, Dean contacted Mr. Hart, Bowman's counsel, and one of its directors, with respect to the possibility of acquiring Bowman (Tr. 1986). Apparently it was as a result of this move on Dean's part that formal negotiations between Dean and Bowman on Bowman's overture of March were opened around July 1965. While the record is not clear whether the negotiations which were commenced in July contemplated a purchase of Bowman's entire dairy business or only a portion of it, the inference is that when Mr. Kullman referred to "serious negotiations" he meant negotiations on a total sale of Bowman's business (Tr. 1662).[47]

In August 1965, Mrs. Lula Bowman, owner of a controlling interest in Bowman's stock, died and the Northern Trust Company became involved in the outcome of the Dean-Bowman negotiations as coexecutor of Mrs. Bowman's estate which held the controlling stock interest in the Bowman Company (Tr. 1935, I.D. 1192). Mr. McLucas, senior vice president of Northern Trust Company, testified that as coexecutor of Mrs. Bowman's estate, the company "took an appraisal of the assets constituting her estate to see if they were all proper investments, if they should be held or what disposition, if any, should be made of them" (I.D. 1192; Tr. 1936). In this connection, Mr. McLucas testified the Northern Trust undertook in the fall of 1965 an analysis of "what would be the investment return to Mrs. Bowman's estate from a continued operation of Bowman's dairy business versus the sale of that business and the reinvestment of the proceeds elsewhere" (Tr. 1938).[48] Northern Trust accordingly analyzed Dean's offering price in comparison with other investment opportunities available to the estate to see if it would yield the four percent return which was required of "a fiduciary investing those funds in common stocks and other investments" (Tr. 1940). Northern Trust came to the conclusion that the sale of Bowman to Dean offered to the Northern Trust the most prudent course of action for Bowman in order to yield the income which the Trust Company as coexecutor of

[47] The record is equivocal as to whether it was Bowman or Dean who had first advanced the complete sale idea in late winter or early spring of 1965 and we make no finding on this point (Tr. 1986, 1641–43).

[48] In anticipation of Mrs. Bowman's advanced age and eventual demise, the Northern Trust Company had discussed Bowman's business situation with the Bowman management about a year before her death or some time in late 1964 (Tr. 1938). Bowman's approach to Dean in March 1965 may well have been influenced by these discussions with the Northern Trust Company (See *supra*, pp. 1245–1246).

Mrs. Bowman's estate had to ensure. As Mr. McLucas put it at the hearing:

The five and three-tenths million of additional funds would have to earn a return of about twenty-three per cent to produce the net income of the equivalent of what could be done under the Dean offer of about five-hundred and fifty thousand dollars; and we just didn't feel that in view of the past record that this is anything that could be conceived—could be earned on the five-hundred—five-million three-hundred thousand dollars; and also to do this would be for the corporation to give up its marketable securities, its only earnings assets, which we would not feel would be a prudent thing for a trustee insofar as the trustee participated in the decision; and even if those assets were put into the business, it would take sometime before they are going to generate any dividends, and we could foresee there would be no dividends paid on the Bowman stock if the debentures were operating satisfactorily; and, furthermore, this assumes one-hundred per cent of the earnings would be paid out in dividends, which seems a little high for any going concern should make, say, fifty, sixty, seventy per cent on the earnings, and retain the balance. So, based on all of these considerations, we concluded that the prudent thing for us to do, insofar as we participated, would be to go forward with the Dean offer. (Tr. 1943)

In August 1965, after exhaustive studies Dean testified it reached the conclusion that it could not meet Jewel's costs and so notified Jewel:

Even to come close meant that we had to give up all of our research and development, and a great many things that we think are extremely important to the continued existence of our company (Tr. 1974–75; also Tr. 2226–27).[49]

The only possible answer to the replacement of all the tonnage that we knew we could take when the Jewel Tea Company opened up their facility was to acquire Bowman (Tr. 1987).

However, Dean continued to study the Jewel problem "off and on for four months," which would mean about through September of 1965 (Tr. 2063). Jewel itself did not finally decide to build its plant until January 1966 after the Dean-Bowman acquisition had been consummated (Tr. 2227–29; 2253; RX 20, 21). The plant is not scheduled to be operational until sometime in 1967 (RX 22, p. 15).

Similarly, Bowman continued to have conversations with other dairy companies right down through September of 1965 (*supra* note 45, p. 1245). In October it purchased the assets of Capitol

[49] Jewel's version of Dean's reactions differed in some respects according to Jewel's president: A. "Well, they didn't agree, quite agree with all of the calculations. They did feel that they could make some adjustment that would reduce some of our prices. They felt they could not discontinue some of the things that they were providing and still supply us, the net amount of which was sufficient to keep us from going into the processing ourselves" (Tr. 2226–27). Dean's president could not recall either their own cost figures or those of Jewel (Tr. 2063–67).

Dairy Company for $367,000. The purpose of this purchase was to enable Bowman to reduce its distribution costs by its acquisition of Capitol's customers. The acquisition represented no increase in Bowman's processing volume since Bowman had been doing the bottling for Capitol since 1962 (Tr. 1626–27, CX 28P).

Agreement on the general terms of the Dean-Bowman acquisition was apparently substantially finalized around the 1st of November,[50] and the actual purchase agreement between Dean and Bowman was signed in December 1965. According to Bowman's president the eventual sales price was higher than the price originally offered by Dean (Tr. 1636). Subject to certain adjustments, Dean paid $5.6 million for Bowman's operating assets, which had been carried on the latter's books at about $19.1 million. Additionally, Dean assumed Bowman's accounts payable and long-term debt of approximately $6.9 million, making Dean's total commitment for the purchase $12.5 million (CX 35 E–G, CX 64K, CX 53f; I.D. 1170). According to Kullman, Dean under the full terms of the sale paid no more than two-thirds of the company's net worth (Tr. 1629, CX 64k). One witness, quoted by the examiner, characterized the sale as a "distress sale" (Tr. 1786, I.D. 1186). However, Bowman's financial advisers, Arthur Andersen and Company, testified that Bowman's book value was largely overstated (Tr. 1861). In addition to the sales price paid by Dean, it also obtained an agreement from Bowman that it would share with Dean any expenses which might be incurred by Dean subsequent to the closing date in defending any litigation which might ensue as a result of the acquisition in an amount not to exceed $125,000. In addition, if Dean should be subsequently required by Court decree to dispose of any physical property acquired pursuant to the purchase agreement, Bowman agreed to reimburse Dean for one-half of any net losses incurred by Dean up to an amount not to exceed $1 million. One million dollars was to be deposited in an escrow account with the Northern Trust Company as collateral for these obligations (CX 53f).

D. *Post-Acquisition Events*

Although Dean and Bowman entered into their agreement of sale on December 13, 1965, the contract was not closed until Jan-

[50] On November 2, 1965, Dean approached the Federal Trade Commission, advised them of the contemplated transaction and sought their reaction to the proposed acquisition (Affidavit of William J. Boyd, dated January 17, 1966, filed with the Court of Appeals for the Seventh Circuit on or about January 18, 1966).

uary 19, 1966. In the period commencing on February 15, 1966, through July 22, 1966, Dean sold Bowman's home-delivery retail routes in the Chicago area to 18 dairy companies or distributors (Tr. 2024).[51]

Dean testified at the hearing that 30% of the Bowman tonnage supplied to its retail home-delivery routes was retained by Dean after the sale of those routes. In other words, Dean continued to supply milk to these new purchasers to the extent of 30% of the former tonnage accounted for by these routes prior to their sale (Tr. 2088).[52]

In addition to the sale of its milk-delivery routes Dean was also permitted by the Commission to sell off certain of its branch buildings and to consolidate certain of Bowman's production operations into two plants. By order of the Circuit Court dated October 13, 1966, over the opposition of the Commission, Dean was further permitted to transfer temporarily 30% of the production of Bowman's River Forest plant to Dean's Chemung and Huntley plants. The Court denied Dean's requests to close down two other Bowman plants.

Respondent Dean's president testified at the hearing that since Dean's acquisition of Bowman it has encountered "no extraordinary loss of customers in the wholesale or store service" (Tr. 2025). According to Mr. Dean, aside from the loss through sale of the business which Bowman had enjoyed with its home-delivery routes, other accounts have been lost involving a dollar volume of $1,189,925 chiefly in Bowman's restaurant and institutional accounts in the Chicago area. According to Dean, 3 of Bowman's largest institutional accounts have been lost since the merger (Tr. 2025; RX 34 A, B, I.D. 1171).[53] The hearing examiner found that

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[51] Despite the stay order issued by the Supreme Court and subsequently reissued in virtually the same form enjoining Dean from making any material changes in Bowman's business and structure, Dean was permitted to dispose of Bowman's home-delivery routes in the Chicago area with the approval of the Federal Trade Commission. In a few instances some sales were consummated without Commission approval. No issue is made of this by the parties nor do we attach significance to it from the point of view of our decision on the issues raised on appeal.

[52] This 30% of tonnage figure is difficult to interpret because the amount of Bowman's business done with its retail home-delivery routes prior to the merger is given in the record in terms of dollar sales. The interpretation of these figures and our findings with respect to them are discussed below at pages 1267 and 1269.

[53] The Bowman institutional accounts lost by Dean totaled 61. The five largest involved the following in order of their dollar size:

$284,000
235,000
70,000
53,700
32,500

The balance of the accounts lost averaged $10,000 (RX 34 AB).

in addition, 11 "master-vendor" accounts whose 1965 sales totaled $1,053,100 had been lost by Dean in the post-acquisition period (RX 35),[54] 18 key management Bowman employees had resigned (RX 33) and in the first 3 months of 1966, Dean had suffered a loss in Bowman's operations of $278,566 (I.D. 1171; CX 104).

It is against the background of these facts, which are essentially uncontroverted by the parties (except where otherwise indicated) that the impact of the Dean-Bowman acquisition must be appraised. We turn now to the arguments presented by counsel with respect to the legality of this acquisition.

IV

Discussion of the Issues on Appeal Respecting the Dean-Bowman Acquisition

A. *The Relevant Markets*

1. Geographic Market

Counsel stipulated that the "Chicago Area" was a relevent market (Tr. 264). Counsel in support of the complaint argues that the impact of this acquisition can also be properly tested in the 9-State area in which Dean and Bowman are engaged in business. We agree with the examiner and respondent that if the acquisition

> cannot be shown to have any probable and substantial adverse effect on competition in the Chicago area . . . there is no basis for concluding that the acquisition would have any probable anticompetitive effects in any other section of the country (I.D. 1173; Resp. Br. p. 43).

We, therefore, confine our considerations to the Chicago Area.

2. The Relevant Line of Commerce

The hearing examiner found that the relevant line of commerce by which to test the competitive impact of the Dean-Bowman acquisition was the "sale [at retail and wholesale combined] of packaged milk, which includes generally milk, skim milk, buttermilk, flavored milk, flavored milk drinks, yogurt, sour cream and sour cream products labeled Grade A, cream and any mixture in fluid form of cream and milk or skim milk" (I.D. 1177). The par-

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[54] Of these 11 Bowman master accounts lost, one account lost totaled $800,000. The next two largest accounts which were lost amounted to $39,000 and $20,000; the smallest account lost amounted to $8,000 (RX 35).

ties have stipulated that these products describe a relevant product market (Tr. 264).

However, complaint counsel also contended that this product market or line of commerce consists of two submarkets, one of which comprises the sales of those products at retail and the other their sale at wholesale.[55] The examiner rejected this latter contention, finding that "the purported distinction between 'retail' and 'wholesale' sales of packaged milk, whether the latter is taken to include retail grocery stores or selected supermarket chains, is artificial and unrelated to commercial and economic realities." (I.D. 1177.) The examiner's findings and conclusions on this point are not challenged by respondent and indeed correspond substantially to those proposed by respondent in its own proposed findings of fact and conclusions of law filed with the examiner on August 8, 1966.[56]

At the outset, it is important to delineate the major criteria by which the relevant market for purposes of Section 7 is to be determined. The applicable legal test for defining the relevant product market was laid down by the Supreme Court in *United States* v. *Brown Shoe Co.*, 370 U.S. 294 (1962), in which the Court noted at page 325:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist, which, in themselves, constitute product markets for antitrust purposes. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593–595. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar char-

[55] Complaint counsel also contend for a third submarket which they denominate as the "choice outlet market" consisting of chain grocery-store accounts regarded as highly desirable because of their high volume and low costs (Comp. C., Brief, p. 10). Because of our conclusion with respect to the propriety of the wholesale market as a relevant submarket which includes these so-called choice outlets, we do not express any opinion as to the validity of counsel's contentions that these "choice outlets" by themselves could be considered as a relevant submarket. See respondent's arguments in opposition to their constituting a relevant submarket (Resp. Brief on Appeal, p. 47).

[56] The hearing examiner declared that "the Commission took the position before the Supreme Court that there was 'no dispute that packaged milk is the relevant line of commerce' " (I.D. 1173) and noted that one of the Commission's affidavits in support of this injunction petition contained a statement that "the proper product market or line of commerce in which to evaluate the probable effects of acquisition is, I believe, packaged milk" (I.D. 1176). Nevertheless the examiner based his conclusion that wholesale sale of milk was *not* a proper line of commerce on the merits of the question as to whether the retail and wholesale markets were distinct and we shall do the same because of our feeling that the respondent was not misled as to what complaint counsel's contentions were. See Compl. pars. 20–22; Compl. Counsel's Trial Brief, p. 2. Stipulation of the Parties and respondent's express reservation of position (Tr. 264), testimony of complaint counsel's witnesses, (Tr. 2386 and 2555), complaint counsel's (CX 87A–B and respondent's lengthy cross-examination with respect to this exhibit (Tr. 1120–43).

acteristics and uses, unique production facilitites, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition "in *any* line of commerce" (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed.[57]

The concept of the relevant market in this sense has uniformly been regarded by the Courts as encompassing not only the range of products to be included in the relevant market but also the different functional levels at which these products are sold.[58]

Applying these criteria as laid down by the Supreme Court in the *Brown Shoe* case to the determination of the relevant market in this case, we are of the view that the hearing examiner erred in his conclusion that the sale of milk at retail and at wholesale constituted a single market which could not be divisible into the two submarkets contended for by counsel supporting the complaint.[59]

Our examination of the evidence respecting the sale of packaged milk at wholesale and at retail impels us to the conclusion that these two markets reflect such differences in their basic structure, their historical development, the relationship which ex-

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[57] The criteria enumerated in *Brown Shoe* had been previously applied by courts in cases decided under Section 7 subsequent to its amendment in 1950. For example, (1) industry and public recognition of the market was regarded as a significant factor in defining the market in *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958) and *A. G. Spalding & Bros., Inc.*, 56 F.T.C. 1125, 1160 (Dkt. 6478, 1960), aff'd., 301 F.2d 585 (3rd Cir. 1962) ; (2) the peculiar characteristics and uses of automotive fabrics and finishes was the sole basis for the finding of the market in *United States* v. *E. I. du Pont de Nemours & Co.* (*General Motors*), 353 U.S. 586, 593–95 (1957) ; (3) the distinct prices of two product lines was one of the factors cited by the Commission in the *Spalding* and *Union Carbide* cases in placing such products in separate markets ; (4) price sensitivity was one of the tests applied in *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 259 F.2d 524, 530 (2nd Cir. 1958) and *Union Carbide*, 59 F.T.C. 614 (Dkt. 6826, 1961).

[58] Thus in the *Brown Shoe* case, *supra*, the District Court found that manufacturing and retailing of shoes constituted separate markets and tested the effects of that merger in each of these two markets finding that it had the prohibitive adverse effects only in the retail market (179 F. Supp. 721 (E.D. Mo. 1959)). This conclusion was not challenged on appeal by either party, but was referred to by the Supreme Court in its review (179 F. Supp., *supra* at 732, 741; *United States* v. *Brown Shoe Co.*, 370 U.S. *supra* at 335).

In *Reynolds Metals* v. *F.T.C.*, 302 F.2d 223 (7th Cir. 1962), the Court upheld the Commission's definition of a line of commerce of "wholesale florist foil" and stated:

> "Analyzing the facts of the present case makes it abundantly clear that under these standards the production and sale of florist foil may rationally be defined by the Commission as comprising the relevant line of commerce in terms of (1) public and industrial recognition of it as a separate economic entity, (2) its distinct customers and (3) its distinct prices" (*id.* at 227).

[59] As noted above, we are including in the wholesale submarket the so-called choice supermarket outlets but are not considering those outlets as a further separate submarket, *supra* note 55 at 1252.

ists between buyers and sellers, the competitive forces to which they respond and the conditions of entry in each as to warrant their being treated as relevant submarkets within the tests laid down in *Brown Shoe* for the determination of the impact of the Dean-Bowman acquisition.

The retail market consists of sales to thousands of ultimate individual consumers via direct home-delivery route distribution. Mr. Kullman, Bowman's Chairman of the Board, himself recognized that because of historical changes in the distribution pattern of dairy products since the 1920's and 1930's this retail market, as he expressed it, "has been drying up" (Tr. 1619).

The wholesale market, on the other hand, comprises the sale of packaged milk to retail grocery stores, to vendors and to institutions such as hospitals and factories.

The record indicates that in 1963 six grocery chains (Jewel, National, A. & P., Kroger, High-Low and Hillman) accounted for 55% of all grocery store sales in the Chicago standard metropolitan area and, therefore, presumably 55% of the wholesale milk sales through grocery stores in the area. (CX 61; CX 66; CX 67B; CX 68E; CX 69A; CX 70A; CX 75A.) Over 95% of the packaged milk requirements of these six leading chains was supplied by the five largest dairies in Chicago (Bowman, Hawthorn-Mellody, Borden, Wanzer and Dean) (Tr. 1247; CX 66D; CX 27C-D; CX 69 B-C; CX 70; CX 75B; CX 78).[60]

In brief, the wholesale market for packaged fluid milk in the Chicago market is characterized by a few large sellers (oligopoly) and a few large buyers (oligopsony). As the Commission economist recognized, the Chicago wholesale market was a "bilateral oligopoly"—an oligopsony confronting an oligopoly. (Tr. 1487.)

The bargaining relation is among relative equals. The discipline buyers can exercise over sellers is considerable, especially when they are financially able and motivated by different profit levels (as was Jewel) to integrate backward. Around this core of oligopoly which characterizes this wholesale market sector there exists a competitive fringe which consists of smaller sized and less demanding buyers and sellers.

In concluding that there was no difference between the retail and wholesale markets, the hearing examiner reported that there

[60] Dean and Bowman combined accounted for about 50% of the packaged milk purchased by these chains in November 1965 with Dean's share totaling 35% while Bowman's share amounted to 15% of their business (CX 87C, step 3).

had been testimony that all dairies, whether engaged in milk distribution at retail or at wholesale, "are essentially competing for the favor of the housewife" and that because of this competition for the housewife's dollar there are daily shifts in customers between home-delivery purchases and grocery store purchases (I.D. 1174).

The hearing examiner seems to have taken a position essentially that milk is milk and anyone selling it regardless of the level of distribution at which he is operating is basically competing for the housewife's dollar. To this extent all sellers of consumer goods and services are competing for the housewife's dollar, but it could hardly be contended that all are thereby in the same market for the purposes of Section 7. Moreover, the retail market offers a package consisting of milk *and* service to the consumer, whereas the wholesale marketer offers primarily milk. Any services performed by the wholesaler for his grocery customers are of an entirely different order than those performed in the retail market for an individual consumer.[61]

No case has ever adopted the position taken by the examiner and we reject the examiner's reasoning on this point as wholly irrelevant to the problem of defining a relevant market under Section 7.

The hearing examiner also found that there was no important industry recognition of a distinction between the retail and the wholesale submarkets and that this factor was important in determining whether the two market sectors constituted valid submarkets (I.D. 1177).

Mr. Kullman, of Bowman, on the other hand, gave clear recognition to the distinction between the two markets in his discussion of the different history of the two markets, the different costs in the two markets, the different future facing the two markets, and finally in his belief that primary responsibility for Bowman's business plight was its inability to adjust to the changes which characterized the development of the two markets (Tr. 1619–1622).

Mr. Dean and other dairies also recognized this difference in the two markets in their own business operations which are devoted exclusively to the wholesale market. In fact, Mr. Dean stated that his company was interested only in the wholesale market (Tr. 1989, 1967).

[61] For example, wholesale customers are serviced six times a week whereas retail customers only three times (Tr. 437–438).

Mr. Schaub, of Meadowmoor which had confined its operations since 1937 to this market, stated that "we don't choose to be in it [retail market] because we don't think you can live with it" (Tr. 1770). Accordingly, we reject this finding of the examiner and find that in fact there was industry recognition of these markets as separate entities each with its own distinct problems.

The hearing examiner found that there were no significant differences in production or distribution facilities between the retail and wholesale distributors of milk (I.D. 1175, 1177). This finding is inaccurate.

The record shows that distribution in the retail market is relatively more costly than in the wholesale market, requires smaller trucks (Tr. 435) which must make some 150-200 stops a day in contrast to a wholesaling truck which may make only 20 daily stops (Tr. 441) and involves higher labor costs (Tr. 450–461, 1770). Glass rather than paper containers predominate in the retail market (CX 71).

Servicing the two markets also requires differences in production facilities particularly as respects the capacity requirements of the wholesale sector. Mr. Esmond, Dean's vice president in charge of production, himself recognized these differences and characterized Bowman's River Forest plant as a "large retail plant" (Tr. 1542). Because of the practice of the large wholesale buyers to purchase either on a full requirements basis or on an exclusive basis (Tr. 132–135, 192–193, 226–228, 282–283, 487), the substantial volume of their purchases and their preferences to deal with a single supplier, the capacity requirements for servicing this portion of the wholesale market are substantially greater than the requirements of the retail sector. Realistically, these large wholesale buyers can only deal with the large dairies which are equipped to service their multiple branch outlets (Tr. 132–135, 173, 192–193, 226–28, 282–83, 287–88, 487, 498, 1736).[62]

These production and distribution differences between these two markets have an important bearing on the relative ease or difficulty of entry into the two markets.

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[62] An exception to this, in some cases, is apparently the grocery cooperative. For example, the Grocerland Cooperative consists of several hundred independent stores that bargain individually with dairies for their milk supply, and there is consequently no single supplier of milk to the autonomous members of the Grocerland Cooperative (Tr. 1915). Certified Grocers is a cooperative of 781 stores. They own their own dairy, Country Delight, which sells on an exclusive basis to all but 175 (Tr. 399). Mr. Holin, of Certified Grocers, noted that small dairies were at a competitive advantage relative to the larger dairies in bidding for the smaller independent accounts because of personal ties and relationships that might exist between buyer and seller (Tr. 400–401).

Entry into the retail market for the smaller entrepreneur is relatively easy and quite literally could be accomplished by a single operator with a truck. On the other hand, because of the reported inability of the larger dairies to achieve the same distribution costs as enjoyed by the smaller dairies (Tr. 1517–1518) the larger firms are discouraged from entering the retail area.

The wholesale market represented by the large chainstore purchasers has quite different entry barriers from those of the retail market. The insistence of the large wholesale buyers on being supplied with milk in paper containers, their large capacity requirements and their preferences for prominently advertised and promoted brands (Tr. 498, 509, 297–298) constitute substantial entry barriers to the smaller dairies and to dairies whose production facilities have been geared to servicing the retail market (Tr. 297–298, 617–618, 1735).

Moreover, the substantial market power wielded by these large wholesale buyers creates another type of entry barrier. Dairies who are unwilling to assume the risk of being a captive supplier may be reluctant to enter this sector of the market (Tr. 1729–30, 1738).

Of major significance to the issue which confronts us here in the problem of market definition is the examiner's further finding that vigorous price competition exists between these two market sectors, that the price spread merely reflects differing costs and should therefore be ignored as a significant factor in this determination and that the prices in those sectors are highly sensitive to each other (I.D. 1174). We do not find support in the record for these findings on the part of the examiner. Our reading of the record impels us to conclude that it is the wholesale sector of this market which performs the major role in setting the price level for the retail market.

We agree with the examiner that the customary spread between prices of the retail milk and wholesale milk to the consumer is undoubtedly due to differences in distribution cost, but we do not agree that the existence of this spread is immaterial. It is undoubtedly true that no market is leak-proof and that many commodities, which may differ in important ways, one with the other, have prices that are interrelated. This factor, however, does not justify the examiner's finding that because all milk competes for the housewife's dollar, all milk sales belong in the same market. No case has ever held that in order to find a relevant market, it must be so insulated from other markets that no inter-

relatedness exists between the prices of the products comprising this market and all other products.

What is of significant determinative value in determining the proper scope of a market involving the same product is whether the price sensitivity which does exist is mutual, whether it is generated equally by both sectors or whether, on the other hand, the competitive forces are all generated primarily in one sector.

Our reading of the record demonstrates to us very clearly that although there is a price spread between the two markets, the retail price moves as the wholesale market moves. The competitive forces in the two markets differ and are of such a nature that the retail prices must adjust in the long run to the wholesale price or the retail outlets will lose gallonage to the wholesale market. This has been the history of the relationship between the two prices in these two markets. The retail market must meet the wholesale competition; in this sense it is defensive or adaptive. The wholesale market, with its bilateral oligopoly and potential backward integration, is subject to competitive forces not found in the retail market and dominates the long-run price of milk.

Industry witnesses testified that milk prices set by the larger chains were set with little or no reference to the price which prevailed at the retail level. Mr. Loeb, of Hillman's testified:

Q. Does Hillman's, Inc. follow the price behavior of home-delivery milk in establishing its retail shelf prices?

A. I doubt whether anyone does what the home delivery—does know what the home delivery price is.

Q. Have you ever heard home delivery prices discussed with officers of Hillman's, Inc. in connection with establishing retail shelf price policies for your company?

A. No, sir (Tr. 194–195).

And Mr. Thomas E. Dewey, of Kroger, testified:

Q. In determining what prices to have your milk sold for in your stores do you attempt to keep track of what the home delivery man is charging the housewife at the back door?

A. Yes.

Q. To what extent?

A. Not appreciably (Tr. 493).[63]

Even Mr. Kullman, of Bowman, recognized the dominant role played by the wholesale sector of the market in determining the retail price when he noted that "any attempt to secure store [wholesale] accounts by submitting a low bid would also have

[63] In the uncorrected transcript Mr. Dewey's statement is "Not depreciably." This was later corrected to read "Not appreciably" (Stipulation Relating to Corrections to the Transcript of Proceedings, p. 5).

tended to reduce the home-delivery price structure where Bowman had the vast bulk of its sales" (Tr. 1620–1621).

This testimony demonstrates in our view that the prices charged by the grocery outlets to the housewife are set quite independently of prices charged by the retail home-delivery market and that in the long run the retail price tends to adapt to the level generated by the wholesale market.

It is true that price skirmishes or wars break out between the retail and wholesale markets. But the testimony indicates that any resulting erosion of the customary difference between the retail and wholesale price is sporadic and nonsystematic and that it had no significant impact upon prices in the Order 30 area and was not determinative of other than local and temporary price fluctuations (Tr. 419, 492 and cf. 421). This is behavior consistent with the existence of excess processing capacity such as characterizes the Chicago market (Tr. 2038).

If retail and wholesale prices are sensitive to each other, as the hearing examiner found, there should be some consideration of percentage of customers that shift back and forth between the two markets in response to changes in relative prices. Mr. Kraml of Kraml Dairy Company testified that a "certain percentage" not a "large percentage" switched back and forth. He attributed the switching not only to price, but also to weather; in the wintertime the housewife prefers home-delivery (Tr. 1691).[64] There was no testimony of a persistent or significant shift away from wholesale delivery toward retail delivery.

In conclusion, therefore, we find that the differing bargaining positions of the buyers and sellers in these two sectors of the market, their differing production and service requirements, the higher distribution costs of the retail sector, the different entry barriers existing for each sector and their different roles in the price behavior of milk in the Chicago area significantly differentiate these two sectors into relevant submarkets for the purposes of Section 7 and we so hold.

B. *Anticompetitive Impact of the Dean-Bowman Acquisition on the Market*

The hearing examiner concluded in the words proposed by respondent in its Proposed Findings that:

[64] See also Tr. 419, 246.

There can be litte doubt under these precedents[65] that if this case involved *only* the question of whether a firm such as Dean, with about 8% of the Chicago packaged milk market, could purchase a firm such as Bowman, with about 11% of that market, the acquisition would run afoul of the antimerger laws (I.D. 1158; RPF, p. 8).

Since the hearing examiner concluded that the acquisition did not have the prohibited anticompetitive effect in the Chicago market, either as a whole or in the submarkets contended for by complaint counsel, he did not discuss the evidence in the record pertaining to the acquisition's impact either in these submarkets or outside Chicago. However, he concluded that the evidence did not demonstrate any anticompetitive effects in any product or geographic market (I.D. 1218–1219).

Respondent agrees that complaint counsel have made out a *prima facie* case.[66]

We conclude that apart from Dean's defenses which we will consider seriatim below, Dean's acquisition of Bowman has the probability of substantially lessening competition in the combined retail-wholesale market in Chicago and in the wholesale submarket in Chicago.

While conceding complaint counsel's *prima facie* case as of the date when the acquisition was consummated, respondent contends, nevertheless, that developments in the dairy market in Chicago after the acquisition occurred demonstrate conclusively that Dean's acquisition of Bowman in fact strengthened, rather than impaired competition and hence that any presumption of illegality which initially attached to the merger is effectively rebutted by these post-acquisition developments. In support of their contention, respondents rely on two occurrences: first, the projected loss by Dean of one of its important milk customers, the Jewel Tea Company, which as of the time of the hearing, was contemplated would take place sometime in 1967; and second, the sale by Dean, after the acquisition, of Bowman's home-delivery routes to various purchasers, including independent dairies.[67]

Dean contends that the loss of its Jewel Tea account would have threatened its continued existence as a viable competitor in

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[65] Referring to Supreme Court decisions "beginning with *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962), and ending with *United States* v. *Pabst Brewing Co.*, 16 L. Ed. 765 (1966), together with the Commission's decisions having particular applicability to the dairy industry" (I.D. 1157–1158; RPF, p. 8).

[66] RPF, p. 8; Transcript of Oral Argument before the Commission, October 28, 1966, p. 28; Resp. Br. pp. 44–5.

[67] Routes were sold to at least one master vendor, Re-Van Milk Distributors, Inc. (Tr. 2275, 2281).

the Chicago area. Dean also contends that its sale of Bowman's dairy routes reduced Dean's post-acquisition share of the market and contributed to the ability of these purchasers to compete.

Our reading of the record in this case and the applicable case law impels us to the conclusion that respondent's contentions cannot be supported and that the hearing examiner erred in his conclusion that these post-acquisition actions served to legalize this merger. We will consider each of these arguments separately.

1. The Market Impact of Dean's Projected Loss of Its Jewel Tea Account

Dean's Jewel Tea account represented an annual dollar volume of $18.5 million or about 25% of its entire dairy business in Illinois and in the six-state area in which it operated. (CX 2a, CX 18, Tr. 1967.)

The hearing examiner found that the projected loss of the Jewel Tea account would affect at least 55.4% of Dean's business in the Chicago area (I.D. 1212), that Dean would not have been able to replace this business from other sources (I.D. 1204–1206), that in fact Dean's acquisition of Bowman was designed solely to counteract this loss of tonnage (I.D. 1207) and that it thereby enabled Dean to remain a viable competitive factor in the Chicago market (I.D. 1219). On the basis of the examiner's conclusions respecting the impact of this projected loss of Dean's Jewel Tea account on Dean's post acquisition share of the market, Dean's share of the market after the acquisition would be reduced from its pre-acquisition level of 8.3% to something below 3.7%. Thus the acquisition of Bowman under the examiner's conclusion respecting the impact of the Jewel Tea projected loss would therefore only have increased the concentration in Chicago to 14.2% instead of to the 19% which respondents conceded represented a prohibited increase (I.D. 1212).[68]

We do not agree with respondent's contentions nor with the hearing examiner's conclusion that a merger can be allowed under Section 7 if undertaken in order to forestall or compensate for a projected loss of business by the acquiring company.

In the first place, as of today, this loss of business has not yet taken place. While we do not question the fact that the Jewel Tea

[68] Actually the hearing examiner never treated separately Dean's arguments concerning the impact on its post-acquisition market share of its projected loss of its Jewel Tea account and the sale of Bowman home delivery routes. Coupling Dean's sale of Bowman's routes and the projected loss of Jewel he concluded that Dean's post-acquisition share of the market would be 10.85% (I.D. 1212).

Company as of March 1966 made a firm decision to build its own milk plant and supply its own needs, there is nothing irrevocable about this decision and it is obvious that it could be reversed.[69] As of today Dean still has the Jewel account and is still supplying Jewel, the Jewel plant is not yet operational and the possibility still remains that if Dean changed its mind and reduced its Chicago milk prices, it might be able to retain Jewel. In the second place, our reading of the record in this case leads us to the belief that one objective of Jewel in making its feasibility studies may have been to attempt to persuade Dean or some other supplier to lower its milk prices to Jewel (*supra* pp. 1246–1249). Jewel waited eight months after notifying Dean of its cost requirements before taking its first firm step towards supplying its own needs. Indeed, it was not until *after* Dean had in fact carried out its purchase agreement and actually acquired the Bowman assets in January 1966, that Jewel's management committee made a recommendation to Jewel's Board of Directors that Jewel should build its own milk plant (Tr. 2254). Thus we are confronted today with a situation in which Dean is arguing that if and when it loses its Jewel account, it will be hurt competitively and that its acquisition of Bowman was solely designed as a defensive measure to offset this contemplated loss. The facts, on the other hand, indicate that just the reverse occurred. We do not agree, therefore, that Dean's acquisition was made as a purely reactive defensive measure to an accomplished fact of the loss of a major customer. Moreover, the standards of legality of mergers under Section 7 were never intended to rest on such indefinite vagaries as are represented by this contention of Dean as to what its market share in the Chicago market may be at some future date in 1967 if the Jewel plant is built and if it supplies all of Jewel's milk requirements, thus involving a cancellation of whatever Dean's present supply arrangements with Jewel may be.

But there is an even more fundamental objection to the effect which the hearing examiner concluded should be given to this projected loss by Dean of its Jewel Tea business. Dean's principal argument, with which the hearing examiner agreed, was that unless Dean could replace the Jewel Tea tonnage with other business it would be substantially weakened as a competitor in the Chicago market and that its acquisition of Bowman therefore be-

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[69] As of the date when the record in this case closed (July 13, 1966) Jewel had publicly announced its intention to build, had hired architects to draft plans for the plant, let bids for construction, hired a plant manager and applied for operating permits (Tr. 2231, I.D. 1203).

came a competitive necessity which should be sanctioned by Section 7. We do not believe that this argument is sound either in law or on the facts.

The record shows that Dean operated in a broad area in seven states. Its total business, dairy and non-dairy, amounted to $87.4 million. Dean's sales to Jewel amounted to about 21% of its total sales and 25% of its dairy sales (CX 18, 2a; Tr. 1967). However, it was not destined to lose all of its Jewel business.[70] Moreover, even if it had, we do not believe that we can conclude from this that its competitive vitality would have been irrevocably impaired. In the late 1940's Dean had lost a major account in the area which did not apparently weaken its competitive viability on any long-range basis. (Tr. 1576–77.) While we have no reason to doubt the testimony of those industry witnesses who talked of the difficulties of replacing wholesale tonnage of this amount, we do not believe that this testimony impels the conclusion that the loss of the Jewel Tea account would have weakened the competitive vitality of the Dean Milk Company. Moreover, loss of market share cannot be equated automatically to a decrease in competitive viability. Indeed, Dean's own vice president in charge of production testified that Dean could make the necessary production adjustments to accommodate the loss of volume which its Jewel account accounted for.[71] We have little doubt that the loss of Jewel, if and when it occurred, would have reduced Dean's market position in the Chicago area for some period of time which could have been weeks, months or years but we cannot say from this that this loss if it had occurred would have weakened it

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[70] Dean testified that in Cook and DuPage Counties 75.96% of the sales of Dean, including ice cream, were to Jewel accounts. (Tr. 1972, 2304.) If ice cream is excluded because Jewel does not plan to make its own ice cream, this represents 7.6% of Dean's sales to Jewel that it will not lose. (Tr. 2304.) If cottage cheese is excluded because Jewel does not plan to make its own cottage cheese, this represents an additional 10.4% of Dean's sales to Jewel that Dean will not lose. (Tr. 2304.) If Dean can retain Jewel's ice cream and cottage cheese accounts, it will lose 63% of its sales in the 2 county area rather than 75.96% with the loss of Jewel. There is also the chance that Dean can keep the bottled gallon business of Jewel because it plans no glass bottling.

[71] The Jewel account represents about 50% of the production out of Dean's Chemung & Huntley plants (Dean, Tr. 1973). Mr. Esmond, Dean's vice president in charge of production, testified that appropriate adjustments in Dean's production could be made. He stated that: "There isn't any doubt in my mind Huntley will have to close immediately . . . All of this production could be put into Chemung without any problems." (Tr. 1546.) While some changes would have to be made to the Chemung plant and while Dean's distribution costs might increase since its routes would be less dense (Tr. 1977–78, 1982), it is clear from Mr. Esmond's testimony, that the loss of Jewel, if unreplaced, the closing of Huntley, and the transfer of the remainder of Huntley's production to Chemung would enable Dean to process its remaining output efficiently. The closing of Huntley or sale of Huntley would probably entail a financial loss for Dean. But from a *production* standpoint, given this adjustment, Dean would certainly be able to remain viable despite the loss of Jewel and their failure to replace it.

as a competitive factor either in that market or in any other market in which it operated.

Respondent and the hearing examiner seem to us to have confused the effects of competition with competitive vitality and to be suggesting that Section 7 was designed to protect market shares from the effects of competition. We have no insight into and indeed respondent did not demonstrate what effect a reduction in Dean's Chicago market share would have on Dean's ability as a company to engage in the dairy business. But as has been reiterated so often the antitrust laws are not designed to protect competitors but only competition. *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 320 (1962).

The point which Dean is apparently trying to make comes closer to a failing company type of argument but even Dean does not go so far as to urge that it would fail if it lost its Jewel account. Absent such a claim, Dean's argument seems to come down to a claim that it is entitled to redress a competitive loss (*i.e.*, the projected loss of an important customer) by purchasing the customers of a competitor. We have not found a case in which such a contention has been allowed. Indeed this argument was summarily rejected by the Supreme Court in *United States* v. *Continental Can Company,* 378 U.S. 441, 463–464 (1964), where the Court stated in response to a substantially similar argument advanced by defendant in defense of its acquisition of Hazel Atlas:

> Continental would view these developments as representing an acceptable effort by it to diversify its product lines and to gain the resulting competitive advantages, thereby strengthening competition which it declared the antitrust laws are designed to promote. But we think the answer is otherwise when a dominant firm in a line of commerce in which market power is already concentrated among a few firms makes an acquisition which enhances its market power and the vigor and effectiveness of its own competitive efforts.

The courts have reached the same conclusion even where the acquiring companies were not dominant wherever in the courts' judgment the mergers had been demonstrated to have had the prohibited anticompetitive effects. The fact that in other ways they might be regarded as having some competitive advantages was held not to have counteracted this adverse effect. *United States* v. *Bethlehem Steel Company,* 168 F. Supp 576, 615–18 (SDNY 1958); *United States* v. *Philadelphia National Bank,* 374 U.S. 321, (1963).

Dean's acquisition of Bowman under those circumstances had a

most direct and adverse effect on the competitive situation in the Chicago market which was precisely of the type which Section 7 was designed to prohibit. Moreover, these adverse competitive effects far outweight any claimed enhancement of Dean's competitive vitality or any claims with respect to the alleged negligible increase in Dean's share of the market which purportedly resulted from this acquisition.

When Dean was confronted with the possibility that it might lose its Jewel Tea account, it immediately made its own studies of the various alternatives available to it to meet Jewel's cost requirements. At just this point in its considerations, the possibility presented itself of replacing its Jewel account with the wholesale accounts of the Bowman Dairy Company. While the record does not indicate the actual considerations which went into Dean's decision not to meet Jewel's costs and to purchase Bowman, we cannot close our eyes to the fact that the Bowman acquisition enabled Dean to compensate for the possible loss of its Jewel account and at the same time maintain its Chicago price structure without having to consider other steps available to it under the circumstances either to retain the Jewel business or to acquire other business through the normal channels of competition. Thus, the Bowman acquisition represented a completely noncompetitive response to the competitive problem posed to it by Jewel's contemplation of furnishing its own milk supplies. It is clear from the record that Dean had an opportunity to retain the Jewel account by making adjustments in its price. Further, if its decision that the necessary price adjustments to retain the Jewel account were undesirable from an economic or business point of view, it still had an opportunity to acquire other accounts and thus maintain its market share by a variety of other competitive moves either in the realm of cost reduction, lowered prices, improved delivery, or other services. Indeed, Mr. Dean acknowledged that the loss of the Jewel Tea account would have required some market restructuring which could have been effected either by consolidation or by a fall in prices, or by a combination of both (Tr. 2111). The main point here is that Dean turned the entry of Jewel which could have resulted in a downward pressure on prices in the Chicago market, into a price stabilization move by its acquisition of Bowman. In these circumstances we cannot conclude that the projected loss of its Jewel Tea account can in any way be considered as lessening the anticompetitive effect of its acquisition of the Bowman Dairy Company and indeed as we view this record this

acquisition insofar as it was a defensive move on Dean's part to protect its Chicago market share had a more serious anticompetitive impact in the Chicago market than is evidenced simply by the increase in Dean's market share in which it resulted. Accordingly, we reject the examiner's conclusion that the acquisition was necessary to enable Dean to remain competitively viable and therefore did not have the probability of substantially lessening competition in the Chicago market.

2. The Market Impact of Dean's Sale of Bowman's Home Delivery Routes

The second argument made by Dean as to why its acquisition of Bowman has no probability of lessening competition and indeed has strengthened competition in the Chicago area rests on the effect on the market which Dean claims resulted from its post-merger sales of Bowman's home-delivery routes.

Dean contended, and the hearing examiner agreed, that because of its post-acquisition sales of Bowman's home-delivery routes, Bowman's and hence Dean's combined share of the Chicago market was much lower than the 19.6% combined market share which complaint counsel had claimed and that the competitive vitality of the purchasers of these routes had been immeasurably strengthened. Dean argued and the hearing examiner concluded, therefore, that Dean's acquisition of Bowman had no anticompetitive impact on the market but on the contrary strengthened competition because the dairies which purchased the routes were thereby enabled to compete more vigorously (I.D. 1208–1211).

There are several problems—both factual and conceptual—which arise in connection with Dean's contentions and the hearing examiner's adoption of these contentions. We will turn to the factual problems first before considering the validity of the overall conclusions which the hearing examiner drew from the factual contentions of respondent as to the effect of these sales on the probable competitive impact of this merger.

Dean contended, and the hearing examiner found, that Bowman's post-acquisition share of the Chicago market should be adjusted by reducing it by 50%, allegedly representing the value of the retail home-delivery routes sold by Dean. Thus, Dean's figures, as also found by the hearing examiner, computed the Bowman share of the post-acquisition Chicago market not at 11.3%, which was Bowman's pre-acquisition market share, but at 5.6%,

representing 50% of that share (I.D. 1211). Thus, according to the respondent's and the examiner's figures and making no allowance for the projected loss of the Jewel account, the acquisition of Bowman by Dean would result in a combined post-acquisition market share of 13.9% rather than the 19.6% urged by complaint counsel.

Both Dean and the hearing examiner are in error on their readjustment of Bowman's post-acquisition market share by 50%. In the first place, the record is equivocal on the percentage of Bowman's Chicago business accounted for by its home-delivery routes. Mr. Dean testified that they represented 50% of Bowman's total dollar sales of fluid milk in Chicago (Tr. 2086). However, Bowman had reported to the Commission in its sworn response to a questionnaire sent to it by the Commission that its home delivery routes accounted for 39% of its total Chicago business (CX 83G; CX 84G).

Our examination of the record leads us to conclude that neither respondent's estimate[72] nor complaint counsel's[73] accurately represents the share of Bowman's Chicago business accounted for by its home-delivery routes.

We believe that the nearest approximation of this share which can be made on the basis of the record is that 41.8% of Bowman's sales were retail.[74] Actually, this estimate is probably overstated in the sense that it may tend to assign a larger share of

[72] Our major objection to respondent's figure of 50% is the fact that it is based on dollar values which, as Mr. Dean recognized, will "substantially" overstate retail sales as a per cent of Bowman's total sales (Tr. 2086). For example, a dollar of retail sales represents fewer pounds than a dollar of wholesale sales. Thus, if retail prices were twice wholesale prices and if total *sales* were 50% retail and 50% wholesale, the 50% retail figure on a dollar basis would shrink to 33% retail figure on a pound basis.

Respondent in its Answering Brief attempts to support the 50% figure by reference to a decline in third quarter sales from $8,389,128 for 1965 to $4,362,181 for 1966. The relationship is only superficially a decline of 50%. The 1965 figure, however, is inflated to the extent that it includes tonnage at retail prices because the 1966 figure includes tonnage only at wholesale prices (Tr. 2088). Furthermore, Dean lost over $2,000,000 (about $500,000 on a quarterly basis) in wholesale accounts. These figures of respondent do not refute our conclusion.

[73] Our major objection to complaint counsel's figure of 39% is the fact the Section 6(b) report requested data covering SIC 202, *i.e.*, all dairy products including ice cream, butter, cheese, etc., in addition to milk and that the reported data include both in-area-and out-area sales.

[74] CX 28Z6 details the 1964 trade sales statistics of Bowman Dairy Company (Parent) in milk points. (A milk point is a physical unit of measure equivalent to one quart of milk. As such its use avoids the overstatement inherent in the use of retail dollar sales.) Applying the same procedure used by respondent in adjusting RX 11 (Tr. 1291–1294), we reduce the 70,998,000 points for total sales of the retail division by 10% (90% of sales of retail division are assumed to be home-delivery sales). The home-delivery sales are, therefore, 63,898,000 points. The total sales of the parent company are 162,455,000 points. Assuming that the "central wholesale" category of CX 28Z6 is the same as the "jobbing sales" of RX 11 (defined by respondent's counsel as bulk milk sales outside Chicago (Tr. 1293)), the total sales are to be reduced by 9,678,000 points. The resulting 152,777,000 points presumably represent total in-area sales.

Bowman's Chicago business to its retail sales than may have actually been the case.[75]

In the second place, we believe that the hearing examiner erred in not giving effect to Mr. Dean's testimony that despite the sale of Bowman's home-delivery routes Dean still retained 30% of the business (in tonnage) which Bowman had done with the customers of those routes (Tr. 2088).[76] Respondent argued to the examiner that this retained business should be disregarded because it is retained by Dean under agreement with the Commission (Resp. Memorandum, p. 9). In its appeal brief, respondent's counsel ignores altogether this testimony as to the amount of this home-delivery business retained by Dean (Resp. Brief, pp. 33–39). We do not understand how counsel can ignore this amount of business retained in its analysis of the impact of these route sales on Dean-Bowman's post-acquisition market shares. Nor do we understand Dean's argument to the hearing examiner that they can be disregarded because the business is retained under agreement with the Commission. It is unreasonable to believe that Dean is selling milk against its will and will seek to stop such sales as soon as the stay order is lifted. The only effect of the stay order is to require Dean to service their customers from milk produced at Bowman plants.

Thus, we do not agree that the 30% of the home-delivery business retained by Dean should simply be ignored. If Dean's combined market share after the acquisition is to be adjusted by deducting from it the amount of business lost as a result of the sale of these routes, then it is essential that the amount of the business retained by Dean must be reflected in any such deduction. This the examiner failed to do and we hold his failure to do so was error. Moreover, the examiner's calculations suffer from an additional problem. The examiner has simply taken Bowman's

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[75] Respondent counsel asks us to assume—it is not represented as a fact—that "the retail divisions are approximately 90 per cent or more home delivery sales" (Tr. 1293). CX 28Z6, on the other hand, indicates that of the total retail division sales of 70,998,000 points only 42,888,000 points were retail and 28,110,000 points were wholesale. If the retail division were allocated in this manner instead of on the 90–10 basis, retail sales would account for only 28.1% of Bowman's sales.

It seems reasonable to assume that when Dean sold Bowman's routes Dean sold not only all the retail sales of the retail division but also an unknown precentage of the wholesale sales of the retail division. It is, therefore, conservative to adopt the 42% figure based on the application of respondent's technique to CX 28Z6.

[76] The hearing examiner nowhere refers in his Initial Decision to the fact that Dean did not lose all of the Bowman business when it sold Bowman's home-delivery routes and, therefore, treats the sale of these routes as equivalent to the loss of the total milk business lost by Bowman as a result of these sales (See I.D. 1208–1211).

preacquisition market share of 11% and deducted from it the 50% of the business which he finds was represented by Bowman's home-delivery business. We do not agree that this business accounted for 50% of Bowman's Chicago business nor do we think that it is proper to ignore the 30% of this business actually retained by Dean.

In brief, if the divestiture of Bowman's routes is to be regarded as reducing the 11.3% market share of Bowman, in our view it would be more accurate to use the 42% figure representing Bowman's home-delivery business appropriately adjusted by deducting from it 30%, the amount of tonnage retained by Dean. The resulting figure, which is probably still somewhat overstated, would place the reduction of Bowman's post-acquisition share of the market at about 30% rather than the 50% used by the examiner and would reduce Bowman's share to 7.9%, resulting in a combined share of 16.2% if the projected loss of Jewel is disallowed or 11.2% if the projected 60% loss of Jewel is allowed.

However, we have a more fundamental objection to the hearing examiner's conclusions with respect to this aspect of respondent's arguments respecting the favorable impact which this acquisition in fact had on competition in the Chicago market.

In the first place we do not believe that post-acquisition market shares can be adjusted for actions which the acquiring company itself undertook. To allow such self-serving adjustments to affect the legality of a merger would be to invite companies to merge and then to exercise the resultant power to restructure the market according to their own whims and desires provided some optimum market share was reached or other favorable restructuring achieved which might by itself be regarded as inoffensive to the competitive dynamics of the market if it had been achieved as a result of unmanipulated market forces. We see no support in the cases dealing with this question of post-acquisition developments for respondent's highly novel argument which they make here. All of these cases dealt with the weight which should be given to developments in the market after the acquisition, but none of them dealt with market manipulations engaged in by the acquiring companies themselves.

Indeed, the possibility of beclouding the actual and eventual effects of the merger on competition by "self-serving" acts on the part of the acquiring company is precisely one of the reasons why the Courts have exhibited hesitancy in according too much weight

to post-acquisition evidence, particularly where it coincides with the period of litigation.[77]

In the second place, even if we were to conclude that it was proper for purposes of evaluating the competitive effect of this merger to make some adjustment for the sale of Bowman's home-delivery routes, we do not believe that our conclusion respecting the impact of this merger would be significantly affected by the question of whether Dean's combined share of the Chicago market after its acquisition of Bowman should be computed at 19.6%, as complaint counsel urges, or at 13.9% under respondent's theory that the Bowman route sales reduced Dean's post-acquisition share (Dean's 8% plus 50% of Bowman's 11.3% pre-acquisition share or 5.6%) or at the 16.2% which our own calculations would produce were we to follow respondent's thesis here.[78]

We believe that the impact of this merger is not simply a matter of looking at bare shifts in market shares. In the Chicago market alone the acquiring and acquired companies represented the first and fifth largest companies in that market. The acquisition eliminated the largest company in the market, moved the company occupying the fifth position into first position and increased the market share of that new number one company any-

[77] *United States* v. *Continental Can Company*, 378 U.S. 441, 463–64 (1964); *Federal Trade Commission* v. *Consolidated Foods Corporation*, 380 U.S. 592, 598 (1965); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 367, (1963); *see also Reynolds Metals Co.* v. *Federal Trade Commission*, 309 F. 2d 223 (D.C. Cir. 1962); *United States* v. *Von's Grocery Company*, 384 U.S. 270 (1966); *United States* y. *Brown Shoe Co.*, 370 U.S. 294 (1962); and *United States* v. *DuPont de Nemours & Co.*, 353 U.S. 586 (1957).

[78] As we noted above, neither respondent nor the hearing examiner computed the post-acquisition market shares which they contended for separately in terms of their Jewel Tea argument or their home-delivery sales argument. Only by accepting both arguments would the Dean-Bowman post-acquisition share of the market be lower than Bowman's original market share. The percentages used in the text are considered solely from the point of view of respondent's contention respecting the home-delivery route sales and does not take into account their additional argument respecting the need to adjust these market shares for the projected loss of Dean's Jewel Tea account. Taking into account both arguments, the hearing examiner found that the post-acquisition market should, for the purposes of evaluating this merger, be considered as follows:

	BOWMAN	DEAN
Pre-Acquisition	11.3	8.3
Post-Acquisition after sale of routes	5.6	
Post-Acquisition after loss of Jewel		3.7

If the only post-acquisition adjustment that is allowed is the sale of the routes, the combined market share would be 13.9%. If the only post-acquisition adjustment that is allowed is the loss of Jewel, the combined market share would be 15%. Only if *both* post-acquisition adjustments are allowed would the Dean-Bowman combined market share be reduced to 9.3%.

where from 11% (Bowman's original share) to 19%. Competition between the number one and number five company was totally eliminated. Moreover, because of Dean's overall larger size and more secure business position, with growing sales of $87 million as compared with Bowman's declining sales of $76 million, Dean's predominance in the Chicago market as a result of the acquisition made it a far more formidable competitor than it had been before, confronted the smaller dairy companies with an expanding and increasingly dominant competitor and confronts the wholesale market with one less alternative source of supply to which they could look. This decreases the possibility that competition will be able to bring the price of milk down in that area and that vertical integration therefore might become an increasingly attractive alternative available at least to the large buyers to lower their milk costs, a likelihood which, again, would have significant anticompetitive effects in this market.

Finally, we do not believe that the record supports Dean's argument, also adopted by the hearing examiner, that the sale of these routes contributed to the competitive vitality of the purchasers of these routes and hence operated to enhance rather than lessen competition at least in the Chicago market.

This argument, as presented by respondent and used by the examiner, does not in any case purport to extend to the effects of Dean's acquisition or competition outside the Chicago market. However, even with respect to the Chicago market, we do not find any support in the record for the argument. Four out of the eighteen purchasers of these routes testified that their businesses were profitable and that the acquisition of these routes added to their profitability.[79] We do not know whether the other purchasers were profitable or marginal firms. We are not even sure that all of the purchasers were in fact daries and hence competitors in the market. Nowhere in the record is there any information about the absolute or relative size of each of these purchasers, what their market share was and whether they sold in both the wholesale and retail markets or merely in the retail market. Nor do we have any facts about the amount of the business by gallonage or dollars involved in each of the various routes which these purchasers acquired. Thus we have no way of determining the competitive force generated by these purchasers relative to that of

[79] Tr. 430, 611–12, 1692, 2298.

the large buyers and sellers whose bargaining power dominated the market. Since respondent has not introduced into the record any data or any of these factors respecting these purchasers, we cannot form any conclusions as to the effects on competition of these purchasers from the bare fact that small dairies purchased some of these routes and enhanced their individual profitability as a result. Nor can we make any estimates as to whether the extent which competition may have been strengthened by the sale of these routes in fact outweighed the extent to which we find competition was impaired by the merger of Dean and Bowman. Accordingly, we reject the examiner's conclusion that the sale of these routes to independent dairies strengthened competition in the Chicago market (I.D. 1209–1211).

Assuming the Bowman Dairy Company was not failing (which will be considered in the next section), and viewing Dean's acquisition of Bowman against the background of the dairy industry, its trend towards concentration and the importance of preserving the integrity and existence of the medium size regional dairies as the major source of competition to the large national dairy companies, we conclude that the Dean-Bowman acquisition would have the probability of substantially lessening competition in the combined retail-wholesale market in Chicago and in the wholesale submarket in Chicago.

3. Bowman's Financial and Business Condition

There is no dispute among the parties that Bowman's dairy operations were encountering business reverses in the six-year period preceding its acquisition by Dean. The parties, however, differ widely on the inferences to be drawn from those facts. Similarly, the parties do not dispute the basic facts respecting net worth, cash position and overall financial picture of the company although again they assign widely differing significance to these facts.

Bowman's overall sales for the entire six-state region in which it was doing business fell from $86.5 million in 1960 to $75.6 million in 1965. This sales decline was caused by Bowman's sales in the Chicago market which fell more than $13 million in this period. Bowman's sales outside the Chicago market were increasing from $29.7 million to $32.2 million or by 8.6%. In brief, Bowman was a company whose sales were declining insofar as Chicago was concerned and which outside Chicago was enjoying slightly expanding sales as can be seen in the table below:

TABLE II[1]

1960 – 1965 Sales of Bowman

	Chicago	Outside Chicago	Total
1960	$ 56,796,962	$ 29,680,949	$ 86,477,911
1961	53,089,958	29,745,557	82,835,515
1962	52,207,120	28,652,840	80,859,960
1963	48,993,885	28,819,692	77,813,577
1964	46,596,008	31,009,408	77,602,431
1965	43,357,668	32,244,763	75,602,431
Change	(13,439,294)	+ 2,563,814	(10,875,480)

[1] 1960 (CX 28g); 1961 (CX 28f); 1962 (CX 28e); 1963 (CX 28d); 1964 (CX 28c); 1965 (RX 2; CX 102); RX 2; RX 3.

Bowman's combined profit picture shows a similar pattern for the 1960–1965 period (Table III in Appendix A). Its total operations show a profit in each of these years except 1961 and 1965 and an overall cumulative profit for the six-year period of $887,176. In brief, Bowman as a corporate entity over the six-year period was profitable, albeit not very profitable.

Throughout this six-year period and notwithstanding the two years in which no profits were earned, Bowman regularly paid out annual dividends amounting to a total for the six-year period $1.2 million. These dividend payments relative to Bowman's Net Operating Income are as follows:

TABLE IV

Dividends Paid Relative to Net Operating Income[1]

		Dividends	Operating Income
1960	$1.60	$ 245,440	$418,867
1961	1.60	245,440	(126,877)
1962	1.30	199,420	86,194
1963	1.20	184,080	55,874
1964	1.20	184,080	(699,488)
1965	1.00	153,400	(255,469)
Total		$ 1,211,860	($520,899)

[1] 1960 (CX 95e); 1961 (CX 95e); 1962 (CX 97E); 1963 (CX 97E); 1964 (RX 9d); 1965 (RX 9d).

The rate of dividends paid out by Bowman declined from $1.60 in 1960 and 1961 to $1.30 in 1962, $1.20 in 1963 and 1964 and $1.00 in 1965. However, the total dividends paid out in this six-year period were more than double the total loss in operating income encountered by Bowman in this same period.[80]

[80] It is interesting to note that the payment of dividends by Bowman to its stockholders during the years 1963, 1964, and 1965 impaired the financial position of the corporation to a greater extent than the losses which the company incurred during the entire six-year period.

Throughout this six-year period, Bowman enjoyed a strong cash position and its working capital ratio, which measures its ability to meet its short-term debts promptly, exceeded in each of these six years the usual rule of thumb of 2 to 1. Thus as of December 31, 1965, Bowman showed a cash position of $2.95 million (CX 53 (c)), marketable securities at a cost of $3.54 million and a market value of $5.21 million (CX 106B) and a working capital position of 2.4 times more current assets than liabilities (CX 53c). Moreover, Bowman's financial statements as of this date showed Bowman with a low long-term debt of $1.27 million and a substantial stockholders' investment of $18,867,869. In brief, Bowman's financial condition in 1965 presented no threat to creditors, either short-term or long-term.

Over the six-year period from 1960 to 1965 Bowman's dairy operations registered a loss in three years, a profit in three years and an overall loss of $520,899 for the six-year period (Table III, Appendix A).

Breaking these operations down, as respondent and the hearing examiner did, into Bowman's dairy operations, inside Chicago and outside Chicago a different picture emerges. The operating divisions of Bowman consisted of Bowman Dairy Company (the parent) which operated in Chicago and thirteen subsidiaries all operating outside Chicago in a seven-state area.[81] Six of Bowman's subsidiaries experienced no losses from 1960 to 1965 and four experienced losses in only one or two of the six years. One was a consistent loser; the Cleveland ice cream plant suffered a loss each year of the period. This amounted to $198,000 for the period or 41% of all losses recorded by the several subsidiaries.[82] The subsidiaries as a group earned accumulated profits of $4,178,103 over the six years.

Bowman's Chicago operations represented 57% of Bowman's sales (Resp. Brief p. 12). These operations showed a loss for each of the six years from 1960 to 1965, totaling $4.7 million for the period (Table III, Appendix A). These Chicago losses exceeded the profits of the subsidiaries by the cumulative loss of $520,899 which the combined dairy operations recorded between 1960 and 1965.

The Chicago annual losses ran somewhat in excess of $600,000 for 1961, 1962, and 1963. In 1964 the loss jumped to $1,572,000.

[81] As of 1960, Bowman had 12 subsidiaries exclusive of Marwyn Dairy Products Corp. which became inactive in 1960. In 1963, Bowman added a thirteenth subsidiary.

[82] The new subsidiary added in 1963 recorded a loss each year from 1963 to 1965 (Table V—Appendix B).

Bowman's profit and loss statement for 1964 indicates that the loss occurred because Bowman's Chicago Milk Division, confronted with a 7.8% decline in sales, could not reduce its cost fast enough. Delivery, selling, and administrative expenses were reduced by 6.7% but cost of sales (production and processing costs) could be lowered only 4.9% (CX 28S, CX 28R). This would indicate that the problem was in production or processing.

However, in 1965 the Chicago loss fell back from its high in 1964 of $1,572,000 to $1,015,270.[83] The loss fell because, despite a decline of 7.9% in sales, Bowman[84] was able to reduce its cost of sales by 10.6% and its delivery, selling and administrative expenses by 2.6% (RX 9e).

While there is no information in the record as to how Bowman was able to reduce its Chicago cost of sales in 1965 by this amount, it is interesting to note in this connection that Bowman had begun its million dollar modernization program of its Chicago River Forest plant in 1964 which it completed sometime in late summer or early fall of 1965 (Tr. 1640). It is possible that this program may have contributed towards the reduction of Bowman's 1965 cost of sales although there is no direct evidence pro or contra on this point.[85]

On the basis of these facts, the hearing examiner came to the conclusion that:

> At the time of the acquisition, Bowman Dairy Company was a failing company. Bowman's dairy operations had been suffering declining sales and mounting losses in recent years and there was no prospect that they could be rehabilitated. The company's operating plight was particularly acute in the Chicago Area, where steadily mounting losses had resulted in a severe drain on the company's resources and had required a partial liquidation of its plant, property and equipment. These losses in the company's dairy business threatened the corporation as a whole with eventual bankruptcy. (I.D. 1219.)

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[83] If Chicago's share of the pension fund contribution that is built into the 1964 figure is also added to the 1965 loss, the figure would be increased by about $200,000 to $1,200,000 (Table III, Appendix A, fn. 5).

[84] The record does not break the parent company's Chicago operations for 1965 down to reveal the figures for its Milk Division. The figures, however, are comparable.

[85] Mr. Kullman believed that this modernization of River Forest, Bowman's Chicago plant, made it a very modern and efficient plant (Tr. 1665). He expressed apparent discouragement, however, with the outcome of the River Forest modernization because the loss of volume through the plant during 1964–65 offset most of the gains associated with the increased efficiency of the plant. He stated:

> ". . . we lost volume, which eradicated it (increased efficiency) and wiped out, and something more. Well, I won't say 'something more'. It wiped out most of the efficiencies" (Tr. 1665).

This suggests that the River Forest modernization program contributed to the reduction of losses between 1964 and 1965 and represents the potential base for a more successful operation in the future.

We do not believe that the record supports the examiner's conclusion that Bowman was failing and that there was no possibility that Bowman's operating difficulties could be solved and its adverse sales and profit experience reversed. We shall discuss our factual objections to the Examiner's reasoning first, and thereafter we will consider the extent to which the cases support his conclusion that Bowman was a failing condition and that its acquisition by Dean did not substantially lessen competition.

The examiner measured solvency by "whether the assets in which the company's past earnings were invested generate funds sufficient to meet its current obligations and pay off its debts" (I.D. 1196–1197). By this standard, or any other standard of which we are aware, Bowman was solvent. Neither party contended that Bowman's financial condition threatened its long-term creditors, its short-term creditors, or its credit rating.

Bowman's total sales and its Chicago sales declined from 1960 to 1965. Nevertheless, in 1965 it remained the largest factor in the Chicago milk market (RX 36). It is difficult to conceive of such a position in the market as representing no competitive significance as the failing company doctrine assumes to be the case with the acquired company. Despite the drop in sales, two of Bowman's largest wholesale customers testified that they were satisfied with Bowman's service and product and thought that the Bowman label had strong consumer acceptance (Tr. 244, 491). Bowman's sales outside Chicago increased 8.6% from 1960 to 1965.

We do not agree, however, that Bowman had experienced "significant operating losses" over the six-year period (I.D. 1160). From 1960 to 1965 Bowman incurred a cumulative loss of $520,899 (or $776,899 if allowance is made for the decision to pass over the contribution to the pension fund) (Table III, Appendix A) on total sales of more than $480,000,000 (Table IV, Appendix B). This was an average for the survey period of about $86,800 (or $129,500). It is true that the heaviest losses were recorded in 1964 and 1965, but it is also true that 1965 was an improvement over 1964, especially in Chicago where the modernization of the River Forest plant increased both its efficiency and performance. From 1960 to 1963 Bowman showed a cumulative operating profit in excess of $400,000. It is the losses of 1964 and 1965 that are responsible for the six-year operating loss. We do not believe that this performance of Bowman concentrated in a two-year period constitutes a sufficient record of operating losses

to give force to the examiner's conclusion that Bowman was a failing company.

We believe that the examiner erred in placing his primary emphasis on Bowman's Chicago sales and according little significance to the profits which were earned by Bowman's subsidiaries operating outside of Chicago. The examiner in support of his position had pointed to the fact that 57% of Bowman's sales were concentrated in Chicago, that the profits of Bowman's subsidiaries dropped by over 12% between 1964 and 1965, and that three of the twelve subsidiaries (outside Chicago) had losses, five of the twelve had marginal profits or declining sales, leaving only four of the twelve which he termed "profitable" (I.D. 1182–1183, 1189–1191). Even under his view of the applicable law, however, a showing of "significant losses" is required (I.D. 1160). Marginal profits are not equivalent to significant losses. If the examiner had chosen not to separate "marginal profits" from profits, his computations would have shown that nine of Bowman's twelve subsidiaries outside Chicago showed profits in 1965. In this context it is important to recall that six of Bowman's subsidiaries earned a profit in each of the six survey years; that two earned profits in five of the six years; and that two recorded profits in four of those years (Table IV, Appendix B). The elimination of one subsidiary—the Cleveland plant, which lost money in each of the six years—would have eliminated $198,000 in losses (Table IV, Appendix B). By this one act alone the total losses for the survey period could have been reduced by 38% (or 26% if the adjustment for the pension fund is made).

Similarly, we do not believe that cumulative operating losses of $520,899 (or $776,899) over the six-year period could in any way be regarded as support for the examiner's conclusion that Bowman was failing and incapable of rehabilitation.

According to the examiner, Bowman's affirmative overall profit picture was immaterial because it was the result of what he termed Bowman's "nonoperating income derived from its securities and realty holding" (I.D. 1191).

There is no basis for the examiner's essentially artificial division of the Bowman company's operations into income earned from the sale of products and what the examiner termed "nonoperating" income. All of Bowman's assets are corporate in nature and must in the absence of any information to the contrary be assumed to have been derived from Bowman's business operations. Whether earnings are plowed back into the business or invested

in securities or realty is immaterial. These earnings and assets are still available to the company for whatever uses it chooses to put them to. Moreover, it was never claimed that Bowman, for its own business purposes, preserved any such artificial distinction between operating and nonoperating income and did not intermingle these assets at will.

Bowman's consolidated income showed a loss for two of the six years from 1960 to 1965. The company had shown a cumulative consolidated profit of $887,176 for the six years. It is true that the elimination of the capital gain of $783,415 from the sale of property in 1964 would almost wipe out that operating profit. But it should also be pointed out that such sales in 1961, 1964, and 1965 resulted in capital losses of $569,545 and that in 1961 a $200,000 provision was made for possible additional losses on sales of properties (Table III, Appendix A). These capital gains and losses or provisions for loss almost offset each other so that the consolidated net income figure can be considered as representative of the operating and nonoperating aspects of Bowman. On a consolidated basis, Bowman was not unprofitable.

The examiner was of the opinion that Bowman's condition was such that the company would face "eventual ruin" unless its sale could be effectuated (I.D. 1199). We believe that the examiner is in error in this belief. If there had been no nonoperating income to set off against the operating loss, it is clear that Bowman's assets would have eventually been dissipated. However, as long as operating losses are less than nonoperating income, the nonoperating income can be used to offset the losses. Since nonoperating assets are relatively nondepletable (*e.g.*, bonds and stocks), it is clear that the assets will not be dissipated regardless of the size of the operating losses. It is only if management decides *not* to use its nonoperating income to offset operating losses that continuing operating losses of any size will eventually consume the productive assets of the company.

It is true that *in the course of time—eventually*—assets will be dissipated by persistent operating losses. But this could take years. The length of time depends upon the relationship between the magnitude of the losses and the assets awaiting dissipation. Neither the Examiner nor respondent counsel explores this question.

Bowman regularly generated a large cash flow. It exceeded $1 million in cash in each of the six years (Table VI). These funds are available to management to finance replacement and expan-

sion costs, to meet debt-retirement requirements, and to maintain regular dividends. The cash flow figures indicate that Bowman generated sufficient funds over the six-year period to maintain and improve its operating facilities. Bowman's cash flow in this period from 1960 through 1965 appeared as follows:

TABLE VI
Bowman's Cash Flow (CX 106E)

Year	Consolidated Net Income (After Taxes)	Depreciation	Cash Flow
1960	$255,999	$1,581,257	$1,837,256
1961	(368,545)	1,624,303	1,255,758
1962	233,591	1,600,425	1,834,016
1963	274,841	1,424,253	1,699,094
1964	318,921	1,386,607	1,705,528
1965	(177,661)	1,238,363	1,060,702

There is nothing in the record nor in Bowman's financial structure which would permit a conclusion that such asset dissipation of Bowman was in any sense imminent or even incipient as of the time of Bowman's acquisition.

The examiner based his conclusion that there was no hope of rehabilitating Bowman's losing operations on his belief that Bowman had made a reasonable attempt to find an internal solution to its operating problems, but had been unsuccessful (I.D. 1184–1185). Management had consolidated its retail routes; combined or closed down bottling facilities; modernized one plant, River Forest, submitted bids to A & P which were unsuccessful, although priced at what Bowman thought was the competitive minimum; and sought to increase their custom bottling business (I.D. 1184).[86]

Prospects of rehabilitation must depend upon the opportunity to turn around which the financial condition of the troubled company affords. The extent of the opportunity depends both upon the time and the access to finances which the financial condition allows. As a firm approaches bankruptcy the opportunity approaches zero and the prospects of rehabilitating such a failing company are indeed slight.

Respondent and the examiner, in reaching their conclusion that Bowman could not be rehabilitated, emphasized the testimony of

[86] He also relied for this proposition upon the testimony of Mr. Leonard Spacek, the Chairman of Arthur Andersen & Company and financial adviser to Bowman (Tr. 1833–34), Mr. Kullman, Bowman's chief executive officer (e.g. Tr. 1627) and Mr. McLucas of the Northern Trust Company (Tr. 1951), who testified as to their pessimism about the rehabilitation prospects of Bowman.

Mr. Leonard Spacek, a partner in Bowman's accounting firm and financial adviser Arthur Andersen & Company (Tr. 1821–82; I.D. 1187–1192; Tr. of Oral Argument on Appeal, October 28, 1966, p. 45). Yet Mr. Spacek himself was very careful in his testimony to state that his analysis of the operations of Bowman's dairy divisions led his firm to conclude that "they had to be disposed of, liquidated, *or readjusted in one way or another* to stop the continuous drain on the company's resources, which would only lead *eventually* to bankruptcy or to loss of the entire operation." (Tr. 1833–34) (Emphasis added.) Thus, it is clear that Mr. Spacek was adamant that something had to be done by Bowman in order to reverse its fortunes and believed strongly that, from a financial point of view, Chicago should be sold (Tr. 1852, 1873). We do not read Mr. Spacek's testimony as evidencing a conclusion that there was nothing which Bowman could do and that there were no circumstances (such as a change of management, for example) under which Bowman could be rehabilitated.[87] Moreover, even Mr. Spacek did not have the benefit of clairvoyance to know whether the River Forest modernization program may not have gone a long way to solving Bowman's Chicago difficulties.

Moreover, it is clear from Bowman's own financial structure that Bowman was not approaching bankruptcy. On the contrary, Bowman's financial condition indicates that Bowman had excellent opportunities and potential for rehabilitation. Its overall financial structure clearly afforded management both the time and funds to effect a rehabilitation. It had sizable holdings of cash and securities. Its credit was in no way impaired.

It is important to note further in this connection that despite its operating reverses Bowman retained the favor of its large wholesale accounts. Two accounts testified that they were satisfied with the service Bowman provided and with the strength of the Bowman label and that they had noticed no deterioration in Bowman's ability to serve them (Tr. 244, 491).

Although many of Bowman's operating facilities were characterized as old and inefficient (Tr. 1533–42, 1624), River Forest is a modern and efficient plant (Tr. 1665), and at the time of the acquisition was operating at a higher percent of capacity than were several of its largest competitors.[88]

[87] Both Mr. Spacek and Mr. McLucas further opined that it would be imprudent to commit Bowman's nonoperating assets to an attempt to rehabilitate Bowman (Tr. 1873, 1943, 1951), thus giving recognition to the availability of these resources for this purpose.

[88] In December 1965, Bowman's River Forest plant was operating at 76.81% of capacity (RX 8). Meadowmoor was operating at 70–75% of its capacity (Tr. 2772–3). Dean's Chemung plant was at 67% (Tr. 2772), and Ludwig was down to 57–66% of its capacity (Tr. 1731–1733).

Indeed, the significance of its River Forest modernization program in our view lies not so much in whether it can be concluded that it was or was not successful,[89] but rather in the fact that a company which the hearing examiner concluded was failing in 1965 was able to pour $1 million into the modernization of one of its plants in 1964 and 1965 when all of the factors on which the examiner based his conclusion as to its failing condition were operative in both 1964 and 1965 and indeed to a greater extent in 1964, when the modernization program was decided upon by management and put into effect.

We find it impossible in the state of the record to resolve the conflicting viewpoints of the parties as to whether in addition, as complaint counsel argues, Bowman could have itself sold off its home-delivery routes just as Dean did, and thus have cut its losses in Chicago.[90] We note only that at least such a sale alternative was open to Bowman.

Respondent answered that Bowman could not sell these routes because of the peculiarities of its union contracts, that in any event if Bowman had disposed of these routes, it would have been left with a high-capacity plant which would have increased, not decreased its unit cost of milk. Thus, while Dean was able to effect a multiplant consolidation with no increase in its unit cost, this alternative was not available to Bowman.

What is of significance on this issue of rehabilitation, which is a difficult issue of forecasting at best, is the fact that funds were clearly available to Bowman with which to maintain and improve its productive facilities—funds presumably generated in the past by the dairy operations[91] that Bowman's credit resources were excellent and its financial structure sound. It was not that Bowman could not have maintained and improved its operations but that it elected not to use its net income in that fashion. The owners of Bowman have and have had the funds to avert any eventual ruin. In this respect Bowman had a significant choice which is denied a truly failing firm.

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[89] The examiner was in error in his statement that the modernization of River Forest was completed in 1964 (I.D. 1182) and hence his conclusion that this program was shown to be unavailing as a rehabilitation step by Bowman's 1965 losses is unfounded. As we noted above, the program was probably successful in reducing Bowman's costs. We have also pointed out that it could not have influenced Bowman's decision to sell as Mr. Kullman suggested since that decision preceded the completion of the modernization. *Supra* p. 1222.

[90] Complaint counsel contended that according to respondent's *pro forma* statement, Bowman's Chicago business could have shown a profit of $303,000 if the retail and mixed routes in Chicago and the Cleveland facility were disposed of and that therefore what Dean did, Bowman could have and would have done and hence resolved its major business difficulties (C.B. 18, 19, 24, 25).

[91] See Tables II—VI, *supra* pp. 1273, 1279 and *infra* Appendices A and B.

Accordingly, we reject the hearing examiner's factual conclusions with respect to Bowman's "failing" condition.

The issue which must be determined, however, is whether in the light of all of the facts respecting Bowman's financial and business condition, Bowman would be regarded as a "failing company" within the meaning of the cases and whether the acquisition by Dean in the light of Bowman's condition had the probability of substantially lessening competition.

The hearing examiner stated that his reviews of the applicable statutory and judicial precedents led him to conclude that "the application of the 'failing company' doctrine does not require, as complaint counsel argue, that the seller be in actual bankruptcy, or even facing imminent bankruptcy." Rather in the examiner's view, the cases indicate that:

> a company, such as Bowman, suffering steadily declining sales and significant operating losses, with no hope of rehabilitation in the foreseeable future, is not compelled needlessly to dissipate its assets and to bring ruin upon itself, its employees and its stockholders before being permitted to sell but without fear of Section 7 violation. (I.D. 1160.)

We do not agree that the cases lay down any such test of failing company as is contended for by the examiner.

The failing company doctrine, as it was referred to in the Congressional reports and hearings [92] and as it has been developed and applied by the courts [93] proceeds on the notion that the challenged acquisition could not under any circumstances be regarded as having the probability of substantially lessening competition because the acquired company was in such financial condition that it could no longer be regarded as a competitor in any sense of the word, actual or potential. Thus, the Courts in sustaining this defense to amended Section 7 violations have described the failing

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[92] S Rep No. 1775, 81st Cong. 2d Sess. 7 (1950) ; HR Rep 1191, 81st Cong. 1st Sess. 6 (1949) ; Hearings on HR 2734 Before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong. 1st and 2d Sess. 79–81 (1950) ; HR Rep. No. 596, 80th Cong. 1st Sess. 5–6 (1947) ; Hearings on HR 515 Before Subcommittee No. 2 of the House Committee on the Judiciary, 80th Cong. 1st Sess. 1 (1947).

In *Brown Shoe Co.* v. *United States*, 370 U.S. 294,331 (1962), the Supreme Court explicitly recognized the intent of Congress to preserve the "failing company" doctrine of the *International Shoe* case.

[93] The landmark "failing company" decision is *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291 (1930), decided under Section 7 prior to its amendment in which the test of illegality was a lessening of competition *between* the acquired and acquiring companies. For a discussion of this case see Connor, "Section 7 of the Clayton Act: The 'Failing Company' Myth," 49 *Geo. L. J.* 84 (1960); for a general review of the failing company decisions prior to and subsequent to the *International Shoe* case, see Wiley, "The 'Failing Company'—A Real Defense in Horizontal Merger Cases," 41 *B.U.L. Rev.*, 495 (1961).

companies as "hopelessly insolvent" [94] or facing "imminent receivership" [95] and in rejecting the defense have described the companies as not being in "failing or bankrupt condition," [96] or as not facing inevitable termination of the business or dispersal of its assets.[97]

The Courts have indicated that the doctrine is not a *per se* defense [98] and most legal and economic commentators have stressed the need to weigh not only the condition of the acquired company but also the impact of its acquisition—even in a failing condition—on the market as well as the alternative of permitting a dispersal of its assets outside the industry.[99]

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[94] *Maryland & Virginia Milk Producers Association* v. *United States*, 167 F. Supp. 799, 808 (D. D.C. 1958) *aff'd.*, in part and *rev'd.* in part, 362 U.S. 458 (1960).

[95] *United States* v. *Diebold, Inc.*, 197 F. Supp. 902 (S.D. Ohio 1961), *rev'd* because the Supreme Court did not agree that issue could be resolved on summary judgment, 369 U.S. 654 (1962).

[96] *Crown Zellerbach Corp.* v. *Federal Trade Commission*, 296 F. 2d 800 (9 Cir. 1961).

[97] *Erie Sand & Gravel Co.* v. *Federal Trade Commission*, 291 F. 2d 279, 280 (3 Cir. 1961).

[98] For a review of the cases from this point of view, see Connor, "Section 7 of the Clayton Act: The 'Failing Company' Myth," 49 *Geo. L. J.* 84, 91–95 (1960). Connor points out that the failing company doctrine "grew up" in the Sherman Act rule of reason context and notes in this connection the fact that the Supreme Court in *International Shoe* concluded that the lessening of competition was not "unreasonable" and that the two decisions preceding it (*American Press Assn.* v. *United States*, 245 Fed. 91 (7 Cir. 1917), and *United States* v. *United States Steel Corp.*, 251 U.S. 417 (1920)), had both considered the issue in the context of balancing the injury to the public and the reasonableness of the alleged competitive restraint.

In *International Shoe*, the Supreme Court, in finding as an alternative holding to its conclusion that competition had not been lessened "between" the acquired and acquiring companies, that the acquired company was failing, was careful to point out not only that the company was failing but also that such failure would result in "loss to its stockholders and injury to the communities where its plants were located," that its acquisition by International Shoe had not been with a purpose of lessening competition, and finally that the acquisition had the effect of "mitigating seriously injurious consequences otherwise probable" (280 U.S. at 303).

In *Erie Sand & Gravel Co.*, v. *Federal Trade Commission*, 291 F. 2d *supra* at 280 (3 Cir. 1961), the Court held that the proper approach to a determination of the issue would involve a balancing of the injuries which might occur to all of the various adverse interests involved, such as the adverse effects on competition as well as on the community, the creditors, the owners and employees of the acquired company and the economy in general.

[99] Bok, "Section 7 of The Clayton Act and The Merging of Law and Economics" 74 *Harv.L. Rev.* 226, 340, 345 (1960) ; Hale & Hale, "Failing Firms and the Merger Provisions of the Antitrust Laws," 52 *Ky.L.J.* 597 (1964); Note, "Horizontal Mergers and the 'Failing Firm' Defense Under Section 7 of the Clayton Act: A Caveat," 45 *Va. L.Rev.* 421 (1959) ; Sotiroff, "Federal Antitrust Law—Mergers—An Updating of the 'Failing Company' Doctrine in the Amended Section 7 Setting," 161 *Mich. L.Rev.* 566 (1963). Mr. Sotiroff listed the following situations in which the acquisition of a failing company could have anticompetitive effects:

"(a) It would enable a dominant firm to move quickly and cheaply into a new market by acquisition of a failing company where, but for the doctrine, the transaction would be in violation of Section 7.*

(b) By increasing the acquiring firm's capacity to fill orders which it would otherwise be unable to accept, the company could strengthen its position in the market and prevent competitors from handling the overflow of business that would otherwise result.*

(c) By removing productive facilities from the market a potential entrant might be forestalled from entry since he would face the increased cost of building new facilities and having these new facilities swell the total productive capacity of the market.

(d) The acquiring firm would probably obtain less of the business of the defunct company if

In *International Shoe Company* v. *Federal Trade Commission*, 280 U.S. 291 (1930), the acquired company had been unable to pay its debts, had a deficit of over $4 million and was insolvent in the bankruptcy sense of the word. Likewise, in none of the subsequent cases in which the acquisitions otherwise in violation of Section 7 were nevertheless permitted because the acquired company had been regarded as failing involved companies which enjoyed the overall debt free and healthy financial position which Bowman enjoyed in 1965.[100] In *Maryland & Virginia Milk Producers Association* v. *United States*, 167 F. Supp. 799 (D. D.C. 1958), *aff'd* in part and *rev'd* in part 362 U.S. 458 (1960), one of the acquired companies was stated to be "hopelessly insolvent and deeply in debt" and the other as being "in fact on the brink of bankruptcy." In *United States* v. *Diebold*, 197 F. Supp. 902 (D.C. Ohio 1961), the District Court granted summary judgment against the government in its Section 7 suit because of its conclusion that the acquired company was in a "precarious financial condition," was hopelessly insolvent and was faced with imminent receivership, had a net overall deficit on all bank accounts of more that $35,000, past due trade bills in excess of $244,000, currently due trade bills of nearly $500,000, and operating loss of more than $200,000 in the immediate preceding period of less than three months, consistent difficulties over the years in raising capital and a working capital ratio of .03. The Court also concluded that the defendant was the only bona fide prospective purchaser. Yet even on these facts, the Supreme Court reversed because of its view that these facts were susceptible to several inferences and should not be determined on a motion for summary judgment. 369 U.S., 654 at 655, (1962).

Moreover, the Courts have consistently refused to regard companies as failing merely because they were encountering a decline in earnings and profits.[101] Similarly the fact that a company was

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the latter experienced total business collapse than if it effectively stepped into the shoes of the failing company and appropriated the remaining good will plus valuable customer lists, price data and other important business information.

(e) Of increasing importance, a large enterprise could vertically integrate by purchasing a failing company and thereby eliminate customer of or supplier to other competitors, depending on whether the integration was backward or forward, respectively, which might result in a substantial lessening of competition in the relevant market.

(f) Such an acquisition might give the acquiring firm an increased percentage of the market and increased market dominance, which has in itself been viewed as an undesirable result." (**Id.* at pp. 577–78; *footnotes omitted from quotation).

[100] For an excellent summary and analysis of the factors taken into account by the courts in evaluating the failing company defense, see Wiley, "The 'Failing Company'—A Real Defense in Horizontal Merger Cases" 41 *B.U.L.Rev.* 495 (1961).

[101] This was the express holding of the Court in *United States* v. *Joseph Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal. 1966), in which the sole fact introduced to show that the acquired

suffering from poor and inadequate management and had obsolete equipment was not enough to warrant its being regarded as failing even though refinancing and rehabilitating it was "not an easy task." [102]

Similarly Courts have refused to give weight to the fact that the acquired company desired to liquidate or sell if in fact the company was still a going concern and could not be regarded as failing.[103]

No Court has ever been willing to look at a company's operating experience isolated from its overall financial soundness, and form a judgment as to the solvency of the company. Indeed, it is the company's financial resources which in many cases plays the more significant role in the Court's determination as to whether the company is failing or not.[104] Similarly, in *Farm Journal,* 53 F.T.C. 26 (Docket 6388, 1956), a decision which was not appealed, the Commission refused to imply insolvency of a respondent which had shown an overall profitability because of the consistent business losses suffered by one of its operating enterprises.[105]

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firm was failing was that the "sales and profits were declining" at the time of the acquisition. The case was affirmed per curiam by the Supreme Court on November 7, 1966. (35 U.S. L. Week 3161.) See also Mr. Justice Stewart's dissent in *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 297–98 (1966), in which he specifically states that Shopping Bag, the acquired firm, was not a failing company within *International Shoe* even though it suffered from the lack of qualified personnel and that although its overall sales had been increasing, its earnings and profits were declining.

[102] *Crown Zellerbach Corp.* v. *Federal Trade Commission*, 296 F. 2d *supra* at 831–32.

[103] *Crown Zellerbach Corp.* v. *Federal Trade Commission*, 296 F.2d *supra* at 831–32; *Erie Sand & Gravel Company* v. *Federal Trade Commission*, 291 F.2d *supra* at 380–81.

[104] An absence of current liquidity was stressed as indicating a failing condition in *International Shoe* in which the company owed $15 million to banks and $2 million on current accounts. In *Diebold*, the District Court sustaining the defense pointed out that the company had past due bills amounting to $500,000. In *Maryland and Virginia Milk Producers*, where the defense was accepted, the companies were indebted to acquiring company for over $300,000. In *Farm Journal*, 53 F.T.C. 26 (Docket 6388, 1956), where the defense was rejected, the company had no bank indebtedness.

In *Crown Zellerbach* v. *Federal Trade Commission*, 296 F.2d *supra* at 831–32, the Court stressed in its conclusion that St. Helens was not failing, that the fact the company had assets of over $15 million and a net worth of over $9 million; its annual net sales in a 9-year period had increased from over $5 million to over $9 million and its annual net income had increased from $350,000 to almost $640,000.

Similarly, the Courts have looked to see whether or not dividends had been regularly paid. In *International Shoe*, dividends of the acquired company's preferred stock had been suspended. In *Crown Zellerbach* and in *Farm Journal*, where the defense was rejected, the acquired firms had paid dividends regularly.

[105] Respondent purchased all interest in *Country Gentleman*, published by Curtis, which in the 45 years in which it had been published had showed losses in all but 12 years, and in the 3 years preceding the merger, its losses were $1.7 million, $1.6 million and $2.5 million. Curtis itself had earned an overall net profit of $4 million. The examiner held that the merger could not be regarded as involving a failing company or enterprise pointing out that:

"Respondent must have been well aware that Curtis *with its healthy surplus* could have, and might have, failing sale, 'modernized'; and well aware that it might also find a purchaser in some competitive farmer publication." (53 F.T.C. 48, emphasis added.)

According to the examiner and respondent's view of the case law respecting failing company, it is sufficient to establish a company as failing merely to show that the firm is "suffering steadily declining sales and significant operating losses, with no hope of rehabilitation within the foreseeable future" (I.D. 1160, 1166) and that it will face "eventual ruin" unless these losses are eliminated (I.D. 1199).

We do not believe the cases support this view of the law although we should add parenthetically here that even under this view of the case law, Bowman was not suffering "significant operating losses" nor facing a hopeless future with no rehabilitation possible and only eventual ruin staring it in the face.[106]

In essence respondent's failing company argument is an incipiency argument. The Supreme Court has never accepted the doctrine as embracing incipient failures. Indeed, were it to do so, it could be posited that companies desiring to merge would have a ready tool by which to nullify the reach of Section 7. The significance of the *International Shoe* test is that it is premised on a business condition which could not easily be artificially produced by a company desiring to sell out to a competitor. We do not believe that either Congress or the Courts intended that the failing

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[106] The cases which respondent places primary emphasis on in support of its interpretation of the law do not in our judgment outweigh or change the force of the Supreme Court and other decisions in this field which we have cited above.

Three of these cases were not decided even under amended Section 7. *American Press Ass'n.* v. *United States*, 245 Fed. 91 (7 Cir. 1917) (Sherman Act §1); *Beegle* v. *Thomson*, 138 F.2d 874 (7 Cir. 1943), *cert den.* 322 U.S. 743 (1944) (pre-1950, Clayton Act §7); *Northwest Airlines* v. *Civil Aeronautics Board*, 303 F.2d 395 (D.C. Cir. 1962) (Federal Aviation Act §408). Each of these cases was decided under different statutory provisions with standards of legality quite different from Section 7 of the Clayton Act as amended. As the Supreme Court observed in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 318 (1962):

"Congress rejected, as inappropriate to the problem it sought to remedy, the application to §7 cases of the standards for judging the legality of business combinations adopted by the courts in dealing with cases arising under the Sherman Act, which may have been applied to some earlier cases arising under original §7."

The other two cases relied upon, *United States* v. *Ling-Temko Electronics, Inc.*, 1961 CCH trade cases 78, 621 (N.D. Tex. 1961); and *United States* v. *Gimbel Bros.*, 202 F. Supp. 779 (D. Wisc. 1962), do not, as respondent contends, change the tests by which a failing company shall be identified. Indeed, in *Ling-Temko*, the Court was basically moved in its conclusion that the acquisition did not offend against the Clayton Act by the fact that the companies did not directly compete with each other. The Court pointed out that with the business reversals which both companies were suffering, "[they] were faced with the problem of having to compete with much larger competition at a time when weapon systems were becoming even more complex and costly. Neither company had sufficient financial strength, plant facilities or depth of personnel to compete effectively for prime missile contracts and they did not have a realistic opportunity to develop the strength they needed to make them effective competitors in the future" (p. 78,640).

United States v. *Gimbel Bros.* did not involve any final decision on the merits but simply a refusal by the District Court to grant the government's request for a preliminary injunction based *inter alia* on the fact that the acquisition did not appear to have reduced competition in a market which was vigorously competitive and that the acquired company's business had been declining and some of its stores did not appear to be in a "healthy condition."

company doctrine should be expanded as respondent urges us to do here to take in companies which are simply experiencing business reverses.

We find that this is the most which can be said about Bowman's condition at the time of its acquisition by Dean. We also find that even if Bowman's condition were regarded as approaching more serious dimensions, its acquisition by Dean nevertheless still had the prohibited anticompetitive impact.

Bowman was a substantial market factor both in Chicago where it ranked first and in the midwestern area generally. As Bok pointed out:

> When the acquired firm is large . . . it becomes more important in the interest of competition not to permit the acquisition if in fact the company can be rehabilitated in some way. At the same time, the assumption that competition cannot be affected by transferring the assets to an even stronger firm becomes increasingly open to question. Hence, as the magnitude of the acquisition increases, a graver likelihood of business failure seems necessary to justify the exception if we are to give expression to all of the interests of concern to Congress.[107]

It can hardly be said that the condition of Bowman in 1965—however denominated—did not afford Dean any competition or that it was probable that in the foreseeable future it would cease to afford Dean competition. Taking Chicago alone, Dean was engaged exclusively in the wholesale sector of the Chicago market. Bowman had about 10% of that market. Bowman's customers might have been ripe targets for Dean's competition in the circumstances of its projected loss of its Jewel account. Instead of engaging in such competition with all of its possible consequences on the overall price structure of this market, Dean chose in effect to purchase Bowman's customers instead, thus reducing the possibility that other competitors in the market could successfully bid for these Bowman customers even assuming Bowman was going out of business.

The very fact that the causes of Bowman's reverses were not "indivisible" involving economies of scale about which little could be done tends also in our view to militate against the permanent gravity of Bowman's condition.[108]

We therefore conclude on the basis of the facts and the law that Bowman was not a failing company and that its acquisition

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[107] Bok, *supra*, 74 *Harv. L. Rev.* at 343.

[108] For discussion of this aspect of a company's ills, see Hale and Hale, *supra* 5 *Ky. L.J.* at 603.

by Dean had the probability of substantially lessening competition in each of the Chicago relevant markets.[109]

V

3. The Section 5 Charge and Liability of Bowman under Section 7

The complaint charged that in addition to violating Section 7 of the Clayton Act respondents had also violated Section 5 of the Federal Trade Commission Act. Paragraph Twenty-Four of the complaint alleges *inter alia* that:

> the contract and combination by which Dean and Bowman undertook to eliminate the independent competition of Bowman is an unreasonable restraint of trade in commerce and may hinder, or have a dangerous tendency to hinder, competition unduly, thereby constituting an unfair act and practice in commerce, in violation of Section 5 of the Federal Trade Commission Act.

In its answer Dean simply entered a general denial to this charge and did not discuss this aspect of the case in its brief on appeal extensively beyond its assertion that Section 5 of the Federal Trade Commission Act cannot be used to "outlaw mergers not condemned by Section 7" and that the hearing examiner was correct in his dismissal of the complaint's charges of violation of these two statutes (Resp. Br. on Appeal, p. 48).

Bowman, on the other hand, has consistently denied any violation of either statute, contending that:

> there is no authority in the Clayton Act or the Federal Trade Commission Act for the Federal Trade Commission to proceed against a company whose assets have been acquired by another or to direct any relief against such company (Bowman's Ans., p. 7).

On July 7, 1966, Bowman moved the hearing examiner to dis-

[109] In reaching this conclusion we have taken into consideration the testimony of the 14 industry witnesses (owners of small dairies and representatives of retail food chains) called by respondent reflecting their estimates of the competitive impact of this acquisition based on their own experience in and knowledge of the industry and also the losses in Bowman's business which Dean suffered in the first quarter following the acquisition. However, the cases indicate that this evidence should be accorded only limited probative effect and in any event it does not in our judgment outweigh the impact of the other evidence in the record as to the anticompetitive effects of the acquisition. See *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), where the Court declared that testimony by members of an industry with respect to the substantiality of the effect of a merger upon competition was "entitled to little weight." See also *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966), where industry testimony that competition had not been impaired by the merger was disregarded by the Court in its decision. Short-term market dislocations resulting from acquisitions can be expected and furnish little reliable guidance as to the long-lasting effects of these acquisitions, or, in this case, of Bowman's business condition. See generally *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592, 598.

miss the case as to it and on July 8, 1966, the final day of the hearings, the examiner granted Bowman's motion with the following statement:

After giving due consideration to the record in this case, the memorandum submitted by counsel with reference to the motion to dismiss, the Hearing Examiner is of the opinion that it would not be proper to enter any order against the respondent, Bowfund. Therefore, he will dismiss the complaint insofar as it pertains to Bowfund (Tr. 2694).

Thereafter Bowman made the same motion to the Circuit Court which motion was denied by order entered on July 19, 1966. In his initial decision the examiner made the statement that "Bowfund called no witnesses in connection with its defense, but its counsel did actively participate throughout the hearings" (I.D. 1157). The examiner, however, gave no reasons for his decision to dismiss Bowman except insofar as he concluded that the acquisition did not violate either Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act.

In their appeal from the examiner's initial decision, complaint counsel claim that Bowman was properly joined in these proceedings since the Federal Trade Commission Act empowers the Commission to prevent corporations from using unfair methods of competition in commerce and unfair and deceptive acts or practices in commerce. "Bowfund was a party to the violation charged in the complaint," counsel argues, "and is thus a proper party in these proceedings" (Compl. Counsel's Br. on Appeal, p. 44). In support of this argument complaint counsel contends that the contract and combination between Dean and Bowman results in "the elimination of significant actual and direct competition between Dean and Bowman" and that such elimination of competition violates Section 5 of the Federal Trade Commission Act, both as a violation of Section 1 of the Sherman Act and independently under the rule set forth in *Federal Trade Commission* v. *Brown Shoe Company,* 384 U.S. 316 (1966); and *Atlantic Refining Co.* v. *Federal Trade Commission,* 381 U.S. 357 (1965). Finally, complaint counsel argues that fully adequate relief in this proceeding requires the participation by Bowman as a party.

In its answering brief, Bowman argues that its dismissal as a party respondent by the examiner was proper because there is no jurisdiction under Section 5, "where, as here, the Commission has been specifically authorized to proceed" against mergers under Section 7 of the Clayton Act, and because the contract does not violate the Sherman Act because there is no "showing of an ac-

tual adverse effect on competition of the magnitude required by the Sherman Act" (Bowman Br. on Appeal, pp. 6–7). Bowman's contentions with respect to the propriety of holding it under Section 7 are integrally related to its arguments respecting the infeasibility and invalidity of the order which counsel seeks and will be considered below in that connection.

We agree with the hearing examiner and with Bowman that Bowman was not a proper party to the Section 7 charge and that the complaint should be dismissed as to Bowman with respect to this charge.

Section 7 of the Clayton Act provides in part that "no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation also engaged in commerce, where * * * the effect of such acquisition * * * may be substantially to lessen competition, or to tend to create a monopoly." It is clear under the language of this section that the Clayton Act prohibition was directed solely against the acquiring companies and did not encompass the activities of the acquired company.[110]

We do not agree with respondent Bowman, however, that the purchase agreement which it entered into with Dean did not constitute a violation of Section 5 of the Federal Trade Commission Act and hold that the hearing examiner was in error in his dismissal of the complaint against Bowman on this charge, and that the purchase agreement constituted a violation of Section 5 of the Federal Trade Commission Act by both Dean and Bowman.

We have found no case holding that a transaction which violates one statute cannot at the same time violate another statute. Indeed, it is settled that a contract may be in violation of both Section 1 of the Sherman Act and Section 3 of the Clayton Act. *International Salt, Inc.* v. *United States,* 332 U.S. 392 (1947).

Section 5 of the Federal Trade Commission Act has specifically been held to encompass any act which may violate Section 1 of the Sherman Act as well as activities which might not have developed into the magnitude of Sherman Act violations. *Federal Trade Commission* v. *Brown Shoe Co.,* 384 U.S. *supra* at 321; and *Atlantic Refining Co.* v. *Federal Trade Commission,* 381 U.S. *supra* at 451–53.

[110] We are aware of the Courts' statements in *United States* v. *E. I. duPont, et al.,* 177 F. Supp. 1 (N.D. Ill. 1959), *reversed* on other grounds, 366 U.S. 316 (1961); and *United States* v. *Pabst Brewery Co., et al.,* 183 F. Supp. 475 (E.D. Wisc. 1960), to the effect that a violation of Section 7 is not a prerequisite to holding the acquired company for purposes of relief. These decisions would seem to indicate that the issue of liability of the acquired company under Section 7 is a moot one. See discussion *infra,* at pp. 1293–1294.

The Supreme Court stated in *Federal Trade Commission* v. *Brown Shoe Co.*, 384 U.S. 316, 320 (1966):

> * * * [T]he Commission has broad powers to declare trade practices unfair. This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policy of the Sherman and Clayton Acts even though such practices may not actually violate these laws.

Since mergers which have the requisite effect upon competition are in violation of Section 7, it necessarily follows that an agreement to effect such a merger must conflict with the basic policies of the Clayton Act and therefore is in violation of Section 5 of the Federal Trade Commission Act. We have found that the acquisition does in fact violate Section 7 and we are unaware of any case that holds that such a ruling prevents the same act from violating Section 5 of the Federal Trade Commission Act.

In *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1091–1092 (Dkt. 6495, 1962) and *Beatrice Foods Company*, 67 F.T.C. 473, 727, 731, we indicated, although did not find it necessary to hold, that a series of acquisitions may violate Section 5 of the Federal Trade Commission Act, whether or not the individual acquisitions violate Section 7 of the Clayton Act. Moreover, in our *Beatrice* decision we specifically held that a violation of Section 5 could be properly charged against a company engaged in a merger prohibited under Section 7 where that company was not subject to Section 7 under the terms of the statute. Thus, for example, Section 7 speaks only of corporation and does not extend to persons and partnerships. Concluding that the failure to include persons and partnerships was not deliberate on the part of Congress, the Commission stated at page 726:

> Applying Section 5 to non-corporate acquisitions effectuates, rather than circumvents or conflicts with, Congress' policy with respect to the prevention of anticompetitive acquisitions.

The reasoning behind this decision is directly relevant to the case at hand. There is no evidence that Congress deliberately omitted the acquired corporation from the reach of Section 7 of the Clayton Act. It is also clear that in proper circumstances the application of the law to the acquired corporation would effectuate rather than circumvent or conflict with the public policy sought to be effecuated by Congress in enacting the Section. Accordingly, we believe that Section 5 is the proper statute under which to charge an acquired corporation where the acquisition substantially lessens competition.

The Second Circuit sustained a similar concept of the supplementary reach of Section 5 in *Grand Union* v. *Federal Trade Commission,* 300 F. 2d 92 (2nd Cir. 1962) when the Court held that Section 5 can be invoked to enjoin the inducing of a promotional allowance by purchasers which Section 2(d) of the Robinson-Patman Act condemns insofar as the payment of these allowances by the sellers are concerned. Just as the Clayton Act in that case was used as a basis for holding the *purchaser* and recipients of these allowances in violation of Section 5 for inducing their payment which was specifically aimed at the payment of promotional allowances by *sellers,* so here Section 5 may be used to hold the selling corporation in violation of the Federal Trade Commission Act even though the Clayton Act only specifically covers the purchasing corporation.

In conclusion, therefore, we hold that Bowman was properly made a party to this complaint insofar as a violation of Section 5 was charged and we hold that the purchase contract which it entered into with Dean was in violation of Section 5 of the Federal Trade Commission Act.

Accordingly, we hold that the respondents Dean and Bowman violated Section 5 of the Federal Trade Commission Act and that responent Dean violated Section 7 of the Clayton Act.

We now turn to the form of order which should be entered in this case.

VI

THE ORDER

Complaint counsel has suggested a form of order which would require Dean to divest the assets acquired from Bowman within three months of the effective date of the order and if the divestiture has not been completed by such date, Dean and Bowman are each to submit a plan for rescission of the purchase agreement "to the end that Bowman be restored as a viable regional dairy business." The order proposed by complaint counsel further provides that under the plan to be submitted a new corporation known as "New Bowman" would be formed to which Dean would contribute the assets required to be divested and Bowman would contribute "sufficient cash and cash equivalents to provide New Bowman with an adequate working capital (not less than a ratio of two to one)." In return, Dean and Bowman would receive capital stock in the new corporation "in relation to the value of their respective contributions and would be required to pass this stock

through to their stockholders. Finally, the proposed order of counsel would require Dean to obtain the prior approval of the Commission before consummating further mergers in the dairy industry within 10 years after the order becomes effective.

Complaint counsel contend that rescission of the purchase agreement and the creation of a new corporation, in the event of Dean's inability to effect a sale to a third party within three months, is necessary to restore the *status quo* in the industry. They argue:

> The purpose of this proceeding is to pry open markets that have been affected by illegal restraints. If the decree accomplishes less than that, the government has won a lawsuit and lost a cause (Complaint Counsel's Brief on Appeal, p. 53).

Their position is that since Bowman has retained all the cash and cash equivalents of the original Bowman company, it must bear a share of the burden in re-creating the older corporation.

Both Dean and Bowman contend that their shareholders should not be required to acquire stock in a corporation which they claim cannot survive in the dairy business. Bowman further submits there is no legal precedent for the entry of an order against the acquired company in a merger action and that the sale of Bowman's retail milk routes, loss of their customers and departure of key Bowman personnel has so changed the business that it would be "grossly punitive" to require Bowman stockholders to take back the business.

The threshold issue is whether the Commission has legal authority to issue an order which grants relief against a firm acquired in violation of Section 7 of the Clayton Act. We think it clear that the Commission does have this authority, which derives not only from Bowman's liability for violating Section 5 of the Federal Trade Commission Act, but also from the Commission's power as an equitable body to administer forms of relief that will fully effectuate the goals of the statute which it enforces. It is established that:

> * * * in a proceeding under Section 7 of the Clayton Act in which it has been found that the acquisition of stock by one corporation in another violates the statute, a court of equity has power to grant such relief against the corporation whose stock has been acquired as may be necessary and appropriate in the public interest to eliminate the effects of the acquisition which have been held to be offensive to the statute.

United States v. *E. I. duPont deNemours & Co., General Motors Corporation, Christiana Securities Company, and Delaware Re-*

alty and Investment Corporation, 177 F. Supp. 1 (N.D. Ill. 1959), *reversed* on other grounds, 366 U.S. 316 (1961).

The facts in *United States* v. *Pabst Brewing Co., Schenley Industries and The Val Corp.*, 183 F. Supp. 475 (E.D. Wisc. 1960) (a preliminary motion; final decision 233 F. Supp. 475 (1964) *reversed*, 384 U.S. 546 (1966)), are similar to the facts in the instant case. In that case, after the sale of its operating assets and business to Pabst, Blatz changed its corporate name to The Val Corporation and was dissolved, and its net assets were distributed to Schenley. Schenley and Val (Blatz) filed motions for summary judgment of dismissal as to them. Denying the motion, the Court pointed out that "in a proceeding under § 7 of the Clayton Act, the Court has authority to grant relief not only against parties who are found to have violated that section, but also against other parties if such relief is necessary to eliminate the effects of an acquisition offensive to the statute."

We conclude that these cases amply support the Commission's authority to enter appropriate relief against Bowman. We see no merit in Bowman's argument that it would be unfair or inequitable for it to be required to participate in the restoration of Bowman as an operating entity. Bowman made its decision to proceed with the merger after the Commission had issued its complaint charging that the acquisition was illegal and that Bowman was liable under the provisions of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. Having determined to proceed with the sale under these circumstances, Bowman is in no position to assert that it should be absolved of all responsibility for the injury to competition which its sale has effected.

Nevertheless, in the circumstances of this case, taking note of the arrangement between the parties under which Bowman has agreed to reimburse Dean for one-half of any loss incurred by Dean in disposing of the Bowman assets up to one million dollars (*supra*, p. 1249) we have determined that there is no necessity for issuance of an order against Bowman, since adequate relief may be obtained against Dean.

We reject Dean's contention that it would be "infeasible" for it to divest the assets and "impractical" to transfer Bowman's assets to a new corporation (Dean's Br. on Appeal, p. 49). The effect of Dean's argument is that it should be released from all obligations under the order and be permitted to enjoy the fruits of its illegal acquisition. This is not an acceptable argument or re-

sult which we will countenance particularly in the light of the preliminary injunction which was granted in this case to forestall just such an eventuality.

However, while the changes which have occurred since the acquisition do not appear to have been of such a character that the Bowman company as such could not, with adequate funds, be restored as an independent and viable entity in the dairy business, we are not convinced at this stage in the proceeding that the spin-off company solution suggested by complaint counsel is necessary in order to undo and redress the lessening of competition in which Dean's acquisition of Bowman resulted. In view of the strenuous objections by Dean to the spin-off solution, we will afford it the opportunity to render such a solution unnecessary through the sale of the assets acquired from Bowman to a purchaser acceptable to the Commission. For this purpose we are providing that Dean have a full year, instead of the three-month period proposed by complaint counsel, in which to effect such a divestiture.

If after one year Dean has failed to effect a complete divestiture of Bowman as a going concern to a purchaser approved by the Commission, Dean shall submit a plan which will effectuate prompt divestiture which might encompass (1) the transfer of additional assets of Dean to be combined with or used in connection with the former assets of Bowman so as to make these assets saleable and usable as a going concern in the dairy industry and the extension of sufficient credit to a potential purchaser to enable him to purchase the business; or (2) creation of a new corporation which would restore Bowman as an independent going concern in the dairy industry.

Finally, we have adopted complaint counsel's proposal that there be a ten-year ban on further acquisitions by Dean in the dairy industry. This prohibition is similar to the restrictions which have been placed upon other leading companies in the industry: *Beatrice Foods Company* (Dkt. 6653; final order issued December 10, 1965) [68 F.T.C. 1003]; *Foremost Dairies, Inc.* (Dkt. 6495; modified order issued March 5, 1965) [67 F.T.C. 282]; *Borden Company* (Dkt. 6652; consent order issued April 15, 1964) [65 F.T.C. 296]; and *National Dairy Products Corp.* (Dkt. 6651; consent order issued January 30, 1963 [62 F.T.C. 120].

These orders have been issued to implement one of the major objectives of the Commission in enforcing Section 7 in the dairy industry: to arrest the trend in the industry of growth by merger

and acquisition through which the nation's largest dairies have attained positions of dominance.

Dean has announced plans calling for:

> Expanding and strengthening fresh milk distribution in markets within the general midwestern area in which the company now operates. This will be accomplished both by acquisition and by our own marketing efforts. (CX 10G. Also see CX 11F, CX 12E, CX 42E.)

During the period since 1960, Dean has acquired six formerly independent dairy businesses in the Midwest, of which three were acquired since April 1965. It appears clear to us that, unless restrained, Dean will continue to acquire dairy firms, in violation of Section 7 and its basic policy and purpose.

CONCLUSIONS

1. The Commission has jurisdiction to proceed against the acquisition challenged in this proceeding. Respondents Dean and Bowman were engaged in commerce within the meaning of the Clayton and Federal Trade Commission Acts at the time of the acquisition.

2. The appeal of complaint counsel is granted to the extent indicated herein. We have set aside the initial decision of the hearing examiner in its entirety. These Findings, Conclusions and Opinion shall constitute the findings of fact and conclusions of the Commission.

Commissioner Elman dissented and has filed a dissenting opinion.

APPENDIX A

TABLE III

Bowman Dairy Company and Subsidiaries Net Income (or Loss) Before Taxes for the Years ended December 31, 1960–1965

Year	Bowman Dairy-Chicago	Other Dairy Operations [1]	Total Dairy Operations	Other Income (Net)	Consolidated Net Income (Before Taxes)
1960	($197,459)	$616,326	$418,867	$164,196	$583,063
1961	(678,127)	551,250	(126,877)	(300,442) [2]	(427,319)
1962	(618,315)	704,509	86,194	168,097	254,291
1963	(617,841)	673,715	55,874	232,667	288,541
1964	(1,571,989)	872,501	(699,488)	1,046,249 [3]	346,761
1965	(1,015,270)	759,802	(255,469)	97,307 [4]	(158,161) [5]
Total	(4,699,001)	4,178,103	(520,899)	1,408,074	887,176

( ) Denotes Loss.

[1] Substantially all of these operations are located outside of Chicago.

[2] This loss is caused by a capital loss of $260,645 on the sale of a bottling plant that was closed in 1960 (Tr. 2682) and a $200,000 provision for possible additional losses on sales of nonoperating properties (i.e., operating properties that have been shut down).

[3] The figure includes a capital gain of $783,415 from the sale of the head office land and buildings in Chicago and a capital loss of $89,894 on other properties.

[4] The figure includes a capital loss of $219,026 (RX 9–d), apparently on the sale of the State Street plant, the Wabash Street garage, and property at the Yards sales division and the South sales division (CX 28-p).

[5] This figure does not include $256,000 which represents the difference between the charges to income for pension expenses and contributions made in 1964 and 1965 (RX 9–g). This charge was allocated to Bowman-Chicago and to the subsidiaries on an approximate 4 to 1 basis (CX 97–f). The effect of the decision to withhold the contribution is to make the loss of the Chicago operation and of the consolidated net income less than it would otherwise be and to make the profits of the subsidiaries larger than they would otherwise be.

Source: 1960 (CX 28–g); 1961 (CX 28–f; 95–e); 1962 (CX 28–e); 1963 (CX 28–d); 1964 (CX 28–c); 1965 (RX 9–d,e).

APPENDIX B

TABLE V.—*Profit Record of Bowman Subsidiaries*

	Net Income Before Taxes					
	1960	1961	1962	1963	1964	1965
Bowman Dairy Sales Co.	115,184	130,281	24,056	61,686	134,211	189,496
Bowman Dairy Co. of Ohio						
Columbus Div.	80,440	44,377	149,545	173,629	173,661	184,672
Cleveland Div.	(20,670)	(19,859)	(14,382)	(33,649)	(50,192)	(59,407)
Bowman Dairy Co. of Indiana						
New Albany Div.	(73,406)	(3,792)	38,584	(8,096)	12,315	11,104
Terre Haute Div.	38,957	(23,746)	(39,887)	46,008	48,232	46,444
Progressive Dairy Products Co.	22,066	27,297	81,023	98,846	168,608	145,760
Sealrich Dairy Co.	67,594	35,262	4,540	8,760	(13,792)	(62,159)
Iowana Farms Milk Co.	118,481	132,278	146,711	70,592	181,484	102,454
Ranney's Dairy, Inc.	40,187	42,388	(9,844)	26,675	7,637	(15,747)
Cremix Co.	74,741	120,091	99,437	83,043	88,245	114,188
Forest Milk Co.	158,902	141,133	185,391	128,329	100,955	78,851
Deerfield Creamery Co.	17,361	(16,303)	83,904	35,072	39,120	108,152
Frosty Products Distributors, Inc.	--	--	--	--	--	--
Marwyn Dairy Products Corp.[1]	(74)	(54)	--	--	--	--
Parade Products, Inc.[2]	--	--	--	(12,075)	(3,576)	(17,320)
Source:	CX 28–g	CX 28–f	CX 28–e	CX 28–d	CX 28–c	CX 102

[1] Inactive with no sales from 1960 on.
[2] Parade Products, Inc. became operative in 1963.

DISSENTING OPINION

NOVEMBER 14, 1966

BY ELMAN, *Commissioner:*

The circumstances of this case are special and unusual. I regret to find myself in disagreement with my colleagues. For the reasons stated below, I would dismiss the complaint.

I

On the merits this is a borderline case. It is by no means clear that the effect of this merger "may be substantially to lessen competition," in violation of Section 7. Conceding at the outset that Dean's acquisition of Bowman was *prima facie* unlawful under recent Supreme Court decisions, respondents attempted to rebut the presumption by introducing evidence showing the actual and probable competitive effects of the merger. After considering all the evidence in the record, the hearing examiner found that respondents had succeeded in this effort. He concluded, upon the basis of detailed and extensive findings of fact, that competition in the relevant geographic and product market—the sale of packaged milk in the Chicago area—was not, and was not reasonably likely to be, substantially lessened as a result of the merger. That conclusion seems to me to be amply supported by the record. With all deference to the majority, I have not been persuaded that the examiner erred in his appraisal of the evidence and that his findings of fact should be set aside.

Analysis must begin—and surely does not end—with the fact that at the time of the acquisition Dean had 8.3% and Bowman 11.3% (for a combined share of 19.6%) of the Chicago area packaged milk market (I.D. 1211).[1] As respondents point out, how-

[1] As was found by the examiner on the basis of the facts of record (I.D. 1171–1177), and as was stated in the Commission's brief in the Supreme Court (p. 31), "There appears to be no dispute that packaged milk is the relevant line of commerce and the Chicago area the relevant section of the country in which to test the competitive effects of the acquisition." The Commission now constructs a new and separate line of commerce, "the wholesale milk submarket in Chicago." The complaint contains no reference to the existence of any such "submarket." Paragraph 24 of the complaint, describing the alleged competitive effects of the merger, likewise makes no mention of a "wholesale submarket." As the record clearly demonstrates (I.D. 1174, 1181; Policka, Tr. 431, 462, 472–73; Quinlan, Tr. 607, 626–28, 636; Oberweis, Tr. 1515–17, 1522; Kraml, Tr. 1689–91; Ludwig, Tr. 1710–12; Schaub, Tr. 1765–66; Esmond, Tr. 1595–1600, 1602–04; Kullman, Tr. 1620–21, 1658; CX–71), there is no economically distinct "wholesale submarket" of packaged milk in the Chicago area, and it is completely artificial and unreal to manufacture one for purposes of this case. But even if such a "wholesale milk submarket in Chicago" were found to exist, the competitive effects of this merger in that "submarket" would be *de minimis*. Using the figures on page 1243 of the majority opinion, Dean's pre-acquisition share of 13.5% of that "submarket" will decline, after its loss of the Jewel account, to about 5.4%. Bowman, with a loss of over $2 million of its wholesale accounts since the merger (footnote 6, *infra*), has already lost about 10% of its wholesale trade (RX–11 shows its total wholesale business in 1965 as $20.8

ever, there is much more to this case than these abstract market share figures.

To begin with, the record discloses a crucial fact of which the Commission was not informed when it issued the complaint on December 20, 1965, namely, that Dean made this acquisition for purely defensive reasons and to preserve, rather than enlarge, its Chicago market position. Dean acquired Bowman because, and only because, it was confronted with the imminent loss of its biggest customer, the Jewel Tea retail food chain.[2] The majority opinion states (p. 1265) that the Bowman acquisition "represented a completely noncompetitive response" by Dean to this situation, and that it "is clear from the record that Dean had an opportunity to retain the Jewel account by making adjustments in its price." The record is clear the other way. It contains positive and uncontradicted testimony that Dean could not meet Jewel's projected cost figures. Mr. Samuel E. Dean, Chairman of its Board of Directors, testified that "We didn't think that they [Jewel] could experience [the projected cost figures], and we knew we couldn't; and even to come close meant that we had to give up all of our advertising, all of our research and development, and a great many things that we think are extremely important to the continued existence of our company." (Tr. 1974–75; see also Tr. 2063–64.) I cannot tell from the majority opinion whether the Commission believes that Dean should have made price adjustments to Jewel which were economically unjustifiable or, indeed, might involve a price discrimination violating the Robinson-Patman Act. In any event, the Commission's speculations in this regard furnish no basis for rejecting the examiner's findings of fact based on the evidence. The record also shows that when Dean determined that it could not meet these projected cost figures and lower its price to Jewel, the latter went forward with its plans for building its own milk processing plant. As the examiner found, Jewel will stop buying milk from Dean by early next year.[3] In losing the Jewel account Dean will lose

million), and its "submarket" share has therefore fallen to about 9%. In sum, the post-acquisition share of the "submarket" enjoyed by Dean-Bowman would be around 14.4%—or a little less than 1% more than Dean's pre-acquisition share of 13.5%.

[2] This information had been communicated to the staff by Dean's counsel, in a letter dated November 4, 1965 (Transcript of oral argument before the Commission, pp. 84–91).

[3] The record includes a letter from Jewel to the Commission stating that the decision to terminate its purchases from Dean is irrevocable (RX–21), a report to Jewel's stockholders describing plans to build its own milk processing plant (RX–22, p. 15), and testimony by the responsible Jewel official that land had been set aside, architects' plans drafted, construction bids let, permits applied for, and a plant manager hired (Clements, Tr. 2231).

over 50% of its Chicago business, and its share of the market will fall to about 3.7% (I.D. 1211–1212).

Moreover, Bowman's market share has been substantially reduced by the sales, with Commission approval, of its retail routes in the Chicago area. Although I would agree with the majority that these sales should be disregarded if they were made *post litem motam* as a litigation tactic, the record contains absolutely no suggestion or hint that these sales were motivated by anything other than business and economic considerations. The retail routes, as developed by Bowman, apparently could not be made profitable. As the volume provided by this unprofitable trade would no longer be required to keep operations at the Chemung or River Forest plants near full capacity after the merger, normal and prudent business judgment dictated that they be sold by Dean as soon as possible. In these circumstances, there is not the slightest basis in the record for describing these sales as "self-serving . . . market manipulations." I would regard them as reasonable and necessary business transactions, which had the incidental effect of reducing Bowman's share of the packaged milk market. With the loss of these retail routes, Bowman's market share will fall to somewhere between 5.6% and 7.2%.[4]

Thus, in a few months the combined Dean-Bowman enterprise will have no more than about 11% of the Chicago market. To put it another way, Dean's pre-acquisition market share of 8.3% will be increased by less than 3%. In *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966), the Supreme Court held illegal a merger affecting competition solely in a local market and involving only a small share of that market. The facts here are clearly distinguishable. *Von's* involved a merger between "two highly successful, expanding and aggressive competitors" (p. 272), each having a significant and growing share of a market characterized by increasing concentration at the time of the acquisition. That merger, by eliminating a direct and substantial competitor of the acquiring company, presented a palpable lessening of competition which was not overcome by any countervailing facts. Here, even if it be assumed that a market share increase of such small pro-

[4] There is some dispute as to what percentage of Bowman's total Chicago business is represented by its retail operations. The best figure readily available appears to be slightly under 50%. RX–11 shows that in 1965 Bowman's "retail and mixed" divisions accounted for $19.4 million of its total Chicago trade of $40.2 million. There is evidence, however, that 30% of the purchasers of Bowman's retail routes still buy their milk requirements from Bowman. If they continue to do so after the merger is consummated, Bowman's trade loss will obviously not be quite as great, but this possibility is reflected in the higher percentage figure (see I.D. 1211–1212), a figure only slightly smaller than that arrived at by the majority.

portions makes Dean's acquisition of Bowman presumptively illegal under *Von's,* persuasive evidence has been adduced by respondents to overcome the presumption.

As already indicated, this is not a conventional horizontal merger case where the acquiring company's motive is to increase its market share by eliminating a direct competitor. The record shows that Dean did not become interested in buying Bowman until it was suddenly confronted with the loss of its principal customer, accounting for over 50% of its Chicago sales (I.D. 1186; 1201–1202). Losing the Jewel Tea account would leave Dean with tremendous excess plant capacity. Its acquisition of Bowman, in replacing this lost volume, will enable Dean to maintain its competitive position in the Chicago market.[5] To be sure, its acquisition of Bowman means that Dean is also acquiring, in the short run, Bowman's wholesale customers. But, in the long run, Dean will retain these customers only if it successfully competes for their business. In no realistic sense has Dean "foreclosed" these customers to competing dairies.[6] Although Dean's market share has temporarily increased as the result of the merger, this transaction must be viewed against a background of recently declining concentration in the Chicago market, and it may even contribute to that trend.[7] It is hard to see how *competition* has been or will be substantially lessened by this merger.

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[5] Although the majority opinion states (p. 1263) that without the Jewel or Bowman business, Dean can efficiently consolidate its Chicago operations in its Chemung plant, this finds no support in the record. Mr. Esmond (Dean's vice president in charge of production), while stating that the production from the Huntley plant " . . . could be put into Chemung without any problems" (Tr. 1546), did not say that this would enable Chemung to operate efficiently. The reasonable inference is to the contrary. At Tr. 1547 he testified that if Dean lost the Jewel account and gained the Bowman business, it could still close Huntley and either River Forest or Chemung. In addition, Dean's distribution costs would be greatly increased without either the Jewel or Bowman business (Dean, Tr. 1977–78).

[6] In fact, since the acquisition, $1,189,925 of Bowman's retail grocery, restaurant, and institutional accounts, and $1,053,000 of Bowman's "master vendor" accounts have been lost to competitors despite Dean's efforts to maintain the Bowman business (I.D. 1171).

[7] The market shares of the four largest dairies have declined over the past ten years, as shown in the following table. (This is taken from RX–30(a) and RX–36. The 1956–64 figures are for March and the 1965 figures for June. RX–30(a) is used rather than CX–107, for it contains complete figures for this entire period.)

Share of Chicago Area Sales by 4 Largest Dairies

Year	Share	Year	Share
1956	48.2%	1961	44.5%
1957	48.7%	1962	43.0%
1958	47.1%	1963	43.2%
1959	44.9%	1964	43.0%
1960	43.6%	1965	40.3%

Based on a postulated post-acquisition market share of 9.3%, this trend would continue after the merger (I.D. 1212–1213). Even a larger share of 11% would not significantly alter the present concentration figures, for although the share of the four largest would then increase slightly to

There is another significant factual difference between this case and *Von's*. Bowman can hardly be characterized as a "highly successful, expanding and aggressive" competitor at the time of the acquisition. It was in serious financial trouble, and this fact certainly bears upon whether its acquisition by Dean will substantially lessen competition. Over the past six years Bowman's Chicago operations were conducted at a loss in each year, and its sales had consistently declined.[8] Although its subsidiary operations had been profitable each year (CX-106D), several of these divisions had been experiencing declining sales (RX-7), and their profits fell by more than 12% during the past year (I.D. 1190). The possibility of reversing this performance appeared slight. The hearing examiner found:

Most of Bowman's plants were old, overcrowded, and in need of modernization. The most recently built was over 20 years old. Bowman did not have a planned program of upgrading its operations and little money had been spent on new equipment designed to cut overhead and labor costs and to improve quality. Refrigerated storage rooms were too small to maintain adequate inventories. In most of its plants Bowman lacked the clean-in-place pipeline systems that most of the other dairies have adopted as a means of controlling sanitation. Bowman's bottling and refrigerating equipment was, for the most part, out of date and inefficient. Most Bowman plants did not have the automatic casers, automatic stackers, and palletized transportation systems required for an efficient dairy operation (Kullman, Tr. 1624, 1668; Esmond, Tr. 1531-1541). (I.D. 1182.)

In short, the subsidiary operations, whose profits had partially offset the Chicago losses in the past, had become increasingly incapable of doing so, especially as the Chicago losses continued to rise and subsidiary profits began to fall. The inevitable result, a net operating loss in Bowman's total dairy operations, had al-

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41.5%, the share of the top eight would decline from 61.7% to 59.1%, and the top twelve from 71.9% to 69.2%, solely as the result of this merger (*cf.* I.D. 1212-1213).

8 *BOWMAN'S DECLINING SALES AND MOUNTING LOSSES IN CHICAGO

	Trade Sales	Net Operating Losses
1960	$ 56,796,962	$ (197,459)
1961	53,089,958	(678,127)
1962	52,207,120	(618,315)
1963	48,993,885	(617,841)
1964	46,596,008	(1,571,989)
1965	43,357,668	(1,015,270)
Total Decline	(13,439,294)	
	Average Annual Decline in Sales (2,687,859)	Average Annual Loss (783,167)

*RX-2.

ready occurred in each of the past two years.[9] In fact, over the past six years Bowman's average return on investment, before taxes, had been a minuscule .4% compared with an industry average of about 11.4% after taxes (Steele, Tr. 2676–7).

Although Bowman Dairy had exceptionally large holdings of securities (CX–106B), and the return on this investment and gains from the sale of some of these securities and property had been used to avoid large overall losses in any single year (CX–106C), and had even enabled Bowman to pay dividends in each year, this was no indication that Bowman's competitive position in the dairy industry was bound to improve. Instead, the extremely low purchase price paid for Bowman's dairy operations and the difficulty in finding a purchaser for them may more accurately reflect an industry appraisal of Bowman's dim prospects.[10]

The conclusion that emerges from the record is that Bowman was headed for eventual insolvency and liquidation, unless it could successfully undertake a massive redirection of its marketing activities and renovation and consolidation of its production facilities.[11] Bowman's management was apparently unable and

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[9] *BOWMAN DAIRY COMPANY AND SUBSIDIARIES
SALES AND NET OPERATING PROFIT OR (LOSS)

	Trade Sales	Net Operating Profit or (Loss)
1960	$ 86,477,911	$ 418,867
1961	82,835,515	(126,877)
1962	80,859,960	86,194
1963	77,813,577	55,874
1964	77,605,416	(699,488)
1965	75,602,431	(255,469)
Total Decline	(10,875,480)	
Average Annual Decline	(2,175,090) Average Annual Loss	(86,816)

*RX–3.

[10] A competing dairy executive described the purchase price as ". . . shockingly low . . ." and stated he believed it " . . . would only be a distress sale." (Schaub, Tr. 1786.)

[11] Its one major attempt at renovation and modernization, a $1 million project at its River Forest plant, had been particularly discouraging, for while this program had prevented its Chicago losses from increasing even faster, the continued decline of sales volume during that year wiped out any operating gains from the resulting cost savings (Kullman, Tr. 1665). A comparison of CX–56 and CX–53E shows that during the last quarter of 1965, a period which should fully reflect the effect of the modernization of River Forest, the Chicago operations still lost $234,715.

Similarly, selling its retail routes would not, in itself, provide a feasible solution to Bowman's problems, for this would leave Bowman's River Forest plant with tremendous excess capacity and hence exceptionally high costs-per-unit. Since the acquisition and injunction, Dean has been forced to conduct the Bowman business separately and without 70% of the retail trade, yet during the first three months of 1966, it still suffered a $278,556 loss on Bowman's operations, and a $299,751 loss in Chicago alone (RX–13).

unwilling to do so. As Mr. Kullman (Bowman's board chairman) testified, it reviewed the general condition of its plants, and its discouraging sales and earnings record and ". . . concluded that realistically it had only two choices: sell out or adopt a program of self-liquidation." (Tr. 1618–27.) Since the hearing examiner found on ample evidence that no purchaser other than Dean was available (I.D. 1185–1187), to hold this merger unlawful means that Bowman had only one choice: involuntary self-liquidation.[12]

These facts of record amply support the hearing examiner's finding that this merger did not, and is not reasonably likely to, substantially lessen competition in the Chicago milk market. This finding does not depend on evidence that Bowman was, strictly speaking, a "failing company" within the defense afforded by *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291 (1930). Nor does it require a showing that its acquisition of Bowman was necessary to enable Dean to remain competitively viable. Section 7 does not demand affirmative proof that a merger is a competitive necessity in order that it be upheld. The burden is the other way. Complaint counsel must show, by the preponderance of material and probative evidence in the record, that the reasonably probable effect of the merger will be substantially to lessen competition in a defined line of commerce. In this case, as the hearing examiner found, that burden has not been met.

II

There are additional considerations, not going to the merits, which in my judgment call for dismissal of this complaint. These considerations relate to the fundamental obligation of the Federal Trade Commission to maintain the confidence of the public, the parties, the bar, and the courts in the fairness and integrity of its adjudicatory process.

Let me state at once that I do not presume to express an opinion regarding disqualification of any member of the Commission for actual or personal bias or prejudgment. "Under the Commission's practice, disqualification is treated as a matter primarily for determination by the individual member concerned, resting within the exercise of his sound and responsible discretion." *American Cyanamid Co.,* 59 F.T.C. 1488. "The inquiry called for

[12] As additional evidence to overcome the presumption of illegality here, Dean offered testimony that smaller dairies will be aided, for in terminating Bowman's retail trade, Dean sold the retail delivery routes primarily to small dairies. These dairies, in increasing their volume, may thereby improve their efficiency and ability to compete (see, *e.g.,* Quinlan, Tr. 611–13; Kraml, Tr. 1692–93).

by a motion for disqualification is necessarily subjective in nature. It is extremely difficult and delicate for a tribunal to assume the responsibility of weighing, objectively, the ability of one of its own members to make an objective judgment in a case." *Ibid.* I shall not address myself, therefore, to any question of actual or personal prejudgment in this case. What concerns me, rather, is the *appearance* by the Commission—before any consideration or weighing of the evidence in the record—of having resolved against respondents basic factual issues in the case.

We would all agree that a judge who, at the outset of a trial and before hearing a single witness, announces from the bench that the defendant is plainly guilty, that his conviction is a foregone conclusion, and that his defense is one which the defendant cannot hope to sustain, has thereby destroyed the fairness of the trial. No subsequent protestations of open-mindedness on the judge's part could repair the damage. There would no longer be that appearance of impartiality and objectivity which is an essential element of fair adjudication. If a decision is to be accepted and respected by the public and the parties as fair and based on the record, the judge must take care to avoid any manifestation of prejudgment. In the words of the Supreme Court, "justice must satisfy the appearance of justice." *Offutt* v. *United States,* 348 U.S. 11, 14; and see *In re Murchison,* 349 U.S. 133, 136. The public and the parties are entitled to have cases considered and decided by judges whose fairness and open-mindedness are both present and visible.

These basic considerations apply to all adjudication, whether by a court or an administrative agency. An administrative hearing "must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process." *Amos Treat & Co.* v. *Securities and Exchange Commission,* 306 F. 2d 260, 267 (D.C. Cir. 1962). See also *Gilligan, Will and Co.* v. *Securities and Exchange Commission,* 267 F. 2d 461, 469 (2d Cir. 1959); *American Cyanamid Co.* v. *Federal Trade Commission,* 363 F. 2d 757 (6th Cir. 1966). To be sure, an agency member, like a judge, "may have an underlying philosophy in approaching a specific case," *United States* v. *Morgan,* 313 U.S. 409, 421, as well as "an opinion as to whether certain types of conduct were prohibited by law." *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, 703. As Judge Washington has said, "Federal Trade Commissioners, like other

adjudicators, are entitled to hold and express views on the laws they are charged with enforcing and applying. * * * We do not expect a Trade Commissioner to be neutral on anti-monopoly policies." *Texaco, Inc.* v. *Federal Trade Commission* 336 F. 2d 754, 764 (D.C. Cir. 1964) (separate opinion).

We are not concerned in this case, however, with alleged prejudgment of questions of law or policy. Respondents assert that the Commission—before considering the case on the basis of the evidence in the record—made various public statements indicating a prejudgment of crucial issues of *fact* in the case. As Judge Washington went on to say in his *Texaco* opinion:

> A fair hearing is denied, however, if the administrative judge, prior to examining the evidence and findings, has indicated his belief that named individuals or firms are violating the statute, and the "guilt" or "innocence" of such parties depends on certain factual findings which are in dispute. Once an adjudicator has taken a position apparently inconsistent with an ability to judge the facts fairly, subsequent protestations of open-mindedness on his part cannot restore a presumption of impartiality. Whether justice was in fact done is not the issue; an administrative hearing "must be attended, not only with every element of fairness but with the very appearance of complete fairness." We must presume that a fair hearing was denied if a disinterested observer would have reason to believe that the Commissioner had "in some measure adjudged the facts . . . of a particular case in advance of hearing it." (Footnotes omitted.)

In the instant case, respondents do not object to the Commission's having a "strong conviction" or a "crystallized point of view" on questions of law and policy. *Cf.* 2 Davis, *Administrative Law*, § 12.01. Their contention is, rather, that "a disinterested observer would have reason to believe," from statements made in the Commission's name and on its behalf during the preliminary injunction proceeding, that the Commission "had in some measure adjudged the facts" of this case "in advance of hearing it." In particular, respondents allege that the Commission appears to have prejudged the purely factual issues of the merger's effects on competition and the "failing company" condition of Bowman at the time of the acquisition. As to these evidentiary issues, respondents assert, the Commission "has taken a position apparently inconsistent with an ability to judge the facts fairly," and "subsequent protestations of open-mindedness on [its] part cannot restore a presumption of impartiality."

Respondents' argument touches a sensitive nerve in the administrative process. The requirement that fairness and impartiality be apparent, as well as actual, imposes a heavy burden upon an agency adjudicator, perhaps heavier than upon a judge. For a

judge is a neutral arbiter of cases and controversies in whose outcome he has no interest other than that of applying the law fairly and evenhandedly. An agency member, on the other hand, has a positive and substantial interest in advancing regulatory goals and policies which may be affected by the outcome of a particular case. Moreover, a judge acts only as a judge in the case. An agency member, on the other hand, may also have acted in an investigative and prosecutorial role in the same case. This fusion of functions in a single body permits a flexibility of action which is the hallmark and glory of the administrative process; but it makes more difficult the task of assuring the public that there has been a fair and impartial adjudication solely on the basis of the record of the case.

There are also subtle institutional influences and pressures, inherent in the structure and operation of an administrative agency, that complicate the process of agency adjudication. The public and the bar can see these obvious dangers, and they must be reassured, by what is visible of the decisional process, that justice is in fact being rendered on the basis of the record by an impartial and open-minded adjudicator. It is not enough that an agency member is convinced in his own mind of his objective capacity to decide the case fairly on the basis of the evidence in the record. The public must also be so convinced; and its range of vision is necessarily limited. It must find impartiality and openmindedness in the external appearances.

The obligation of an administrative agency like the Commission to provide the public with compelling evidence of its fairness and impartiality is brought into clear focus by the unusual circumstances of this case. But even if it had been an ordinary, routine merger case, the Commission would have had to be careful not to compromise its role as adjudicator on the record. In any Section 7 case where it issues a complaint, the Commission determines only that there is "reason to believe" that the merger is illegal. Such a determination is *ex parte* and based solely on internal staff memoranda and submissions which have not been tested in the crucible of an adversary proceeding. In issuing the complaint, the Commission makes no judgment whatsoever on the merits of the factual questions involved, not even a "probable" or "presumptive" judgment shifting the burden of proof to the respondent. Issuance of the complaint serves only to initiate a formal adversary proceeding where disputed issues of fact must be determined solely on the basis of the evidence in the record. In

the adjudicatory proceeding which follows upon issuance of a complaint, the burden of proving the alleged violation of law rests on complaint counsel, to the same extent as upon the prosecution in a Section 7 case brought by the Attorney General in a district court. And in considering and deciding the case on the basis of the evidence of record, the Commission—despite the fact that it initiated the proceeding by issuing the complaint—must be as fair and open-minded, and give the same appearance of fairness and open-mindedness, as a federal judge.

But this was not an ordinary merger case. It was in this case that the Federal Trade Commission, for the first time since the Clayton Act was enacted in 1914, asked the Supreme Court to hold that a court of appeals has jurisdiction under the All Writs Act to enjoin the consummation of a merger during the pendency of the adjudicatory proceeding before the Commission. On June 13, 1966, the Supreme Court held that a court of appeals has such jurisdiction. *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597 (1966). In a dissenting opinion joined by three other members of the Court, Mr. Justice Fortas argued that the Commission, by assuming the role of advocate and litigant in court seeking a preliminary injunction, would be undermining its role as adjudicator in the administrative proceeding:

> The Commission was not intended to—it has no power to—it should not—make a judgment on the merits prior to notice and hearing. To sanction its doing so is to strike a devastating blow at the fundamental theory upon which the exercise of both prosecutorial and adjudicatory functions by an administrative agency is based. *Cf.* §5(c) of the Administrative Procedures Act of 1946, 5 U.S.C. §1004(c).
>
> The Commission, prior to taking evidence and writing a report, is supposed to make only a very limited judgment: that there is "reason to believe" the law is being violated. But to obtain a preliminary injuncton, it must—without hearing the other side, and ordinarily merely on its staff's recommendation, necessarily based upon a quick exposure of the facts—file affidavits or produce evidence with the calculated purpose of demonstrating to the court of appeals that consummation of the merger will have such adverse effects that it must be halted *in limine*. In fact, and in all realism, it must take positions and establish, with sufficient positiveness to overcome strenuous opposition, that the merger will tend substantially to lessen competition or create danger of monoply, that it is harmful to the economy, immediately threatening in its consequences, and that it is unlawful. There must be Commission conclusions, not merely the views of the staff. Their assertion and necessarily stout advocacy make a mockery of a subsequent quasi-judicial proceeding in which the Commission is supposed objectively to consider the same issues on the basis solely of the record. (384 U.S. at 617–18.)

This was a powerful argument—and while it was rejected by

the majority of the Court as a ground for denying the courts of appeals authority to issue preliminary injunctions in merger cases, I find no rejection whatsoever of its basic premise that "The Commission was not intended to—it has no power to—it should not—make a judgment on the merits prior to notice and hearing." The Supreme Court certainly did not reject, implicitly or otherwise, so fundamental a principle of administrative adjudication. I find nothing in the opinion of the Court delivered by Mr. Justice Clark that countenances any dilution or compromise of the fairness of "the subsequent quasi-judicial proceeding in which the Commission is supposed objectively to consider the same issues on the basis solely of the record." The Supreme Court did not uphold the injunctive powers of the courts of appeals at the expense of impairing the integrity of the Commission's adjudicatory function. Whatever difference of opinion existed on the question of whether the courts of appeals have jurisdiction to grant preliminary injunctions in merger cases, there was surely no disagreement in the Supreme Court that the Commission should in all cases, whether an injunction was sought or not, preserve "the appearance of justice."

Obviously, as all the members of the Supreme Court were aware, where an administrative agency acts as both advocate and judge in the same case, there arises the danger of actual and apparent unfairness. When it goes into court seeking a preliminary injunction in a Section 7 case, the Commission is the petitioner—and its adversary in the injunction proceeding is the same respondent as in the administrative proceeding, where the Commission will later be adjudicating the legality of the merger it seeks to enjoin. In the injunction proceeding the Commission will be represented by counsel making arguments and representations to the court in its name and on its behalf. It is, of course, the duty of Commission counsel to be forceful and effective in urging that a preliminary injunction is necessary to prevent such commingling or dissipation of the acquired assets as would preclude effective relief if a violation of law were ultimately found. But it is not necessary, and it is surely improper, for the Commission, in attempting to show the need for an injunction, to indicate a prejudgment of factual issues which must be resolved solely on the basis of the record in the subsequent administrative proceeding. Forceful and effective advocacy is to be encouraged, but not at the cost of impairing the fairness and integrity of the Commission's adjudicatory function. The members of the Supreme Court un-

doubtedly assumed that the Commission would be sensitive to the need for assuring the public of the actual and apparent fairness of its adjudicatory process, and that care would be taken in the injunction proceeding not to attribute to the Commission any position or views that would be inconsistent with its role of judge in the subsequent administrative proceeding. The Supreme Court held only that, upon a proper showing, the Commission could obtain a preliminary injunction in a merger case. The Court did not hold that, in its effort to obtain an injunction, the Commission—or counsel speaking for the Commission—could freely disregard the limitations and constraints imposed by its adjudicatory role.

Unlike my colleagues, I do not regard this to be a matter of "semantics" or insistence upon niceties of expression in formal advocacy. Nowhere is there greater need for concern over "the appearance of things" than in a preliminary injunction proceeding where the agency seeking an injunction is the same tribunal which will later be required to rule on the legality of the transaction it seeks to enjoin. In this situation the Commission, in its desire to win a court injunction, cannot afford to lose sight of its dual roles. Both the Commission and those speaking for it must be careful to avoid making any statements which would appear to a disinterested observer to imply a prejudgment before the case has been heard and the evidence weighed. Judicial open-mindedness requires that there be *no* prejudgment of the merits, actual or apparent. Any expression or hint in the injunction proceeding that the Commission has already formed a judgment adverse to the respondents on the basic factual issues of the case completely destroys that appearance of open-mindedness which is essential to fair adjudication.

Regrettably, counsel for the Commission, in seeking a preliminary injunction in this case, were insensitive or indifferent to these considerations in presenting the Commission's position before the Court of Appeals. Since this was a test case, counsel for the Commission were understandably anxious to impress the Court of Appeals with the strength of their showing as to the need for an injunction. Speaking for the Commission, they expressed views on the legality of the merger which to a disinterested observer can only be understood to mean that the Commission had in some measure adjudged the factual issues in this case in advance of the hearing.

These statements are set out in full context in the majority opinion (pp. 1227–1228) and need not be repeated here. To be

sure, these statements were made by Commission counsel; but they were speaking not for themselves but for the Commission. The Commission speaks in court only through its counsel, and I do not see how we could disavow in this case, any more than in any other case, representations made to a court in the name and on behalf of the Commission. In urging the court to grant a preliminary injunction, the Commission—in advance of considering this case on the record—made such statements as these: "the conclusion is inescapable that the antitrust laws have been violated"; "We think that Dean and Bowman are right now in the process of violating Section 7"; "the acquisition by Dean of Bowman constitutes a contract in restraint of trade and as such amounts to a violation of Section 1 of the Sherman Act"; the "failing company" defense is "a defense which Dean cannot hope to sustain"; "any Procrustean effort to fit the failing-company doctrine to the instant situation is bound to come to grief in light of Bowman's over-all healthy financial conditions at the time of acquisition"; "Bowman's overall operations demonstrated it was a viable enterprise."

These statements attributed to the Commission a definite position on the merits, taken in advance of hearing the case and considering the evidence in the record, which is plainly inconsistent with an ability to judge the facts fairly. From the standpoint of the public and the respondents, how can any protestations of open-mindedness on the Commission's part now restore complete confidence in its fairness and impartiality? If this were a clearcut case of illegality, dismissal of the complaint would be a most unhappy disposition. But illegality here is at best doubtful, and the hearing examiner's findings of fact in respondents' favor are amply supported by the evidence.

The independence of hearing examiners, and especially their isolation from the investigative and prosecutorial processes, is a substantial safeguard against unfairness in administrative adjudication. As a general matter, an agency should be reluctant to overrule an examiner's findings on strictly evidentiary questions. An examiner should be regarded as the agency's special master on purely fact questions. Where his resolution of an issue of fact involves no errors on legal or policy grounds, the examiner's findings should be accorded great weight. We strengthen the safeguards of fairness in adjudication, and at the same time help agency members concentrate on their basic function of formulat-

ing law and policy, by attaching greater finality to hearing examiners' findings on strictly factual questions.

These general observations have special application here, where the members of the Commission not only are in no better position than the examiner to resolve the evidentiary fact questions involved but are vulnerable—because of the statements made to the Court of Appeals in the injunction proceeding—to a charge of *appearing* to be less impartial and open-minded. In this case especially, the findings of the hearing examiner should be respected. Unlike the Commission, the hearing examiner has never acted as an advocate or adversary in litigation with the respondents.[13] Not having participated in either the process of issuing the complaint or seeking a preliminary injunction, the examiner appears to the public to be a wholly disinterested trier of the facts on the record. So far as he is concerned, there would be no appearance of embarrassment in a dismissal of the complaint after vigorously contested litigation going all the way to the Supreme Court in which the Commission obtained a preliminary injunction on the basis of strong representations regarding the illegality of the merger. I emphasize again that no question is raised here as to actual bias or prejudgment by any member of the Commission. It is a question solely of "the appearance of justice." Nothing in this dissent is intended to cast the slightest doubt on the personal integrity and uprightness of any member of the Commission or its staff.

Neither in this case nor in any other merger case where the Commission should decide to seek a preliminary injunction does it bind itself to decide the merits against the respondents. Every member of the Commission, I am sure, would agree to that. There will inevitably be cases in which the Commission, after obtaining a preliminary injunction, will conclude in the subsequent administrative proceeding, after full consideration of the record, that the case should be dismissed. Since that may be done in a future case, I see no reason why we should not do so in the present case. On the contrary, such a disposition of the case would seem to me to reinforce public confidence in the fairness and impartiality of the Commission's role as adjudicator on the record.

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[13] The Commission, as this is being written, has again assumed the role of litigant in court, with respondent Dean as its adversary. On November 16, 1966, the Commission filed a petition in the Court of Appeals for continuance of the preliminary injunction entered on July 18, 1966.

SEPARATE STATEMENT

NOVEMBER 14, 1966

BY MACINTYRE, *Commissioner:*

It is with considerable reluctance that I add words to those already expressed by the other Commissioners in this matter. However, the reference in the dissenting opinion by Commissioner Elman to the effect that there is a "fundamental obligation of the Federal Trade Commission to maintain the confidence of the public, the parties, the bar, and the courts in the fairness and integrity of its adjudicatory process" in my opinion requires comment.

As a member of the Commission I carefully and thoroughly considered all aspects of the motion that the Commission disqualify itself from deciding this case on its merits. I and three other Commissioners reached the conclusion that such motion was without merit and therefore to deny it would be no reason for anyone to hold the view that the Commission had failed to discharge its fundamental obligation to maintain the confidence of the public, the parties, the bar and the courts in the fairness and integrity of its adjudicatory process. It is my opinion that any member of the Commission holding any views to the contrary should not have participated in the Commission's consideration and decision of this matter on its merits. Certainly if I had had any question in that regard I would have disqualified myself from so participating in such function.

FINAL ORDER

This matter having been heard by the Commission on appeal by complaint counsel from the initial decision of the hearing examiner, and upon briefs and argument in support thereof and in opposition thereto; and

The Commission having issued its Findings, Conclusions and Opinion in which it set forth its determination that the appeal should be granted to the extent set forth in said Findings, Conclusions and Opinion, that the initial decision should be set aside and that said Findings, Conclusions and Opinion shall constitute the findings of fact and conclusions of fact and law of the Commission;

It is hereby ordered, That:

I

The initial decision of the hearing examiner be and hereby is, set aside and the facts and conslusions set forth in the Findings,

Conclusions and Opinion herein shall constitute the findings of fact and conclusions of fact and law of the Commission.

II

Respondent Dean Foods Corporation (hereinafter referred to as "Dean"), through its officers, directors, agents, representatives and employees, shall divest itself absolutely, in good faith, all right, title and interest and all assets, properties, rights and privileges, tangible and intangible, including without limitation all manufacturing plants, equipment and operating facilities, lands, leases and the warehousing facilities, machinery, inventory, trade names, trademarks and good will, acquired by Dean as a result of its acquisition of certain assets of Bowman Dairy Company (hereinafter referred to as "Bowman"), pursuant to their purchase agreement of December 13, 1965, together with all additions thereto of whatever description which are presently utilized or which may hereafter and prior to such divestiture be utilized by Dean in its operation of the acquired assets, excluding therefrom the retail routes and assets connected therewith which shall have been as of the effective date of this order divested by Dean with the approval of the Federal Trade Commission (which assets, including such additions, less such excluded assets, are hereinafter referred to as the "Bowman Assets") to a purchaser approved by the Federal Trade Commission who shall operate said assets as a going concern in the dairy industry.

III

The Bowman Assets shall not be sold or transferred, directly or indirectly, to any person who at the time of the divestiture is a stockholder, officer, director, employee or agent of, or otherwise directly or indirectly connected with, or under the control or influence of, Dean or any of Dean's subsidiaries or affiliated companies, or who owns or controls, directly or indirectly, more than one (1) per cent of the outstanding stock of Dean.

IV

Pending effectuation of the divestiture required under Paragraph II hereof, Dean shall not make any material changes, directly or indirectly, with respect to the Bowman Assets, including the operation and policies affecting said assets, except such changes which may be required in the ordinary course of business or which may be required to improve the saleability of said assets or to prevent the impairment of value of said assets or of the business conducted through the use of said assets.

V

In effectuating Paragraph II hereof, Dean shall divest the Bowman Assets in the following manner and subject to the following conditions:

A. Beginning promptly after the effective date of this Order and for a period of one (1) year thereafter, Dean shall make a diligent effort in good faith to effectuate the divestiture required by Paragraph II hereof.

B. If Dean is unable to effectuate such divestiture within such one (1) year period, Dean shall, within thirty (30) days after the termination of such period, submit a plan in form and substance satisfactory to the Commission in accordance with the provisions of subparagraphs V(B) (1) or V (B) (2) hereof, the purpose and probable effect of which plan shall be to effectuate such divestiture promptly thereafter:

(1) Under the first alternative plan Dean shall submit a program which may encompass, *inter alia,* (a) the transfer to any purchaser not only of the Bowman Assets but also of such additional assets, including without limitation processing plants, equipment, and customer lists, which may be used in connection with or consolidated with the Bowman Assets, as are necessary to insure the prompt sale of and the continued use of the Bowman Assets as a going concern in the dairy industry; and (b) the extension of credit by Dean to such purchaser for the purpose of enabling such purchaser, otherwise unable to do so, to purchase the Bowman Assets: *Provided, however,* In the plan provided for herein Dean may include such additional or alternative provisions which may be sufficient to implement the objective of effectuating the prompt divestiture by Dean of the Bowman Assets.

(2) Under the second alternative plan Dean shall submit a plan providing for the creation of a new and separate corporation (hereinafter referred to as "New Bowman") with sufficient assets as will restore Bowman as it existed prior to the acquisition as a going concern in the dairy business.

Such a plan may encompass

(a) Transfer to New Bowman of the Bowman Assets as defined herein and also sufficient cash and cash equivalents to provide New Bowman with an adequate working capital ratio which shall be not less than a ratio of 2 to 1;

(b) Distribution of its capital stock to the stockholders of Dean; and

(c) A provision that any direct or indirect holder of more than 1% of the outstanding capital stock of Dean shall divest all stock interest in New Bowman within a period of six (6) months from the date of incorporation of New Bowman.

C. If Dean has failed to complete the divestiture required by Paragraph II hereof within one (1) year after the effective date of this Order and if the parties fail to submit a feasible and acceptable plan within the meaning of Paragraph V(B) hereof, and divestiture under such plan is not effectuated promptly thereafter, the Commission may issue an order to show cause as to why some other form of relief which may be necessary to effectuate divestiture should not be ordered.

D. Within thirty (30) days from the effective date of this Order, and every thirty (30) days thereafter until it has fully complied with this Order, Dean shall submit in writing, to the Federal Trade Commission, a report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with this Order. All compliance reports shall include without limitation a specification of the steps taken by Dean to make public its desire to sell these assets, a list of all the persons, including dairy and non-dairy companies, bankers, brokers and management consultant firms to whom this notice of sale has been given, a summary of all discussions and negotiations, together with the identity of all such potential purchasers or intermediaries with whom these discussions or negotiations were undertaken and copies of all written communications to and from all such intermediaries or potential purchasers and all contracts entered into with purchasers.

VI

Dean, for a period of ten (10) years from the date this Order becomes final, shall cease and desist from acquiring, directly or indirectly, by any device or through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets (other than products sold in the course of business), of any firm engaged in the manufacture, processing, distribution or sale of dairy products (Standard Industrial Classification Group No. 202) without the prior approval of the Federal Trade Commission.

VII

As used in this Order, the word "person" shall include all members of the immediate family of the individual specified and shall include corporations, partnerships, associations and other legal entities as well as natural persons.

Commissioner Elman dissented and has filed a dissenting opinion.

IN THE MATTER OF

S. DEAN SLOUGH TRADING AS STATE CREDIT CONTROL BOARD

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

Docket 8661. Complaint, June 16, 1965—Decision, Nov. 16, 1966

Order requiring a Quincy, Ill., seller of debt collection forms to cease using forms which imply an official government connection, that the sender of the forms is a third party collector, and that delinquent accounts are turned over to a State agency for collection.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that S. Dean Slough, an individual, trading and doing business as State Credit Control Board, hereinafter referred to as the respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent S. Dean Slough is an individual trading and doing business as State Credit Control Board. His address is 1302 Royal Road, Quincy, Illinois.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of collection forms to dealers for resale to businessmen and to businessmen directly. Respondent is also engaged in the operation of a remailing service with respect to such forms.

PAR. 3. In the course and conduct of his aforesaid business, re-