mation of the transaction, as required by Section 226.8(a) of Regulation Z.

2. Failing to identify the creditor in any credit transaction, as required by Section 226.8(a) of Regulation Z.

3. Failing to disclose the annual percentage rate with an accuracy at least to the nearest quarter of one percent, in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and that respondent secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

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

IN THE MATTER OF

GOLDEN GRAIN MACARONI COMPANY, ET AL.

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

Docket 8737. Complaint, May 23, 1967—Decision, Jan. 18, 1971

Order requiring a San Leandro, California, Manufacturer of macaroni and related paste products to divest within one year all assets of three previously acquired competitors in the Pacific Northwest and not to acquire for the next 10 years without prior approval of the Federal Trade Commission all or part of any firm manufacturing macaroni products in the Pacific Northwest.

COMPLAINT

The Federal Trade Commission having reason to believe that Golden Grain Macaroni Company, a corporation, and Paskey DeDomenico, individually and as an officer of said corporation, herein-

after referred to as respondents, have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act (52 Stat. 111; U.S.C., Title 15, Sec. 45), 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 with respect thereto as follows:

PARAGRAPH 1. Golden Grain Macaroni Company, hereinafter sometimes referred to as Golden Grain, 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 1111 139th Avenue, San Leandro, California.

Respondent, Paskey DeDomenico, an individual, is the president of the corporate respondent, with his office and principal place of business located at 4715 6th Avenue South, Seattle, Washington. Said respondent as an officer, director and the principal owner of said corporation, formulates, directs and controls the policies, acts, practices and operations of said respondent corporation, including the acts and practices alleged herein.

PAR. 2. Golden Grain is primarily engaged in the business of producing, processing, distributing and selling macaroni, spaghetti, noodle products and related paste products. Said respondent is also engaged, under the name of D. Ghirardelli, in the business of producing, distributing and selling chocolate and cocoa candy.

Golden Grain has plants located in San Leandro, California, Seattle, Washington, and Bridgeview, Illinois. Through its Seattle plant, operated by the Mission Division of Golden Grain, macaroni and related paste products are distributed and sold, under the Mission and Golden Grain brand names, in the States of Washington, Oregon, Montana, Idaho and Hawaii. Said respondents' sales of all products exceeded $15,000,000 in 1963, and its sales of macaroni and related paste products exceeded $7,500,000 during 1963.

When the geographical terms of "Pacific Northwest" and "Pacific Northwestern United States" are used herein such shall be taken to mean the States of Washington, Oregon, Idaho and the Western half of the State of Montana.

PAR. 3. The macaroni and related paste products produced or distributed by Golden Grain have been and are being, sold by Golden Grain to purchasers located throughout the several States of the United States and in the District of Columbia. The respondents have caused and are causing said macaroni and related paste products to be transported and shipped from the various places of manufacture to purchasers thereof who are located in States other than the State where said macaroni and related paste products have been

and are being manufactured, and there has been and is now a constant and continuous current and flow of said macaroni and related paste products in interstate commerce. Respondents, therefore, have been and are engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Except to the extent that competition has been hindered, frustrated, and lessened as set forth in this complaint, respondent Golden Grain has been and is now in substantial competition with other corporations, individuals and partnerships engaged in the manufacture, sale and distribution of macaroni and related paste products in "commerce" as that term is defined in the Federal Trade Commission Act.

PAR. 5. For many years past and continuing to the present time, respondent Golden Grain, the largest and most dominant seller of macaroni and related paste products in the Pacific Northwest has used its dominant position, size and economic power to frustrate the growth of smaller macaroni manufacturers; to eliminate their opportunities for business survival; and to eliminate competitors and prevent, hinder or lessen competition in the manufacture, distribution and sale of macaroni and related paste products. Thus, Golden Grain has been for a number of years last past, and is now, engaging in various monopolistic or other unfair acts, practices or methods of competition in an attempt to monopolize and maintain a monopoly in the manufacture, distribution or sale of macaroni and related paste products.

More particularly, respondents have adopted and placed into effect and carried out various policies, acts and practices to lessen, restrain, eliminate and prevent sales of macaroni and related paste products by others engaged in the manufacture, distribution and sale of such products in the Pacific Northwest and in the State of Hawaii. Among such monopolistic policies, acts and practices, respondents engaged in the following:

1. Adopted and followed the continuous practice of acquiring various competing macaroni manufacturers in the Pacific Northwest for the purpose or with the effect of enhancing or making more secure, its already dominant position in such area and eliminating such competition as may previously have existed between such competitors and respondent Golden Grain, as follows:

(a) Acquired 49 percent of the stock of Porter Scarpelli Macaroni Co., Inc., including vital information pertaining to costs of manufacture, its prices, profits, losses and identity of customers;

(b) Acquired 51 percent of the stock of Major Italian Foods

Company, a competitor, in June 1963 thus gaining control over the entire operation of such company;

(c) Acquired 100 percent of the stock of Oregon Macaroni Manufacturing Company, a competitor in March 1966 thus gaining control over the entire operations of such company.

2. Purchased from certain retail outlets all macaroni and related paste products produced and sold by respondents' competitors to such outlets, and substituted respondents' products in said retail outlets.

3. Reduced prices or other charges to some grocers of retailers for the purpose or with the intended effect of gaining entry into the stores of such grocers or retailers, thereby enhancing the potential resale of its products at the expense of similar products distributed and sold by others.

4. Engaged in price wars for extended periods of time in the Pacific Northwest in order to injure and destroy competitors and prevent, lessen and eliminate competition in the manufacture, sale and distribution of macaroni and related paste products.

5. Sold at lower prices, directly or through the use of coupons, free merchandise or other devices, for macaroni and related paste products in some areas than it did in other areas without any real justification.

6. Sold, or offered to sell, macaroni and other related paste products at below cost or unreasonably low prices with the intent and purpose, or under circumstances where the effect has been or may be to injure, restrain, suppress, destroy or eliminate competition in the sale of such products in the states comprising the Pacific Northwest area of the United States and in the State of Hawaii.

PAR. 6. The acts and practices of the respondents as herein alleged have had and do have the effect of hindering, lessening, restricting, restraining, destroying, and eliminating competition in the manufacture, distribution and sale of macaroni and related paste products; have had and do have a tendency to unduly hinder competition or to create and maintain in respondents a monopoly; have constituted an attempt to monopolize; have foreclosed markets and access to markets to competitors or potential competitors in the manufacture, distribution and sale of macaroni and related paste products; are all to the prejudice of competitors of respondent and to the public; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Mr. James Y. Wood and *Mr. Charles E. Mueller*, for the Commission.

Mr. J. Paul Coie and *Mr. Douglas P. Beighle* of *Holman, Marion,*

Initial Decision by John B. Poindexter, Hearing Examiner

APRIL 30, 1969

CONTENTS

	Page
PRELIMINARY STATEMENT	67
FINDINGS OF FACT	70
History of Golden Grain Macaroni Company	71
Golden Grain's Acquisition of the Capital Stock of Mission Macaroni Company	74
The Origination and Growth of Major Italian Foods Company of Seattle, Washington	76
The Acquisition by Golden Grain of 51% of the Stock of Major Italian Foods Company	77
The Acquisition by Golden Grain Macaroni Company of Oregon Macaroni Company	78
The Geographic Market	79
The Relevant Product Line	83
Concentration	85
Barriers to Entry	90
Pricing and Trade Practices by Major Italian Foods Company, Inc	93
Secret Rebates by Major Italian Foods	101
Alleged Purchases of Competitors' Macaroni	104
Reducing Prices to Gain Entry into Stores	105
Charges Against the Mission Division of Golden Grain: Re—Price Wars, Geographical Price Discrimination, and Sales Below Cost in the Pacific Northwest	108
Pricing on the 6/4-Pound Size Macaroni and Spaghetti	110
Geographical Price Discrimination	111
Alleged Sales Below Cost	113
Alleged Sales Below Cost in Hawaii	118
Sales in Hawaii	118
Competitors in Hawaii	120
Golden Grain's Alleged Discriminations in Price Between Hawaii and Northern California	121
Promotional Allowances by Golden Grain in Hawaii From 1958 to 1968	123
Golden Grain's Prices on Bulk Macaroni in Hawaii	126
Promotions by Golden Grain Competitors in Hawaii	128
Eagle Macaroni Company	130
Alleged Monopoly by Respondents	137
CONCLUSIONS	150
ORDER	151
APPENDIX A	152
APPENDIX B	153

Preliminary Statement

The complaint in this proceeding, issued on May 23, 1967, alleges that Golden Grain Macaroni Company, a corporation incorporated under the laws of the State of California, with its principal office lo-

cated in San Leandro, California, and Paskey DeDomenico, individually and as an officer of said corporation, violated the provisions of Section 5 of the Federal Trade Commission Act.

The complaint alleges, among other things, that Golden Grain is the largest and most dominant seller of macaroni and related paste products in the Pacific Northwest, and has used its dominant position, size and economic power to frustrate the growth of smaller macaroni manufacturers; to eliminate their opportunities for business survival; and to eliminate competitors and prevent, hinder or lessen competition in the manufacture, distribution and sale of macaroni and related paste products. Thus, the complaint continues, Golden Grain has been for a number of years last past, and is now, engaging in various monopolistic or other unfair acts, practices or methods of competition in an attempt to monopolize and maintain a monopoly in the manufacture, distribution or sale of macaroni and related paste products. More particularly, the complaint alleges, respondents have adopted and placed into effect and carried out various policies, acts and practices to lessen, restrain, eliminate and prevent sales of macaroni and related paste products by others engaged in the manufacture, distribution and sale of such products in the Pacific Northwest and in the State of Hawaii. Among such monopolistic policies, acts and practices, the complaint alleges that respondents engaged in the following:

1. Adopted and followed the continuous practice of acquiring various competing macaroni manufacturers in the Pacific Northwest for the purpose or with the effect of enhancing or making more secure, its already dominant position in such area and eliminating such competition as may previously have existed between such competitors and respondent Golden Grain, as follows:

(a) Acquired 49 percent of the stock of Porter-Scarpelli Macaroni Co., Inc., including vital information pertaining to costs of manufacture, its prices, profits, losses and identity of customers;

(b) Acquired 51 percent of the stock of Major Italian Foods Company, a competitor, in June 1963, thus gaining control over the entire operation of such company;

(c) Acquired 100 percent of the stock of Oregon Macaroni Manufacturing Company, a competitor in March 1966, thus gaining control over the entire operations of such company.

2. Purchased from certain retail outlets all macaroni and related paste products produced and sold by respondents' competitors to such outlets, and substituted respondents' products in said retail outlets.

3. Reduced prices or other charges to some grocers or retailers for the purpose or with the intended effect of gaining entry into the stores of such grocers or retailers, thereby enhancing the potential resale of its products at the expense of similar products distributed and sold by others.

4. Engaged in price wars for extended periods of time in the Pacific Northwest in order to injure and destroy competitors and prevent, lessen and eliminate competition in the manufacture, sale and distribution of macaroni and related paste products.

5. Sold at lower prices, directly or through the use of coupons, free merchandise or other devices, for macaroni and related paste products in some areas than it did in other areas without any real justification.

6. Sold, or offered to sell, macaroni and other related paste products at below cost or unresonably low prices with the intent and purpose, or under circumstances where the effect has been or may be to injure, restrain, suppress, destroy or eliminate competition in the sale of such products in the States comprising the Pacific Northwest area of the United States and in the State of Hawaii.

The complaint further alleges that the acts and practices of the respondents as herein alleged have had and do have the effect of hindering, lessening, restricting, restraining, destroying, and eliminating competition in the manufacture, distribution and sale of macaroni and related paste products; have had and do have a tendency to unduly hinder competition or to create and maintain in respondents a monopoly; have constituted an attempt to monopolize; have foreclosed markets and access to markets to competitors or potential competitors in the manufacture, distribution and sale of macaroni and related paste products; are all to the prejudice of competitors of respondents and to the public; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Complaint counsel request that respondents be ordered to cease and desist:

1. From discriminating in the price of macaroni or related paste products, in commerce, by selling such products to any purchaser at a price which is lower than the price charged any other purchaser at the same level of distribution, where such lower price undercuts the lowest price offered to that purchaser by any other seller in that market, including failure to reasonably reflect differences in consumer acceptability in the marketing area between respondents' products and those of any other seller in that market;

2. From selling or offering to sell its macaroni or related paste products at a price less than the cost of manufacture and delivery thereof with the purpose or intent to injure, suppress or stifle competition in the manufacture, sale or distribution of such products;

3. From offering to buy or buying and taking over stocks of macroni products sold and distributed by competitors, or agreeing or arranging with retail sellers for any consideration whatever to lift or remove from the channels of trade stocks of macaroni products distributed to such retail sellers by competitors.

Complaint counsel further request that Golden Grain and its subsidiaries, be ordered, among other things:

> To divest, to a purchaser or purchasers approved by the Federal Trade Commission, all stock, assets or other interests acquired by respondents from Mission Macaroni Company, Major Italian Foods Company, Inc., Oregon Macaroni Manufacturing Company, Inc., and Porter-Scarpelli Macaroni Co., Inc.

Respondents, through their attorneys, answered the complaint and denied the substantial allegations thereof. Hearings have been completed, and proposed findings of fact, conclusions of law and replies thereto have been filed by respective counsel. The transcript of the testimony taken at hearings comprises more than 5100 pages. Approximately 790 Commission exhibits were received in evidence, many of them multi-paged. Approximately 321 exhibits were received in evidence on behalf of respondents.

All proposed findings and conclusions not found or concluded herein are denied. Upon the basis of the entire record, his observation of the witnesses and their demeanor while testifying on the witness stand, and an evaluation and determination of the weight to be given their testimony, the hearing examiner makes the following findings of fact and conclusions of law, and order:

FINDINGS OF FACT

1. Golden Grain Macaroni Company, hereinafter sometimes referred to as "Golden Grain," is a corporation organized and doing business under the laws of the State of California, with its office and principal place of business located at 1111 139th Avenue, San Leandro, California (admitted in Answer).

2. The individual respondent, Paskey DeDomenico, is the president of the corporate respondent, with his office and principal place of business located at 4715 6th Avenue South, Seattle, Washington. In his capacity as an officer, director and stockholder of Golden Grain, Mr. DeDomenico formulates, directs and controls the policies, acts and practices of the Mission Division of Golden Grain, and he,

together with the other officers and directors of Golden Grain, formulates, directs and controls the policies, acts, practices and operations of respondent Golden Grain (admitted in Answer).

3. Golden Grain is primarily engaged in the business of manufacturing, processing, selling and distributing macaroni, spaghetti, noodle and dry paste products, including so-called convenience dinners, to wholesale grocery companies, retail grocery chain stores, and institutions, including restaurants, schools, hospitals, and military installations. Under the name of D. Ghirardelli, corporate respondent is also engaged in the business of manufacturing, selling and distributing chocolate and cocoa candy (admitted in Answer).

4. Golden Grain has plants located in San Leandro, California, Seattle, Washington, and Bridgeview, Illinois. Through its Seattle plant, operated by what is called the Mission Division of Golden Grain, macaroni and related paste products are sold and distributed under the Mission brand name or label, among others, in the States of Washington, Oregon, Montana, Idaho, Hawaii, and Alaska.

5. When the terms "Pacific Northwest" or "Pacific Northwestern United States" are used herein, the same shall be taken to mean the States of Washington, Oregon, Idaho, and the western one-half of the State of Montana as delineated in the last paragraph of Paragraph Two on page 64 of the complaint herein.

6. The macaroni and related paste products manufactured and produced by Golden Grain have been, and are being sold by Golden Grain to purchasers located throughout the several States of the United States and in the District of Columbia. Golden Grain has caused, and is now causing, said macaroni and related paste products to be transported and shipped from the various places of manufacture to purchasers located in States other than where said macaroni and related paste products have been, and are being, manufactured, and there has been, and is now, a constant and continuous flow of said macaroni and related paste products in interstate commerce. The respondent, Golden Grain, has been, and is now, engaged in commerce as "commerce" is defined in the Federal Trade Commission Act. Golden Grain has been, and is now, in substantial competition with other corporations, individuals and partnerships engaged in the manufacture, sale and distribution of macaroni and related paste products in "commerce" as that term is defined in the Federal Trade Commission Act (admitted in Answer).

History of Golden Grain Macaroni Company

7. Golden Grain Macaroni Company was originated in 1912 by the father and grandfather of Mr. Paskey DeDomenico, the president

of Golden Grain, and his two brothers, Messrs. Vincent and Tom DeDomenico, in San Francisco, California. These three brothers are now the principal stockholders of Golden Grain Macaroni Company, which was incorporated in 1916. For the first twenty years of its existence, Golden Grain manufactured and sold macaroni products in bulk containers of 10-pound, 25-pound and 50-pound boxes and 100-pound sacks, mainly to the Italian trade, bulk customers. During the depression years of the 1930's prices of dry paste products in northern California were depressed and manufacturers located there were not making a profit. However, shipments of dry paste products reached the northern California market from as far east as Louisville, Kentucky, and New Orleans, Louisiana, at a price of 90 cents for 20 pounds of macaroni, or 4½ cents per pound. About that time, the Dupont Company introduced a new product, called "Cellophane," and Mr. Paskey DeDomenico conceived the idea of packaging macaroni and spaghetti in cellophane bags. Mr. DeDomenico also originated the idea of providing the store owner with a small retail rack upon which to display the packaged macaroni products (Tr. 4342–43). Immediately prior to the time Golden Grain began packaging macaroni and paste products in cellophane bags, Golden Grain was probably the tenth largest packer of bulk macaroni products in northern California. After four or five years of promoting the sale of macaroni in cellophane packages, Golden Grain had probably become the number two brand in northern California, the number one brand on the Pacific Coast at that time being Fontana. Fontana was also the number one brand in Hawaii. Fontana's plant burned in 1949, and it ceased production in 1951 and withdrew from the market. Golden Grain then became the number one plant in northern California (Tr. 4343–44).

8. In June 1941, the Golden Grain plant, then located in San Francisco, California, burned (Tr. 4025), and Golden Grain was compelled to buy its dry paste from other suppliers. As a result of shortages which arose, an adequate supply of dry paste products became more difficult for Golden Grain to obtain. In the fall of 1941, Messrs. Paskey and Vincent DeDomenico learned about, inspected, and made arrangements for the purchase of an abandoned and vacant macaroni plant located on Sixth Avenue in Seattle, Washington. The plant had formerly been operated by the Ghighlione Macaroni Corporation of Seattle, Washington, but that company had ceased operations and the plant had been closed for about one year and a half. The building and former plant had been taken over by the Reconstruction Finance Corporation. Golden Grain purchased

the plant building and machinery from the RFC for approximately $31,000 in the fall of 1941 (CX 3-A and B; Tr. 4219; 4344-45).

9. The brothers, Paskey and Tom DeDomenico, with their respective families, moved to Seattle from California and commenced operating the former Ghighlione plant. Initially, all of the production from the Seattle plant was shipped to California for the use of Golden Grain's accounts located in California. By early 1943, Mr. Vincent DeDomenico was successful in salvaging three production lines from the four production lines formerly operated by the Golden Grain plant in San Francisco, California. The San Francisco plant was then reopened. When the San Francisco Golden Grain plant was able to start supplying part of its own requirements in California, the Seattle plant began to develop a small number of accounts in the Pacific Northwest (Tr. 4344-45).

10. In 1950, Golden Grain's rebuilt San Francisco plant was condemned by the city of San Francisco for the purpose of constructing a freeway. Golden Grain then constructed a new and larger plant in nearby San Leandro, California, in which it began operations in 1951. Although the new San Leandro plant became less dependent upon Seattle to supply part of its requirements for northern California, the Seattle plant continued to supply the San Leandro plant with a substantial amount of dry paste until 1964, when a State of Washington Freeway condemnation took the Golden Grain Mission Division's 8th Avenue plant in Seattle (Tr. 4346). This condemnation is discussed in more detail in paragraph 18 hereof.

11. However, Golden Grain's Seattle operation made little progress. In 1954, it had only $458,095 in gross sales, incurring an operating loss of $90,304. Its cumulative loss up to 1955 was approximately $355,235 (CX 39). Golden Grain's gross sales from its Seattle operation in 1955 (Tr. 3989, 4218) increased only $1,000 over 1954, to a total of $459,037 (CX 40-E), and its operating loss was $78,815. In 1955, the sales of the Golden Grain Seattle plant were so low that negotiations were begun with a local competitor, Mission Macaroni Company, of Seattle, Washington, whereby Golden Grain would sell its Seattle plant to Mission in exchange for a minority stockholder's interest in Mission Macaroni Company (CX 6; Tr. 4039, 4346). At that time, Mission Macaroni Company had approximately 80% of the macaroni market in Seattle and the Pacific Northwest and, according to Mr. DeDomenico, Mission Macaroni Company had the price of macaroni so low that Golden Grain was not able to make any money at those prices (Tr. 3989-4218). However, these negotiations failed, and Golden Grain did not sell out to Mission.

12. In June of 1956, Golden Grain and Favro Macaroni Company, a small macaroni plant located in Seattle, decided to merge their Seattle operations. Neither company had been operating successfully, and, by combining, the respective owners believed that they could operate more efficiently and competitively (Tr. 4034). Golden Grain paid $50,000 for Favro Macaroni Company, payable over a period of ten years at the rate of approximately $416.66 per month, plus a commission of 5% on all sales to Favro's old customers. (In this connection, it is noted that the complaint does not object to this acquisition and divestiture is not requested.) Favro's net sales at that time were approximately $250,000 per year, of which amount approximately $200,000 were sales to Safeway Stores, Inc. (Tr. 3986–87, 3990; CX 17 and 18).

Golden Grain's Acquisition of the Capital Stock of Mission Macaroni Company

13. About this time (1956), three of the stockholders of Mission Macaroni Company, a competing and the leading macaroni manufacturer located in Seattle, Washington, had differences with the fourth stockholder, Mr. Joseph Merlino. These were resolved by Mission's purchasing Mr. Joseph Merlino's stock for $225,000, the payments to be made over a five-year period. Mr. Joseph Merlino thereby severed his connection with Mission Macaroni Company and, in March 1957, built and began operating a new macaroni plant in Seattle under the name of Major Italian Foods Company, Inc., hereinafter discussed in paragraph 16 hereof. Mission Macaroni Company had been selling its principal macaroni products under the Mission label. Shortly thereafter, Mr. Guido Merlino, president of Mission, initiated negotiations with Mr. Paskey DeDomenico, president of Golden Grain, for the sale of Mission Macaroni Company to Golden Grain. Mr. Guido Merlino advised Mr. Paskey DeDomenico that the reason the remaining three shareholders of Mission Macaroni Company wished to sell to Golden Grain was that Mr. John Madonna, one of the three stockholders in Mission, was 65 years old and wished to retire. The second stockholder, Mrs. Pesce, was not active in the business, and third stockholder, Mr. Guido Merlino, had two children who were deaf and dumb, and he had no close family relatives who could operate the business, so he decided to sell out at the same time (Tr. 4039, 4219–20, 4346, 2147, 5036–37). The owners of Mission Macaroni Company gave Golden Grain a 60 or 90 day option in which to consummate the sale. Golden Grain borrowed the

necessary $150,000 with which to purchase the stock, and Golden Grain then took over the operation of Mission Macaroni Company on or about September 10, 1956 (CX 13). Golden Grain assumed the obligation of Mission Macaroni Company to pay Mr. Joseph Merlino the $225,000 for his former one-fourth stock interest in Mission Macaroni Company. Mission Macaroni Company was dissolved on November 30, 1956, and its assets distributed to Golden Grain (CX 16–A and B). The operations of Mission Macaroni Company were continued by Golden Grain at the former Mission plant located on 8th Avenue in Seattle as the Mission Division of Golden Grain Macaroni Company (Tr. 4024). Golden Grain continued operating its original plant located on 6th Avenue in Seattle. The former Mission plant on 8th Avenue had five presses and the Golden Grain plant on 6th Avenue had two presses (Tr. 4236). Mr. Paskey DeDomenico makes all decisions with respect to pricing by the Mission Division (Tr. 4044, 4322). The Mission Division sells macaroni and dry paste products in Washington, Oregon, Montana, Idaho, Alaska, and Hawaii. After the acquisition of Mission Macaroni Company, Golden Grain Macaroni Company continued to sell macaroni products under the brand name of Golden Grain, and also began to sell macaroni products under the brand name of Mission, which it had acquired by the purchase of Mission Macaroni Company.

14. At the time Golden Grain purchased the stock of Mission Macaroni Company in 1956, Mission Macaroni Company owned 49% of the stock of Porter-Scarpelli Macaroni Company, a macaroni manufacturing plant located in Portland, Oregon. In the early 1950's Mrs. Louise Scarpelli, the widow of the uncle of Mr. Ernest Scarpelli, had a disagreement with certain members of the Scarpelli family, and refused to sell her 49% stock interest in Porter-Scarpelli to any member of the Scarpelli family. Eventually, she sold the stock to Mission Macaroni Company, which at that time was owned by Messrs. Guido and Joseph Merlino, Mrs. Pesce, and Mr. John Madonna (Tr. 1939). So, it is seen that Golden Grain's ownership of the 49% minority stock interest in Porter-Scarpelli Macaroni Company was incidental to its acquisition of the stock of Mission Macaroni Company on or about September 10, 1956. The acquisition by Golden Grain of the stock of Mission Macaroni Company in 1956 was investigated and examined by the Federal Trade Commission to determine whether or not such acquisition violated the provisions of Section 7 of the Clayton Act, as amended. As a result of this investigation, the Federal Trade Commission issued a letter of clearance, dated July 10, 1957, and the Commission's investigative file was

closed. A copy of this letter was received in evidence at the hearing as Respondents' Exhibit 294.

15. Since the acquisition of Mission Macaroni Company in 1956, Golden Grain has not used its 49% stock interest in Porter-Scarpelli to the detriment of Porter-Scarpelli Macaroni Company. Golden Grain's 49% minority stock interest in Porter-Scarpelli Macaroni Company constitutes an investment in said company. The majority 51% interest in Porter-Scarpelli is owned by the Scarpelli family, including Mr. Ernest Scarpelli, his sister, and his father, and the Scarpelli family has complete control of the Porter-Scarpelli operations (Tr. 1673). Golden Grain has never exercised any control over the operations or management of Porter-Scarpelli Macaroni Company and has never had a representative on the board of directors of Porter-Scarpelli Macaroni Company. The only information that Golden Grain receives from Porter-Scarpelli Macaroni Company is an annual profit and loss statement (Tr. 4245–46; 1821–22; CX 550–1960; CX 552–1962; CX 554–1964; CX 557–1966).

The Origination and Growth of Major Italian Foods Company of Seattle, Washington

16. In early March of 1957, Major Italian Foods Company began operations as a manufacturer of macaroni and paste products in Seattle, Washington. The company began as an individual proprietorship owned by Mr. Joseph Merlino, referred to in paragraph numbered 13 above. Previously, Mr. Merlino had been a one-fourth owner and operator of Mission Macaroni Company, but sold his stock in Mission Macaroni Company in 1956. Major Italian's growth was meteoric; from a new plant with no sales in March of 1957, Major achieved a sales volume of $622,000 by 1960, and $852,000 by 1961 (CX 507). In 1960, Major produced approximately 4,345,000 pounds of dry paste, or 14.6% of all dry paste produced by all of the manufacturers in the Pacific Northwest (CX 509). In 1960, Major's volume exceeded that of U. S. Macaroni Company by 30%, and U. S. Macaroni, a manufacturer located in Spokane, Washington, had been operating in the Pacific Northwest market for 44 years. In 1961, Major's volume increased to 6,052,000 pounds, primarily at the expense of Golden Grain and Porter-Scarpelli Macaroni Company, the manufacturer located in Portland, Oregon. This volume was 18% of the total manufactured by all of the macaroni and dry paste manufacturers located in the Pacific Northwest and was close to the 7,457,000 pounds produced by Porter-Scarpelli, which had been op-

erating in the Pacific Northwest market for 45 years. Golden Grain's annual sales decreased substantially during the same period. In 1957, Golden Grain's net macaroni sales totaled $2,302,504. By 1960, its macaroni sales had declined to $1,994,000, a decrease of $310,000 in annual volume (CX 507; CX 42). On the other hand, Mr. Ernest A. Merlino, the general manager of Major Italian Foods, and a Commission witness, testified that, by 1960, Major's macaroni sales had increased to such an extent that its plant was short of production and there was a problem in supplying all of its customers. Mr. Ernest A. Merlino is the son of Mr. Joseph Merlino, the founder of Major Italian Foods Company and former one-fourth owner of Mission Macaroni Company. In 1960, Major added a long goods press (Tr. 2162–66). In contract, Golden Grain's Seattle plant, by 1955, after fifteen years of operation in the Pacific Northwest market, had developed only $458,095 in annual sales (CX 39–E).

The Acquisition by Golden Grain of 51% of the Stock of Major Italian Foods Company

17. During 1961–1962, in spite of its large sales volume, Major Italian Foods Company was having difficulty in meeting the payments of its bills for flour purchases from flour mills (Tr. 4241). Major attempted to negotiate a sale of its company to American Beauty Macaroni Company. A representative of the American Beauty plant in Denver, Colorado, inspected the Major Italian Foods plant in Seattle, but, after consideration, American Beauty decided against the purchase (Tr. 2210). Subsequently, Mr. Ernest Merlino requested Mr. Vern McElroy, a salesman for Centennial Flour Mills Company, to attempt to negotiate a sale of Major Italian Foods to Golden Grain Macaroni Company. Pursuant to this request, Mr. McElroy submitted several offers on behalf of Major Italian Foods Company to Mr. Paskey DeDomenico, president of Golden Grain, but these early proposals were refused by Golden Grain (Tr. 2214, 4241). Finally, an agreement was reached, dated August 8, 1963, in which 51% of the common stock of Major Italian Foods Company was sold to Manteca Bean Company, a wholly owned subsidiary of Golden Grain Macaroni Company, with an option to purchase the remaining 49% after three years (CX 20). In 1967, Golden Grain notified Major Italian Foods Company that Golden Grain intended to exercise its option to purchase the remaining 49% stock interest (CX 21). However, at the date of the hearing, the purchase of the remaining 49% had not been consummated.

At the time of the purchase by Golden Grain of the 51% stock interest in Major Italian Foods Company on August 8, 1963, there were no other prospective purchasers for the stock of Major Italian Foods Company (Tr. 5028, 5031).

18. In 1958, prior to the purchase of 51% of the stock of Major Italian Foods Company by Golden Grain in August 1963, it became known that the State of Washington intended to condemn the 8th Avenue plant of Golden Grain Macaroni Company, among other properties, for the Seattle-Tacoma Freeway (Tr. 4235). (The 8th Avenue plant was the plant purchased from Mission Macaroni Company in 1956). Golden Grain then began enlarging its other plant, the 6th Avenue plant, which contained only two presses. The maximum number of presses which could be installed at the 6th Avenue plant was four, so it was evident to Golden Grain that it would lose production from three presses when the 8th Avenue plant was condemned and its operations transferred to the 6th Avenue plant (Tr. 4236). This imminent condemnation made it necessary for Golden Grain to obtain an additional source of supply, and this was one of the reasons for its decision to acquire 51% of the common stock of Major Italian Foods Company. The condemnation award for the 8th Avenue plant occurred in June 1964, and the manufacturing operations in the 8th Avenue plant were transferred to the 6th Avenue plant approximately sixty days thereafter (Tr. 4238).

The Acquisition by Golden Grain Macaroni Company of Oregon Macaroni Company

19. About three years later, in 1966, Golden Grain purchased the capital stock of Oregon Macaroni Company, a small macaroni manufacturer then located in Portland, Oregon, which was owned one-third each by three individuals, Messrs. Ernest A. Staino, Ralph Rieman, and Ed Kelner. These three persons had acquired the company in 1948 for $7,000 each, a total of $21,000, including machinery, stock, inventory and goodwill (Tr. 4092). The purchase price paid by Golden Grain was $66,000, plus employing Mr. Staino and his two partners at the "same money" they had been receiving from Oregon Macaroni Company (Tr. 4239). Oregon's sales were confined to the Portland trading area (Tr. 4094). Mr. Staino and his partners had attempted to sell their company for three or four months, both to Porter-Scarpelli Macaroni Company, a Portland, Oregon, macaroni manufacturer, and Golden Grain, of Seattle. Porter-Scarpelli Macaroni Company had offered them $70,000 for the company, but

Golden Grain offered the best employment contract, fringe benefits, etc., to the three owners, so Mr. Staino and his partners accepted the Golden Grain offer. In addition to the purchase price of $70,000, Porter-Scarpelli Macaroni Company had only offered union wages to Mr. Staino and his two partners. At the time of the hearing, Mr. Staino and his former partners were operating the former Oregon Macaroni plant as a subsidiary of Golden Grain, and were still producing the same products which were formerly produced by the Oregon Macaroni Company, primarily bulk paste products. The plant has one production machine and produces approximately $180,000 worth of paste products each year, the same volume produced before its sale to Golden Grain (Tr. 4095–96). The plant does not pack any product under the Golden Grain or Mission label, but only under its own label, Best Ever. The former Oregon Macaroni plant's prices for macaroni products have remained the same and have not been changed since the purchase by Golden Grain (Tr. 4098). A good portion of the plant's sales today are to the institutional trade (Tr. 4100), but Golden Grain takes approximately 60% of the plant's production (Tr. 4240). Golden Grain needed the production, since the condemnation of the 8th Avenue plant reduced the number of Golden Grain's presses from seven to four. Mr. Staino testified that he and his partners sold the Oregon Macaroni plant to Golden Grain because they were going broke; they were always behind in payment of their bills (Tr. 4100). In the early 1960's, Oregon Macaroni lost its Fred Meyer private-label account to Major Italian Foods Company, Inc. (Tr. 4102). Mr. Staino testified that, when Major Italian Foods Company, Inc., came into the Portland, Oregon, market in 1960 or earlier, "They kept coming in with such a price you couldn't very well meet it; if you did meet it you would lose money on it" (Tr. 4104). At the time of the hearing, the former Oregon Macaroni plant was obtaining the same price for all of its products as the Mission Division plant of Golden Grain in Seattle was receiving for its products (Tr. 4113).

The Geographic Market

20. The relevant market for dry paste products has been delineated in the complaint as the Pacific Northwest, consisting of the States of Washington, Oregon, Idaho, and the western one-half of the State of Montana. Guy G. Gordon, A.B., M.B.A., and Ph.D. in economics from the University of California, and presently professor and chairman of the Department of Marketing Transportation

and International Business at the University of Washington, Seattle, Washington, a witness for respondents, believes that the State of Alaska should be included in the relevant market area since Alaska is a part of the Pacific Northwest market (Tr. 4915). Shortly before the beginning of hearings in this proceeding, Dr. Gordon had completed a study and forecast of industry growth for the State of Alaska for the next 20 years on behalf of the Federal Maritime Administration. Dr. Gordon was of the opinion that in the next 20 or 30 years, Alaska will be too small to support one macaroni manufacturing plant, even if the plant had the entire Alaskan market, which was very unlikely (Tr. 4910, 4921). Dr. Gordon also believes that the State of Hawaii should also be included in the Pacific Northwest market for dry paste products because all dry paste products sold in Hawaii today are produced from plants located outside that state and the freight rate on macaroni from all Pacific Coast ports to Hawaii is the same. There is neither a locational advantage nor disadvantage to a particular port in serving Hawaii. Typically, manufacturers have wider trading areas than a wholesaler's trading area (Tr. 4921). Although Dr. Gordon stated he would include Washington, Oregon, Idaho, western Montana, Alaska and Hawaii in the Pacific Northwest relevant market area for wholesalers of dry paste products, this would not be an accurate definition of a manufacturer market area as distinguished from wholesalers, because there is actual competition in the Seattle dry paste market from manufacturers whose plants are located more than 3000 miles away (Tr. 4915). For example, the Creamette Company, sells and ships nationally from its plant located in Minneapolis, Minnesota. Creamette's trading area extends to Buffalo, New York, 1000–1100 miles to the east, approximately 1900 miles to Florida in the southeast, approximately 850 miles to Texas in the southwest, and approximately 1800 miles to Washington and Oregon on the West Coast (Robert H. Williams, president of Creamette Company, Tr. 3637–3638); V. La Rosa & Sons, New York, with plants in Warminster, Pa., Danielson, Conn., Chicago, Ill., and Milwaukee, Wisc., sells and ships dry paste products on a national basis, including sales in Washington, Oregon and California shipped from its plants in Connecticut and Chicago, a maximum distance of more than 2500 miles (Vincent P. La Rosa, executive vice president of Creamette Company, Tr. 3723); Rongoni Macaroni Co., of Long Island City, New York, ships its dry paste products to stores in Seattle, more than 2500 miles away (Tr. 4939); and Western Globe Macaroni Co., of Los Angeles, Calif., sells and ships as far away as to Utah, Idaho, Washington, and Hawaii,

400–2678 miles distant (Tr. 783). Dr. Gordon testified that he had read the transcript of the testimony by witnesses who had testified in support of the complaint and was of the opinion that the record shows that dry paste manufacturers in the Eastern, Midwestern and Western United States which are at the threshold of economies of scale or higher have a trading radius approximating or exceeding 1000–3000 miles (Tr. 4917). He stated that "the efficient firm can feasibly and profitably serve more territory than the inefficient firm" (Tr. 4920).

21. Although the complaint designates the Pacific Northwest (the States of Washington, Oregon, Idaho and the western one-half of the State of Montana) as being the market involved in most of the alleged violations of Section 5 of the Federal Trade Commission Act by respondent Golden Grain Macaroni Company, complaint counsel's expert witness, Dr. Leon Garoian, in his testimony, broke the area into what he called three "sub-markets" within this Pacific Northwest area, to wit: (1) western Washington (or the Seattle-Tacoma area); (2) central and eastern Washington and Montana; and (3) western Oregon (Portland-Eugene). The basis for his classification of these so-called sub-markets were transportation costs, which, according to Dr. Garoian, "isolate the Pacific Northwest from other geographic areas, thus creating significant absolute barriers to entry" (Tr. 4501). Complaint counsel also refer to sub-markets at several places in their proposed findings. These so-called sub-markets to which reference is made are either wholesale trading areas or parts of wholesale trading areas, and are not determinative of the percentage of the market for the dry paste manufacturers. Of course, it works to the advantage of complaint counsel's argument to reduce the geographical size of the dry paste manufacturers' market to as small an area as possible. By the use of artificial boundaries around selected locations and limited customers, higher but artificial market percentages can be pictured. As suggested by respondents, by the means of arbitrarily designating a market comprised of the Seattle warehouses of Safeway Grocery Stores, Inc., and one wholesaler, such as Associated Grocers, complaint counsel claim that in the largest of the sub-markets involved (the Seattle area "the Golden Grain group of firms holds approximately 98% of the total sales" (Page 15, Par. 3, Complaint Counsel's Proposed Findings). As authority for this contention, complaint counsel cite CX 513, which is a summary of dry paste products moving through the Seattle warehouses of Safeway and Associated Grocers, and which ignores all of the other grocery chains and wholesalers located in Seat-

tle and western Washington. Counsel also say, that, regardless of the fact that the largest wholesaler in the area, West Coast Grocery Company located in Tacoma, Washington, has had I.B.M. stock control records available for many years, complaint counsel ignored these records, as well as those of other grocery chains and wholesalers, in computing the movement of their dry paste products through warehouses (Tr. 5102–5111, 3940–45).

22. Also, by using the Safeway warehouse, complaint counsel included dry paste products moving to both Alaska and Eastern Washington, as the Safeway warehouse in Bellevue, Washington, supplies eastern Washington stores as far east as Prosser, Washington, as well as Alaska. Competing stores in the Prosser area are supplied by wholesalers from Spokane. It is seen, therefore, that there is a definite overlap in the two trading areas. There is also an overlap in trading areas of American Wholesales, with a warehouse in Bellevue, Washington, and one in Yakima, Washington, which is east of the Cascade Mountains; Associated Grocers, with warehouses in Seattle and Yakima; Safeway, which, as noted above, supplies stores in Eastern Washington as far east as the Tri-cities area, and also stores south to Longview (stores in Longview also being supplied from Portland, Oregon, by Portland wholesalers); and Pacific Fruit Co. Produce, a wholesaler with headquarters located in Seattle, with warehouses located in Seattle, Wenatchee and Yakima, Washington (Spokane wholesalers ship into the Yakima, Wenatchee and Tri-cities areas) (Tr. 4222–23, 4921–22). Because of the overlap between the trading area of the Seattle-based wholesalers and those based in Spokane and Portland, and particularly because of the fact that Seattle-based wholesalers have branch warehouses located in eastern Washington, the wholesale trading area is larger than either a Seattle, Spokane or Portland trading area (Tr. 4921–22). Certainly, as a practical matter, the dry paste manufacturing trading area is, as testified by Dr. Gordon, no smaller than the one circumscribed in the Commission's complaint. The designation by Dr. Garoian of these three sub-markets within the Pacific Northwest is purely artificial. His reason for the classification of the three sub-markets as being due to transportation costs, which "isolate the Pacific Northwest from other geographic areas, thus creating significant absolute barriers to entry" (Tr. 4501), is, contrary to the preponderance of the evidence. The evidence with respect to "barriers to entry" are discussed in a subsequent part of this decision.

The Relevant Product Line

23. The term "macaroni" is used by the macaroni industry to designate the dry paste products produced by a macaroni manufacturer. There are approximately 40 or more varieties or shapes of macaroni and spaghetti products produced today, in three basic types, generally characterized as "long goods," "short goods," and "coil products." Each of these three basic shapes are in either the egg (noodle) or non-egg category (Tr. 175, 832, 1680). The basic ingredients used in manufacturing macaroni dry paste products are flour (preferably durum wheat or semolina wheat flour) and water. The flour is mixed with water and run through an extruding press, then placed in a die so as to give the mixture the desired shape. The shaped dough is then placed in a heated dryer for varying periods of time. After drying, the macaroni product is then placed in packages, polyethylene film bags or paper boxes. Macaroni plants today are fully automatic, including the packaging machinery (Tr. 701–02, 3654–55).

24. It is the contention of counsel supporting the complaint that so-called convenience dinners should not be considered and included along with macaroni dry paste products as a part of the relevant product market for testing the monopoly allegations of the complaint. Counsel for respondents contend that convenience dinners should be so considered. Complaint counsel rely principally on the testimony of their expert witness, Dr. Leon Garoian, and several other witnesses, who testified that no high cross-elasticity of demand exists between packaged dry paste and dry paste convenience dinners; that they are different products and appeal to different customers, that prices of one are not responsive to price or volume movements of the other, and that the two products are priced completely independent of each other (Tr. 4500–01). On the other hand, several witnesses, including respondents' expert witness Dr. Gordon, several manufacturers and a retailer, testified that dry paste and convenience dinners compete in the same market for customers. If a housewife buys one product, she does not buy the other (Tr. 3634, 4254).

25. With respect to the product market, respondents' expert witness, Dr. Gordon, was of the opinion that, as a minimum, all dry paste macaroni products should be considered, including those both canned and frozen, as well as convenience dinners, because they are substitutes for each other and are directly competitive (Tr. 4910–15). Mr. Hamlin, a salesman for Golden Grain in Seattle, testified, among other things, that, in the last several years, sales of

convenience dinners have materially cut into the Golden Grain, Mission Division's noodle sales, amounting to a reduction of approximately 30% of its noodle sales. He attributes this reduction in noodle sales to the large number of wives working today, who want a food which they can prepare within 15 minutes when they reach home in the evening. To prepare a casserole, some thirty to forty-five minutes are required. Working wives do not have this much time, so they buy and pay an additional price for convenience dinners (Tr. 4253–54). Mr. Hamlin was of the opinion that a 10% decrease in price of convenience dinners would tend to reduce the sales volume of dry paste products, whereas a 10% decrease in price of paste products would not tend to reduce the sales volume of convenience dinners "because the average housewife is looking for a short cut. She likes this 15 minute preparation. I believe she is going to continue to buy convenience dinners" (Tr. 4258). Mr. Robert Williams, president of the Creamette Company, testified that the same store customers are potential purchasers of both dry paste and convenience dinners (Tr. 3634), and a retail store operator, Mr. Paul Bocci, of Portland, Oregon, testified that a store promotion on macaroni and cheese convenience dinners slows down his sales of dry paste elbow macaroni (Tr. 4903). Mr. Bocci likened the increase in sales of convenience dinners and resulting decrease in sales of dry paste to the effect on sales of sack flour when ready cake mixes were introduced on the market some years ago. Mr. Bocci testified that his store's sales of sack flour decreased from approximately 25 cases per year to two cases per year after the introduction of packaged cake mixes some years ago (Tr. 4905–06).

26. Mr. Paskey DeDomenico testified that Golden Grain's sales of dry paste products are on the downgrade, while most of Golden Grain's growth in recent years is due to its increase in sales of convenience dinners, such as macaroni and cheese, spaghetti dinners, and noodle dinners (Tr. 4283). Golden Grain's total sales for 1960 were $11,000,000. Its total sales for 1966 were $25,494,000, but only $8,409,000 of this volume was for dry paste. The remaining volume of approximately $17,000,000 consisted of convenience dinners and miscellaneous items, such as dried beans, rice, peas, nuts, candy, soups and desserts (Tr. 4347). Dr. Gordon was of the opinion that the rapid increase in sales of convenience dinners indicated that the macaroni business is entering a phase that has occurred in other products, such as cake mixes and dehydrated and frozen potatoes, in which the prepared form replaced much of the market for the unprepared product. The A. C. Nielson survey report shows that for

the period February–March 1968, dry paste convenience dinners totaled approximately 50% of the total sales of dry paste (CX 777), thus demonstrating, in the opinion of Dr. Gordon, that the same people are customers for the various forms of the product. Dr. Gordon emphasized that, in any market, where one product is a substitute for another, there is a cross-elasticity of demand (Tr. 4914–15).

Concentration

27. In 1963, there were five companies operating macaroni plants within the States of Washington, Oregon, Idaho and the western one-half of Montana: the Mission Division of Golden Grain, Major Italian Foods Company, Inc., both located in Seattle, Porter-Scarpelli Macaroni Company and Oregon Macaroni Company, both located in Portland, Oregon, and U.S. Macaroni Company, located in Spokane, Washington. Each of these companies sold their macaroni products at wholesale prices to wholesalers, retail chains, and institutions on a delivered price basis. In fact, wholesale prices by all macaroni manufacturers in the United States are on a delivered basis. Complaint counsel contend that Golden Grain's ownership of the 51% interest in Major Italian Foods Company, Inc., and its ownership of Oregon Macaroni Company, when added to the sales by its Mission Division, gave Golden Grain a total market share of 69.8% of the total dollar sales and 68.1% of the total sales in pounds of paste products by macaroni manufacturers located in the Pacific Northwest in 1966, for example. For this assertion, complaint counsel rely on Commission Exhibit 507 and Commission Exhibit 509, respectively. Commission Exhibit 507 purports to represent the total sales in dollars by macaroni manufacturers located in the Pacific Northwest made both within and without the Pacific Northwest, for each of the years 1960–1966, inclusive. Commission Exhibit 509, purports to be a tabulation of flour "purchased or consumed for the production and sale of paste products by Pacific Northwest manufacturers," and also includes flour used to produce dry paste that was sold both within and without the Pacific Northwest. The record shows that the Mission Division's sales during May 1962, May 1963, and May 1964 outside of the Pacific Northwest ranged from 7.3% to 11.1% of its total sales (CX 760–B). During the same period, Major's sales outside of the Pacific Northwest ranged from 6.1% to 23.5% (CX 761). Therefore, these exhibits are not valid bases upon which to make the conclusions advanced by complaint counsel. To make a fair analysis of the Pacific Northwest dry paste market, the

manufacturers' sales in the Pacific Northwest should be separated and subtracted from their total sales in all areas.

28. The second deficiency in Commission Exhibit 507 and Commission Exhibit 509 is the fact that the Mission Division's dollar sales include its sales of dry paste Mission macaroni and cheese dinners, and, with respect to Commission Exhibit 509, flour purchased by the Mission Division was used in producing the dry paste packaged in Mission's macaroni and cheese convenience dinners. A third defect is the fact that the sales by Major Italian Foods included a substantial volume of dry paste sales to Mission for resale. The resale of the products was then included in Mission's sales. As a result, what was ultimately one sale by the Mission Division to a wholesaler or chain store was counted twice in Commission Exhibit 507 in determining Mission's share of the dollar sales. For example, if in 1966 Mission purchased $400,000 in dry paste products from Major Italian Foods, Major's sales of $1,269,000 for that year as shown on Commission Exhibit 507 would be overstated by $400,000 in computing market shares because these sales were not to wholesalers or chains but to the Mission Division. The same paste products purchased from Major and represented by the $400,000 of sales by Major would then be sold by Mission and would be again represented in Mission's net sales. This was recognized by the person who prepared Commission Exhibit 507 because the footnote recites ". . . sales include paste products purchased for resale. . . ." However, in computing market shares, complaint counsel ignore this fact.

29. Commission Exhibits 754–767 are tabulations of sales invoices of Pacific Northwest dry paste manufacturers to customers located within the Pacific Northwest for the months of May 1962, 1963 and 1964, but not for 1965 and 1966. In other words, sales of dry paste by these manufacturers to customers located outside the Pacific Northwest are excluded from these tabulations, as they should be. However, complaint counsel have ignored the data contained in these exhibits for 1962 through 1964 in computing the degree of concentration of market shares held by Pacific Northwest dry paste manufacturers. When the sales by Pacific Northwest dry past manufacturers made to customers located in that area, as shown on Commission Exhibits 765–767, are combined with the sales of dry paste manufacturers located outside of the Pacific Northwest but selling within that area, the percentages are substantially lower than those shown on Commission Exhibit 507 and Commission Exhibit 509. The table on the following page combines the sales within the Pacific Northwest shown on Commission Exhibits 765–767 with the

sales in the Pacific Northwest by manufacturers located outside of the Pacific Northwest (as shown on Commission Exhibit 283) as follows:

May 1962, May 1963, May 1964—Sales to Grocery Store Customers in the Pacific Northwest by Pacific Northwest Manufacturers and by Other Manufacturers Selling Within the Pacific Northwest

	1962	Percent	1963	Percent	1964	Percent
Mission Division	$141,594	45.2	$126,124	42.2	$160,810	44.0
Major Italian Foods	44,899	14.3	44,999	15.0	47,581	13.0
Oregon Macaroni	5,090	1.6	4,625	1.5	7,174	2.0
Porter-Scarpelli	59,760	19.1	58,359	19.5	73,509	20.1
U.S. Macaroni	32,245	10.3	33,969	11.4	41,824	11.4
Outside-the-area suppliers	[1] 30,000	9.6	[2] 31,119	10.4	[3] 34,465	9.4
Total sales—all suppliers	$313,588		299,195		365,363	
Total of combined Mission-Major percentage for 1963 and 1964 [4]				57.2		57.0

[1] Annual sales of $294,644 as shown on CX 283, plus approximately $15,000 of sales by A&P Stores and $50,000 in sales by Pot-O-Gold Noodles for a total of sales in 1962 of $359,644, or an average of $30,000 per month. Pot-O-Gold sales are set forth at p. 16, Complaint counsels' Proposed Findings.

[2] $323,437 as shown on CX 283, together with $50,000 in annual sales by Pot-O-Gold Noodles for a total annual sale of $373,437, or an average of $31,119 per month.

[3] Sales of $363,576 as shown on CX 283, together with $50,000 in annual sales by Pot-O-Gold Noodles, for a total annual sale of $413,576, which is an average of $34,465 per month.

[4] Oregon Macaroni sales are not combined with Mission's sales for the reason that Oregon Macaroni was not acquired until 1966.

30. The cumulative effect of the three defects in Commission Exhibits 507 and 509 and in the computation of market shares proposed by complaint counsel is particularly demonstrated for the year 1964. The table shown on the previous page hereof [above], which is based upon Commission Exhibit 283 and Commission Exhibit 767, shows Mission's and Major's combined market shares for 1964 at 57%, as compared to 67.4%, as shown on Commission Exhibit 507, or 10.4% higher than it actually was. Indeed, respondents contend that Commission Exhibit 767 and the table on page 25 hereof [above], which is based upon Commission Exhibit 283 and Commission Exhibit 767 show a higher market share for Mission and Major than they actually had in the Pacific Northwest because (1), all sales to wholesalers in western Washington were included on Commission Exhibit 767 unless the invoice clearly indicated that the dry paste product shown on the invoice was to be transshipped to Alaska. If the invoice did not so indicate, then the sale was tabulated as part of sales in the Pacific Northwest, resulting, counsel contend, in an overstating of sales in western Washington, and (2), the market share of the Mission Division is also overstated for the reason that a number of brands of dry paste products sold in the Pacific Northwest are not included in the Commission's figures on Commission Exhibit 283. As an example, the "Rose" brand noodles were found by Dr. Gordon in 17 of the 25

stores that he visited, but are omitted from the FTC table. Also omitted were Ronzoni, which Dr. Gordon found in eight stores with as many as eight facings, and several other brands were omitted. Counsel for respondents say that Mission's 44% of the dry paste sales in the Pacific Northwest for May 1964 to wholesalers and chains is close to the percentage of 43.3 determined by A. C. Nielson for movement through grocery stores for the two months following May 1964. (See Nielson Report for June–July 1964, designated "JJ" on RX 295–C). As shown on Respondents' Exhibit 295 A through D, Mission's share of the market in Nielson's North Pacific area declined from 43.3% in June–July 1964, to 37% in June–July 1965, to 35% in June–July 1967, and to 34% in February–March 1968. This decline of approximately 10% in Mission's sales from June–July 1964 through February–March 1968 is shown on the A. C. Nielson report of that date (RX 295 A & H). Counsel further say that the addition to the 1968 percentage of the 1.5% to 2% share of the market formerly held by Oregon Macaroni Co. would result in a combined market share of 49.3% to 49.8% in February–March 1968. That actually, Oregon Macaroni's market share in 1968 was substantially less than its share of 1.5% to 2.0% during 1962–64, as shown on the table on page 25 hereof [p. 87 *supra*], for the reason that Oregon Macaroni has lost a substantial portion of its business to Porter-Scarpelli (Tr. 4111, 4096, 4109). Counsel for respondents say that neither a 57% market share in 1964 nor a 47–49% share in 1968 represent a monopoly share of the Pacific Northwest dry paste market.

31. However, respondents contend that, even if the relevant product line excludes dry paste convenience dinners, Golden Grain has only 34% of the dry paste macaroni market in the Pacific Northwest. In support of this contention, respondents offered and there was received into evidence, four reports prepared by the A. C. Nielson Co. on sales of packaged dry paste through grocery stores (RX 295 A–H). The reports are made bi-monthly and are received 30 to 40 days after the end of the period. Nielson uses a statistical sample of grocery stores and sends employees to selected stores to inventory the store to determine movement of products through the store. Mr. Vincent DeDomenico testified that Goldern Grain has used the A. C. Neilson reports for more than ten years and had found the service to be the most accurate of its kind distributed in the United States. Golden Grain depends upon the Nielson survey data in making marketing decisions in its business (Tr. 4377). Respondents' Exhibit 295 A–D is a series of Nielson reports covering the period from

April–May 1963 to February–March 1968 for an area designated North Pacific, with subisidiary information defining North Pacific and the brands included for Golden Grain. The North Pacific area is defined as the States of Washington and Oregon, and the north one-half of the State of Idaho (RX 295 E, G). In order to place the excluded area in Idaho in proper perspective, the excluded portion of Idaho in 1965 had total dollars of grocery store sales equal to 5.3% of the total dollars of grocery store sales in the included areas of Washington, Oregon and northern Idaho. The Golden Grain brands that are included in the Nielson reports are Golden Grain, Mission, Dinner Hour, Best Bet, Spun Gold, and Manchu brands (RX 295 F).

32. The Nielson report for April–May 1963 through October–November 1964 shows that on April–May 1963 Golden Grain brands had 50.6% of the grocery store sales of packaged dry paste in the North Pacific (RX 295 C). This report is to be compared with the report for February–March 1968, which shows that by February–March 1968 Golden Grain's share of the North Pacific packaged dry paste sales through grocery stores had declined to 34% (RX 295 A, H). The report shows sales during the February–March 1968 period for other companies as follows:

	Percent
Major (including Majorette and Family Pak labels)	13.8
Porter-Scarpelli (including Porter and Sunrise labels)	22.8
U.S. Macaroni (including Taystee and Betty Baker labels)	14.6
All other brands	14.8

The "all other" category includes Creamette, Globe A–1, La Rosa, Ronzoni, American Beauty, and private labels.

33. Golden Grain has less than 20% of the sales in western Montana (Tr. 4386) and approximately 20% of the sales in the southern Idaho market (Tr. 4730). If these sales were included in the Nielson report (RX 295 H), Golden Grain's share of the Pacific Northwest packaged dry paste market would have been less than 34%. Major does very little business in either Idaho or western Montana (CX 756 A, B). If the sales by Golden Grain and Major are combined, the total share in 1968 of sales in the North Pacific through grocery stores of packaged dry paste is 47.8%. The share of sales in the Pacific Northwest would be less. Golden Grain's sales have declined by 16% in the past five years and neither its share of the market nor its share combined with Major represents a monopolistic market share or concentration of market power. This fact is confirmed by the evidence of competitive behavior and pricing in the Pacific Northwest during 1963–1968.

Barriers to Entry

34. Complaint counsel say that there are four types of barriers to entry into the Pacific Northwest market which "permit respondent to charge a super-competitive price in the Pacific Northwest without triggering that self-correcting mechanism," which would otherwise occur if there was easy entrance (CPF, p. 17). The barriers listed are freight costs, other cost disadvantages, product differentiation, and respondents' pricing practices. With respect to freight costs, there is generally a built-in advantage which a local manufacturer may have over a manufacturer who must ship his product into that market from a great distance. However, freight costs in the dry paste macaroni industry are not comparable to freight costs incurred by many manufacturers, such as steel or concrete manufacturers. The evidence shows that economies of scale utilized by an efficient macaroni plant appreciably offset the cost advantages held by the small local manufacturer. The Creamette Company, of Minneapolis, Minnesota, is competing in the Seattle market. This plant produces approximately 32 million pounds per year (Tr. 3596), and is thus able to produce macaroni products at 1.6¢ per pound cheaper than a plant producing 10 million pounds, such as the Mission Division (Tr. 1252). Also, the freight costs on flour purchases by macaroni manufacturers located in the Pacific Northwest must be considered. Here again, a dry paste manufacturer such as Creamette has an advantage over dry paste manufacturers located in the Pacific Northwest because Creamette is located near the flour mills. The differential between freight that the Mission Division pays on its flour purchases and the freight that Creamette pays on its dry paste is only 61¢ per cwt., or approximately ½¢ per pound. Thus, Creamette has a possible 1¢ per pound advantage after payment of freight costs in competing in the Pacific Northwest against Major Italian Foods, Porter-Scarpelli Macaroni Company or U.S. Macaroni Company, all of which produce less than 10 million pounds per year, except Mission, which produces 12 million pounds per year. Complaint counsel and their expert witness Dr. Garoian characterized freight costs as "absolute" barriers to entry into the Pacific Northwest dry paste market. That this contention is not valid is demonstrated by the large number of outside manufacturers who are now shipping to and selling dry paste products in the Seattle market from plants located as far away as the Eastern Seaboard. These manufacturers have already entered the Pacific Northwest market where they are

now selling their dry paste products. The names and locations of some of these plants are listed in Paragraph 20 hereof.

35. Complaint counsel say there are other and additional cost barriers, other than freight, such as the initial small sales volume when entering a new market, thus resulting in higher sales costs. This is true in any line of business, but these barriers are not barriers to entry. These barriers are normally to be expected by any new entrant. After the entrant has been in the new market for a while and his product brand has become established in that market, his higher initial costs will tend to diminish.

36. The third type of barrier to entrance urged by complaint counsel is what they characterize as "product differentiation barriers." The Commission's expert witness, Dr. Leon Garoian, testified that product differentiation refers to the distinctions of similar products in the minds of consumers by advertising, such as brand names, causing the consumer to believe that the advertised brand product is superior in quality to an identical product. Dr. Garoian testified that consumers consider it a superior product and are willing to pay a premium price for it rather than accept a substitute offered by competitors. Dr. Garoian further testified that: "Since new entrants must frequently accept a lower price than established firms are able to get for a product of equal quality and cost, this disadvantage *is said* [italics supplied] to constitute a 'barrier to entry,' one that permits established firms to charge a super competitive price without attracting new entry." (Tr. 4485–86.) He further testified that product differentiation is measured in terms of the ability of a seller to command a higher price than his competitors for example, a 5% premium price for a product of identical quality (Tr. 4486). Dr. Gordon, respondents' expert witness, disagreed with Dr. Garoian's definition of product differentiation. In the opinion of Dr. Gordon, product differentiation means that a product is unlike another product and for it to have significance in the market it must be recognizably different. Dr. Gordon testified that, at the present time, product differentiation is achieved primarily through the use of brands and, in modern grocery supermarkets, all manufactured items, whether food or nonfood, are branded. Dr. Gordon continued: "So it seems a bit ridiculous to say that all manufactured products in stores have a premium price. I would certainly challenge this basic definition" (Tr. 4923–24). Brand acceptance by consumers in any market is a handicap that any new brand must overcome in entering a new market. However, this handicap is only temporary and

is generally removed by promotional and advertising effort by the new entrant. The Neilson reports (RX 295–A–D) show that Golden Grain's brands (Golden Grain, Mission, Dinner Hour, Best Bet, Spun Gold and Manchu, RX 295–F) experienced a substantial decline in the degree of consumer acceptance during the period 1963–1968. These reports reflected a decline in the market share of Golden Grain brands from more than 50% in 1963 to 34% in February and March 1968. A possible explanation of the decline of Golden Grain's dry paste sales is the large number of private label dry paste products which Dr. Gordon testified were presently available for sale in Seattle grocery stores, in addition to the large number of paste products manufactured by outside and far distant manufacturers, whose products are being sold in Seattle supermarkets. Economic theory cannot eradicate the factual evidence that absolute barriers do not exist in the Pacific Northwest that prevent new entrants into that market.

37. The fourth type of barrier to entry into the Pacific Northwest cited by complaint counsel on page 17 of their Proposed Findings are "barriers created by respondent pricing practices," which counsel state are discussed under the heading "Conduct," beginning on page 26 of complaint counsel's Proposed Findings. In this section of complaint counsel's Proposed Findings (page 26), they quote Dr. Garoian's definition of "conduct" and portions of his testimony contained on transcript pages 4492 and 4493, including the statement: "In general, there is *said* to be a casual connection between an industry's structure . . . and the 'conduct' patterns selected by its members." [Italic supplied.] Counsel then again refer to Dr. Garoian's statement above and cite the testimony of Messrs. Ernest Merlino and Phillip Schwartz to show that representatives of U. S. Macaroni Company, Porter-Scarpelli Macaroni Company, Oregon Macaroni Company, Major Italian Foods, and Golden Grain Macaroni Company had various meetings at various locations in the Pacific Northwest in an attempt toward "price coordination." This hearing examiner does not consider the testimony of Mr. Merlino and Mr. Schwartz to be reliable and trustworthy. Mr. Merlino was one of the principal witnesses offered by complaint counsel to support many of the allegations of the complaint against Golden Grain, in addition to his testimony concerning attempts toward "price coordination." Mr. Merlino testified for several days on direct and cross-examination in support of many of the allegations of the complaint. He was also called as a rebuttal witness for the Commission. This hearing

examiner observed his demeanor while he was testifying. On direct examination, Mr. Merlino was glib and voluble in his testimony and demonstrated a manifest hostility and bias toward respondents. He depicted Golden Grain as the leading "price cutter" in the Pacific Northwest and responsible for a so-called price war in that area during 1962–1963. On cross-examination, Mr. Merlino was evasive, equivocal, and on the whole, his testimony was untrustworthy. Mr. Schwartz also demonstrated bias and hostility toward respondents at the outset of his direct examination and, on cross-examination, exhibited untruthfulness in his testimony. For example, on cross-examination, Mr. Schwartz was questioned concerning the contents of a note or memorandum (RX 290), which Mr. Schwartz admitted he had written and transmitted to his superior, Mr. Charlie Pope, sales manager for Porter-Scarpelli Macaroni Company. In this note Mr. Schwartz purported to report to Mr. Pope the reason a Safeway representative had given to Mr. Schwartz for not reordering 4 lb. macaroni from Porter-Scarpelli. Mr. Schwartz finally testified that his statement in the note was false (Tr. 3247–48). This hearing examiner does not consider the testimony of Mr. Merlino and Mr. Schwartz to be of the character of the reliable, probative, and substantial evidence required by the Administrative Procedure Act. Therefore, this hearing examiner does not give any weight to the testimony of Messrs. Merlino and Schwartz.

Pricing and Trade Practices by Major Italian Foods Company, Inc.

38. In view of the fact that complaint counsel rely so heavily on the testimony of Mr. Merlino to establish many if not most of the allegations of the complaint against respondents, and the finding of this hearing examiner as to the reliability and credibility of Mr. Merlino's testimony, it is appropriate to cite from the record, documentary evidence and testimony, concerning some of the pricing and trade practices which were simultaneously being engaged in by Major Italian Foods, Inc., at the very time Mr. Merlino was complaining about Golden Grain's pricing and trade practices. It will be noted that Mr. Merlino was general manager of Major Italian Foods Company, Inc., and testified, among other things, that immediately after Major began operations in March 1957, the Mission Division of Golden Grain reduced the prices of its own dry paste products below those of Major Italian Foods, Inc., in an attempt to drive Major out of business, and had continued these and similar practices

during the succeeding years until Golden Grain acquired 51% of the stock of Major Italian Foods, Inc., in 1963. A copy of the Major Italian Foods Company initial price list when it began production in March 1957 was received in evidence as Commission Exhibit 140 (Tr. 1416; 2151). The Golden Grain price list bearing the heading "MISSION BRAND MACARONI PRODUCTS," dated October 1, 1956, which was in effect at the time Major's initial price list (CX 140) became effective, was received in evidence as Commission Exhibit 110. Golden Grain's prices at that time were $1.50 for the 10-pound bulk and $2.90 for the 20-pound bulk. Major's initial list price was $1.45 and $2.80 for the same sizes, respectively, or five cents under Golden Grain on the 10-pound bulk and ten cents under Golden Grain for the 20-pound bulk size. However, it must be kept in mind that the prices set forth in the Major Italian Foods price list do not necessarily reflect the prices at which Major actually sold its bulk and packaged macaroni products. The evidence shows many instances of macaroni sales by Major Italian Foods at prices lower than those quoted in its price list. Examples of these deviations are hereinafter referred to. The packaged macaroni was priced higher than the bulk macaroni. The 14-ounce Golden Grain dry paste price was $2.00, while Major's list price was $1.80. The 24-ounce Golden Grain dry paste list price was $3.25, while Major's list price was $2.95. So, it is seen that contrary to the testimony of Mr. Merlino, when Major first began business in March 1957, its initial price list was lower than Golden Grain's, and the evidence also establishes the fact that Major's actual selling prices were still lower than the prices set forth in its price list. Among the first customers that Major obtained in the Seattle area were two large buyers of bulk dry paste who had been customers of Mission: Western Farmers, a canning company, and Nalley's, Inc. Golden Grain quoted reduced prices to Nalley's, Inc., in an attempt to hold Nalley's as a customer (CXs 192 and 193). Golden Grain was informed by a representative of Nalley's that, no matter what price Golden Grain quoted to Nalley's, Major's price would be lower. Golden Grain was unable to hold this account (Tr. 4163–64).

39. On direct examination, Mr. Merlino testified, among other things, that, in 1957, Golden Grain reduced its price on the 14-ounce package size macaroni from $1.90 to $1.70 in Seattle, Tacoma, and Everett only, which undercut Major's price of $1.80 with comparable reductions on the other package sizes, and that it was never possible for Major Italian Foods to undersell Golden Grain on any package size during 1957 (Tr. 2159–2160). To contradict Mr. Merlino's testi-

mony, respondents offered, and there was received in evidence as Respondents' Exhibit 214, a copy of an order book from The Commission Company in Seattle, dated October 1957, which shows that 12/14-ounce Majorette elbow macaroni (a Major Italian Foods Company product) was priced at a cost to The Commission Company of $1.63, as contrasted to Golden Grain's cost to The Commission Company of $1.73. With respect to the 12/24-ounce elbow macaroni, this exhibit shows The Commission Company's cost from Major Italian Foods was $2.67, as contrasted to its cost from Golden Grain of $2.81. Again, an American Wholesale Grocery, Seattle, Washington, wholesale order sheet, dated December 9, 1957, shows 12/14-ounce Majorette elbow macaroni at $1.64 cost, as contrasted to 12/14-ounce Golden Grain elbow macaroni at $1.80 cost (CX 177–B). With respect to the 12/24-ounce size, the Majorette elbow macaroni is listed at $2.69 cost, as contrasted with the Golden Grain product at $2.95 cost (CX 177–B). At the end of 1957, Major Italian Foods Company had a list price of $1.70 for 12/14-ounce, with one case free with ten, or a net of $1.55. This is to be contrasted with Golden Grain's price at that time of $1.80 (RX 288).

40. In 1958, Major Italian Foods entered the Oregon market. To obtain new accounts in that territory, it offered an allowance of 50¢ per case and a 10% rebate or discount (Tr. 1951–53). In September 1959, Major was selling 12/14-ounce products at $1.45 net and 12/24-ounce at $2.56 net (RXs 225, 234). In November 1959, Mission was forced to reduce its price for the 12/14-ounce products to $1.60, and on 12/24-ounce to $2.70 (CX 118), which left Mission prices still above Major. On August 24, 1959, Major made an offer to Associated Grocers, one of the largest wholesale grocers in the Pacific Northwest, to sell and supply to Associated its Verifine brand private label at $1.27 for the 12/14-ounce products and $2.57 for the 12/24-ounce products, plus a 7% brokerage allowance (RX 82). Major began supplying Associated about 10 months later. The low prices at which Major provided Associated with its Verifine brand private label dry paste products during the period 1960–1963 were one of the most disrupting factors for dry paste in the Pacific Northwest market.

41. During 1959, Porter-Scarpelli Macaroni Company joined Major in a dry paste price battle. In March 1959, Porter-Scarpelli reduced its price on 12/14-ounce products to $1.25, which put it substantially under Major Italian Foods (RXs 211, 212). In a letter dated March 16, 1959, to United Grocers, a wholesale grocer located in Portland, Oregon, Porter acknowledged its low prices with the

statement that "The prices that you will have in the order guide should stop the sale of any competitive brands" (RX 212). Porter also dropped the price of 6/4-pound dry paste from $3.50 to $2.48, less 2% cash (RX 226). Porter continued its price reductions in 1960. In Feburary and April 1960, it offered its Sunrise brand 12/14-ounce product in Washington and Oregon at $1.00 per case, less jobber discounts, for a net price of 96¢ per case (RXs 287, 224). At this time Mission's price was $1.60 per case (CX 118).

42. On June 20, 1960, Mission raised its prices on 6/4-pound sizes in all of its areas of distribution (Tr. 4179, 4300–02; CX 122). On June 28, 1960, Major raised its list price in certain areas to equal Mission's list price. Major gradually raised its price in other areas, but not until the end of July of 1960 were all of Major's customers being billed at the new list price. Mr. Paskey DeDomenico testified that Major gradually raised its price following Mission's June 20 price raise (Tr. 4179). This is confirmed by the written comments of the Federal Trade Commission attorney-examiner on the face of Commission Exhibit No. 144–D.

43. On August 8, 1960, U.S. Macaroni raised its price on 12/14–ounce, 12/24-ounce, and 6/4-pound dry paste products in the Seattle area (CX 732). On August 15, 1960, Mission followed suit and raised its prices on these same sized products to the same level as U. S. Macaroni (CX 124). Major Italian Foods gradually raised its prices upward, but gave its customers protection at the old prices (Tr. 4180; CX 144–E).

44. In November 1960, Major Italian Foods began selling Associated Grocers' private label, "Verifine" at low prices—the 12/14-ounce size at $1.30 and the 12/24-ounce size at $2.50 (RX 244; Tr. 2400). Golden Grain's prices for these same packaged sizes were $1.80 and $2.95, respectively (CX 126). In a letter dated November 29, 1960, a salesman for Major Italian Foods explained Major's plan to a store owner as follows:

> It is our suggestion that Verifine items be stocked next to the other macaroni lines. In this way the customer will be able to quickly spot the price differential and therefore it will help the movement of your own label. If the Verifine line is stocked as a complete section, the price differential isn't as noticeable. The 10¢ per package in the 12-ounce Verifine Noodle line differential will be quickly noticed by the customer. (RX 47.)

Associated Grocers is one of the largest wholesalers in the Pacific Northwest with approximately 600 member grocery stores. Notwithstanding the devastating effects of Major's low prices on Verifine dry paste products, Mission made no changes in its own prices which

it had established on August 15, 1960, of $1.80 for 12/14-ounce and $2.95 for the 12/24-ounce products, until October 22, 1962. Major Italian Foods continued to follow its price of $3.15 for the 6/4-pound package for approximately 60 days, then it began a 50¢ per case promotion on that package size and continued to sell 6/4-pound packages to Safeway Stores in Richmond, California, at $2.50, f.o.b. Richmond, and to Safeway Stores in Spokane at $2.90, f.o.b. Spokane (RX 244; CX 144-F). On December 12, 1960, the Mission Division was forced to drop its price on 6/4-pound Best Bet brand packages to $2.65 to meet this promotion (CX 126; Tr. 4181). Mission's list price on 6/4-ounce packages remained unchanged thereafter until May 1962 (CX 656). On Nobember 6, 1961, the Mission Division reduced the price on its second label to $1.60 for the 12/12-ounce size and to $2.70 for the 12/24-ounce size in an attempt to compete with Major's price on the Verifine brand (CX 127; Tr. 3181–82). However, this attempt to meet the Verifine competition was not successful (Tr. 4181).

45. During the period 1960–1962, Major Italian Foods had many special deals on its 6/4-pound sizes. Beginning on January 1, 1960, it supplied a number of accounts in Spokane at a special price of $2.16 per case, including Safeway, Low Cost, Albertson's, and Roundup Wholesale Grocer. These same discounts were being offered in June 1961 and continued thereafter (Tr. 2849–63). Discounts of 9% on 6/4-pound sizes were also offered to a number of accounts in Oregon in 1961 (Tr. 2872–94). Beginning on October 2, 1961, Major sold 6/4-pound sizes to Big Bear Stores in Seattle at $2.65, less 50¢ per case, or a net of $2.15. On Commission Exhibit No. 125–C, the Federal Trade Commission attorney-examiner observed that "It was later extended to P–X Stores, to American Wholesale, and others. It . . . extended into the Oregon trading area."

46. Major had so many different pricing arrangements with each of its customers that Mr. Ernest Merlino, its general manager, on cross-examination, was only able initially to remember a few of them. However, after extensive cross-examination, and in each instance having been confronted with documentary evidence indicating facts contrary to his previous testimony, Mr. Merlino grudgingly admitted some of the rebates, cash payments, merchandise pickups, free merchandise, and other financial inducements that Major used to obtain new accounts. Rebates to customers were handled in various ways: Some received a cash rebate by check; others deducted an agreed amount when they paid their account; some were paid in cash by salesmen who, in turn, were reimbursed by submitting an

expense account; some were given credit memos; and certain accounts received a combination of two or more of the above examples. An indication of the tactics used by Major in obtaining business at the expense of two of its competitors, Golden Grain and Porter-Scarpelli, is contained in Respondents Exhibit 221, which was identified by Mr. Ernest M. Scarpelli, a Commission witness. Mr. Scarpelli testified that this exhibit was a letter, dated August 11, 1958, from a Porter-Scarpelli salesman, and received in the Porter-Scarpelli office on August 13, 1958, a portion of which is as follows:

> Major's new theory is to disregard the value of labels and sell on price. Ernie told me the other day they are not interested in building the Majorette label as much as they are on destroying Mission and Porter labels and the only way they can do it is by price (RX 221; Tr. 1856–57).

47. Near the end of 1961, U. S. Macaroni became active in promotions with an allowance of 40¢ off per case on its 12/24-ounce size products, and on its 12/14-ounce noodles. This reduced its price on the 12/24-ounce packages from the $2.95 list to $2.55. This allowance was provided to Safeway at Wenatchee, Washington, as per invoice dated December 8, 1961 (Tr. 3171), and to Safeway at Bellevue, Washington, as per invoices date January 10, February 1, February 19, and April 26, 1962 (RX 279). The allowance was provided to URM Stores, Inc., in Spokane on January 2, 1962 (RX 279). The terms of this promotion of indefinite duration on its primary label "Taystee" is shown on Respondents Exhibit 277, which is an announcement of a promotion to URM and Roundup, the two largest wholesalers in Spokane. This promotion placed U. S. Macaroni 40¢ per case under Mission on the 12/24-ounce size and came within 5¢ of meeting Major's price on the 12/24-ounce Verifine brand to Associated Grocers' ($2.55 vs. $2.50). In early 1962 Porter-Scarpelli Macaroni Company also became very active in promotions. Mr. Ernest Scarpelli, president of Porter-Scarpelli testified that, during the period from 1959 through 1961, Major Italian Foods offered 50¢ per case off plus a 10% discount to Oregon customers (Tr. 1951–53). These prices placed Major under the prices of the Mission Division, Porter, and all other competitors in Oregon during that period (Tr. 1953). Mr. Scarpelli stated that Porter did not meet this competition from Major until 1962, when it began meeting the competition from Major with the Porter "Sunrise" label and began offering more specials on Sunrise label 6/4-pound cases (Tr. 1952). On May 23, 1962, Porter wrote to Safeway in Portland offering to sell 6/4-pound Sunrise label products to Safeway at a list price of $2.00 per case, with a net cost of $1.76 per case, less 2% for cash (RX 218). This is to be

compared with the Mission Division's list price at that time for the 6/4-pound "Best Bet" label product of $2.35 and with Major's low price to Associated Grocers for the 6/4-pound Verifine product at $2.15. Porter's intentions in connection with this offer to Safeway were stated in its letter (RX 218), where it stated:

If I may make a suggestion in line with our previous phone conversation; advertise at 39¢ for 2 weeks and plug the market at that price. After a couple of weeks at 39¢ start to drop the price at the rate of 2¢ a package each week. When you get it down to 29¢ per unit let it set. I believe this will resolve this four pound problem for some time to come.

Porter's offer at the price of $1.76 net for the 6/4-pound package became effective on June 11, 1962, at which time all Porter salesmen were notified (RX 216). This offer was also made to Safeway Stores in Seattle during June 1962 (RX 217). On June 26, 1962, Safeway ordered 2,000 cases of 6/4-pound packages, which were delivered in July 1962 (RXs 292, 293). The Mission Division did not meet Porter's price of $1.76, but left its price at $2.35 until October 22, 1962, at which time it reduced its price for the 6/4-pound Best Bet label to $2.25 and for the 6/4-pound Dinner Hour label to $2.08 (CX 129). The Mission Division's price decrease to $2.08 on the Dinner Hour label was caused by Safeway, which advised the Mission Division that if it did not meet in part the Porter price, it would be dropped by Safeway (Tr. 4063). As has been stated, Associated Grocers is a purchasing organization for 600 stores in Washington, and in October 1962 it carried both the Mission and Verifine brands. Because of the price difference between its "Mission" and "Best Bet" labels and Major's "Verifine" label, the Mission Division was losing all of its Associated Grocers' customers (Tr. 4204–05). A comparison of these prices are as follows:

	Mission [1]	Best Bet [1]	Verifine [2]
12/12-oz. and 14-oz.	$1.80		$1.30
12/24-oz.	2.95		2.50
6/4-lb		$2.35	2.15

[1] CXs 124, 654–6. Best Bet is an unadvertised second label, comparable to a private label.
[2] RXs 65, 244.

48. In an attempt to meet this competition, the Mission Division, on October 22, 1962, reduced its prices on the Mission label to $1.65 for the 12/12-ounce and 12/14-ounce size, and to $2.70 for the 12/24-ounce size, and on its Best Bet label to $2.25 for the 6/4-pound size (CX 129). The Mission Division also reduced its prices on its "Dinner Hour," a controlled, nonadvertised second label, from

$1.49 on the 12/12-ounce and 12/14-ounce and from $2.51 for the 12/24-ounce to $1.46 for the 12/14-ounce, $1.30 for the 12/12-ounce, and $2.39 for the 12/22-ounce and 12/24-ounce packages (CX 580). These were the first price changes the Mission Division had made on its 12/12-ounce and 12/24-ounce and 12/24-ounce sizes, or any other Mission label products, since publication of its August 15, 1960, price list (CX 124), and they were the only downward changes by the Mission Division on its Mission label from November 1959 to October 1962. Immediately thereafter, on October 26, 1962, Major Italian Foods reduced its price on 12/12-ounce and 12/24-ounce Verifine label products to $1.10, on 12/24-ounce products to $2.25, and on 6/4-pound to $2.10 (RXs 65, 68). The differential after these October 1962 price changes is as follows:

	Mission	Best Bet	Verifine
12/12-oz. and 14-oz	$1.65		$1.10
12/24-oz	2.70		2.25
6/4-lb		$2.25	2.10

49. The Tradewell Grocery chain began purchasing private label dry paste from Major Italian Foods about the middle of 1962. During his testimony Mr. Ernest Merlino at first denied that Major sold Tradewell at the same low prices as to Associated Grocers, but after he was confronted with several selected invoices, he agreed that Tradewell was receiving the same low price as Associated (Tr. 2413–15). Major's price reductions on October 26, 1962, to Associated and Tradewell actually increased the disparity in price between the Mission Division's 12/12-ounce and 12/14-ounce sizes and the Verifine and Tradewell 12/12-ounce and 12/14-ounce sizes from 38% to 50%, and increased the spread on the 12/24-ounce package size to 20%. On October 25, 1962, U. S. Macaroni reduced the prices on its Taystee (primary) label 12/14-ounce size to $1.60, and on the 12/24-ounce to $2.55 (CX 739). These prices placed the Taystee brand 12/14-ounce at 5¢ and the 12/24-ounce sizes at 15¢ per case under the price of the Mission brand products. On December 6, 1962, Golden Grain complained to the Federal Trade Commission concerning the activities of Major Italian Foods and the pricing of Verifine label paste products. This letter was accompanied by copies of Associated Grocers' order guides showing the differences in the prices between products of the Mission Division and the Best Bet and Verifine brands (RX 298A–F).

50. During this time, sales of dry paste products by Major Italian Foods steadily increased. Its total annual sales for 1960 were

$605,000. This total increased to $802,000 in 1961, to $872,000 in 1962, and to $930,000 in 1963 (CX 507). It is thus seen that Major's sales increased from zero in March 1957, when it began business, to almost $1 million within a period of approximately 6 years, and a good part of this increase had been obtained by Major at the expense of Porter-Scarpelli, the Mission Division of Golden Grain, and Oregon Macaroni Company (Tr. 4294). An example of Major's ruthless drive for sales volume was a proposal made to Lucky Stores in Seattle on April 11, 1963 (RX 48). This letter is a proposal by Major Italian Foods to provide private label dry paste to Lucky Stores at a price which Mr. Ernest Merlino, general manager, testified was definitely below cost (Tr. 2466–67). Mr. Merlino explained that Major offered to sell the private label below cost so that Major would have its Majorette brand label as the exclusive primary label at Lucky Stores and the Mission label would be dropped as a primary label at Lucky Stores (Tr. 2468–69). On May 6, 1963, the Mission Division made its second price reduction during the period 1959–1963 on its 12/12-ounce and 12/14-ounce, and on its 12/24-ounce Mission brand products, when it reduced the price to $1.60 and $2.55 (CX 131). These new prices were equal to, but not lower than, the prices announced on October 25, 1962, by U.S. Macaroni for its primary label (CX 739) and were higher than the prices of the Verifine dry paste products produced by Major and sold to Associated Grocers' and Tradewell, priced at $1.10 and $2.25 per case since October 1962. After the secret rebates granted by Major, the Mission Division's reduced prices were still higher than the Major price.

Secret Rebates by Major Italian Foods

51. The findings made in the preceding paragraphs concerning prices by Major Italian Foods relate primarily to Major's list prices and announced promotions, and do not include Major's secret rebates and discounts. These rebates and discounts do not appear on the face of Major's invoices. The evidence shows that Major Italian Foods sold very little of its products at list prices during the period 1957–1963, and as testified by Mr. Ernest Merlino, general manager, Major's invoices do not reflect the actual selling price of its dry paste products. In order to determine the actual price at which Major sold the dry paste product, it is necessary to determine the cash rebates given by Major to a customer by check, the discount given by credit memorandum, the cash paid by the salesman and accounted for on his expense account, and the discount taken by the purchaser when he paid for the dry paste product (Tr. 2396–97, 2451, 2460–61, 2646, 2697).

52. Some of the secret discounts and allowances granted by Major Italian Foods were made in the form of unjustified 5% warehouse allowances or other discounts. For example, on direct examination, Mr. Merlino testified that he did not recall any deviation by Major Italian Foods from its published price list (Tr. 2269). On cross-examination, when questioned on this point, Mr. Merlino testified that the only deviation that he could recall was to the Piggly-Wiggly Stores in Portland, Oregon. Major drop-shipped directly to each of the 32 Piggly-Wiggly Stores in Oregon but still allowed each of them a 5% warehouse discount (Tr. 2335–36). Mr. Merlino had previously testified that "if the customer did not have a warehouse he would not be entitled to a 5% discount" (Tr. 2334). Mr. Merlino denied that the P–X Stores in Seattle received any type of special discount (Tr. 2355), or that Mid-State Food and Coffee Company in Yakima had a special arrangement (Tr. 2357). After lengthy cross-examination Mr. Merlino finally admitted that the P–X Stores in Seattle had received a 5% special discount which they deducted when they paid their bill (Tr. 2733, 2755). Mr. Merlino also finally admitted that Mid-State Food and Coffee Company in Yakima received a 5% cash discount off the invoice and that Major's ledger card showed that Mid-State received an additional 12% discount when it paid the invoices. However, Mr. Merlino refused to admit the obvious, that Mid-State received a special price from Major Italian Foods that is clearly shown on Respondents Exhibit 259. This exhibit shows how Mid-State computed the special price that it received from Major when it made payment on the several invoices involved (Tr. 2678–2709; RX 259). Mr. Merlino, after extensive cross-examination, finally admitted that Big Bear Stores in Seattle had received a special price in the way of a 10% discount which Big Bear deducted from the amount of the invoice when it paid its bill (Tr. 2617–20). Mr. Merlino also admitted that Major had purchased a $135 Polaroid camera for the buyer at Big Bear Stores (Tr. 2621). Mr. Merlino was then questioned about Dieringer's Stores in Portland, Oregon, and admitted that they had received a special 7% discount (Tr. 2630). He did not recall any cash payments by Major to obtain the account (Tr. 2632). After further questioning, he then remembered an advertising allowance of $25 per quarter that Major had paid to Dieringer's Stores (Tr. 2633). After being shown several checks of Major Italian Foods, Mr. Merlino further remembered that Dieringer's Stores had received payments of $25 per month from Major Italian Foods, beginning in 1959, and that these payments probably continued up to the date of the hearing

(Tr. 2640). Mr. Merlino finally remembered discounts or rebates that Major granted to Fuller's Market and Kanouse's Market, both located in Chehalis, Washington. Each of these accounts had deducted 9% from the amount of the invoice when it paid the invoiced amount. However, the invoices did not show the discount. The only way that the discount could be discovered was by an examination of Major Italian Food's account receivable ledger card for each store. Mr. Merlino's explanation of the discounts was that they were necessary to meet price competition from Verifine label paste products sold by Associated Grocers of which Major Italian Foods was the manufacturer (Tr. 2661–74). After extensive cross-examination, Mr. Merlino finally admitted other rebates, discounts, and cash payments by Major Italian Foods to gain entry into stores. For example, Nalley's, a large wholesaler of Tacoma, Washington, received a 5% discount on the invoice, plus 10% to 13% discount on payment, which discounts were discoverable only by an examination of the Major accounts receivable ledger cards (Tr. 2744, 2750). Also payments of $182 and $219 and a credit memorandum for $500 were given to Nalley's during the one-year period about which Mr. Merlino was questioned (Tr. 2746–49). Olympic Foods also of Tacoma, Washington, received a commission of 10, plus 5%, plus 5% (Tr. 2754).

53. During a portion of the period from 1958 through 1962, Major Italian Foods enclosed in each case of dry paste a 10¢ coupon for handling Major's dry paste products. When the grocer opened the case to place the contents on the shelf, he removed the coupon. Later the grocer presented the coupon to Major, who redeemed it for cash. Thus each coupon redeemed served to reduce the price of dry paste by 10¢ per case. Mr. Merlino was unable to remember the exact length of time that coupons were offered, but he did not believe it lasted for 2 or 3 years (Tr. 2537–40). However, he could not explain the 10¢ handling allowance shown on Major's February 1959 invoice to Piggly-Wiggly Stores (Tr. 2541), or the 10¢ coupon to which reference was made in a letter from Major to Safeway on July 18, 1958, which letter stated that the 10¢ coupon program was to become effective on July 28, 1958, to all accounts in Seattle, Spokane, and Portland (RX 127; Tr. 2844–47). Checks in various amounts, $412.26, $205.79, $142.50, and $178.94, were given by Major during 1960 through 1962 to Wadhams, a Portland, Oregon, wholesaler. Each of these checks is recorded in Major's check ledger as being issued in payment for the purchase of vitamins. Major bought no vitamins from Wadhams, and Mr. Merlino was unable to explain the reason for the checks (Tr. 2516–23).

470-536—73—— 8

Alleged Purchasers of Competitors' Macaroni

54. Subparagraph 2 of Pargraph Five of the Complaint alleges that Mission "purchased from certain retail outlets all macaroni and related paste products produced and sold by respondents' competitors to such outlets, and substituted respondents' products in said retail outlets." The testimony offered by complaint counsel in support of this allegation was meager and consisted of the testimony of Mr. Ernest Merlino and possibly, another competitor of the Mission Division, to the effect that Major's dry paste products had been removed from grocery store shelves and replaced by respondents' macaroni products. Respondents offered testimony to show that, where Mission macaroni replaced Major's macaroni on grocery shelves, the operator of the grocery store had made an independent decision to change brands and, for example, substitute Mission macaroni for the Majoarette brand, free and apart from any financial consideration offered or paid by the Mission Division. For example, Mr. Paul Bocci, owner of Paul's Foodland in Portland, Oregon (CX 99), testified that he decided to switch from the Majorette brand to the Mission brand macaroni in his market, and permitted his stock of Majorette items to dwindle to a small remaining stock approximating $57. He then requested Mission to remove the remaining Majorette items. Accordingly, the $57 worth of Majorette items were removed and replaced with Mission brand products. The Mission Division gave Mr. Bocci credit for the Majorette items at their wholesale cost (Tr. 4902–03). Another example of substitution by the Mission Division of a competitor's macaroni products on a grocery store shelf involved the Tom Boy Food Basket, of Seattle, Washington, which was purchased by the owner of another grocery store, who was a customer of the Mission Division. This Mission customer requested that the Mission Division remove the remaining packages on hand in his newly purchased store and replace them with Mission macaroni (CX 100; Tr. 4211–14). The other instance of the substitution of Mission macaroni for a competitor's product involved a change in ownership of Bill's Oakway Market, in Eugene, Oregon, where the new owner decided to replace the remaining stock of macaroni products amounting to approximately $50, and replace it with Mission macaroni (CX 98; Tr. 4211–2). In each of the examples referred to, the store owner decided to change brands and requested that Mission remove the competitor's stock of dry paste packages remaining on the grocery store shelves and replace it with the Mission brand. These were not predatory acts and competition was not injured thereby.

55. On the other hand, evidence was developed during the hearings showing many instances where macaroni products of the Mission Division were removed from shelves in grocery stores and replaced by macaroni products of Major Italian Foods and, to a lesser degree, by Porter-Scarpelli macaroni products. The evidence showed that, on many occasions, Major Italian Foods made a cash payment to the store owner for permitting Major to substitute Major's macaroni for a competitor's product (Tr. 2543–2606, 2728–9; RX 267). In other instances, Major made financial inducements to the store by purchasing the competitor's dry paste at the retail price, thus providing the grocer with a profit on the brand switch. Mr. Ernest Staino testified that Oregon Macaroni Products had been removed from grocery store shelves and replaced by either Major Italian Foods or Porter-Scarpelli Macaroni Company (Tr. 4108). Mr. Ernest Scarpelli remembered several instances where his company, Porter-Scarpelli, purchased competitors' macaroni from a retail grocery store, including Mission macaroni (Tr. 1913; RX 235). Where the substitution of one brand of macaroni for that of another was made at the request of the store owner, and the new supplier picked up the packages of the former supplier which remained on the grocery shelf, no injury to competition resulted.

Reducing Prices to Gain Entry into Stores

56. The evidence offered by complaint counsel to establish the allegations contained in subparagraph 3 of Paragraph Five of the complaint to the effect that Golden Grain reduced its prices or other charges to some grocers or retailers for the purpose of gaining entry into stores related to Golden Grain's transactions with the K-Mart Store in Spokane, Washington; Pay-N-Takit Stores in Vancouver, Washington; and Eddie's Distributing Company in Spokane, Washington. The evidence also showed that Golden Grain granted a 5% rebate to some customers in 1956 and 1957.

57. The evidence concerning the K-Mart Store in Spokane, Washington, shows that K-Mart was a new store being opened in Spokane and, as was the custom on the occasion of new store openings, Mission gave the new store one case of dry paste free for each facing in the store. The sale of the dry paste to the store was at Mission's list price (Tr. 1641–42). The evidence shows that for many years, it has been the custom of all the Pacific Northwest macaroni manufacturers to give one case free for each facing at a new store opening (Tr. 1641–42, 1778–79, 1815, 1876–77, 1906–07, 1912, 1921, 2007, 2345,

4230, 4334; RXs 210, 219, 232, 234, 238). The practice is not confined to the Pacific Northwest. American Beauty Macaroni makes such an offer in west Texas and New Mexico (Tr. 800).

58. The evidence concerning Golden Grain's dealings with the Pay-N-Takit Stores in Vancouver, Washington, was that when Pay-N-Takit Stores became a Mission customer in 1962, Mission agreed to pay Pay-N-Takit $50 per quarter per store in lieu of the 2% cooperative advertising allowance which Mission provided to all of its customers (Tr. 4214). The first payment was made on or about March 30, 1962, and the entry in the Pay-N-Takit books was recorded as "advertising-all stores" (Tr. 2031, 4215). Respondents point out that Pay-N-Takit purchased approximately $60,000 to $70,000 in dry paste from Mission during the 2½ years that Mission supplied it with dry paste. Respondents say that if Pay-N-Takit had received the 2% cooperative advertising allowance which Mission offered to all of its customers instead of the $50 per quarter per store in lieu thereof, Pay-N-Takit would have received a minimum of $1,200 over the 2½ year period (2% x $60,000 = $1,200). Respondents further contend that the Pay-N-Takit books reflected twelve payments by Mission to the four Pay-N-Takit stores, six payments of which were for less than $20 each. Respondents contend that some of the twelve payments were obviously for promotions on nondry paste items, such as the $105 payment recorded "mac and cheese" (Tr. 2032), and the $12.50 payment recorded "soup" (Tr. 2033), because Golden Grain sells many items, such as convenience dinners and gelatin products (Tr. 4215). Respondents further contend that, even if it be assumed that the remaining ten payments were part of the advertising allowance, the payments would total only $803.22, which is $400 less than the $1,200 Pay-N-Takit would have received if it had instead elected to take the 2% cooperative advertising allowance (Tr. 4217).

59. With respect to Eddie's Distributing Company of Spokane, the evidence shows the following: Eddie's Distributing Company, known also as Patterson Potato Chip Company and Country Style Products, was acquired as a customer by the Mission Division when Golden Grain acquired the Mission Macaroni Company in 1956. The account is a one-man wagon jobber operation and sells the Mission Division's products exclusively. Eddie's Distributing Company is Mission's only wagon jobber in the Pacific Northwest that calls on small stores in the Spokane area and sells and delivers the Mission Division's dry paste and other products in small amounts of less than case lots. Eddie warehouses and delivers the merchandise to his store customers, places and arranges the merchandise on the stores'

shelves, and prices the merchandise. Many of the duties he performs are the same as those that would be performed by Mission salesmen. Eddie does not represent any competing lines. Since Eddie sells primarily to small stores in the Spokane area, he would not be considered as a competitor to the wholesale houses in Spokane. Wholesalers are not interested in selling less than case lots or mere packages of various products (Tr. 4231–32, 4011–12). For his services the Mission Division allows Eddie a 10% trade discount when he pays his bill. Although Eddie warehouses the merchandise that he purchases from Mission, he does not receive a 5% warehouse allowance. Mr. Marvin Pearlman, a Commission witness, testified, among other things, that the functions of a wagon jobber are to sell and to service the small stores that buy in small lots; for these services, the wagon jobber receives a discount ranging from 10% to 25% (Tr. 899–900). Mr. Peter Vagnino, manager of the American Beauty Macaroni Company's plant in Los Angeles explained the functions of a wagon jobber in a similar manner. The American Beauty wagon jobber in Hawaii receives a 20% to 25% discount (Tr. 664–68). In 1962, Eddie's Distributing Company purchased a total of $12,447.63 worth of products from the Mission Division, which included dry paste, convenience dinners, beans, peas, etc. Eddie received a discount of $1,244.76 for his services as a wagon jobber (CX 746). In 1963, Eddie purchased $15,171.53 worth of products from Mission on which he received a discount of $1,453.92. In 1963, $10,720.45 of Eddie's total sales were paste products, including macaroni and cheese dinners. The balance of the sales of approximately $4,500 was made up of other items, such as beans, rice, etc. (CX 520).

60. The evidence shows that the 5% discount allowed by the Mission Division during 1956 and 1957 was in large part a discount that Mission Macaroni Company had customarily allowed some of its customers prior to its acquisition by Golden Grain in 1956. Consequently, when Golden Grain acquired Mission Macaroni, it inherited along with the Mission Macaroni customers a system of cash rebates that Mission Macaroni had been paying to some customers at the end of each month. Commission Exhibit 187–A–I is the Mission Macaroni check register that lists the monthly amounts of these discounts or rebates and that includes many months prior to the time that Mission Macaroni Company was acquired by Golden Grain. Commission Exhibit 188–A–Z–55 comprises 80 check vouchers issued by Mission Macaroni Company at about the time that the company was acquired by Golden Grain. These check vouchers represent payments by Mission Macaroni Company of these rebates or discounts to its customers.

61. During 1957, Golden Grain put into effect in all of its trading areas a 5% warehouse allowance to wholesalers or to chains taking a warehouse delivery, and encouraged all of its individual store customers to buy through a wholesale house rather than to buy direct. By June 1957 the practice of granting these 5% rebates or discounts that Golden Grain had inherited from Mission Macaroni Company in 1956, which had averaged approximately $3,000 per month under Mission Macaroni Company, had been reduced by Golden Grain to approximately $700 per month. By the end of October 1957, the Mission Division had terminated all of these discounts or rebates (CX 189-L).

Charles Against the Mission Division of Golden Grain: Re—Price Wars, Goegraphical Price Discrimination, and Sales Below Cost in the Pacific Northwest (subparagraphs 4, 5 and 6 of Paragraph Five of Complaint.)

62. The allegations contained in subparagraphs 4, 5, and 6 of Paragraph Five of the complaint to the effect that the Mission Division of Golden Grain engaged in price wars for extended periods of time in the Pacific Northwest in order to injure, lessen, prevent, or destroy competition; sold at lower prices, directly or through the use of coupons, free merchandise, or other devices, in some areas than it did in other areas without any real justification; and sold or offered to sell at below cost or at unreasonably low prices with the intent and purpose to injure, restrain, suppress, destroy, or eliminate competition are related and intertwined in the testimony and will be discussed together. Many of the facts with respect to the pricing of dry paste in the Pacific Northwest have been developed in previous findings herein.

63. While respondents do not deny that prices for dry paste in the Pacific Northwest were depressed from time to time during the period 1957 through 1963, they deny that Golden Grain engaged in any pricing activity with the purpose or intent to injure, suppress or destroy competition. Respondents say that the pricing patterns that developed in the Pacific Northwest were not the result of illegal activities or improper intentions of Golden Grain. Respondents claim that the Mission Division was faced with ruthless price competition from Major Italian Foods during the entire period from March 1957 through 1963. This price competition was impossible to meet on a store-by-store basis because Major Italian Foods had a different price deal with each store and Major's secret deals with some of its

customers were so varied and complicated that its general manager, Mr. Ernest Merlino, testified that he could not remember the price which Major charged each of its customers for dry paste. Respondents say that, in 1956, he Mission Division had a substantial number of accounts in the Seattle area, primarily as a result of the acquisition of Mission Macaroni Company in August of that year and for this reason, there was no need for the Mission Division to engage in price wars either to obtain new business or retain the business that it had. Respondents say that the Mission Division's actions were not the aggressive price-cutting tactics of a predatory competitor. To the contrary, respondents say that the Mission Division was very slow in responding and its actions were strictly defensive in nature in an attempt to retain its existing business. Golden Grain contends that, instead of creating a chaotic pricing situation in the Pacific Northwest by attempting to meet each and every deal offered by Major Italian Foods, Golden Grain acted with restraint and made only one price reduction during 1960 and 1961. This was a reduction in the 6/4-pound secondary label "Best Bet" package in December 1960, which reduction was made in an attempt to meet, but not beat, the price reduction by Major Italian Foods of its list price on that particular package size. That the Mission Division was not successful in meeting Major's actual price after deduction of all of Major's special deals is shown by the exhibits and testimony. Mr. Merlino admitted that Major's prices were 5% under Mission's prices from 1957 through the middle part of 1962 (Tr. 2183, 2365).

64. A preponderance of the evidence shows and it is found that the Mission Division made no price reduction on its two most popular sizes of macaroni and spaghetti products (12/12-ounce and 14-ounce and 12/24-ounce) for approximately 3 years from September 1959 through October 1962. These two sizes accounted for more than 40% of mission Division's sales in 1962-1963 (CXs 576-578, 580-588, 591, 513-546). Curiously, complaint counsel contend that the Mission Division's prices at the present time for the 12/12-ounce and 14-ounce and 12/22-ounce dry paste are unreasonably high and constitute monopoly pricing. The Mission Division's prices at the present time for these two sizes are $1.80 and $3.20 as compared to its prices of $1.80 and $2.95 during the alleged price war from 1960 through 1962. During the entire period from September 1959 through October 1962 the Mission Division was undersold by both the Major primary label Majorette and Major's private labels Verifine and Tradewell. Finally, on October 22, 1962, the Mission Division reduced its prices in order to partially reduce the spread between Mission

and its competitors. This reduction amounted to less than 10%. On May 8, 1963, the Mission Division again reduced its prices in order to narrow the spread between its prices and those of its competitors. These reductions were only 3% for the 12/12-ounce size and 5% for the 12/22-ounce size. These actions do not establish Mission as a predatory competitor with the intention to injure or destroy competition.

Pricing on the 6/4-Pound Size Macaroni and Spaghetti

65. Note of the four Pacific Northwest paste manufacturers produced a 6/4-pound package under their primary label. The Mission Division's 6/4-pound package was produced under the "Best Bet" label, a second label which it did not advertise. Major's 6/4-pound package was produced under its "Family Pak" label. Porter-Scarpelli produced the 6/4-pound package as well as other packages under its "Sunrise" label. These unadvertised labels are the approximate equivalents to private labels, such as Associated Grocers' Verifine label. Some of the pricing practices engaged in by the Mission Division's competitors, especially Major Italian Foods and Porter-Scarpelli, are made in the findings herein—Paragraphs 38 through 53. The Mission Division's price on the 6/4-pound dry paste remained at $2.65 from December 1960 until May 1962. This 16-month period is the time when Mission was alleged to be engaged in a price war with Major Italian Foods, but during this period Major was underselling the Mission Division by as much as 50¢ per case in Washington and Oregon. In May 1962, the Mission Division reduced its price on 6/4-pound dry paste to $2.35, and, in October 1962, to $2.25, to meet, but not beat, the price competition by Major and Porter. The Mission Division made no other price reductions from December 1960 through August 1963 on its 6/4-pound dry paste. There is no evidence of any promotions or special deals by the Mission Division on 6/4-pound dry paste. In fact, the Mission Division discouraged sales of the 6/4-pound dry paste. In addition, the evidence shows that, with few exceptions, all of the Mission Division's sales of 6/4-pound package of dry paste during 1962 and 1963 were made in combination with the sale of the more popular size packages of macaroni, spaghetti, and other dry paste products (CXs 518–546, 576–578, 580–588, 591). The small package sizes of macaroni and spaghetti sold at a higher price per pound than the 4-pound package. For example, during the period January to October 1962, the 12/14-ounce macaroni and spaghetti sold for 17¢ per pound (10-1/2 pound

at $1.80), the 12/24-ounce macaroni and spaghetti sold for 16.4¢ per pound (18-pound at $2.95), and the 6/4-pound macaroni and spaghetti sold at 10¢ per pound (24-pound at $2.35). Commission Exhibit No. 765–A shows that the average selling price per pound of the Mission Division's dry paste products was 16.2¢. In this connection, respondents say that if the Mission Division was involved in a price war with the intent to injure Major Italian Foods, it is not likely that the Mission Division would have refrained, as it did, from making any reduction in price in its most popular sizes, namely the 12/12-ounce and 14-ounce and the 12/24-ounce sizes from 1959 through October 1962 and no changes in its bulk price from June 1960 through August 1963. A preponderance of the evidence does not establish that the Mission Division, in its pricing policies, was attempting to drive Major Italian Foods out of business as testified to by Mr. Ernest Merlino, but reduced its prices in an attempt to meet the competition of lower prices by its competitors, Major Italian Foods in particular.

Geographical Price Discrimination

66. The evidence shows that during a portion of 1962 and 1963, the Mission Division sold some of its paste products in western Montana at higher prices than were charged its customers in Washington and Oregon. These geographical price discriminations are illustrated in graph form on Commission Exhibits 654, 655, and 656. The evidence further shows that, during the period from October 22, 1962, to May 7, 1963, Golden Grain sold its 12/12 and 14 ounce packages at $1.65 per case in Washington and Oregon, and at $1.80 per case in western Montana; and, during the period May 8, 1963, to August 19, 1963, at $1.60 per case in Washington and Oregon, and at $1.65 per case in western Montana. During the period October 22, 1962 to May 7, 1963, Golden Grain sold its 12/24-ounce packages at $2.70 per case in Washington and Oregon, and at $2.95 per case in western Montana; and, during the period May 8, 1963 to August 19, 1963, at $2.55 in Washington and Oregon, and at $2.70 in western Montana. During the period October 22, 1962, to January 1, 1963, Golden Grain sold its 6/4-pound packages at $2.25 in Washington and Oregon, and at $2.35 in western Montana; and, during the period January 1, 1963 to August 19, 1963, at $2.25 per case in Washington and Oregon, and at $2.65 per case in western Montana. Respondents say that these price differentials were *de minimis*, and that the extra monetary return to the Mission Division which resulted from the higher prices

obtained in western Montana mounted to only $371 out of Mission's total sales of $2,890,000 in 1962. Respondents point out that Mission's sales in western Montana have always constituted a small proportion of its total sales. Counsel for respondents say that its sales to grocery customers in western Montana during May 1962 totaled only $5,163, or 3.6% of its total sales in the Pacific Northwest. Its sales to grocery store customers in western Montana totaled only $4,693 during May 1963, or 3.6% of its total Pacific Northwest sales. Aside from the inconsequential nature of the price differentials between western Montana and Washington and Oregon, respondents say that there was real justification for the differentials. Western Montana is on the eastern border of the Mission Division's trading area and, as the prices in Washington and Oregon became depressed on October 22, 1962, the Mission Division was justified in establishing a small differential between its western Montana prices and its Washington and Oregon prices to cover the higher cost of selling in western Montana. Respondents say that Major Italian Foods had reduced its prices in Washington and Oregon and the Mission Division was compelled to lower its prices on October 22, 1962, and on May 8, 1963. Major Italian Foods had sold very little paste products in western Montana and had not caused a lowering of prices or paste products in that market. Counsel for respondents further say that if the Mission Division and reduced its prices in western Montana on October 22, 1962, and May 8, 1963, to the same level as the Washington and Oregon prices, Mission would possibly have undercut its competitors in western Montana and might have caused a deterioration of the price structure in that market. Respondents say that the Mission Division's price reductions in Washington and Oregon were made to meet, and not to beat, competition. Respondents also say that the total pounds of dry paste sold by the Mission Division in Washington and Oregon declined from May 1962 to May 1963, and again from May 1963 to May 1964, which further indicates the *de minimis* nature of the effect on competition of the Mission Division's higher prices in western Montana (CXs 765–767). Instead of declines in sales volume, the opposite occurred for each of the other major dry paste manufacturers in the Pacific Northwest. The sales of Major Italian macaroni for the month of May 1963 increased more than 14% over its sales for May 1962. Porter-Scarpelli's sales for May 1963 were approximately 18% above its sales for May 1962. U.S. Macaroni's sales for May 1963 increased by 20% over its sales for May 1962 (CX 765–66). In any event, these price differentials between Washington-Oregon and

western Montana were eliminated after August 1963 by respondents (Tr. 4509).

67. Complaint counsel contend that Golden Grain also discriminated in price between its customers located on the mainland as against its customers located in Hawaii, which had the effect of driving Eagle Macaroni Company, a Hawaiian dry paste manufacturer, out of business. Findings with respect to pricing in Hawaii are discussed in subsequent paragraphs under the heading "Prices in Hawaii."

Alleged Sales Below Cost

68. Complaint counsel's contentions that some of the Mission Division's dry paste package sizes were sold below cost during the period 1962-1963, while other package sizes were sold near the cost of manufacture during the same period, were based on a so-called cost study conducted and prepared by Mr. W. S. Opdyke, a Commission accountant. This study was received in evidence as Commission Exhibit 659–664. Complaint counsel contend that this cost study demonstrates that the Mission Division sold its 6/4-pound package size of macaroni in Seattle, Spokane, Portland and Eugene, Oregon, and Missoula, Montana, below its cost of manufacture during portions of 1962 and 1963, and that the Mission Division realized a very low profit margin on its 12/14 and 12/24-ounce package sizes of dry paste products. During this 1962–1963 period the Mission Division's sales of dry paste products in Hawaii were confined to the 10 and 20 pound bulk package sizes, and complaint counsel contend that the Mission Division sold both of these bulk sizes below the cost of manufacture during the entire calendar year of 1962, and from January 1 through August 18, 1963.

69. Dr. Don T. DeCoster, a professor and cost accountant at the University of Washington, appeared and testified as an expert witness on behalf of respondents (Tr. 4739). Dr. DeCoster testified, among other things, that, in his opinion, the Commission cost study presented an unreasonably high cost figure (Tr. 4864–67, 4870–82). Respondents contend that the Commission cost study is defective and presents a false picture of the Mission Division's actual cost of manufacture for numerous reasons, among them being: failure to take into account that Golden Grain operated two plants in Seattle during 1962 and 1963 or the fact that all the bulk macaroni and spaghetti was produced at the 6th Avenue plant (Tr. 4138–39). Thus, the Commission's cost study did not trace the flour purchased to the plant where it was consumed, thereby overstating the flour cost for

10 and 20 bulk and 4-pound size packages of macaroni and spaghetti (Tr. 4863–70). Respondents say that the Commission's cost study used an artificial packing rate for all of the 40 varieties and sizes of dry paste manufactured by Golden Grain, which rate was determined on a per pound basis by dividing the total pounds of flour consumed by both plants during a calendar year into the total packing costs for that year. Respondents say that this method was incorrect for several reasons. For instance, it failed to take into account the obvious fact that more pounds can be packed per hour in larger package sizes than in smaller package sizes (Tr. 4133, 4140–44, 4266–75, 4752, 4864, 4870). Second, it failed to recognize and take into account the fact that approximately 17½% of the packing labor was expended on nonpaste items such as rice, beans, etc. (Tr. 4021, 4131, 4784–88). Third, if failed to add the pounds of egg solids to the pounds of flour to obtain the total pounds of raw material to be divided into the total packing costs (Tr. 4760). Respondents contend that each of these errors result in substantial overstating of the packing labor costs for 6/4-pound and bulk dry paste. This method increased the packing costs (including carton and cellophane) to approximately 35.8¢ per carton for 6/4-pound macaroni and spaghetti in 1962, which was 13¢ to 14¢ per carton too high (compare RX 313 and 314 with CX 662, cf. CX 748–F).

70. The Commission cost study directly traced the freight to Hawaii on 10 pound and 20 pound bulk macaroni and spaghetti. Mission sold its bulk macaroni and spaghetti at the same delivered price throughout the Pacific Northwest and Hawaii, thereby averaging its freight expenses throughout its sales territories. The average freight on 10 pound and 20 pound bulk would have been substantially less than the direct freight to Hawaii. Thus, by directly tracing the freight to Hawaii only, the cost study used the highest possible amount for freight to Hawaii. The cost study then failed to take into account the fact that bulk macaroni and spaghetti were cheaper to produce and pack than the smaller packages. Instead of directly tracing the cost of the bulk macaroni and spaghetti, the Commission cost study used an average of all sizes and varieties of products. This increased the cost of the 10 and 20 pound bulk macaroni to a level so that when the directly traced freight was added, the bulk was purportedly being sold below cost in Hawaii (Tr. 4870, 4876–82).

71. Respondents also contend that the Commission cost study used an arbitrary 95% conversion factor in computing the number of pounds of dry paste produced from each 100 pounds of flour. This

95% conversion factor, which assumed a 2% waste factor, respondents say, was contrary to Mission's actual production experience and to its general ledger (Tr. 4127). The general ledger shows that only a small amount of waste had been disposed of as hog food as contrasted to the 350,000 pounds of waste that a 2% waste factor would have produced (Tr. 4781, 4855, 4865–66). At least some of the 2% waste was recaptured, reground and reused (Tr. 3489–92). Regrinding and reusing the trimmings would have an effect on the cost of production and was not taken into account in the Commission cost study. The Commission cost study averaged the cost of manufacturing and selling on a calendar year basis and, to be consistent, respondents say that the average cost of manufacturing for the year should have been compared with the average selling price during the year. Instead, the average cost of manufacturing and selling was compared with the lowest price in effect during the year. No attempt was made to limit the period over which costs were averaged to the period that the lowest price was in effect. As a result, respondents contend that the lowest price is compared to an average cost figure, which cost figure could be higher than the actual cost of goods sold under the lower price. For example, Mr. Opdyke testified that the cost of flour shown on Mission's 6–B reports (CX 269) as of November 1, 1962 and November 1, 1963, shows the correct cost of flour on that date. The cost of flour on November 1, 1962, was $5.975 per hundred weight, as compared to the average cost of flour shown on the commission study of $6.118, or a difference of 14¢ per hundred weight. Mr. Opdyke justified the use of the selling prices used in his cost study as being the prices in effect for the longest period during each year, 1962 and 1963. Respondents assert that this is not accurate. The prices of $1.65 for the 12/14-ounce, $2.70 for the 12/24-ounce, and $2.25 for the 6/4-pound size that were used in the Commission cost study for 1962 were in effect only from October 22, 1962, through the end of that year. Prices of $1.80 and $2.95, respectively, for the 12/14-ounce and 12/24-ounce were in effect from January 1 through October 22, 1962, which was the longest period (CX 654–8). The selling prices of $1.60 and $2.55 for the 12/14-ounce, 12/24-ounce sizes that were used in the 1963 cost study were in effect only from May 8 through August 21, 1963. Higher prices were in effect during the remaining 8½ months of that year (CX 654–58). Respondents also point out that, in addition to selecting the lowest price which was in effect during each year, the Commission cost study also assumed that a 5% warehouse allowance was given on each sale and, therefore, 5% was deducted to arrive at the net

selling price. Since the 5% warehouse allowance was not granted on one-third of respondents' sales (Tr. 3956), respondents contend that the lowest possible selling price was selected to be compared against the highest possible cost of goods sold, to respondents' prejudice. Respondents also say that the Commission cost study attempted to determine the average cost per pound for all dry paste produced, since it was impossible to determine the cost on a variety basis, and the study did not attempt to develop actual costs for each of the package sizes. Since the Commission cost study purports to be basically an average cost per pound for all varieties and sizes of dry paste, respondents contend that it would have been more consistent to have compared that average cost per pound with the average net selling price per pound of dry paste in order to determine whether Mission was selling at or below cost Respondents contend that this would be particularly consistent with a product such as dry paste because macaroni and spaghetti are packaged and sold in 12/12-ounce, 12/14-ounce, 12/22-ounce, 12/24-ounce and 6/4-pound sizes, and is also packaged and sold in 10 pound and 20 pound bulk. Respondents also contend that, almost without exception, the 6/4-pound sizes were always sold together with the 12/12-ounce and 14-ounce and the 12/22-ounce and 24-ounce sizes in the same order.

72. Dr. Don T. DeCoster, who appeared as an expert witness on behalf of respondents, also prepared and developed a cost study, which was received in evidence as Respondents' Exhibits 313 and 314. Dr. DeCoster testified that, in his opinion, his cost study presented as fair and reasonable an approximation of the unit cost as can be obtained (Tr. 4765). The schedule in his cost study is based upon respondents' general ledger, which is the official record of the company (Tr. 4764). The same base is used in the Commission cost study. The lowest selling price, rather than the price in effect during the longest period of the year or an average price, was used by Dr. DeCoster in order to demonstrate that the fully absorbed cost was less than the lowest selling price. Also, a 5% warehouse allowance was deducted to arrive at the lowest selling price, rather than an average based on the percentage of sales to which it applied. Based upon his cost study, Dr. DeCoster concluded that Mission was selling its products in the seven sizes as shown on the cost study in 1962 and 1963 at a profit on each of the seven sizes (Tr. 4868). This conclusion that Mission was selling all seven sizes at a profit in each of the years was reached by taking the lowest selling prices as shown on the Commission cost study (CX 659–64) and comparing them to

the cost of manufacture and sale based upon a fully absorbed cost (Tr. 4869).

73. Counsel for respondents say that, even though Mission's lowest selling price on the 6/4-pound packages were sold at a low profit margin or even below cost during portions of 1962 and 1963, these sales were not made with the intent to injure or eliminate competition; that, in order to determine whether Mission's sales of its 6/4-pound macaroni and spaghetti during 1962 and a portion of 1963 were made with the intent and purpose to injure, restrain, suppress or eliminate competition, it is necessary to examine the pricing acts of Mission and its competitors during this period and the effect on competition of sales of the 6/4-pound packages. Respondents contend that the chaotic pricing practices engaged in by Major Italian Foods, and to a lesser degree by Porter-Scarpelli Macaroni Company, partially set out in Paragraphs 38 to 53 of this Initial Decision, were responsible for the macaroni prices prevailing in the Pacific Northwest and that Mission's prices during 1957 through 1963 were not motivated by any intent and purpose to injure competition. Respondents say that the few price reductions which the Mission Division made during the period 1959 through 1963 were of a defensive nature and were forced upon it by intense competion. Respondents claim that Mission helped lead the prices of the 6/4-pound macaroni and spaghetti upward on two occasions in 1960 and that Major slowly followed these price increases. Following the second increase, Major instituted a continuing promotion that drove the price from $3.15 back to $2.65. Respondents contend that Mission made no reduction in any of its package sizes, including the most popular sizes, the 12/14-ounce and the 12/24-ounce, except the 6/4-pound package, from November 1959 through October 22, 1962. Package sizes other than the 6/4-pound account for approximately 84% of Mission's sales. Respondents say that the reductions in prices by Mission in its two most popular sizes in October 1962 and May 1963 were made for the purpose of meeting competition and did not place Mission's prices under those of its competitors. Respondents assert that Mission made no attempt for more than two years to reduce the differential between its prices for the 12/12 and 14-ounce and the 12/22 and 24-ounce sizes and those prices charged by its competitors, Major Italian Foods in particular. Respondents also point out that Mission made no attempt from December 1960 to May 1962, a period of approximately 18 months, to reduce the differential between its prices for 6/4-pound macaroni and spaghetti and the

prices charged by its competitors. The price reductions it made in May and October 1962 on 6/4-pound packages were made in an attempt to meet competition and did not place Mission's prices under those of its competitors. Respondents further contend that it could not have been Mission's intent or purpose to injure or destroy competition when it reduced the price on one size only and left all of the other package sizes at a greater profit margin. Also, respondents point out that the 6/4-pound macaroni and spaghetti was generally sold in an order which included the more popular package sizes of macaroni and spaghetti.

Alleged Sales Below Cost in Hawaii

74. The Mission Division's sales of dry paste in Hawaii during 1962 and 1963 were confined to the 10 and 20 pound bulk package (Tr. 3555–56, 4047, 4056; CX 269–E). The cost study prepared by Mr. Opdyke purporting to show the cost of manufacture and delivery by the Mission Division of its 10 and 20 pound bulk macaroni sold in Hawaii for the years 1962 and 1963 was received in evidence as Commission Exhibit 659. This exhibit shows that, during 1962, and from January 1 through August 18, 1963, both of these bulk sizes were being sold below the cost of manufacture and delivery to the Hawaiian Islands. However, during the period October 14 through December 31, 1963, both of these bulk sizes were being sold at prices above the cost of manufacture, but at a small profit margin. Respondents contend that the 10 and 20 pound bulk macaroni account for an insignificant part of Mission's annual sales during 1962 and 1963; that the 10 pound bulk accounted for only .7% of respondent's sales and the 20-pound bulk accounted for only 1.5% of its sales in each of the years 1962 and 1963. Respondents further say that the total dollar amount of bulk dry paste sales tabulated on CX 659 were only approximately $11,000 in 1962 and $26,000 in 1963 (CX 518–46, 576–78, 580–9, 591, 659). Respondents argue that, due to the inconsequential percentage of sales which were involved, it cannot be seriously suggested that Mission's bulk prices were established with the intent to injure or suppress competition.

Sales in Hawaii

75. Golden Grain began selling dry paste in Hawaii in 1941 or 1942. Its first customer was Hilo Rice Mill. Mr. D. C. Parker was its first broker in Hawaii. Golden Grain's chief competitors in Hawaii were

Fontana Macaroni Company and the California Vulcan Macaroni Company, which company sold under the "Royal" brand. At that time, Fontana had approximately 75% of the dry paste market in Hawaii, Golden Grain approximately 5%, and the remaining 20% was held by California Vulcan and Porter-Scarpelli Macaroni Company (Tr. 1141–43). In 1951 or 1952, Fontana ceased production and withdrew from the Hawaiian and West Coast markets (Tr. 1277–78). Golden Grain's sales in Hawaii in 1960 were $207,102. They declined below this level in 1961, 1962, and 1963. In 1964 they increased to $215,209, and in 1966, to $244,491 (CX 284). Golden Grain's competitors in packaged dry paste in Hawaii during the period 1958–1966, were Western Globe Macaroni Company ("Globe A–1" brand), West Coast Macaroni Company ("Perfection" brand), American Beauty Macaroni Company, Los Angeles Division ("American Beauty" brand), Roma Macaroni Company ("Roma" brand), California Vulcan Macaroni Company ("Royal" brand), and U. S. Macaroni Company ("Taystee" brand) (Tr. 237–39). There was also competition in Hawaii from Gold Medal (Tr. 1163), Van Camps "Tenderoni" (Tr. 563), Mueller Macaroni Company and Imperial Macaroni Company (Tr. 646–47). Other companies have been in and out of that market, such as LaRosa Macaroni Company (Tr. 3765) and Porter-Scarpelli Macaroni Company (Tr. 1167).

76. The Seattle Mission Division of Golden Grain had made no sales in the Hawaiian Islands prior to 1956. In October of that year, Golden Grain acquired Mission Macaroni Company. Mission Macaroni Company had been selling in Hawaii for many years prior to the time that it was acquired by Golden Grain. After the acquisition of Mission Macaroni Company in 1956, Golden Grain began selling in Hawaii from its Seattle plant to the former customers of Mission Macaroni Company, as well as continuing to sell from its San Leandro plant. The Mission Division was represented by Ned Smith as its broker in 1956 and 1957, and by Harold T. F. Lam from January 1, 1958, to the present time (Tr. 1019–92). Prior to October 1961 sales of bulk dry paste products constituted practically all of the total sales by the Mission Division in Hawaii, and by October 1, 1961, it made no package sales of dry paste in Hawaii (Tr. 1095, 1105). Mission's dry paste sales in Hawaii in 1960 totaled approximately $42,000, which represented approximately 11% of the total volume of dry paste sales in Hawaii (CX 284). Mission's sales declined each year thereafter, and totaled only $17,601 in 1966, or 4.2% of the total sales of dry paste shown on Commission Exhibit 284.

470-536—73——9

Competitors in Hawaii

77. Western Globe Macaroni Company, one of Golden Grain's competitors in Hawaii, was organized in 1955, and its total annual sales are approximately $3,500,000. It produces approximately 18,000,000 pounds of dry paste each year. Western Globe has been selling in Hawaii since 1956 (Tr. 827–8, 889). Western Globe's broker, Aloha State Brokerage Company, receives a 5% commission (CX 201–D). Globe A–1 brand products are distributed in Hawaii through Sunshine Enterprises, a wagon jobber that takes merchandise into its warehouse and distributes it to customers on a store-by-store basis. The wagon jobber sells and services the stores in less than case lots. As compensation for its services, Western Globe sells the wagon jobber at less than list price (Tr. 898–900, 907–08). Western Globe's sales in Hawaii were $66,000 in 1960, $88,000 in 1961 and from 1961 to 1965, its sales ranged from $76,000 to $88,000 (Tr. 915; CX 215).

78. West Coast Macaroni Company, Oakland, California, a subsidiary of Fresno Macaroni Company, Fresno, California, has been selling dry paste in Hawaii for many years. The Oakland plant, which produced 6½ to 7 million pounds of dry paste per year, was recently closed and manufacturing operations were consolidated at the plant in Fresno, California. The Fresno plant was constructed in about 1966, and has a capacity of between 20 and 25 million pounds of dry paste annually. West Coast's sales in Hawaii have increased from $8,306 in 1961 to $51,488 in 1966 (CX 284), and Mr. Dorman Metz of West Coast estimated that West Coast has approximately 25% of the total market and 50% to 60% of the dry paste bulk market in Hawaii (Tr. 1329).

79. American Beauty Macaroni Company, another Golden Grain competitor in Hawaii, entered that market in 1959 or 1960 from its Los Angeles plant. Its initial broker was not successful in establishing sales of American Beauty dry paste products in Hawaii and the company withdrew from the Hawaiian market. After remaining out of the market for one year, American Beauty re-entered the Hawaiian market in 1963, with Mother's Food Company as its distributor. Mother's Food Company warehouses American Beauty's dry paste products, delivers and services the store customers, as contrasted to a broker who merely sells the merchandise. Since the appointment of its distributor, American Beauty's volume has increased from $1,600 in 1963 to $21,100 in 1965, and to $36,500 in

1966 (CX 284). Another competitor, California Vulcan Macaroni Company, whose plant is located in San Francisco, California, has been selling its "Royal" brand dry paste in Hawaii since 1925. Approximately ⅔ of its sales are shipped to Hawaii and overseas (Tr. 1503). Its sales in Hawaii were $16,173 in 1960, $28,045 in 1961, approximately $22,000 in 1964, and $20,067 in 1965 (Tr. 1518–21; CX 320–C).

Golden Grain's Alleged Discriminations in Price Between Hawaii and Northern California

80. Among the charges against Golden Grain with respect to its sales in Hawaii, complaint counsel stated on the record that respondents' San Leandro plant discriminated in price between Hawaii and northern California, and that respondent maintained the lowest price in Hawaii and met any competitive price, promotional offer or advertising allowance in order to establish and maintain its monopoly (Tr. 107). From 1958 to the time of the hearing in 1968, it has been Golden Grain's practice to sell its dry paste in Hawaii at the same price at which it sells the same products in northern California. The earliest period for which price information was available for Hawaii and northern California is contained in a Golden Grain price list dated February 7, 1959 (CX 38–L). This price list reflects identical prices for Hawaii and northern California customers taking a nonwarehouse delivery. This price list discloses a discount of 5% to customers taking warehouse deliveries, plus a 1% discount for cash to all buyers. Respondents' Exhibit 299–A is a chart of the prices charged by Golden Grain in Hawaii and northern California for the period February 7, 1959, to May 1, 1960. This exhibit shows the price to customers who take a warehouse delivery and the price to customers who do not take a warehouse delivery. Respondents' Exhibit 299–B shows the prices for Hawaii and northern California for the period May 1, 1960, through December 30, 1961, for the two classes of customers. Respondents' Exhibit 299–C shows the prices for the period January 1, 1962, through December 31, 1966. That Golden Grain charged the same prices to the same classes of customers in Hawaii and northern California during the period from February 1959 through December 1966 is established by the record (Tr. 1441–51, 4392–4441; CX 38–K, L, 268, 270, 369–75, 382, 383, 384, 388, 389, 392, 396, 402, 405–20, 599–625, 728, 729; RX 300–08, 315–17).

81. The prices shown on Golden Grain's invoices are net prices,

after deduction of the warehouse allowance where appropriate. Prices charged by Golden Grain on sales to customers in Hawaii who take a warehouse delivery should not be compared with the prices charged on sales to customers in northern California who do not take a warehouse delivery because the sales are to two different classes of customers. All customers taking a warehouse delivery in either Hawaii or northern California received a 5% warehouse allowance. Seventy-five percent of Golden Grain's sales in northern California are to customers taking a warehouse delivery (Tr. 4413–20). Practically all of Golden Grain's sales in Hawaii were to customers taking a warehouse delivery because, with one exception, all of its customers had warehouses in Hawaii. One customer in Hawaii did not take a warehouse delivery and this customer was charged the same price as that charged to customers in San Francisco not taking a warehouse delivery (CX 369-B; RX 299 A–C; Tr. 4412).

82. The 5% warehouse allowance has been available to Golden Grain customers in San Francisco for 20 years (Tr. 4413). When Golden Grain initially began selling through D. C. Parker as its broker in Hawaii, Mr. Parker made deliveries to the grocery store customer from a warehouse in Hawaii and did not allow the customer a warehouse allowance (Tr. 4413). Golden Grain paid the warehousing and delivery expenses. After the market had developed sufficiently, Mr. Parker began selling on a warehouse delivery basis to Hawaiian customers CIF the dock, Honolulu (Golden Grain does not deliver to the customers' stores or warehouses in Hawaii. Its deliveries are CIF the dock, Honolulu or FOB the Golden Grain warehouse. Golden Grain delivers to the customers' stores or warehouses in San Francisco). From that time Golden Grain charged the same price to its customers in Hawaii that took warehouse delivery as it did to the same class of customers in northern California. The Golden Grain invoices are prepared by its computer and, consequently, the price shown on each invoice is a net price. If the customer was entitled to the 5% warehouse allowance, the allowance was deducted and the net price printed on the invoice (Tr. 4396, 4398). Also, there was an automatic display allowance of 10 cents per case on 12-package cases and 8-ounce packages, and 20 cents per case on 24-package cases, deducted from the bottom of the invoice during the period February 7, 1959, through December 31, 1961, for all customers in Hawaii and northern California (Tr. 4392–94). This display allowance was eliminated and the list price reduced accordingly, effective January 1, 1962 (RX 299 A–C). The notation

"display advertising allowance" shown on Mr. D. C. Parker's orders was a reference to the allowance above described which was automatically deducted on the bottom of the invoices for both Hawaii and northern California (Tr. 4398–4414). Golden Grain maintained warehouse stock in Hawaii during the entire period from 1958 to date, but, in 1963 or 1964, it increased its warehouse stock. If a customer took from the warehouse stock instead of ordering direct from Golden Grain, the customer paid an additional charge of 10 cents per case at the time it picked up the merchandise from the warehouse. As mentioned before, Golden Grain deliveries to customers in Hawaii were either CIF the dock in Honolulu or FOB the Golden Grain warehouse. Golden Grain did not deliver to the warehouses of customers in Hawaii. Deliveries to customers in northern California were freight prepaid to the warehouse of the customer or to the customer's store (Tr. 1402–4, 4460–62).

Promotional Allowances by Golden Grain in Hawaii from 1958 to 1968

83. It was the general policy of Golden Grain to offer the same or equivalent promotions to customers in Hawaii as those offered to customers in northern California (Tr. 1452, 4442–59; RX 309, 310, 311, 312; CX 355, 356, 360, 361). Although promotions offered by Golden Grain in Hawaii were generally the same as those offered in northern California, in a few instances where the item being promoted in northern California was an item that did not sell well in Hawaii, Golden Grain would substitute an equivalent item on the promotion in Hawaii. Golden Grain's promotions are generally set forth on a quarterly promotion form published approximately four to six weeks in advance of the effective date. This form sets forth the promotions to be effective on the various items sold by Golden Grain during the following three months. The Golden Grain products included on these promotion forms were dry paste, convenience dinners, gelatin, beans, popcorn, dry soup and candy (RX 309 A–0). Examples of identical promotions in Hawaii and northern California are set forth on Respondents' Exhibits 310 and 311, which reflect the earliest promotions for which information was available. These exhibits show an identical promotion in the form of an advertising allowance for Times Supermarket in Honolulu and Stop & Shop Market in Woodland, California. Comparisons were made between promotions in Hawaii and northern California during the winter, fall and summer of 1963 and the fall and winter of 1964 (Tr. 4444–7). These comparisons indicate that the dry paste promo-

tions for the summer and winter of 1963 and the fall and winter of 1964 were identical and the promotion for the fall of 1963 was a comparable equivalent. It appears that Golden Grain's promotion and price policies were the same in both Hawaii and northern California during the period 1958 through 1966, for it does not appear that Golden Grain sold its dry paste products at a lower price in Hawaii than it charged in northern California. Golden Grain's competitors for packaged dry paste in Hawaii are the same competitors that it meets in northern California. Western Globe, American Beauty, West Coast and California Vulcan compete with Golden Grain in both Hawaii and northern California.

84. During the period from 1958 through 1966, Western Globe ("Globe A-1" brand) generally had the lowest price on its dry paste than any competiton in the Hawaiian market (Tr. 859, 877, 925-06, 1165, 1288, 1307, 1359-60, 1395). One of the earliest exhibits showing prices in Hawaii in February 1957 was Commission Exhibit 240-A and B. This exhibit shows that Western Globe was selling the 12/1-pound package, the most popular package size in Hawaii, at $2, compared to the Golden Grain price of $2.32 (Tr. 1161, 1406). The tables on the following pages show the actual prices for the various package sizes during the years 1959 through 1966, so that Golden Grain's prices may be compared with the prices of its competitors in Hawaii. These tables show that Golden Grain's prices were not the lowest in Hawaii during the period 1959 through 1966, but remained the same from May 1, 1960, following a small increase, through 1966.

Comparison—24/1-lb. dry paste prices in Hawaii for 1959-66

Year	Globe A-1	Golden Grain [9]	West Coast	Eagle	Royal
1959	[1] $4.43	$4.72	----------	----------	----------
1960	[2] 4.43	4.78	----------	----------	----------
1961	4.43 and [3] 4.34	4.78	----------	----------	----------
1962	4.53 and [4] 4.33	4.78	[10] $4.75	----------	----------
1963	[5] 4.52	4.78	[11] 4.78	----------	----------
1964	[6] 4.52	4.78	----------	[12] $4.66	----------
1965	[7] 4.64	4.78	----------	[13] 4.48	----------
1966	3.97 and [8] 4.52	4.78	----------	----------	----------

[1] CX 401-C, RX 161.
[2] CX 216-F, CX 401-C and D.
[3] CX 216-J, RX 296.
[4] CX 216-Z-10 and -22, RX 193-B
[5] RX 195-D ($4.76 less 5 percent).
[6] RX 192-A ($4.76 less 5 percent).
[7] RX 196-B ($4.76 less 2½ percent).
[8] RX 180-B, RX 197-A, (also $4.76 less $1 less 5 percent-RX 198-A), CX 682A-O.
[9] Golden Grain prices are set forth on RX 299A-C, together with the supporting exhibits and record references.
[10] CX 252-F (1962, $5 less 5 percent).
[11] CX 234-I (Jan. 1, 1963).
[12] RX 162; see also RX 172 (24/1-lb. $4.72 less 6 cents per case pickup allowance, 24/8 oz. $2.74 less 6 cents per case); RX 164 and RX 166.
[13] RX 167; see also RX 163 ($5.25 less 10 percent quantity incentive, 5 percent additional warehouse allowance, less 5 percent dealer's allowance, less 2% cash).

Comparison—12/2-lb. dry paste prices in Hawaii for 1959–1966

Year	Globe A-1	Golden[9] Grain	West Coast	Eagle	Royal
1959	[1] $4.33	$4.47			
1960	[2] 4.33	4.52			
1961	[3] 4.33 and 4.24	4.52			
1962	[4] 4.41 and 4.33	4.52			
1963	[5] 4.40	4.52	[10] $4.52, 4.11 and [11] 3.23		
1964	[6] 4.40	4.52			
1965	[7] 4.51	4.52			
1966	3.86 and [8] 4.40	4.52			

[1] CX 401-C, RX 161.
[2] RX 191-A.
[3] CX 216-J, RX 296.
[4] CX 216-Z-10 and -22, RX 193-B.
[5] RX 195-D ($4.63 less 5 percent).
[6] RX 192-A ($4.63 less 5 percent).
[7] RX 196-B ($4.63 less 2-½ percent).
[8] RX 181, RX 197-A (1 free with five) and CX 682A-O.
[9] Golden Grain prices are set forth on RX 299A-C, together with the supporting exhibits and record references.
[10] CX 234-I (Jan. 1, 1963).
[11] CX 235, which shows 2 cases free with five from May 1 to July 31, 1963; 1 case free with ten from June 1 to July 31, 1963.

Comparison—12/1-lb. dry paste prices in Hawaii for 1959–66

Year	Globe A-1	Golden[9] Grain	West Coast	Eagle	Royal
1959	[1] $2.27	$2.36			
1960	[2] 2.27	2.39			
1961	2.27 and [3] 2.22	2.39			
1962	2.27 and [4] 2.37	2.39	[10] $2.37		
1963	[5] 2.37	2.39	[11] 2.39, 2.17 and [12] 1.71		
1964	[6] 2.37	2.39			
1965	[7] 2.37	2.39			
1966	2.08 and [8] 2.37	2.39			

[1] CX 401-C, RX 161.
[2] RX 191-A.
[3] CX 216-F, RX 296.
[4] CX 216-Z-23, RX 193-B.
[5] RX 195-D ($2.49 and $2.94 less 5 percent).
[6] RX 192-A ($2.49 and $2.94 less 5 percent).
[7] By interpolation from prices for 1964 and 1966, RX 196-B.
[8] RX 180-B, RX 197-A (1 free with five) and CX 682A-O.
[9] Golden Grain prices are set forth on RX 299A-C, together with the supporting exhibits and record references.
[10] CX 252-K (1962, $2.50 less 5 percent).
[11] CX 234-I (Jan. 1, 1963).
[12] CX 235, which shows 2 cases free with five from May 1 to July 31, 1963; 1 case free with 10 from June 1 to July 31, 1963.

Comparison—24/8-oz. dry paste prices in Hawaii for 1959–66

Year	Globe A-1	Golden Grain [8]	Coast West	Eagle	Royal
1959	[1] $2.61	$2.70			[11] $2.50
1960	2.50 and [2] 2,60	2.73			[12] 2.50
1961	[3] 2.74	2.73			
1962	[4] 2.80	2.73			
1963	[5] 2.79	2.73			[13] ****
1964	[6] 2.79	2.73		[9] $2.68	
1965		2.73		[10] 2.47	
1966	2.29 and [7] 2.61	2.73			

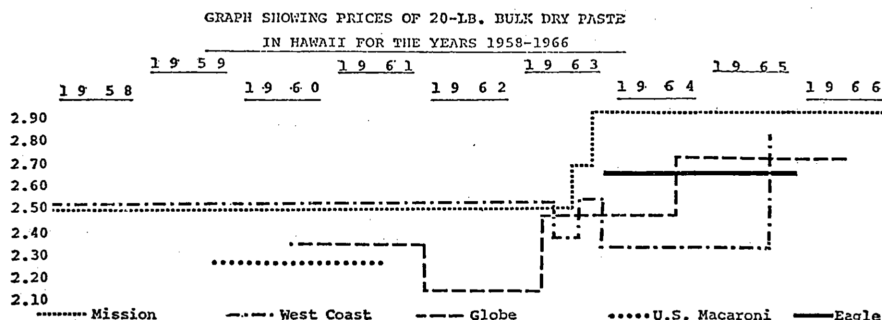
[1] CX 401–C, RX 161.
[2] RX 178–A & B, CX 401–D ($2.80 less 20 cents per case).
[3] RX 296.
[4] CX 216–Z–10 and –22, RX 193–B.
[5] RX 195–D ($2.49 and $2.94 less 5 percent).
[6] RX 192–A ($2.49 and $2.94 less 5 percent).
[7] RX 181 and RX 197–A (1 free with five), CX 682A–O.
[8] Golden Grain prices are set forth on RX 299A–C, together with the supporting exhibits and record references.
[9] RX 162; see also RX 172 (24/1-lb. $4.72 less 6 cents per case pickup allowance; 24/8-oz. $2.74 less 6 cents per case); RX 164, RX 166.
[10] RX 167; see also RX 163 ($5.25 less 10 percent quantity incentive, 5 percent additional warehouse allowance, less 5 percent dealer's allowance, less 2 percent cash).
[11] RX 161, CX 401.
[12] RX 178, CX 401.
[13] Royal apparently had a reduced price in 1963 (RX 134).

Golden Grain's Prices on Bulk Macaroni in Hawaii

85. With respect to the prices on the Mission Division's bulk dry paste sales in Hawaii as compared to northern California, it is clear that the price of the Mission Division's bulk dry paste was $2.50 for 20 pounds from 1958 through August 18, 1963 (Tr. 1109, 4160; CX 105–108). At that time the price increased to $2.70 (Tr. 4160). In October 1963, the price was increased to $2.95, where it remained through 1966 (CX 269–H; Tr. 4160–01). Today the price is $3.15. The only allowance or discount which the Mission Division allows on bulk sales of dry paste in Hawaii is the 5% allowance to wholesalers who maintain warehouse stock and a 2% cash discount if payment is made within 10 days after arrival in Hawaii (Tr. 1098). Mission has never allowed an advertising or display allowance on bulk dry paste in Hawaii and has never had a promotion on bulk dry paste (Tr. 1101, 1114, 1295). The 5% warehouse allowance is allowed wholesalers in the Pacific Northwest who take a warehouse delivery and the 2% cash discount is allowed all buyers. As confirmed by the decline in Mission sales from $42,000 in 1960 to $17,600 in 1966 (CX 284), the Mission Division has lost bulk customers in Hawaii since 1963, which Mission claims were lost by reason of lower prices by its competitors. For example, in 1966 Mission's price for 20-pound macaroni and spaghetti was $2.95, less 5% warehouse allowance and 2% cash discount. Western Globe's price

was either \$2.65 or \$2.75, less 5% and 2% (Tr. 1129; CX 682–G), and West Coast Macaroni's price was \$2.80 less 5% (CX 234–I).

The following graph shows the prices for 20-pound bulk macaroni and spaghetti charged by Mission and its competitors in Hawaii from 1958 to date and indicates that the prices of Mission's competitors were below those of Mission. The prices on which the graph is based are shown in the schedules immediately following the graph.



Mission Macaroni Co. ("Mission" brand):

\$2.50—less 5% warehouse allowance from Jan. 1, 1958 to Aug. 18, 1963 (TR. 4160, CX 105, 106, 107, 108).

\$2.70—less 5% warehouse allowance from Aug. 19, 1963 to Oct. 14, 1963 (TR. 4160).

\$2.95—less 5% warehouse allowance from Oct. 14, 1963 through 1966 (TR. 4161, 1129).

In 1961 the Mission Division net price on bulk dry pasts was \$2.375 as compared to Western Globe's ("Globe A–1") price of \$2.37. However, Mission's price was CIF the dock Honolulu, and Globe's price was delivered to the warehouse of the wholesaler. It cost the Mission customer approximately 10¢ per case to pick up its merchandise at the dock and transport it to the purchaser's warehouse. (TR. 1108.)

Western Globe Macaroni Co. ("Globe A-1" brand):

\$2.37—on Aug. 31, 1960 (CX 216-B).

\$2.37—on July 21, 1961 (CX 216–D and M).

\$2.18—on Jan. 12, Sept. 27, Oct. 4, Nov. 12 and Dec. 28, 1962 (CX 216–Z–19 and –37, RX 200–A, RX 193–C, CX 301–I).

\$2.50—less 5% on Apr. 16, 1963 (CX 216–Z–48 and –49).

\$2.50—less 5% on Dec. 17, 1963 (RX 195–C, TR. 1046).

\$2.50—On June 9, 1964, less 5% (RX 192–F and G).

\$2.75—less 5% on Sept. 22, 1964, (RX 192–C).

\$2.75—less 5% on Mar. 2 and July 22, 1965 (RX 194, RX 196–A).

\$2.75—less 5% on July 25, 1966 (CX 682–G).

West Coast Macaroni Co. ("Perfection" brand):

$2.50—less 5% from 1958 through 1962 (TR. 1312–13).

$2.50—less 5% during 1961 and 1962 (CX 252–A through 252–Z–35, RX 297).

$2.37—net on May 31, 1963 (CX 252–Z–5, CX 236 (undated but numbered prior to CX 235)).

$2.56—net on Aug. 29, 1963 (CX 250, CX 251).

$2.37—net on Dec. 1, 1963 (CX 234–J).

$2.80—less 5% on Sept. 7, 1965 (CX 234–I).

U.S. Macaroni Manufacturing Co. ("Taystee" brand):

$2.30—net on Sept. 1 and Oct. 20, 1959 (CX 266–Q, RX 276–A and D).

$2.30—net on Mar. 11, 1960 (CX 266–Z–9).

$2.20
and
$2.30—net on July 22, 1961 (RX 160).

Eagle Macaroni Co. ("Eagle" brand):

$2.68—net 1964 and 1965 (RX 162 (less 5% warehouse allowance); see also RX 163, 164 and 167).

Promotions by Golden Grain Competitors in Hawaii

86. Golden Grain, as well as its competitors, had promotion campaigns in Hawaii. For example, Western Globe Macaroni Company had a promotion of one case free with five-case purchases of its dry paste in Hawaii during a large portion of 1966 (Tr. 1000). In September 1966, Western Globe offered 24/1-pound dry paste at $4.76, less $1 per case allowance. Mr. Marvin Pearlman, vice president of Western Globe, who testified as a Commission witness, did not know whether this was advertising allowance, a cash rebate, or just what type of allowance it represented. In addition, during 1966 Western Globe had promotions of seven cases free with each five cases purchased. These types of promotions are listed on a series of Western Globe invoices which were received in evidence as Respondents' Exhibit 204. In June 1964, on behalf of Western Globe, Mr. Pearlman reported to the Federal Trade Commission in a 6–B Report that, during January 1, 1960 to January 1, 1964: ". . . each month we feature one item, elbow macaroni, for example, and allow one case free with each ten case purchase" (CX 201–D). The Federal Trade Commission 6–B questionnaire is Commission Exhibit 195. In 1963, Western Globe made a 20 cents per case advertising allowance on its 24-package cases and 10 cents per case on its 12-package cases. This allowance was handled by check and was offered nine times each year on one and two item advertisements. The payment was generally handled by a credit memorandum and did not appear on the Western Globe invoice (Tr. 1021–22; RX 187). Also, during that

period Western Globe had a 2½% Lenten promotion (Tr. 1047; RX 195–D). Mr. Pearlman did not remember the exact amount of the allowances in effect during 1962 and 1963, but they could have been anywhere from 25 cents per case to $1 per case (Tr. 967). In a letter to the Federal Trade Commission dated October 30, 1967, Mr. Pearlman stated that:

We generally offer to all the trade a quarterly promotion. This is usually equal to one case free with ten for a 30-day period. Customers usually bill us back for this amount and a credit memorandum is issued (CX 215–B).

Mr. Pearlman testified that the Western Globe invoice did not reflect the ultimate cost to the purchaser (Tr. 969).

87. The president of American Beauty Macaroni Company did not know what promotions were being carried on in Hawaii on its dry paste. American Beauty allows its distributor, Mother's Foods, a discount of approximately 20% to 25% for its services. Mother's Foods is permitted to sell American Beauty macaroni at whatever price it can obtain. There was testimony at the hearing that American Beauty paid $500 to $1,000 per store in the San Francisco area (Tr. 1234, 1236, 1254–55).

88. U. S. Macaroni Company had a continuous promotion program on its dry paste in Hawaii. From January 8, 1959, through September 1, 1961, U.S. Macaroni paid 25 cents per case as a promotion allowance. On September 1, 1961, it changed its promotion. U.S. Macaroni then began to allow its broker in Hawaii, Mr. D. E. Scoble, 30 cents per case on dry paste, of which 15 cents was to be used for promotion and 15 cents for brokerage. This form of promotion continued through 1963. Beginning in 1964, U.S. Macaroni allowed the purchaser a 5% rebate on purchases as a promotion allowance. The promotion allowances were paid by check (Tr. 3136–39). West Coast ("Perfection" brand) has also had promotions in Hawaii on dry paste. For example, from May 1 through July 31, 1963, West Coast offered two cases free with each five cases purchased. This was allowed during May 1 through July 31, 1963, with a promotion of one case free with ten cases purchased (CX 235). Eagle Macaroni Company also had promotions in Hawaii. Mr. Baron Inaba, Eagle's former president, testified that Eagle had promotions on dry paste on anniversaries and during the Lenten season. Eagle gave promotions not more than four times for each store per year (Tr. 286). Eagle also paid stores an advertising allowance based on the cost of the advertisement (Tr. 286) and also special display allowances of 5% for store promotions (Tr. 438).

Eagle Macaroni Company

89. At the hearing, complaint counsel questioned Mr. Baron Inaba, former president of Eagle Macaroni Company, quite extensively in support of the allegations with respect to geographic price discrimination and sales below cost in Hawaii, or at unreasonably low profit. Mr. Inaba blamed Golden Grain for Eagle's unprofitable operations. A brief history of Eagle Macaroni will be outlined as follows: Mr. Inaba entered the macaroni business in 1941 by purchasing Hinode Macaroni Company, located in Honolulu. Its basic business was the manufacture of noodles, with a capacity of 1,500 pounds per hour (Tr. 353–54). Mr. Inaba incorporated Eagle in 1947, retaining 80% of the stock with the other 20% owned by a group of stockholders (Tr. 356). Eagle installed its first macaroni machine in 1948 and additional equipment in 1950 or 1951 at a cost of approrimately $45,000 (Tr. 379). During this same period, Mr. Inaba organized another corporation, Pan Pacific, and became a 90% stockholder in this corporation. He also organized Coral Investment, Inc., a corporation, again being its largest stockholder (Tr. 375–78). Coral Investment, Inc., had land holdings and owned the building in which the Eagle Macaroni plant was located (Tr. 378). Eagle Macaroni Company invested in the stock of Pan Pacific and Coral Investment, Inc. Mr. Inaba could not identify on the financial statement just what the indebtedness of $160,000 consisted. He stated that it could have included indebtedness to Pan Pacific and Coral Investment, Inc. (Tr. 573). In 1961 Eagle Macaroni sold its manufacturing division to BMI Industries, Inc. Mr. Inaba retained 90% of the stock of BMI Industries, Inc. (Tr. 300). Mr. Inaba did not know what amount BMI Industries had paid for Eagle Macaroni (Tr. 572). In 1962, Mr. Inaba attempted to sell Eagle Macaroni and had correspondence with Western Globe in this regard (Tr. 571). Mr. Inaba could not recall the asking sale price for Eagle Macaroni at that time. Western Globe decided not to purchase Eagle Macaroni, primarily because of Eagle's inadequate plant. Western Globe could manufacture noodles more profitably on the mainland and ship them to Hawaii than to manufacture them in Hawaii (Tr. 853–56). In correspondence, Mr. Robert William, president of Western Globe, described the Eagle plant as a "headache plant" (Tr. 856).

90. Mr. Inaba testified, among other things, that Eagle Macaroni Company, Inc., lost money during the period 1958–1963 (Tr. 272). During subsequent direct examination Mr. Inaba testified that Eagle

Macaroni Company, Inc., operated at a profit each year during the period 1957 through 1960 (Tr. 299–300). In 1961, Eagle Macaroni Company, Inc., was consolidated with BMI Industries, Inc., and, for subsequent years, it was not possible to allocate the losses, if any, attributable to the operations of Eagle Macaroni Company, Inc. Mr. Inaba was not able to read aloud for the record the figures contained on a purported financial statement which Mr. Inaba had before him at the hearing. Complaint counsel had to assist Mr. Inaba in reading the profit and loss figures from his own company's purported financial statement (Tr. 301–03). In spite of alleged loss of profits on macaroni sales during this period, Eagle Macaroni Company, Inc., installed additional equipment in its plant during the period between August 31, 1962 and August 31, 1964, and also installed a new roof on the building in which the macaroni plant was located (Tr. 386; RX 159–A–B). The installation of the additional macaroni equipment and replacing the roof of the building interrupted macaroni production and contributed to the loss of profits, if any, by Eagle Macaroni Company, Inc. (Tr. 581, 620; RX 159). In 1965 Eagle Macaroni Company, Inc., defaulted on the payments for the machinery which had been installed in its plant, resulting in the repossession of the equipment by the manufacturer (Tr. 3672–73).

91. Mr. Inaba gave contradictory testimony as to which competitors were the price leaders in macaroni sales in Hawaii during the period 1958 through June 1966. He first testified that the three "primary" competitors who lowered their prices for dry paste products under the prices of Eagle Macaroni Company, Inc., were Western Globe Macaroni Company ("Globe A–1" brand), Golden Grain Macaroni Company, and U.S. Macaroni Company ("Taystee" brand) (Tr. 284). In answer to a question by complaint counsel as to which firm was the first to lower its price, Mr. Inaba replied: "I can't recall as to which one, but they all seemed to be at the same time" (Tr. 285), and ". . . I cannot say at this time as to which one came before the others, but usually they are about the same. . ." (Tr. 323–24). Counsel supporting the complaint then read several statements Mr. Inaba was alleged to have given under oath at an investigational hearing by the Federal Trade Commission in Honolulu on September 10, 1963, and Mr. Inaba attempted to change his testimony (Tr. 324). From his answers to questions propounded by complaint counsel, this hearing examiner gained the impression that Mr. Inaba did not have an intimate knowledge of the business of dry paste manufacturing. Also, Mr. Inaba was not familiar with financial account-

ing methods and terms used therein, although Mr. Inaba had testified that, in addition to being president of several corporations, including Eagle Macaroni Company, Inc., he also worked in the field as an "international business consultant." Mr. Inaba had an office in Tokyo, Japan (Tr. 255). For example, counsel supporting the complaint asked Mr. Inaba the following question:

Q. What method of cost accounting did you use from 1958 until the time you closed the doors of Eagle Macaroni Company?

In reply to this question, Mr. Inaba went off on a long, rambling statement unrelated to any "method of cost accounting." Mr. Inaba's answer was as follows:

A. We used, as I have explained previously, included all the raw materials, the labor involved, and the other expenses such as depreciation, taxes, fuel, packaging, materials and also we have a unique system in our own way to divert part of the administrative expenses to manufacturing costs as overhead and part of the sales costs to the manufacturing of other products because we do handle other products in our wholesale division, which we call Eagle Merchandising Company. (Tr. 267.)

Complaint counsel then proceeded on another line of questioning. Later, complaint counsel returned to the subject of the earlier question, and repeated it in substantial form as follows:

Q. As to Eagle Macaroni Company, what method of cost accounting did you use?

A. The raw materials used?

Q. No, I understand—

A. Oh, method of cost accounting?

Q. Yes.

A. The method of cost accounting is—well, all the materials used, raw materials, and other overheads.

HEARING EXAMINER POINDEXTER: You have told us that.

THE WITNESS: Yes. That is the cost accounting. However, for our own purposes we use every unit or every package or every production of which the cost is taken on those daily, so that every day we know that day's production cost. That can be broken down to categories and the individual packages. (Tr. 268–69.)

Later, in further direct examination of Mr. Inaba, complaint counsel again returned to the question of the method of accounting which Eagle Macaroni Company used. This time, counsel suggested the answer to Mr. Inaba, as follows:

Q. Which costing method did you use, last in first out, or first in first out?

A. First in first out. (Tr. 279.)

92. On cross-examination, Mr. Inaba was questioned concerning

certain written exhibits and financial statements which were contained in a box which Mr. Inaba produced and brought to the hearing room at the request of counsel. Among these was a list of dry paste manufacturers which had been prepared by Mr. Inaba, showing the prices for selected sizes of dry paste. This exhibit, dated October 1959, and received in evidence as Respondents' Exhibit 161, shows that U. S. Macaroni Company had the lowest price for 20 pound bulk dry paste in Hawaii at that time, and that both Western Globe Macaroni Company ("Globe A-1") and California Vulcan Macaroni Company ("Royal") were charging a substantially lower price than Golden Grain for the 24/8-oz. dry paste product. Mr. Inaba also testified that he had documentary evidence to substantiate lower prices by his competitors. Counsel for respondents requested that he produce these documents. Mr. Inaba subsequently produced a price list issued by U. S. Macaroni Company, dated July 22, 1961. This price list was received in evidence as Respondents' Exhibit 160, and shows that U. S. Macaroni Company had the lowest price on 20-pound bulk macaroni and spaghetti in 1961, as well as in 1959 (Tr. 321–22).

93. Among the papers contained in the box which Mr. Inaba brought to the hearing room at the request of counsel, above referred to, was a document dated October 8, 1965, with the words "Confidential Allowances: 10%—5%—2%—5% (commission)" written across the top of the document. This document, which was received in evidence as Respondents' Exhibit 167, shows that, in October 1965, Eagle Macaroni Company, Inc., was selling 24/8-oz. macaroni and spaghetti for a net price of $2.47 and the 24/1-pound macaroni and spaghetti for a net price of $4.49, as compared to Golden Grain's net prices of $2.73 and $4.78, respectively, for the same product sizes. This document refutes Mr. Inaba's testimony that Eagle Macaroni Company, Inc., did not ever sell its dry paste products at prices below those of Golden Grain. Also, at that time, the net price of Mission macaroni was higher than the Eagle price for the 20-pound bulk dry paste. The Mission macaroni net price for 20-pound bulk dry paste was $2.80 ($2.95 less 5%) while the Eagle Macaroni Company, Inc., price of the 20-pound bulk dry paste was $2.63 (Tr. 4160). The evidence shows that Eagle Macroni Company, Inc., was also underselling Golden Grain in 1964. The Eagle Macaroni Company, Inc., price list, effective July 15, 1964, shows that the Eagle Macaroni Company, Inc., price for the 24/8-oz. macaroni was $2.68 FOB the warehouse, and its price for the 20-pound bulk was

$2.76 FOB the warehouse (RX 162). The Golden Grain price for 24/8-oz. dry paste was $2.73, CIF the dock, Honolulu (RX 299-C). Mission Macaroni's price for the 20-pound bulk was $2.95 less 5%, or $2.80 net, CIF the dock, Honolulu (Tr. 4160).

94. The evidence shows that the market for dry paste in Hawaii is more or less static. The total dollar sales in 1961 were $406,687, and by 1966 they had increased to only $421,996 (CX 284) in Hawaii. Translated in pounds, these sales represented 2,847,000 pounds in 1961 as compared to 2,954,000 pounds in 1966, based upon 7 pounds per dollar (Tr. 4707–08). One macaroni press has an annual capacity of approximately 5,000,000 pounds (Tr. 3697–98, 4709). Mr. Amato, president of a company which manufactures dry paste making equipment, testified, among other things, that, if a plant with one line drops below 3,000,000 pounds per year, that plant was not operating efficiently (Tr. 3697). So, it is seen that this minimum is greater than the total dry paste market in Hawaii. Mr. Julius DiDonato, president of West Coast Macaroni Company, testified that a plant has to produce 7,000,000 pounds of macaroni products annually to be efficient (Tr. 1231), and another witness set the minimum breaking point at 6,000,000 pounds annually (Tr. 4720). Mr. DiDonato also testified that a plant can produce 15,000,000 pounds a year for 4½ cents less per pound than a plant which produces 1,000,000 pounds per year (Tr. 1251–52). Even with freight costs of 3 cents per pound for macaroni products shipped from the mainland to Hawaii, it is obvious that a large efficient macaroni plant situated on the mainland can manufacture, ship and sell in Hawaii at less cost than a small plant located in Hawaii. The inefficiency of the operations of the Eagle Macaroni Company, Inc., plant is emphasized by the fact that after the new equipment was installed during 1962–1964, the plant had two lines (Tr. 3699–3700). With two lines, the plant's capacity was 3 to 4 times as great as the total market for dry paste products in Hawaii. Consequently, the plant did not run a full shift each day (Tr. 415). In 1963, Eagle Macaroni Company, Inc., sold only $39,000 worth of dry paste. At 7 pounds per dollar, this totaled approximately 280,000 pounds of dry paste. In 1960, Eagle sold only $50,000 in total sales, or 350,000 pounds (CX 284).

95. It is significant to compare the Eagle Macaroni Company, Inc., cost of manufacturing with that of Western Globe Macaroni Company. Respondents' Exhibit 168 shows that, in 1960, it cost Eagle Macaroni Company, Inc., $2.86 to manufacture a carton of

24/8-oz. macaroni. In 1965 it cost as high as $3.25 (RX 167, 169). In contrast, Western Globe's cost was $2.00 in 1963; including freight (CX 201–N), and Golden Grain's cost was $2.132 in 1960, and $2.118 in 1963, including freight (CX 270–G). In view of Eagle's high production costs, it is not surprising that Western Globe Macaroni Company decided not to purchase Eagle Macaroni Company, Inc., in 1962. Western Globe Macaroni Company could manufacture noodles at its plant on the mainland and sell them in Hawaii at a more profitable margin than Eagle's plant in Hawaii.

96. The contentions of complaint counsel with respect to macaroni prices in Hawaii are shown by the record to be inconsistent with their contentions with respect to macaroni prices in the Pacific Northwest. In one breath, complaint counsel contend that Golden Grain prices in Hawaii were unreasonably low (Tr. 107). In the next breath, complaint counsel, supported by their expert witness, Dr. Garoian, contend that the Mission Division is extracting a monopolistic price for dry paste products in the Pacific Northwest and overcharging consumers by as much as 3 cents to 4 cents per pound (Tr. 4511–13). A comparison of the Mission Division prices in the Pacific Northwest with Golden Grain prices in Hawaii show that the Pacific Northwest prices are approximately 18% lower than the prices in Hawaii. This is so, even after taking into account the 3 cents per pound freight costs on dry paste shipments to Hawaii. The following table sets forth the price differences:

Comparison of prices—Pacific Northwest and Hawaii

Product	Price Golden Grain Hawaii [1]	Approximate freight to Hawaii at 3 cents per pound	Net after freight	Mission price Pacific Northwest [2]
12/2-lb. macaroni and spaghetti	$4.52	72	$3.80	$3.73
12/12-oz. macaroni and spaghetti products	2.39	27	2.12	$1.71 & $1.90
12/24-oz. long macaroni	4.11	54	3.57	[3] $3.42
12/24-oz. coil spaghetti	4.52	54	3.95	[4] $3.76

[1] Source: CX 268, which is wholesaler's net price after deduction of 5 percent warehouse allowance.
[2] Source: CX 682, after deduction of 5 percent warehouse allowance.
[3] Mission does not pack a 12/24-oz. long macaroni. However, its price for 12/12-oz. long macaroni is $1.80 less 5 percent warehouse allowance. The net price of $1.71 has been doubled to arrive at a price for 24-oz.
[4] Mission's product is 12/22-oz., which is approximately 10 percent less than Golden Grain's 12/24-oz. Mission price of $3.60 less 5 percent for coil vermicelli has been adjusted upward 10 percent accordingly. Mission 12/12-oz. coil spaghetti, coil vermicelli and rigatoni each sell for $2.00, less 5 percent warehouse allowance, or a net of $1.90. By doubling the price for 12/12-oz., the Mission price for 12/24-oz. would be $3.80, which is 15 cents less than the Hawaiian price less freight. Mission does not produce a size comparable to Golden Grain's 1-lb. size. However, until late 1963 Mission produced a 14-oz. package, which it sold in Oct. 1963 for $1.75, less 5 percent warehouse allowance, for a net of 15 cents per lb. ($1.66 ÷ 10.5 lbs.) Golden Grain's 1-lb. size sold for $2.39 or 20 cents per lb. Its Hawaiian price less freight would be 17 cents per lb.

470–536—73——10

97. A preponderance of the evidence does not establish the claims by complaint counsel and their witness Baron Inaba that Golden Grain's prices in Hawaii injured Eagle Macaroni Company, Inc., or were responsible for its financial difficulties. Although witnesses in the employ of Western Globe Macaroni Company also complained in their testimony concerning low prices in Hawaii, the evidence shows that Western Globe had the lowest price on dry paste products in Hawaii during the period 1958–1963. On the other hand, Mr. Marvin Pearlman, its general manager, in a letter to the Federal Trade Commission in 1964, stated, among other things, that Western Globe "has not been disturbed by the pricing practices of competitors ..." (CX 201–U). Mr. Vincent LaRosa, vice president of V. LaRosa & Sons, a Commission witness, testified that he considered the prices of dry paste products in Hawaii to be reasonable (Tr. 3766), and Mr. LaRosa's company sells macaroni products in many parts of the United States, both East and West.

98. A preponderance of the evidence shows that the Mission Division's prices for paste products in Hawaii during the period from August 1963 through 1966 were not lower than the prices of its competitors, as contended by complaint counsel. As a matter of fact, beginning in 1963, the Mission Division's sales decreased from $36,078 to $25,402 in 1964, to $18,132 in 1965, and to $17,601 in 1966 (CX 284). As has been found in previous findings, the original plant of Eagle Macaroni Company, Inc., was inefficient. Also, replacement of the plant roof and installation of additional machinery and equipment during the years 1962 and 1963 interfered with production and sales and contributed to Eagle's financial difficulties. Further, Mr. Inaba's involvement in varied business enterprises in Japan and elsewhere may have contributed to his failure to give proper attention to the operation of Eagle Macaroni Company, Inc. These were the principal factors that contributed to Eagle's and BMI's losses during 1963 through 1966 (Tr. 853–56, 392; RX 159–A–B, 291). From a preponderance of the evidence, it is found that the losses incurred by Eagle Macaroni Company, Inc., and its successor BMI were not caused by the pricing practices of the Mission Division of Golden Grain, Golden Grain Macaroni Company or by the other macaroni manufacturers competing in Hawaii.

Alleged Monopoly by Respondents

99. In the opinion of Dr. Gordon, it is a practical impossibility for Golden Grain or any dry paste manufacturer to monopolize the

Pacific Northwest dry paste market, regardless of how the market is delineated geographically. He gave several reasons for his opinion. For instance, it is necessary to put the Pacific Northwest market in proper perspective by examining the size of the economic units involved. The Mission Division's dry paste sales are approximately 2.7 million dollars annually (CX 507; Tr. 4926). When the size of this sales volume is compared with the standard size supermarket built several years ago (newer ones are larger), it will be seen that the supermarket would have a sales volume in excess of the total sales of the Mission Division's dry paste sales in the Pacific Northwest. It should also be noted that, without exception, each supermarket is tied to some type of buying group. Each one is a member of some powerful buying group, either a corporate chain, a retailer cooperative, a voluntary wholesale group, or some other type. For example, the Mission Division sells to A & P Stores, which chain has a dollar volume 2,000 times as large as the Mission Division's dry paste business (Tr. 4927).

100. Dr. Gordon also pointed out that a few years ago the battle within the food stores was between manufacturer and manufacturer, each trying to get more shelf space for its individual brand, whereas now the battle has shifted to where it is manufacturer versus retailer for the survival of the manufacturer. At page 58 of *Grocery Manufacturing Magazine* for April 1968, the problem is discussed. The average store will have 8,200 facings. Of these, 5,800 are allocated to the demand items, which must have two facings each. This leaves 2,400 spaces to allocate to faster moving items which need three or more facings, plus new products. The article points out that stores take on an average of 400 new products a year. In this environment the manufacturer must fight to hang on (Tr. 4926–29).

101. This same problem facing the manufacturer was cited by Mr. Matt Ulrich, the Seattle salesman for the Creamette Company, a Commission witness. Mr. Ulrich has sold macaroni products in four different markets other than Seattle, namely Kansas City, Pittsburgh, Omaha and Iowa. He stated that Safeway Stores, Inc., for example, as well as any other chain, is confronted with a tremendous influx of new items. The chain's problem is where to place the new items on its grocery store shelves. Along with the new items the chain has its own private labels that it promotes (Tr. 2082, 2085). This problem is general and is not limited to Seattle. Also, as Dr. Gordon pointed out, a large grocery chain which manufactures its own products can and does undersell the regular macaroni manufacturers. In 1967, 8.8 per cent of the sales of the largest food chains

was merchandise these chains had manufactured themselves, excluding private labels. The world's largest food processing plant at Horseheads, New York, is not operated by a food processing company, but by the Great A & P Food Stores (Tr. 4928–29). A & P has a buying power of six billion dollars per year on a national basis. A & P also has a dry paste manufacturing plant at Terre-Haute, Indiana, from which it ships by rail and supplies its 21 stores in the Seattle-Everette-Tacoma-Bellingham areas. A & P stores in western Washington carry a full line of A & P's private label, Ann Page, a full line of Mission, two sizes of Creamette, Rose's Noodles and one brand of Majorette (Tr. 3793).

102. Dr. Gordon also testified concerning his visit to A & P stores in Seattle and the fact that A & P's private label "Ann Page" had twice the shelf space allocated to Mission and was selling at retail on July 28, 1968, at 21 cents a pound (Tr. 4932; 4959), as contrasted to Mission's price of 33 1/3 cents per pound, or 44% above the A & P (Tr. 4932–34). There were also Ann Page convenience dinners on the top shelf to the right of the dry paste products. Both convenience dinners and the dry paste bore the Good Housekeeping Seal of Approval, which is accepted by consumers as a measure of quality (Tr. 4926–4934). A & P's shelf price of 21 cents per pound for dry paste on a full line of dry paste shipped to its 21 stores in the Seattle area from A & P's own plant at Terre-Haute, Indiana, should be compared with other prices. For example, the United States' average retail price in July 1964 for dry paste was 25 cents per pound (CX 632) as against 28 cents per pound in Seattle Washington (CX 628–D). The average United States manufacturers' price in February 1968 was 23.5 cents per pound, or 2.5 cents per pound more than A & P's retail price (CX 653) [p. 153 *infra*]

103. Dr. Gordon also pointed out that if someone tried to manufacture dry cereal in Seattle, he would learn very quickly that General Mills, Kellogg, General Foods, Nabisco and other companies would have no difficulty competing with the local manufacturer in this market, even though their factories were located at Battle Creek, Michigan, and other distant locations. In Dr. Gordon's view it is entry into sales that is the surest guarantee of competition, and it doesn't really matter if the plant is located in Japan, Cleveland, Seattle or Horseheads, New York. Further, in Dr. Gordon's opinion, the ease of entry into sale of the product is one of the principal explanations for relatively strong competition in the food retailing in-

dustry despite the existence of giant chains, buying groups, co-ops or other forms of concentration. It is the ease of entry into the sale of the product which is critical. It does not matter where the plant is located (Tr. 4935). According to Dr. Gordon, "the ease of entry is the guarantee of competition in a sense and I say this means entry into the sale of the product ... as opposed to building a plant. I think the building of a plant is just irrelevant. It is the appearance in the supermarket of that product available to the customers" (Tr. 4936). In Dr. Gordon's opinion, there is relatively easy entry into the Pacific Northwest with respect to the sale of dry paste products. He stated that he agreed with Dr. Garoian to the effect that if entry is truly easy, then a person with a large share of the market would have no real monopoly power, even if he had 100 per cent of the market (Tr. 4936). In this connection, the testimony of Mr. Byron Shiedler is appropriate. Mr. Shiedler conducted a study on private label dry paste products for Safeway Stores, while he was employed by that company. Mr. Shiedler, a witness called by complaint counsel, testified, among other things, that there was no relationship between the number of suppliers in an area and the private label prices quoted to Safeway. To Mr. Shiedler, the "essential fact was that most suppliers could get into most areas" (Tr. 1565).

104. In order to determine the nature of the dry paste market in Seattle, Dr. Gordon made a personal survey of 25 grocery stores. He looked for brands, location of the dry paste section, location of the sauces, location of the dry beans and rice, of the convenience dinners, of the canned dry paste products, and of the frozen dry paste products. In the 25 stores he found 30 brands of packaged dry paste. There were nine brands with full lines, that is, a complete display of all types of dry paste products, namely, Ann Page, Globe A-1, May Fresh, My-Tee-Fine, Tradewell, Verifine, Majorette, Mission and Dinner Hour. Six of these were either private or controlled labels as follows: Ann Page, the private label of A & P Stores; May Fresh, the private label of Mayfair Stores; My-Tee-Fine, the private label of Round-Up Wholesale Grocery, Spokane, Washington, and Fred Meyer Stores; Verifine, the private label of Associated Grocers; Tradewell, the private label of Tradewell Stores and Pacific Gamble-Robinson; and Dinner Hour, a controlled label owned by Mission and handled by Safeway Stores (Tr. 4938-40). With respect to the frequency of brands, Dr. Gordon found in the 25 stores the following frequency: the Creamette brand of Minneapolis, found in 21 stores; the Mission brand, Seattle, in 18 stores; Rose Noodles, Seat-

tle, in 17 stores; Majorette, Seattle, in 15 stores; Ronzoni brand, New York, in eight stores; Best Bet, Mission Division, Seattle, in seven stores; La Rosa, V. La Rosa & Sons, New York, in seven stores; Manischewitz brand, Newark, New Jersey, in seven stores; Family Pak, Major Italian Foods, Seattle, in six stores; Hime, Sacramento, California, in four stores; Dinner Hour, Mission Division, in three stores; May Fresh, Mayfair Stores, in two stores; Mrs. Reese, Guyol Company, Los Angeles, California, in two stores; Taystee, U.S. Macaroni, Spokane, Washington, in two stores; Quality brand, Mission Division, in three stores; Ann Page, A & P, in the two A & P stores which he visited; Buitoni, New Jersey, in two stores; Freshies, Tradewell Stores, in two stores; Maggi, Cross & Blackwell, a division of Nestles, in two stores; Pagota brand, Seattle, in two stores; Horowitz, Long Island City, New York, in one store; My-Tee-Fine, Fred Meyer, Portland, in one store; Globe A-1, California, in one store; Tradewell, Tradewell Stores, in two stores; Verifine, Associated Grocers, in two stores. In one Thriftway store (Associated Grocers) there were 23 facings of Verifine, 18 of Mission, four of Creamette, two of Ronzoni, and four of Rose brand. Creamette had nine facings in one store plus an advertised special, with a large aisle display. La Rosa had as many as seven facings in one store (Tr. 4940–4941). During 1967–1968, the Creamette Company of Minneapolis stepped up its promotional program in Washington and Oregon, and now has a full-time salesman in the area, Mr. Matt Ulrich. Creamette is listed in the Wadham wholesale order book in Portland, but Mission is not (Tr. 1819). Creamette has no shortage of plant capacity (Tr. 3590, 3639). Mr. Julius DiDonato, vice-president and general manager of West Coast Macaroni Company, San Francisco, California, estimated that a plant producing 30,000,000 pounds per year could do so at 1.6 cents per pound cheaper than a plant producing 10,000,000 pounds (Tr. 1252). Thus, Creamette is at no disadvantage shipping into the Pacific Northwest or to Florida (Tr. 3635–39). Creamette produces 32,000,000 pounds per year (Tr. 3596). Also, V. La Rosa & Sons, of New York, has no shortage of capacity (Tr. 3742). LaRosa presently sells both packaged and bulk macaroni in the Pacific Northwest area. Its bulk sales are made through Standard Brands Inc., which has represented La Rosa for the past couple of years (Tr. 3782). La Rosa bulk sales have grown to 6,000 pounds per month in Washington and Oregon (CX 777).

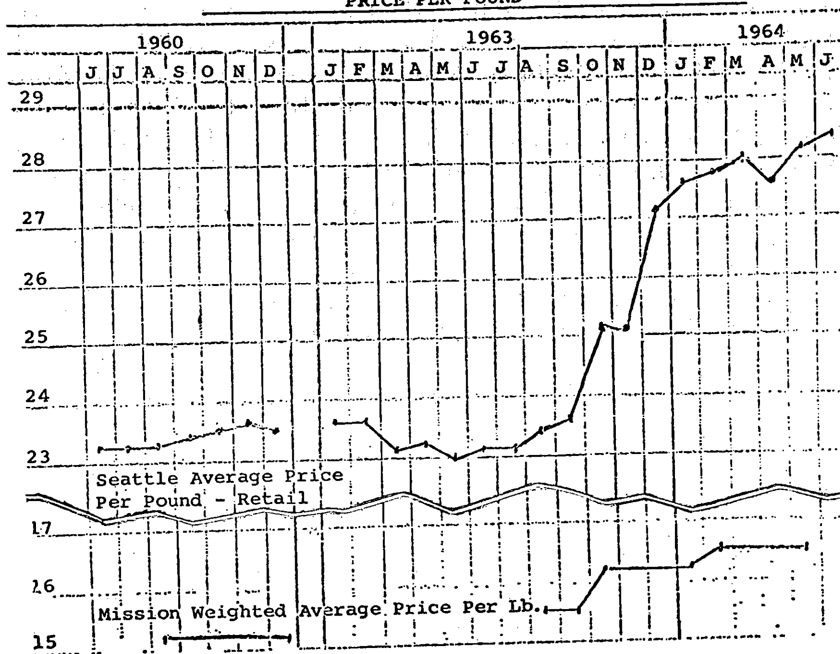
105. It appears that the present capacity of dry paste manufacturers in Pacific Northwest is more than sufficient to meet the needs of

that area. The present capacity of Porter-Scarpelli Macaroni Company of Portland, Oregon, is approximately 11,000,000 pounds per annum, although, in 1967, it produced only 6,250,000 pounds (Tr. 1765). Mr. Ernest Scarpelli, president of Porter-Scarpelli, stated that his company is striving to operate five days per week and that it would be able to reduce operating expenses considerably if it could operate more days and longer hours (Tr. 1704). To summarize, Dr. Gordon stated that, in his opinion, "market power is really in the hands of the buying offices that buy for retailers, chains, co-ops, voluntaries, discount groups" (Tr. 4930). Dr. Gordon further testified that with respect to the question of any barriers to entrance into the Pacific Northwest dry paste market, there is absolutely no fence around that market. Competing dry paste products are in the market and there is also competition from all of the manufacturers of dry paste convenience dinners with several of said manufacturers having greater financial resources than the total combined resources of all of the West Coast macaroni manufacturers(Tr. 4944), including National Dairy Products Corp., which manufactures the Kraft brand, Unilever Company, which manufactures the Lipton brand, General Mills, manufacturer of the Betty Crocker brand, American Home Products, manufacturer of the Chef Boy-ar-dee brand, Borden Co., and numerous other smaller companies (Tr. 4347–4357).

106. Complaint counsel and their economist, Dr. Garoian, rely largely on Commission Exhibit 629 to support their contentions that Golden Grain engaged in monopoly pricing. Commission Exhibit 629 purports to show in graph form the national average retail prices of macaroni in the United States during the period April 1960 through June 1964 on a cents per pound basis, and also the retail prices of macaroni in certain selected cities, to wit: Seattle, Washington; Portland, Oregon; and San Francisco and Los Angeles, California, during the same period. (For convenience a copy of CX 629 is reproduced in the Appendix herein.) Respondents emphasize that they are a manufacturer and retail prices bear no necessary relationship to a manufacturer's prices, and that retail prices vary from city to city. In their use of this graph, complaint counsel and Dr. Garoian assume that any price changes by Mission were "reflected by Safeway and other Seattle retailers, in their prices to the consuming public" (Complaint counsel's Proposed Findings, p. 52). This assumption is not valid. That there is no necessary relationship between the average retail price per pound in Seattle and Mission's prices for macaroni is shown on a graph submitted by respondents (p. 93) [*infra*]. The graph illustrates that the retail price increase in

Seattle between 1960 and 1964 had no relationship to Mission's prices. The bottom line on the graph is the weighted average price per pound of Mission's 12/12-ounce or 14-ounce, 12/22-ounce or 24-ounce, and 6/4-pound macaroni and spaghetti on four dates.[3] These dates are August 15, 1960 (the beginning prices); August 9, 1963 (the first of two increases in 1963); and February 17, 1964 (the only increase in 1964 prior to June 1964, which is the final month that the macaroni statistics were maintained by the Bureau of Labor Statistics. The second line on the graph is the Bureau of Labor Statistics' retail price per pound of macaroni in Seattle for the period June through December 1960; January through December 1963; and January through June 1964).

COMPARISON BETWEEN THE AVERAGE PRICE PER POUND AT RETAIL IN SEATTLE AND MISSION'S WEIGHTED PRICE PER POUND



107. As shown on the foregoing graph, Mission's weighted average price from February through June 1964 was 16.5¢ per pound, which was an increase over 1960's average price (15.2¢) of only 1.3¢ per

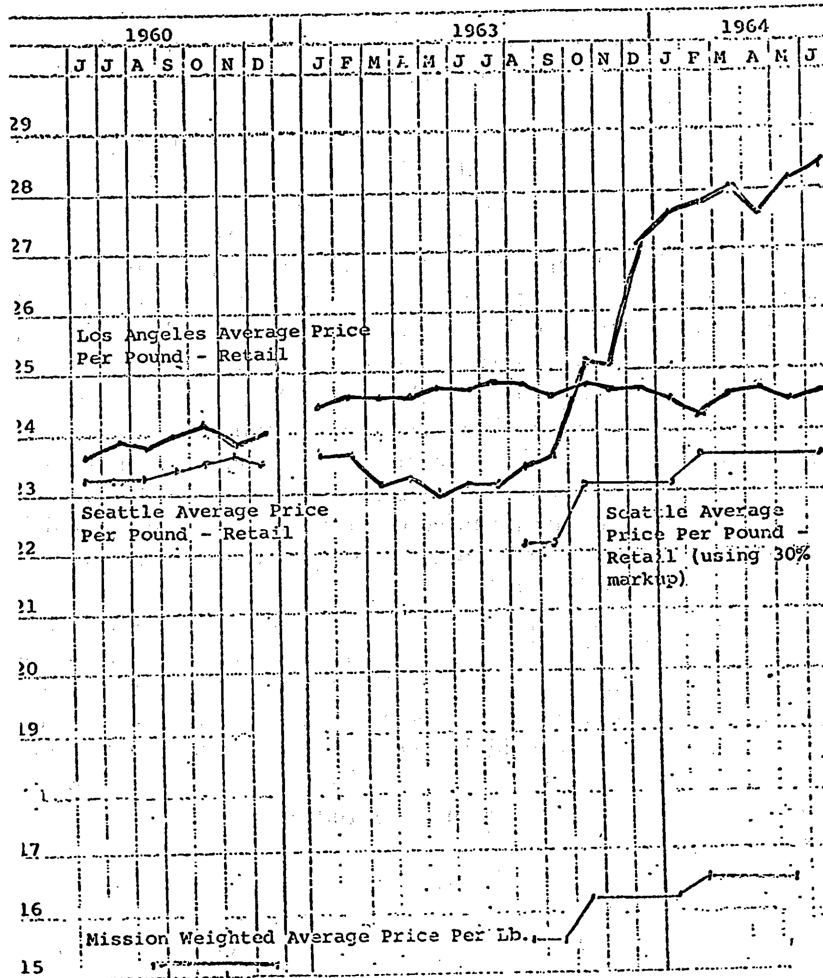
[3] Mission's average price per pound based upon a weighted average of 12/14-oz., 12/24-oz. and 6/4-lb. sizes for 8/5/60; 12/12-oz., 12/24-oz. and 6/4-lb. sizes for 8/9 and 10/15/63 and 2/17/64, assuming a ratio of sales of 20% 12/12-oz. or 14-oz., 20% 24-oz. and 14% 6/4-lb., which ratio is established by CX 518–46, 576–8, 580–8 and 591. Prices for August 15, 1960–CX 124, Prices for August 19, 1963—CX 132. Prices for October 15,

pound. However, the average retail price in Seattle increased from approximately 23.5¢ per pound in the last half of 1960 to 28.4¢ per pound in June 1964, an increase at retail of 4.9¢ per pound. This increase of 4.9¢ per pound in the retail price cannot be charged to Mission's pricing, whose average wholesale price per pound increased only 1.3¢ per pound from August 1960 through June 1964. Dr. Garoian evidently did not compare Mission's prices with those of other macaroni manufacturers or with the national average price per pound charged by macaroni manufacturers in the United States as shown on Commission's Exhibit 653. (A copy of CX 653 is reproduced in the Appendix herein [p. 153 herein].) Basing his conclusions solely on the average retail price per pound as shown on Commission's Exhibit 629, Dr. Garoian concluded that the increase from 23.5¢ to 28.4¢ per pound at retail in Seattle during 1963 and 1964 must be blamed on the Mission Division. An analysis of the Mission Division's prices demonstrates that the slight increase of 1.3¢ per pound in the Mission price during the period August 1960 to February 1964 was not the cause of the increase in retail prices in Seattle. Actually, Mission's slight increase of 1.3¢ per pound from August 1960 to February 1964 was 50% less than the increase in the average United States manufacturer's price during the same period, which average price rose from 18.8¢ to 20.8¢ per pound from March 1961 through June 1964 (CX 653).

108. In his analysis, Dr. Garoian used average retail prices that prevailed in the Los Angeles area. In order to demonstrate that the relationship in retail prices between Seattle and Los Angeles is actually far different from that assumed by Dr. Garoian (based largely on Commission's Exhibit 629), respondents have submitted an additional graph, similar to the previous graph, but with two additional lines. This second graph is reproduced and shown on the following page. The first two lines on the second graph are the same as those on the first graph. The third line on the graph is the retail price per pound in what Dr. Garoian described as "highly competitive" Los Angeles. The fourth line is what the average retail price per pound would be in Seattle if retailers in Seattle during the period August 1963 through June 1964 had used the markup suggested by complaint counsel of 30%.[4]

[4] Complaint counsel state at p. 52 of their Proposed Findings: "The retail chains generally take a 'markup' on macaroni products that range from 25% to 30% above what they pay for them." Dr. Garoian estimated 28% to 31% markup (Tr. 4614).

COMPARISON BETWEEN SEATTLE AVERAGE PRICE PER POUND AT RETAIL (USING A 30% MARKUP) AND THE LOS ANGELES AVERAGE PRICE PER POUND AT RETAIL



109. As can be seen on the preceding graph, if the retail price of macaroni in Seattle had been determined by use of a 30% markup, the retail price in Seattle in August 1963 would have been 22.1¢ per pound. The price would have increased on October 15 to 23.1¢ per pound, and to 23.6¢ per pound on February 17, 1964. These prices would place the Seattle retail prices substantially under those of Los

Angeles on the same dates. (The Los Angeles retail price per pound was 24.8¢ in August 1963; 24.8¢ per pound in October 1963; and 24.3¢ per pound in February 1964 (CX 628–C–D).) The graph illustrates that but for the fact that retailers in Seattle took a markup of more than 40% during the period August 1963 through June 1964, the Seattle retail price in 1963 and 1964 would have been lower than the Los Angeles price. This indicates that the Mission Division's prices were competitive.

110. Dr. Gordon, respondents' expert economist, was asked his opinion as to the use of a retail price graph to determine whether a manufacturer's prices were monopolistic or an entry barrier, testified as follows:

A. Retail prices are some indication of retail behavior. No indication whatsoever of manufacturer behavior. Now, see, one of the things we have to keep in mind is that there is no necessary relationship between a manufacturer's selling price and the later retail price. Remember the manufacturer's prices are very specific at a point in time he has charged so much for a product. Now, that retail price is twice removed. This retail price is a price that arrives at the third decision center. In other words, the manufacturer has made his decision in charging his prices. The wholesaler for a whole set of independent and different reasons and for whatever affects him has arrived at his price, then he in turn sells to the retailer and we know that the retailer can have all sorts of reasons for the kind of price he uses, so really what you are saying is that you are going to tell whether I am speeding down the freeway because three cars up you have caught some other car. In other words, there is no necessary connection between retail prices really; I fail to understand why this came in because it seemed to me that entered in the record are the wholesale prices of the manufacturer. Here is what he did do if you want to evaluate his behavior, take his prices and then say all right, maybe we can draw some conclusion on the price movement of his selling price—

HEARING EXAMINER POINDEXTER (interposing): As compared to other wholesalers.

THE WITNESS: As compared to other manufacturers, you see, and even there you might have problems of comparison.

A. (Continuing) But the idea of saying after a product goes through this whole decision process by the wholesaler and then goes on and goes through another decision process at the retail and then some statistical sampling of retail prices relates to the behavior of manufacturers, to me this is sheer nonsense. There is no connection, no necessary connection. (Tr. 4945–46.)

111. Dr. Gordon further testified that an examination of Commission's Exhibit 629 shows that the variation in the retail price of macaroni between early 1963 and the middle of 1964 was 5¢, but the variation in the Mission Division's price of its most expensive product, the 12/12-ounce size macaroni, varied only 2.2¢. Dr. Gordon fur-

ther testified concerning Commission's Exhibit 629, the retail price graph, as follows:

. . . But I think the one point that would invalidate this graph—

HEARING EXAMINER POINDEXTER (interposing): What exhibit is that?

THE WITNESS: This exhibit is 629.

By Mr. Coie:

Q. Commission Exhibit 629?

A. Commission Exhibit 629.

The one thing that would invalidate this whole proposition if we had no other evidence is the fact that from sometime in 1962 the Portland price went down and had a general downward trend. In '63 the Seattle price had a rising trend and crossed this Portland line. Portland had been above Seattle so what you had here are Portland prices moving in the opposite directions from Seattle but the testimony shows that both markets had identical prices from Mission during this period. This to me is enough to show that there is no necessary relationship.

112. In *United States* v. *Aluminum Company of America*, 148 F.2d 416 at 424 (2d Cir. 1945), Judge Learned Hand stated that 90% of the market "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four per cent would be enough; and certainly thirty-three per cent is not." Paragraph Five of the complaint sets forth six specific charges in which it is contended that Golden Grain is now, and has been, engaging in various unfair acts, practices or methods of competition in an attempt to monopolize and maintain a monopoly in the manufacture and sale of macaroni products. The first of these charges is the acquisition of 49% of the stock of Porter-Scarpelli Macaroni Company, 51% of the stock of Major Italian Foods, Inc., and 100% of the stock of Oregon Macaroni Company. The acquisition of 49% of the stock of Porter-Scarpelli Macaroni Company was an incident to the acquisition of Mission Macaroni Company in 1956. In other words, Mission Macaroni Company owned 49% of the stock of Porter-Scarpelli Macaroni Company at the time Golden Grain acquired Mission Macaroni Company. There is no allegation, evidence or contention that the acquisition of Mission Macaroni Company was improper or illegal. Golden Grain's acquisition of Mission Macaroni Company in 1956 was investigated by the Federal Trade Commission. This investigation resulted in a letter of clearance by the Commission dated July 10, 1957 (RX 294). A short time prior to the acquisition of Mission Macaroni Company, Golden Grain had attempted to sell its Seattle plant to Mission Macaroni Company. This would indicate that Golden Grain had no intention at that time to monopolize the dry paste market in the Pacific Northwest. On August 8, 1963, Golden

Grain purchased 51% of the stock of Major Italian Foods, Inc., for the sum of $20,000 (CX 19). Golden Grain claims that its acquisition of 51½ of the stock of Major Italian Foods, Inc., was made for legitimate business purposes, to acquire additional needed production, and was not made with the intent to monopolize. Further, Golden Grain states, and Mr. Harry C. Visse, Jr., a certified public accountant who participated in an audit of Major's books testified that Major Italian Foods, Inc., was insolvent in June, July and August 1963, and on the verge of bankruptcy (Tr. 5021). Major Italian Foods, Inc., was also substantially overdrawn at the bank (Tr. 5004–06; CX 19–28). Current liabilities exceeded assets by $40,000 (Tr. 5021), and the only reason Major was still in business was due to the leniency of its creditors (Tr. 5022). During the period April–July 1963, Major Italian Foods, Inc., was delinquent in the payments of its flour bills and began issuing a complicated series of checks to obtain additional time for the payment of its bills for flour. Major would write a check on the bank payable to Merlino, Inc., for one amount of a flour invoice. Merlino, Inc., is a corporation owned by Ernest Merlino and his brother. Merlino, Inc., would deposit Major's check to the account of Merlino, Inc., in a different bank and Merlino, Inc., would draw and send a check to the flour company in payment of the flour invoice. The flour company would then deposit Merlino, Inc.'s check to its account, which was in a different bank than the Merlino, Inc., account. By the use of two checks, Major was able to obtain the additional time required for the checks to clear the various banks (Tr. 3022–26). Commission's Exhibits 721–725 and Respondents' Exhibits 272–274 are copies of checks that were involved in the three-way transaction in the payment of flour bills. Mr. Merlino admitted that Respondents' Exhibits 272, 273, and 274 were each handled twice by the bank and the reason could have been that the first time they were deposited for collection they were returned by reason of insufficient funds (Tr. 3024–33). After Golden Grain acquired its stock in Major Italian Foods, Inc., Golden Grain began obtaining some of its macaroni requirements from Major Italian Foods, Inc.; this has enabled Major Italian Foods to increase its production and operate its plant more efficiently, adding approximately 1 cent per pound to Major's profits (Tr. 4242–43, 4288–90).

113. The Oregon Macaroni Company of Portland, Oregon, which Golden Grain acquired in 1966, was a small company with macaroni sales of $175,000 to $200,000 during the early 1960's, but in recent years had lost some of its best accounts to Major Italian Foods, Inc.,

and Porter-Scarpelli Macaroni Company, including the Fred Meyer account (Tr. 4102; 4112). Mr. Staino, one of the owners and operators of Oregon Macaroni Company, testified, among other things, that Oregon Macaroni was in financial difficulties and was going broke owing to the fact that Major Italian Foods, Inc., and Porter-Scarpelli Macaroni Company had obtained many of Oregon's best accounts (Tr. 4096–4111). By 1966, Oregon Macaroni's sales had dropped to a volume of approximately $80,000 per year, or about 1½ per cent of the Pacific Northwest dry paste market. Its acquisition by Golden Grain made little change in the competitive nature of the Pacific Northwest market and did not injure competition. Golden Grain contends that Oregon Macaroni, like Major Italian Foods Company, Inc., was a failing company and also Golden Grain was interested in purchasing Oregon Macaroni to provide it with a reliable source of production. Today Golden Grain purchases approximately 60% of the production of the Oregon Macaroni plants (Tr. 4240).

114. Findings under subparagraph (2) of Paragraph Five of the complaint to the effect that the Mission Division purchased competitors' products from certain retail stores and substituted therefor Mission Division's products have been previously made herein. The substitutions of Mission's products for those of its competitors were made at the instance of and request of the respective store owners. Findings have also been made with respect to the allegations of subparagraph (3) of Pargraph Five of the complaint to the effect that the Mission Division reduced prices for the purpose of gaining entry into stores. It has been found that this was the general practice of the Mission Division's competitors, more especially Major Italian Foods Company, Inc. The evidence does not establish that the Mission Division originated such a practice but that it merely indulged in such practice on occasion by attempting to meet, but not to beat, the prices of its competitors. Also, by the end of October 1957, the Mission Division had voluntarily discontinued the 5% discounts or rebates to some customers. They have not been resumed and there is no likelihood that they will be resumed in the future. With respect to the allegations in subparagraph (4) of Pargraph Five of the complaint to the effect that the Mission Division engaged in price wars to injure and destroy competitors, it has been found that the Mission Division reduced its prices from time to time to meet the price competition of its competitors, and especially Major Italian Foods Company, Inc., and not with the intent to injure Major Ital-

ian Foods Company, Inc., or any other competitor. The allegations of subparagraph (5) of Pargraph Five of the complaint that Mission charged a higher price for macaroni in western Montana than in Washington and Oregon during 1962 and 1963 were established and respondents do not deny these allegations. However, the evidence shows that these price differentials were voluntarily eliminated after August 1963 and thre is no evidence to show that these discriminatory practices have been resumed. Also, it does not appear that these geographical price discriminations injured or had any harmful effect on competition because, during 1962 and 1963, sales by Golden Grain's competitors increased, while Golden Grain's sales decreased (CX 765–767). Although these price discriminations violated Section 5 of the Federal Trade Commission Act, an order against these practices is not necessary since they were voluntarily discontinued in 1963 and not resumed.

115. The allegations in subparagraph (6) of Paragraph Five of the complaint to the effect that Golden Grain sold macaroni below cost with the intent to injure and eliminate competition have not been established. The circumstance that Major Italian Foods, Inc., incurred losses in 1962 and 1963 cannot, under the evidence, be imputed to Golden Grain. A preponderance of the evidence shows that Major Italian Foods, Inc., began business in 1957 with prices for macaroni and paste products below those of the Mission Division and continued to cut prices below those of Golden Grain, granting rebates, discounts and allowances below the prices shown on Major's published price lists. The actual selling price of Major's paste products cannot be determined from the face of the invoice which Major Italian Foods issued to its customer because of these hidden rebates, discounts and allowances. On the other hand, Golden Grain observed its published price lists and the prices shown on its invoices were the actual prices which Golden Grain received for the merchandise. Even Dr. Garoian, the Commission's expert economist, who had testified that he had read the transcript of the testimony compiled prior to the date of his appearance as a witness on July 23, 1968 (Tr. 4483), admitted on cross-examination that, to his knowledge, Golden Grain's actual selling price of its macaroni products did not deviate from the amount shown on its invoice (Tr. 4623). The violations of the Federal Trade Commission Act by Golden Grain Macaroni Company found herein were voluntarily discontinued long prior to the issuance of the complaint. They have not been resumed, and it is not likely they will be resumed in the future. Under the circumstances, a cease and desist order is not necessary.

CONCLUSIONS

1. Golden Grain's acquisition of 51% of the stock of Major Italian Foods, Inc., in August 1963 gave Golden Grain controlling interest in that company. Major's share of the macaroni sales of paste manufacturers located in the Pacific Northwest in 1963 was approximately 20%. At that time, the Mission Division's share of that market was approximately 44%. Golden Grain's acquisition of 51% and majority control of the stock of Major Italian Foods, Inc., increased Golden Grain's total share of that market to approximately 64. This was contrary to the intent and policy of the Clayton Act, as amended, and an unfair method of competition in commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act (*F.T.C.* v. *Brown Shoe Co.*, 384 U.S. 316, 321–22 (1966)). That the Congress was concerned with the possible danger to the American economy in unchecked corporate expansions through mergers is apparent from the legislative history of the 1950 amendment to Section 7 of the Clayton Act, and this concern is still evident in 1969. As stated by the Supreme Court in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1961) (at p. 315):

> The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy. . . . Other considerations cited in support of the bill were the desirability of retaining "local control" over industry and the protection of small businesses.

And at page 317, the Court said:

> Third, it is apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum.

2. Accordingly, a provision in the order to be entered herein will direct that Golden Grain divest itself of the 51% of the stock of Major Italian Foods Company, Inc., that Golden Grain acquired in August 1963.

3. All acts of the individual respondent Paskey DeDomenico disclosed in the record herein were performed in his capacity as president of Golden Grain Macaroni Company and not as an individual. There is no evidence to indicate that Mr. DeDomenico will not abide by any order to be issued in this proceeding. Therefore, the complaint against Mr. DeDomenico as an individual will be dismissed.

4. In all other respects the allegations of the complaint should be dismissed.

ORDER

It is ordered, That Golden Grain Macaroni Company, a corporation, and its subsidiaries, officers, directors, agents, representatives, employees, successors and assigns, shall, within one (1) year from the date of service upon it of this order divest, absolutely and in good faith, to a purchaser or purchasers to be approved by the Federal Trade Commission, all stock, assets or other interest heretofore acquired by Golden Grain Macaroni Company from Major Italian Foods Company, Inc., including the 51% of the capital stock of Major Italian Foods Company, Inc., that Golden Grain Macaroni Company purchased from that company in August 1963.

It is further ordered, That Golden Grain Macaroni Company shall not sell or transfer, directly or indirectly, any of said stock, assets or other interests herein ordered divested to anyone who is, at the time of divestiture, an officer or director of or under the control or direction of Golden Grain Macaroni Company or any of its subsidiaries or affiliates.

It is further ordered, That, pending divestiture, Golden Grain Macaroni Company shall not make any changes in the assets of Major Italian Foods Company, Inc., which would impair its ability to manufacture or sell macaroni products, or its market value.

It is further ordered, That Golden Grain Macaroni Company, for a period of ten (10) years from the date of service of this order, shall not acquire, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Fedeal Trade Commission, the whole or any part of the stock, assets or other interest of any manufacturer of macaroni or related paste products.

It is further ordered, That within sixty (60) days from the date of service upon it of this order, and each sixty (60) days thereafter until it has fully complied with the provisions of this order to divest, Golden Grain Macaroni Company shall file with the Commission a report in writing setting forth in detail the manner and form in which it proposes to comply, is complying or has complied with the provisions of this order to divest. Said compliance report or reports shall include a summary of all contracts and negotiations with potential purchasers of the capital stock, assets or other interests to be divested under this order, the identity of all such potential purchasers and copies of all written communications to and from such potential purchasers.

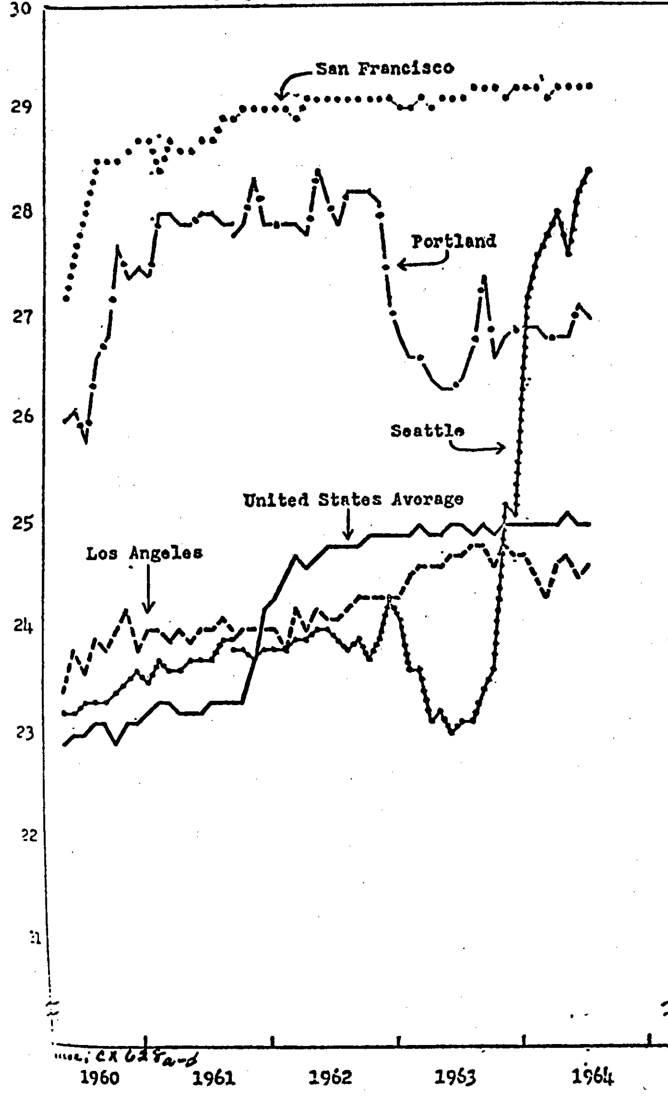
470-536—73——11

It is further ordered, That the complaint herein against the individual respondent Paskey DeDomenico be, and the same hereby, is, dismissed.

It is further ordered, That, in other respects, the allegations of the complaint herein be, and the same hereby are, dismissed.

APPENDIX A

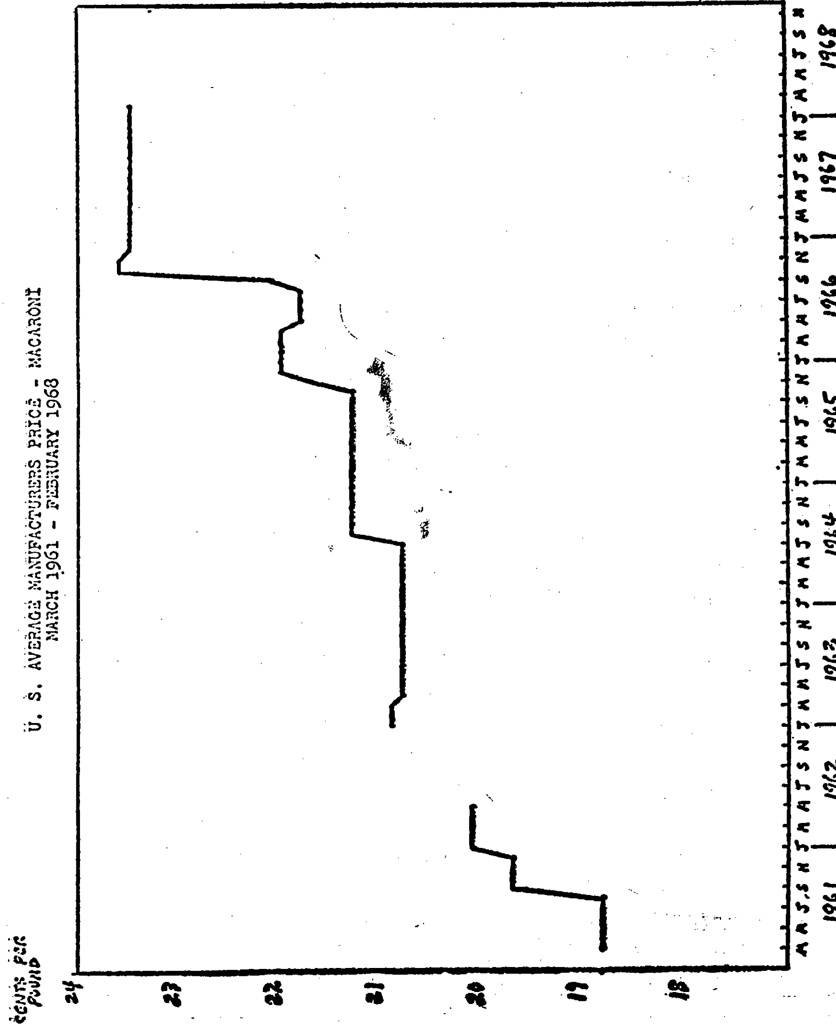
Composite graph of selected West Coast Cities and National average of Average Retail Prices of Macaroni, April 1960 through June 1964. (Cents per pound)



CX 629

APPENDIX B

CX 653



OPINION OF THE COMMISSION

JANUARY 18, 1971

BY DIXON, *Commissioner:*

This matter is before the Commission on cross appeals of counsel supporting the complaint and respondents from the hearing examiner's initial decision and order filed April 30, 1969.

Respondents are Golden Grain Macaroni Company (Golden Grain) and its president and principal owner, Paskey DeDomenico, named both as an individual and as an officer of Golden Grain. Complaint charges respondents with violating Section 5 of the Federal Trade Commission Act by attempting to monopolize and maintaining a monopoly in the manufacture, sale, and distribution of dry paste products in the Pacific Northwest and the State of Hawaii The complaint alleges respondents engaged in the following specific monopolistic practices: acquiring or gaining control of three specifically-described competitors operating in the Pacific Northwest, with the purpose or effect of enhancing their already dominant position and eliminating such competition as may have existed between such competitors; purchasing competitors' products and substituting their own; reducing prices with the purpose of gaining entry into retail stores; engaging in extensive price wars in order to lessen competition; engaging in geographical price discriminations; and selling dry paste products below cost, or at unreasonably low prices, with the intent or under circumstances where the effect has been, or may be, to eliminate competition.

The examiner held that the evidence was sufficient to sustain only two allegations of the complaint and ordered that the remaining charges be dismissed. He ruled that Golden Grain's acquisition of Major Italian Foods Company was contrary to the intent and policy of Section 5, and ordered respondents to divest their interest in the firm. He also included in his order a ten-year prohibition against the acquisition by respondents' of the assets of any firm manufacturing macaroni or related paste products without the Commission's prior approval. The only other allegation which the examiner held to be sustained by the evidence was that respondents had engaged in a geographical price discrimination in 1962 and 1963. Although he concluded that the discrimination constituted a violation of Section 5 of the Federal Trade Commission Act, he held that because no actual injury resulted from the discrimination, and because the practice had been voluntarily discontinued, an order to cease and desist was unnecessary. Respondents appeal as to all rulings against them,

and complaint counsel appeal as to all the dismissed allegations of the complaint.

The examiner's findings respecting the general history of the corporate respondent, and the broad nature of the involved industry, are not controverted. Golden Grain manufactures, sells, and distributes macaroni, spaghetti, and noodles, which are collectively known as dry paste or as macaroni. Respondent also produces and markets dry paste convenience dinners. This is a processed dry paste product packaged with an appropriate sauce and designed for easier and quicker preparation than the traditional macaroni product. Golden Grain operates plants producing these macaroni products in San Leandro, California; Seattle, Washington; and Bridgeview, Illinois. In 1966 its volume of sales for all products was $25,494,000, and for macaroni products (excluding convenience dinners), $8,409,000. Its customers include wholesale grocery companies, retail grocery chains, restaurants, schools, hospitals, and military installations.

The initial decision contains the following description of the macaroni product and its method of manufacture:

> There are approximately 40 or more varieties or shapes of macaroni and spaghetti products produced today, in three basic types, generally characterized as "long goods," "short goods," and "coil products." Each of these three basic shapes are in either the egg (noodle) or non-egg category (Tr. 175, 832, 1680). The basic ingredients used in manufacturing macaroni dry paste products are flour (preferably durum wheat or semolina wheat flour) and water. The flour is mixed with water and run through an extruding press, then placed in a die so as to give the mixture the desired shape. The shaped dough is then placed in a heated dryer for varying periods of time. After drying, the macaroni product is then placed in packages, polyethylene film bags or paper boxes. Macaroni plants today are fully automatic, including the packaging machinery (Tr. 701–02, 3654–55). (I.D. 83)

Respondents first produced dry paste in San Francisco in 1912. The product was then marketed in boxes and sacks containing no less than 10 pounds of macaroni products. This method of packaging by bulk was changed when, in the 1930's, respondent Paskey DeDomenico introduced to California cellophane bag containers, which were displayed on small racks, another innovation of respondents. In addition, the packaging of macaroni in this manner enabled respondents, for the first time, to label their products with the Golden Grain brand name. An apparent consequence of this improved method of merchandising and brand identification was respondents' advance from approximately tenth largest producer in northern California, to second, and then, when the largest producer ceased operations after its plant was destroyed by fire, to first in 1951.

Golden Grain's production and distribution of macaroni products were restricted to northern California until 1941 when its San Francisco plant was destroyed by fire, and the company purchased, to meet production needs, an abandoned macaroni plant in Seattle, Washington. However, the entire output of the Seattle plant was shipped to northern California, and it was not until 1943 that respondents began to market even a small portion of their seattle production in the Pacific Northwest. More extensive marketing efforts were undertaken in the Pacific Northwest with the opening, in 1951, of the San Leandro plant. Yet, by 1954, Golden Grain had sales of only $458,095 in the Pacific Northwest, and a net loss of $90,304. By 1955, its cumulative loss reached approximately $355,235. As a consequence, respondents attempted to sell their Seattle operation to Mission Macaroni Company, a Seattle producer of dry paste. When this proved unsuccessful, respondents acquired, in June 1956, another Seattle manufacturer, Favro Macaroni Company. Favro's yearly sales had been approximately $250,000, and the purchase price paid by Golden Grain was $50,000, together with a commission of 5% on all sales to Favro's old customers.

For a variety of reasons, the owners of Mission Macaroni decided, in 1956, to sell their interest in the firm. In September of that year, respondents purchased this Seattle competitor and have operated it as a corporate division. Respondents thus added the Mission brand to their Golden Grain brand. Mission had several years before obtained a 49% interest in a Portland, Oregon, macaroni manufacture (Porter-Scarpelli Macaroni Company), so, with the purchase of Mission, respondent also obtained a minority interest in this second company.

In 1957, Joseph Merlino, one of the four owners and operators of Mission Macaroni prior to its sale to Golden Grain, began again to manufacture macaroni in the Seattle market through the newly-formed Major Italian Foods Company. By 1960, Major's sales were $622,000; by 1961, $852,000. During this period, Golden Grain's annual sales decreased from $2,302,504 in 1957 to $1,994,000 in 1960.

Although Major's gross sales were impressive, its earnings were not. During the period 1961–1962, its losses were so great that Merlino decided to sell the company, and in August 1963, respondents, through their wholly owned subsidiary, Manteca Bean Company, purchased 51% of Major, and obtained an option to purchase the remaining shares. Golden Grain, in 1967, notified Major of its intent to exercise the option. However, the sale of the remainder of the

Major shares had not been consummated when the record in this proceeding was closed.[1]

In 1966, Oregon Macaroni Company, a relatively small producer operating out of Portland, Oregon, was put on the market for sale, and respondents, outbidding Porter-Scarpelli, purchased the company for $66,000, plus an employment contract for its two owners. Approximately 60% of the Oregon Macaroni production has been taken by respondents. The remainder has been sold to the institutional trade. This was respondents' final acquisition.

I. Monopolization

Generally, to sustain a monopolization charge, it must be shown that the respondent has obtained monopoly power in the relevant market, and that the power was obtained by willful acquisition or maintenance, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *United States* v. *Grinnell Corporation*, 384 U.S. 563 (1966). This decision defined monopoly power as the capacity to control prices or exclude competition. This capacity, the Court further pointed out, may be inferred from the "predominant share of the market" possessed by the defendant.

Following the lead of Grinnell, complaint counsel would have us infer respondents' monopoly power from their predominant market share. Essential, of course, to market share findings is the determination of the precise boundaries of the geographical and product markets. The examiner failed to make findings in this regard, but assumed *arguendo* that the geographical market was the Pacific Northwest and the product market, dry paste. Using these markets, the examiner, after careful consideration of the record, made fully substantiated market share findings. We adopt these market share findings to the extent that they coincide with our geographical and product market findings, which we turn to next.

Geographical Market. The complaint charges respondents with engaging in unfair practices in the Pacific Northwest and in the State of Hawaii. The Pacific Northwest is defined in the complaint as Oregon, Washington, Idaho, and the western half of Montana. No submarkets are described or referred to in the complaint, but complaint

[1] Ernest Merlino, in an affidavit filed with the Commission on December 10, 1969, represented that respondents (through Manteca Bean Company) in a proceeding before the Federal District Court for the Western District of Washington are seeking specific performance of the option, and the Merlino family, in a counter claim, are asking for rescission of the 1963 agreement of sale of the 51% interest in Major.

counsel maintained at the hearings and in their briefs to the Commission that, together with the larger relevant market of the Pacific Northwest, there are three relevant submarkets: (1) western Washington (the greater Seattle-Takoma area); (2) central and eastern Washington and Montana; and (3) western Oregon (Portland-Eugene, or an area slightly larger than the Willamette Valley).

With respect to the larger market, the examiner observed, "Certainly, as a practical matter, the dry paste manufacturing trading area is . . . no smaller than the one circumscribed in the Commission's complaint." (I.D. 82) He did not find that this was a relevant market and gave some indication that he thought that the market should be larger. He summarized and appeared to give credence to the testimony of respondents' expert witness who believed that Alaska should be included in the Northwest market, as dry paste manufacturers located in the Northwest are the sole source of supply to that state.[2] (I.D. 79) He testified further that manufacturers as far away as 3,000 miles from the Seattle market compete in that city, and said generally that if a firm is efficient, even though it is located several thousand miles from the Pacific Northwest, it could compete in the Pacific Northwest with less efficient firms.[3] (I.D. 80)

The appropriateness of the Pacific Northwest as a geographical market in which to determine whether respondents possess monopoly power turns on the significance of transportation costs to outside producers. In this connection, it is important to understand that all flour (with water, the only essential ingredient in the manufacture of dry paste) used in the Pacific Northwest is shipped from Minneapolis. The Pacific Northwest firms' cost advantages derived from freight savings therefore must be considered alongside any cost advantage to firms operating at or near the source of flour—Minneapolis.

The record shows that the freight costs for a firm producing dry paste outside the Pacific Northwest are so high that any cost advan-

---

[2] The Pacific Northwest firms supply Alaska for the reason that the state is too sparsely populated to support efficiently a macaroni manufacturer, and so Alaska's retailers turn to suppliers in the closest markets, which include the Pacific Northwest. It does not follow that any producer (and there is none) with facilities in Alaska could effectively compete in the Pacific Northwest. This testimony, therefore, has no bearing on the question whether the Pacific Northwest is a relevant geographical market.

[3] Respondents point out that because dry paste is sold on a delivered pricing basis buyers purchasing from respondents in Seattle pay the same as their Spokane buyers. Respondents conclude from this that the delivered pricing system encourages entry by lessening the importance of freight costs. This is not the case as outside firms still must absorb the higher freight costs.

tages (whether derived through its size of operation or its location near the source of raw material, or both) are such that a firm outside the area cannot effectively compete with one located within the Pacific Northwest. In other words, freight costs constitute a barrier sufficiently high to forestall entry by firms with production facilities outside the Pacific Northwest. This was the experience of the dry paste producer, The Creamette Company. Creamette, as found by the hearing examiner, enjoyed optimum cost advantages. Its plant, with an annual production capacity of 32,000,000 pounds of dry paste, enjoys a cost advantage of 1.6¢ per pound or, approximately, 10% over respondents whose facility produces an annual maximum of 10,000,000 pounds. Even with this cost advantage and that derived from its location at the source of flour, Creamette's costs at Seattle exceed those of respondents by from 3 to 5 percent. Creamette's representative attributes this cost difference to transportation costs. Not surprisingly, Creamette's overall cost disadvantage is reflected in its share of sales in Seattle: just 1%. It is clear then that neither economies of scale nor close proximity to the source of the raw material (flour) neutralizes to any significant extent the cost of shipping dry paste into the Pacific Northwest. We conclude that the Pacific Northwest constitutes a separate relevant geographical market for the purpose of determining respondents' monopoly power.

We agree with the hearing examiner that complaint counsel have not made a convincing showing that the three geographical areas described above constitute relevant submarkets. First, the record fails to show that transportation costs between one and another of the three areas is so great in relation to the overall cost of dry paste as to make these areas separate submarkets. The contrary is indicated by the evidence that both Major and respondents, although operating exclusively out of plants in Seattle, sell a significant amount of their products to retailers in the three alleged submarkets. If transportation costs were significant, we would not expect Seattle producers to enjoy such a large share of sales in Portland (where Porter-Scarpelli operates a plant) and Spokane (the operational base of the U.S. Macaroni Company).

To further support their contention that the three areas constitute geographical submarkets, complaint counsel point up what they term "distinctive characteristics" of the three areas: different manufacturers dominate in each of the three areas and different prices prevail in each.

Complaint counsel employ a chart tracing retail prices of macaroni from April 1960 to June 1964 in San Francisco, Portland, Seattle, Los Angeles, and the United States average to show that different prices prevailed in the three geographical areas. Assuming the accuracy of the exhibit, its relevance is questionable. Differing retail prices may reflect the structural configuration of the retail food market and have no connection with wholesalers' or manufacturers' prices in the particular areas. In other words, the graph does not necessarily show that prices differed at the manufacturing level in the three geographical areas.

As to complaint counsel's contention that different wholesalers sell in the three areas, respondents maintain that the distributional areas of the wholesalers overlap, and that these areas do not coincide with the boundaries of the alleged submarkets. But even if we should agree with complaint counsel as to the facts, we see little relevance as to the areas wholesalers restrict or are restricted in their sales. Like retailers, wholesalers may have limitations on the areas in which they sell that have no relevance to the sale of the product at the manufacturing level. A wholesaler may, because of limited assets, storage facilities, local law, or a myriad of other factors, distribute in a restricted area. This area does not necessarily become a relevant submarket or market with respect to the manufacturer.

On the other hand, it is important to know whether different manufacturers of dry paste products operate in the three geographical areas. Complaint counsel contend that a different manufacturer dominates in each. This may be the case, but its importance is greatly lessened by the fact, as already noted, that in each of the areas Major and respondents also share a sizeable portion of the market. There is not then a different group of sellers in each area (which would tend to show that submarkets exist), but only the same firms, or some of the same firms, sharing several geographical areas in different proportions. This fact is also the answer to complaint counsel's contention that product differentiation makes the areas distinct submarkets. Unquestionably, brand preference by consumers within a geographical area may serve to exclude outside producers, and to make the area a relevant market or submarket. But complaint counsel do not prove that such product preferences exist by showing only that in each area a different brand is first in sales. Moreover, complaint counsel fail to square their contention respecting product differentiation with the fact that most of the Pacific Northwest producers are in each of the three alleged submarkets. We conclude

therefore that complaint counsel have failed to show that the three areas constitute relevant geographical submarkets.

Product Market. At issue here is whether the relevant product market should be limited to dry paste products [4], as complaint counsel contend, or whether it should include convenience dinners, as urged by respondents. Again the examiner discusses the contentions of complaint counsel and respondents, but fails to come to any conclusion, although he appears to be favorably disposed to respondents' argument. (I.D. 83–85)

Determinative of this issue is the showing by complaint counsel that there is no significant cross-elasticity of demand between convenience dinners and dry paste. Respondents' own representative testified, in this connection, that numerous price increases and decreases of dry paste products in a portion of the relevant market (Seattle) brought about no corresponding increase or decrease in the volume of sales of convenience dinners. Indicative of the extent of the nonelasticity is the fact that during the period about which this witness testified, the price of respondents' dry paste products increased by 25%. Respondents have failed to make any showing which tends to contradict this evidence. In the context of the monopoly charge, then, any producer of dry paste would not be inhibited in initiating price increases (*i.e.*, exercising monopoly power) by the presence of macaroni convenience dinners. We find therefore that dry paste is a separate product market.

Concentration. In 1963, five firms manufactured dry paste products in the Pacific Northwest: Mission and Major in Seattle, Porter-Scarpelli and Oregon Macaroni in Portland, and U.S. Macaroni Company in Spokane. (I.D. 85)

The examiner found that, in 1968, Major's share of the North Pacific market (which, unlike the Northwest Pacific market, does not include Idaho or western Montana) was 13.8% [5]; Porter-Scarpelli's, 22.8%; U.S. Macaroni's, 14.6%; and all other brands, 14.8.% (I.D. 89) Golden Grain had 34% of the market so that in 1968, with

---

[4] There appears to be no dispute that there is no significant quality difference between the dry paste products of the manufacturers involved herein.

[5] These figures are based on market surveys made for respondents by A. C. Nielson. Although no representative of A. C. Nielson testified, the record shows the reports to be reliable. Respondents have since 1958 based marketing decisions on the reports; and on the several occasions when they checked actual shipment figures against Nielson's estimates, they found the Nielson estimate to be within 2½% of the actual shipping figures. Further, the surveys were not prepared for this or any other litigation.

Major's 13.8%, respondents had no more than 47.8% [6] of the dry paste sales in the North Pacific market. With the inclusion of western Montana and Idaho, that figure decreased, although to a small extent, as Major's and Golden Grain's share in those markets was less than in the North Pacific market as a whole. (I.D. 89) However, Oregon Macaroni's share is to be added. The examiner found that it was 1.6% at the time of the acquisition, while complaint counsel maintain it was between 3 and 4 percent. Respondents contend that by 1968 the firm's share had declined as it had lost considerable sales to Porter-Scarpelli. Even if we should find that complaint counsel's figures are correct, a 3 to 4 percent increase in respondents' market shares would not affect the outcome of this case insofar as the monopoly charge is concerned.

The dry paste market in the Pacific Northwest was, in 1968, as thus described, oligopolistically structured, and we, without more, cannot reasonably infer from a market so constituted that respondents had the capacity to raise prices or exclude competitors.[7] Moreover, our findings relative to performance and conduct, two further indicators of market power, do not sustain the monopolization charge. As to performance, Golden Grain's profits, the record shows, are no higher than the national average or those of competing firms in the Pacific Northwest. Complaint counsel point out that respondents' return on investment exceeds the national average. However, the figures that respondents used (and these figures are relied upon by complaint counsel) to calculate return on investment relate to all of respondents' product lines, *e.g.*, convenience dinners. This would explain the seeming inconsistency in respondents' higher return on investment than the industry as a whole, without a corresponding more favorable profit margin. We therefore rely upon the profit margin figures and find the return on investment figures of no value.

[6] Porter-Scarpelli's share of the market is not included as part of respondents', although respondents own 49% of the shares of that company. On one hand, respondents have made no attempt to control or influence this concern's operations. On the other, Porter-Scarpelli's competitive activity is likely to be inhibited by the looming presence of respondents as a large minority shareholder. So it is not a complete and accurate description of the market to say that respondents, in 1968, had 47.8% of the market, and thereby imply that the remaining shares acted as a countervailing force to whatever control over prices that was derived by respondents from their 47.8% share of the market. We direct ourselves to this problem in a different context below.

[7] A firm with roughly 50% of the market might possess monopoly power if the remaining firms, for some reason, were competitively impotent vis-a-vis the major firm. Such might be the case if the major firm possessed capital assets far in excess of those of its competitors, in a market where assets were essential to competitive vitality; or if the dominant firm marketed a product with a strong consumer preference over its rivals', or if the remaining portion of the market was divided in small fragments, so that no one firm represented a meaningful countervailing force to the pricing activities of the dominant firm. However, none of these circumstances, nor any similar one, was shown to exist in the relevant market here.

The only record showing relating to conduct which bears on market power is that immediately following the Major acquisition respondents' prices increased by 25%. Presumably, complaint counsel intend for us to infer from this increase that the acquisition gave Golden Grain the power to raise prices. This is a possible inference but not a necessary one. The price increase may be viewed as a natural economic reaction in the market resulting from the removal of the firm (Major) that had depressed prices to an unrealistic level. Supportive of this view are the increases in cost of flour and labor that preceded the 25% rise in price, and which presented a sound business reason for the increase in prices after Major was no longer of competitive importance. Also significant is the fact that respondents' profit margin was not enhanced to a level above that of the industry average by the price increase. Accordingly, we reject the inference that the price increase evinced respondents' capacity to increase prices.

Relevant to the question of market power is respondents' market position at the time of their acquisition of Major (in 1963), as compared to the most recent date (1968) shown in the record. In 1963, Golden Grain had 50.6% of the market; Major, 13.8%, giving respondents a total of 64.4%.[8] By 1968, their combined share dropped to 47.8%, a decrease of 25.7%. Whatever market power respondents possessed as a result of the acquisition, or otherwise, it was not so great that it allowed them to maintain their market share between the period 1963 and 1968.

In summary, neither respondents' conduct nor their performance tends to rebut the inference that they operate in an oligopolistic market, an inference we draw from the market shares of respondents and their competitors.[9]

---

[8] Complaint counsel, in their proposed findings, maintained that respondents' market share in 1966 was 69.8%. This was based on two exhibits (CXs 507 and 509) which the examiner found to be deficient. Complaint counsel make no attempt to reconstruct these exhibits but say that, even using the examiner's figures, it can be shown that respondents' share of the relevant market was monopolistic. Complaint counsel say the examiner found that respondents' market share in 1963 was 57%. However, what the examiner said was that Commission exhibits 283 and 767 show Mission's and Major's combined market shares in 1964 were 57%. The examiner does not make this his finding but says that respondents contend that this figure (57%) is exaggerated because it does not include sales outside the Pacific Northwest or a number of brands sold in that market.

[9] Barriers to entry which are discussed at length in the initial decision and in the briefs to the Commission would be relevant only if we found that respondents' market share was so large that they enjoyed monopoly power. For, if the barriers were not high, the potential entrants would operate as a deterrent to price increases and demonstrate respondents' incapacity to exclude competitors (the earmarks of a monopolist). In the same way, if we concluded that respondents' performance or conduct was that of a monopolist, we would measure entry barriers so as to gauge better the market power of respondents. But since we have found that under none of these tests (structure, performance or conduct) do respondents have the ability to exclude competitors or raise prices, it is not necessary for us to determine what the record shows respecting entry barriers.

II. Attempt to Monopolize

We consider next the charge that respondents attempted to monopolize dry paste sales in the Pacific Northwest. To sustain the attempt to monopolize charge, complaint counsel must show that respondents specifically intended or planned to monopolize the sale of dry paste in the Pacific Northwest. *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D.C. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).[10] Because this is not a case where respondents have obligingly verbalized or documented their state of mind relative to their conduct, it is necessary to examine the practices of respondents to determine whether we can infer from them the requisite intent to monopolize.[11] Then, if we should find the specific intent, we must determine whether there was a "dangerous probability" that the practices and conduct of respondents would lead to monopoly.

The alleged practices to which we turn to determine specific intent relate generally to respondents' pricing activities and to a series of acquisitions made of competing dry paste manufacturers in the Pacific Northwest.

The Acquisitions. Respondents' growth in the Pacific Northwest was effected almost entirely by acquisition. We have already related the uncontroverted findings describing the acquisitions at pages 155–57. Further findings, and these were not entirely accepted by complaint counsel, relating to the acquisitions were made, as follows: the hearing examiner found that respondents' acquisition of Mission was effectuated to meet their floundering financial condition, and coincidentally Mission's owners were intent upon leaving the macaroni business. He further found that the acquisition of 49% of the stock of Porter-Scarpelli was incidental to that of the Mission acquisition. (It will be recalled that Mission owned this stock at the time respondents acquired Mission.)

According to the initial decision, the Major and Oregon Macaroni acquisitions were made in part to meet the loss of a portion of respondents' production facilities resulting from the condemnation by Washington State of one of respondents' two Seattle plants. Both

---

[10] Complaint counsel would have us infer from the market structure the existence of the specific intent. But only if we had found that respondents were monopolists would such an inference be reasonable.

[11] Complaint counsel cite the testimony of Ernest Merlino, of Major, that respondents' pricing practices were designed "to set us [Major] broke—get us out of the macaroni picture." The president of Golden Grain, to whom Mr. Merlino ascribed the above statement, specifially denied having made it.

Major and Oregon Macaroni, the examiner further found, sought the sale of their facilities because of the financial distress of their respective companies.

These further findings are of some relevance, as they tend to show that in making the acquisitions it was not respondents' sole purpose to gain monopoly power. However, it would not be inconsistent with these findings to conclude that the acquisitions were made for the overriding purpose of gaining monopoly power in the Pacific Northwest. Still, the mere showing that the acquisitions were made (especially in the context of a respondent's need to remedy the loss of production facilities) is not evidence, standing alone, from which we can infer specific intent. We look then to respondents' pricing practices.

The Pricing Practices. Complaint counsel contend that respondents' pricing practices were intended to drive Major from each geographic area in which it operated, and that these practices succeeded, since the firm was made insolvent. Major was forced, as a consequence, to sell a controlling portion of its shares to respondents. The nature of these pricing practices, as described by complaint counsel, were as follows:

> In response to the efforts of this new entrant [Major] to gain a share of the market, respondent engaged in a series of selective price cuts, confining its lower prices to the specific areas in which that new firm operated. That firm, continuously moving into new areas of the Pacific Northwest in an effort to blunt or escape respondent's discriminatory low prices in those selected areas, was pursued by respondent and ultimately required to face, in the summer of 1963, a pricing pattern that was below cost for its most popular size packages throughout the entire Pacific Northwest. While its market share had risen from zero (as a new entrant) in 1957 to approximately 20% of the Pacific Northwest in 1963, this pattern of below-cost, discriminatory pricing (higher prices were being charged by respondent in other parts of the country) ultimately pushed it to the edge of bankruptcy and forced it to sell 50% of its stock to respondent on August 8, 1963. (CC Br. 2–3)

The crucial question here is not whether respondents sold one or more of their numerous different macaroni products, in their great variety of packages and sizes, below cost. For even if we should find that respondents' sales were below cost, if we find further that they acted defensively in reaching such a pricing level, their conduct will not be illegal because of the absence of the requisite predation.[12] On the other hand, if respondents drove prices downward, to a level *above* their cost, but to a level so low as to result in Major's near in-

[12] The courts have said that predatory intent may be inferred from the fact that sales were made below cost. This inference, however, does not arise when there is evidence that the below-cost level was reached defensively as a response to price cuts of competitors.

solvency, we could reasonably infer from such an act that they attempted (*i.e.*, specifically intended) to monopolize dry paste sales. What we must determine then is whether respondents were responsible for pushing prices downward to the level that eventually resulted in Major's near insolvency.[13]

To show that respondents priced and promoted their products in such a manner that they (and not a third party or Major) were responsible for driving prices downward, complaint counsel rely upon the testimony of Ernest A. Merlino.[14] Merlino testified on direct examination that respondents acted with the predation necessary to sustain the attempt to monopolize charge. He testified, in brief summary, that because of consumer preference for respondents' Mission brand, a 5% differential existed between the price of that brand and the price of Major's brand and respondents' other brands. As a consequence, if Major did not maintain the 5% differential, not only would the company lose sales to the Mission brand, but to respondents' three other brands. The witness testified that this could place Major in an "untenable" position.[15]

He further testified that approximately two weeks after Major entered the market, respondents lowered their prices on some 40 macaroni items. However, Major continued to underprice the Mission label by 5% and its sales rose beyond expectations. But by 1962, according to Merlino, respondents' previously initiated (in 1960) price cuts reached a level below Major's costs, and Major could no longer sustain the 5% price differential. In addition to the price cuts, he testified that respondents engaged in heavy advertising and in a promotion whereby one case of Golden Grain macaroni was given free

[13] Major entered the market as an independent in March 1957. By 1960, its sales were $226,000; by 1961, $852,000. By contrast, respondents' sales in 1957 were $2,302,504; in 1960, $1,994,000. Thus, if Major was injured by respondents' pricing practices it was not because it allowed sales to be diverted or lost, but because it matched respondents' prices or underpriced respondents, and these prices were at a level which was unprofitable to Major.

[14] The complaint describes other practices that, if engaged in by respondents, would tend to establish the requisite specific intent, but again, this would be the case only if the record shows that respondents initiated or were responsible for such practices. As an example, respondents are charged with engaging in a territorial price discrimination. Even if we should find that respondents charged a higher price outside of the Pacific Northwest market for their dry paste products than in that market, we could not properly infer from this practice the requisite of predatoriness to the attempt to monopolize charge if the record shows that respondents' lower price in the Pacific Northwest was brought about to meet the pricing or promotional practices of Major or some other competitor in that market. Therefore the testimony of Merlino is essential to complaint counsel's attempt to monopoly case with respect to these other alleged practices in the complaint.

[15] The examiner made extensive findings to show that Major's list prices were generally lower than those of respondents, that Major engaged in numerous price promotions not shown on its invoices or on its price lists, and that Major, not respondents, initiated the price cuts.

for each ten purchased—causing Major's loss of six to eight accounts to respondents. As a result of this pricing pattern, the witness testified, although Major's sales increased over the years, its earning record was so poor that the company was insolvent by 1963.

The examiner rejected Merlino's testimony as untrustworthy. He came to this conclusion because of the witness' demeanor (*i.g.*, glib, voluble), because of the begrudging manner in which the witness testified on cross-examination, because of his repeated qualifications of assertions, concerning prices and promotions after being confronted with documents (*i.e.*, invoices, credit slips) from Major's files, and because of contradictions in the witness' testimony. (I.D. 93–104)

Findings by the trier of fact as to a witness' demeanor are not conclusive in an administrative proceeding. As with other findings of fact, the Commission has, in reviewing the findings of a witness' demeanor, "all the powers which it would have in making the initial decision. . . ." 5 U.S.C. 557 [Supersedes former Administrative Procedure Act]. *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955). But because we did not observe the witness as he testified, we are not in a position to contradict the examiner's findings respecting the witness' voice pitch, his countenance and the like (in short, his demeanor) in the way we might concerning, say, the existence of a discrimination in price. Still we may, after considering the record in its entirety, disagree with the examiner and find the witness' testimony reliable, irrespective of the examiner's findings relative to demeanor. We turn then to Merlino's further testimony and the record as a whole to determine whether what the witness said is substantiated or contradicted, and whether the manner in which he testified was consistent with the testimony of a reliable and trustworthy witness.

Unquestionably, the witness, on cross-examination did not rush to respond to each question of respondents' counsel; often he had to be led by Major's records. However, the questions generally dealt with specific customers and transactions, and related to promotions undertaken at a period of time substantially before the witness testified. Understandably, Merlino's recollection of these dealings with customers was not so vivid that he could invariably respond promptly, and so it was understandable that his recollection required reviving.

A more serious challenge to the trustworthiness of Merlino as a witness arises from the contradictory nature of his testimony. On direct examination, he left the unmistakable impression that Major sold at a uniform price to all customers throughout the Pacific

Northwest and that deviations from its published list price, if they existed at all, were unusual. The import of Merlino's testimony was clear: that we need only look at the list prices of Major and of respondents to know that Major's price cuts were in response to those of respondents. Yet it was developed, through cross-examination of the witness and numerous documents which he verified, that Major's list prices rarely reflected its actual price to customers and that price uniformity was very much the exception.[16] Accordingly, we concur with the hearing examiner that this witness' testimony should be disregarded.

Further, even if we believed the witness' testimony, including, of course, what developed on cross-examination, it is clear that Major extended price concessions on an individual, *ad hoc* basis, unrelated, it appears, to the prices charged by respondents. As noted, the witness broadly stated that price concessions were in response to Golden Grain's prices, but in the numerous individual cases to which his attention was directed, there was no connection made to respondents' prices. And the contrary was shown in a large number of instances, that is, that Major's prices were set in response to the prices of competitors other than respondents, or as a result of the inducements of its customers. Thus, complaint counsel's reliance on Merlino's testimony to establish the attempt to monopoly charge is misplaced for the reasons that the witness is not credible and his testimony—even if it were believed—fails to support the contention that respondents were responsible for prices reaching the low level that complaint counsel contend brought about Major's insolvency.

* * * * * * *

There remains to be considered the complaint charge that respondents monopolized, or attempted to monopolize, the sale of dry paste in the State of Hawaii. With respect to the monopolization charge, the examiner and complaint counsel differed broadly over the market share of respondents in Hawaii. The examiner found that, in 1968, respondents' share was 4.2%, while complaint counsel contend that it was 62.1%. The discrepancy is accounted for by the fact that complaint counsel include in calculating sales in Hawaii macaroni produced by respondents' San Leandro plant, while the examiner in-

[16] For example, when queried as to how the price to a customer could be determined, Merlino testified that "it is a combination of everything," including "the invoice and the check that was returned [by the customer] and the promotional allowance that was given credit on the card." Even Major's salesmen's expense accounts had to be considered as the salesmen often advanced a discount directly to customers and were reimbursed through their expense billing. Clearly, Major's list price had only a remote connection to the actual price to its customers.

cluded only the sales of macaroni produced by respondents' Seattle plant. The examiner is clearly in error, as the monopolization charge is not restricted by the complaint to sales of macaroni out of respondents' Seattle plant. Further, we agree with complaint counsel that, in most circumstances, a 62. 1% share of the market would give respondents the capacity to control prices or exclude competitors, and, hence, monopoly power.

There is, however, substantial uncertainty as to the accuracy of the exhibit (CX 284) upon which complaint counsel rely to establish market shares in Hawaii. The exhibit states that the total sales of dry paste in Hawaii for 1963 was $409,595, and for 1966, $421,996. The latter figure does not include sales of any firms operating plants in Hawaii, and complaint counsel maintain that no macaroni manufacturer operated plants in Hawaii after 1963. The Census of Manufacturers shows that ten establishements, located in Hawaii, produced dry macaroni (excluding convenience dinners and canned macaroni) with a value of $1,500,000 in 1967, while twelve establishments produced a value of $1,022,000 of dry paste in 1963. A portion of this production may, of course, have been shipped to other markets in close proximity to Hawaii, placed in inventory or disposed of in some way other than by sale for resale at the retail level in the relevant market. Still the discrepancy between the universe used in CX 284 and the Census figures is so great that we cannot reasonably rely upon the exhibit for market share findings. Accordingly, we must affirm the examiner's dismissal of the charge that respondents monopolized dry paste sales in Hawaii.

As to the attempt to monopolize charge, complaint counsel again have failed to show that respondents acted with the requisite specific intent. Complaint counsel contend that Golden Grain engaged in a territorial price discrimination (*i.e.*, higher prices on the mainland than in Hawaii), and that respondents sold their dry paste products below cost on the Island. Putting aside the question whether these contentions have been sustained by the evidence, we find that complaint counsel have failed to connect the practices, generally, with any increase in respondents' market shares, or, specifically, with the financial difficulties of Eagle Macaroni Company, at one time the Island's largest manufacturing concern, and apparently the only possible victim of respondents' pricing practices in Hawaii. What the record shows is that Eagle became insolvent as a result of its inefficient operation, its management's inattention, and production stoppages brought about by internal operational problems. We there-

fore conclude that the record does not sustain the attempt to monopoly charge with respect to Hawaii.

* * * * * * *

We turn next to the question, do the acquisitions and pricing practices alleged in the complaint as the means by which respondents attempted to monopolize or maintained a monopoly position constitute "unfair methods of competition" in and of themselves and, if so, is an order proper?

Four of respondents' acquisitions are challenged by complaint counsel. The first, in point of time, was respondents' 1956 acquisition of Mission Macaroni Company. A threshold issue here is whether an order affecting this acquisition would vary to a fatal extent with the allegations of the complaint.[17] The examiner found, in this connection, that "there is no allegation, evidence or contention, that the acquistion of Mission Macaroni Company was improper or illegal." (I.D. 146)

Generally an order is not considered to vary fatally from a complaint unless it comprises a substitute dispute which respondent "could not have anticipated, and which he had no opportunity to meet." *Armand Co.* v. *Federal Trade Commission*, 84 Fed. 2d 973, 974 (2nd Cir. 1936). In line with this holding, section 3.15(a)(2) of the Commission's Rules of Practice states:

Conformance to evidence.—When issues not raised by the pleadings or notice of hearing but reasonably within the scope of the original complaint or notice of hearing are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings or notice of hearing; and such amendments of the pleadings or notice as may be necessary to make them conform to the evidence and to raise such issues shall be allowed at any time.

We look then to the complaint to determine whether the Mission acquisition was reasonably within the scope of that pleading. In pertinent part, the complaint charged that respondents had "adopted and followed the continuous practice of acquiring various competing macaroni manufacturers in the Pacific Northwest for the purpose or with the effect of enhancing, or making more secure, its *already* dominant position in such area and eliminating such competition as may previously have existed * * *" (Emphasis added.) The complaint then specifies the three acquisitions that fall within this description.

---

[17] None of the other alleged practices or acquisitions considered herein were similarly challenged by respondents.

It is clear that the Mission acquisition was not within the scope of the complaint—first, for the reason that it is not one of the three specifically described acquisitions, and, second, because the complaint is directed to those acquisitions made after respondents had gained a dominant position. As already noted, respondents had but 15% of the market at the time of the Mission acquisition, so it was the Mission acquisition that placed respondents in their allegedly dominant position.

Respondents could not reasonably have anticipated a challenge to their Mission acquisition, and we therefore agree with the examiner's holding rejecting complaint counsel's argument.

Mission, when it was acquired by respondents, owned 49% of the shares of Porter-Scarpelli.[18] Complaint counsel seek to have respondents divest themselves of this interest. The examiner ruled in favor of respondents, first because the Commission, in 1957, wrote to respondents that it had no objection to the acquisition. In this regard, the record establishes that, in 1957, the Commission's Secretary wrote Golden Grain informing it that the Commission had "examined" the acquisition of Mission and that the Commission "contemplates no further action . . . at this time and it [the file] is accordingly closed." The letter continued, however: "You are advised further that the Commission reserves the right to reopen this matter if additional evidence or subsequent developments warrant such action." The examiner found that the Porter-Scarpelli acquistion was incidental to that of the Mission acquisition and so reasoned that the clearance extended to the former acquistion.

The examiner further found that the 49% interest obtained by respondents constituted an investment, relying on the contention of respondents that Golden Grain had never exercised or attempted to exercise control over the company.

As noted above, the so-called clearance letter reserves to the Commission the right to reopen the file should "either additional evidence or subsequent events" warrant it. Respondents' acquisitions, following the clearance letter, unquestionably constitute such "subsequent events" and justify the Commission's reopening of the matter and exposing the Porter acquisition again (assuming it was considered along with the Mission acquisition) to our scrutiny.

The examiner's findings that the 49% interest of Porter-Scarpelli represents an investment does not, as complaint counsel argue, en-

[18] The Porter-Scarpelli acquisition was specifically challenged in the complaint and is within its scope. Respondents do not contend otherwise.

tirely beg the question. Section 7 of the Clayton Act in pertinent part reads:

> This section shall not apply to corporations purchasing such stock *solely* for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. (Emphasis added.)

However, given the relationship of the firms involved here (*i.e.*, major competitors in an oligopolistically structured market) and respondents' percentage of ownership in Porter-Scarpelli (*i.e.*, 49%), the acquisition was bound to affect the operations of respondents in a way that an acquisition made "solely" for investment would not.[19] Respondents can reasonably be expected to hesitate in engaging in vigorous competition with Porter-Scarpelli as it might jeopardize their investment.[20] These facts make respondents more than just investors. In other words, when an acquisition will necessarily affect the competitive behavior of the two involved firms, it cannot be said that the *sole* purpose of the acquisition was for investment. Purpose cannot be divorced so completely from effect.

Even if respondents' 49% non-controlling interest in Porter-Scarpelli should be deemed solely an "investment" within the exempting provision of Section 7 of the Clayton Act, at any future time respondents may come into control—either by an acquisition of another 2% interest or by some other means. Because this threat constantly hangs over the market and represents a potential means of monopolization or further substantial lessening of competition, we hold that retention of the 49% interest in Porter-Scarpelli amounts to an incipient violation of the antitrust laws and therefore a violation of Section 5 of the Federal Trade Commission Act. As stated in *Federal Trade Commission* v. *Brown Shoe Co.*, 384 U.S. 316, 322 (1966): "[O]ur cases hold that the Commission has power under Section 5 to arrest trade restraints in their incipiency without proof that they amount to an outright violations of Section 3 of the Clayton Act or other provisions of the antitrust laws."

As to the question whether the acquisition may substantially lessen competition, when a firm acquires a competitior in an oligopolisti-

---

[19] Whether an acquisition is or is not for investment must be determined by objective, not subjective, standards. The investment exception otherwise could be employed to make Section 7 a nullity.

[20] Although Golden Grain might be willing to shave its price to some extent to obtain or retain customers in the face of competition from Porter-Scarpelli, there would logically be some point at which vigorous price competition would reduce Golden Grain's marginal profits so low that it would prefer to forego sales and allow Porter-Scarpelli to take the business at a higher price, knowing that 49% of profits made by Porter-Scarpelli at that higher price would inure to its own benefit.

cally structured market, and both firms have a substantial share of the market, the requisite injury is presumed, and detailed economic analysis is not necessary. *E.g.*, *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963). Here, of course, unlike the cases from which this rule has been drawn, the acquired firm maintains a degree of independence. Nonetheless, the relationship between the two firms is such that it probably will, if it has not already, inhibit the competitive vigor of the firms, vis-a-vis one another, and in any event poses a clear threat of eventual control by one firm over the other. The examiner's ruling on the Porter-Scarpelli acquisition is therefore reversed and respondents will be ordered to divest themselves of their interest in Porter-Scarpelli.

Respondents' next acquisition was that of Major. The examiner found that Major's share of the market at the time of the acquisition, in 1963, was approximately 20% and Mission's, approximately 44%, so that the acquisition increased respondents' share to 64%.[21] The examiner concluded that the acquisition was contrary to the intent and policy of the Clayton Act and of Section 5 of the Federal Trade Commission Act. His order would require respondents to divest their 51% interest in Major.

Unquestionably, the acquisition was anticompetitive to a substantial degree, and respondents do not contend otherwise. Instead, they maintain that the failing company doctrine obtains. To support their defense, respondents contend that the acquisition was for the legitimate purpose of obtaining an additional source of supply of dry paste; that Major, at the time of the acquisition, was insolvent and near bankruptcy; that an established dry paste producer, with a plant outside the Pacific Northwest, had decided against purchasing Major, and that no other purchasers were available.

The examiner failed to discuss this defense, but he did find that American Beauty Macaroni Company, a producer of dry paste outside the Pacific Northwest, turned down the opportunity to acquire Major, and that Major's production facilities were acquired to meet

[21] As already noted, respondents' share of the market declined to 47.8% by 1968. In *Fruehauf Trailer Co.*, No. 6608, FTC, May 28, 1965 [67 F.T.C. 878], respondent argued that its declining shares of the relevant markets, following two challenged acquisitions, demonstrated that the acquisitions did not have the effect of substantially lessening competition. Because Fruehauf retained a dominant position and the same relative position vis-a-vis its nearest competitors in the relevant markets, the fact that its market shares declined did not refute "the basic anticompetitive features of the challenged acquisitions." Similarly, here, the decline in respondents' market share did not meaningfully alter the anticompetitive aspects growing out of the challenged acquisitions. Golden Grain retained its dominance in 1968 with 47.8% of the market; the remaining firms continued as relatively minor factors in the market: Porter-Scarpelli with 22.8%, U.S. Macaroni with 14.6%, and all others with 14.8%.

respondents' anticipated shortage resulting from the condemnation of one of their plants.

Complaint counsel point out that respondents knew of the condemnation six years before it took place, and contend that the real purpose of the acquisition was to gain control of all production facilities in the relevant market. Complaint counsel do not challenge respondents' contention that Major was on the brink of bankruptcy but contend that the company's financial difficulties were brought about by the pricing practices of respondents. We have already determined that the record does not show that respondents were responsible for Major's insolvency, and we reject this last contention of complaint counsel.

To support their contention that they were the only available purchaser, respondents rely solely on the testimony of Paskey De Domenico, president of Golden Grain. Respondents' counsel asked him, on direct examination, "In 1963, prior to August [when Major was acquired] was there any prospective purchaser, to your knowledge of the Major Italian Food Company besides yourself?" He responded, "No." (Tr. 5028.) This testimony, standing alone, is entirely inadequate to establish that Major made a good faith effort to find a less objectionable purchaser than respondents. First, there is nothing in the record that shows that De Domenico had reason to know what efforts Major made to sell its assets to interested parties other than respondents and American Beauty. The witness' testimony was, in short, without benefit of adequate foundation.

Further, the record indicates that firms other than respondents were likely prospects to purchase the Major assets. We know that several large dry paste manufacturers sell their products in the Pacific Northwest, but their sales are relatively small because they do not operate plants in that market and shipping expenses place them at a cost disadvantage. Minimally, we would expect that Major would have approached these firms. Then too, irrespective of Major's financial difficulties, it should have been attractive to potential purchasers. Its share of the market was significant; its Majorette label had gained consumer acceptance (five years after the acquisition it was still being marketed); and its production facilities were efficient (respondents contend that its acquisition was in part made to obtain these facilities). Therefore, because the record fails to show a good faith effort on the part of Major to sell to a party other than respondents, respondents cannot avail themselves of the failing company defense. Consequently, having found that the Major acquisi-

tion was anticompetitive to a substantial degree, we will order respondents to divest themselves of their 51% interest in Major.

The last acquisition by respondents to be considered is that of Oregon Macaroni Company. This is a relatively small company with one production machine whose output is approximately $180,000 worth of dry paste products annually. Respondents acquired Oregon Macaroni in 1966 for $66,000, together with an employment contract for its owners. The examiner found that this acquisition did not constitute a violation of Section 7, as Oregon had only 1½% of the dry paste market and so the acquisition, he concluded, "made little nothing in the record that shows that De Domenico had reason to (I.D. 148).

Complaint counsel appeal the ruling, arguing that Oregon's share of the Pacific Northwest market was 4.4%, and that, given the high degree of concentration in that market, the prevention of any increase in concentration, however slight, is important.

Respondents contend, on the other hand, that Oregon Macaroni was a failing company. The examiner made no findings in this regard, and again the record fails to show that no other prospective purchasers were available. What the record does show is that Porter-Scarpelli offered to buy Oregon Macaroni for substantially the same price and under the same terms as were given by respondents.[22]

The only question then is whether Oregon Macaroni's share of the market was so insignificant that its acquisition did not, or probably would not, result in a substantial lessening of competition. Generally a dominant firm's acquisition of a competitor with even a relatively small share of the market may substantially lessen competition if the market is highly concentrated, which it was here. *United States* v. *Aluminum Co. of America*, 377 U.S. 271 (1964). We therefore find that the Oregon Macaroni acquisition is a Section 7 type violation. The examiner's ruling is reversed and respondents will be ordered to divest their interest in Oregon Macaroni.

Together with the divestiture of respondents' interest in Porter-Scarpelli, Major and Oregon Macaroni, we will order respondents to make no further acquisition without prior approval of the Commission. This provision is necessitated by respondents' history of growth through acquisitions.

---

[22] This is not to say that Porter's acquisition of Oregon would not have contravened Section 7; the offer is noted only to show that the company was attractive to other potential purchasers.

That Porter-Scarpelli sought to purchase Oregon Macaroni at the same time as respondents tends to show that the two firms were not entirely inhibited by the minority holdings of respondents in Porter-Scarpelli. It does not show, however, that the independence evinced here extended to other equally important areas of competition (*e.g.*, pricing) and that the apparent independence will continue.

Together with the acquisitions, respondents are charged with engaging in five monopolistic practices relating generally to price discrimination, predatory pricing, and product substitution.[23] Of these, the examiner held that the record established only the territorial price discrimination, but found it unnecessary to issue an order with respect to the violation. He reasoned that the territorial discrimination was voluntarily discontinued after August 1963, and found that "it does not appear that these geographical price discriminations injured or had any harmful effect on competition because, during 1962 and 1963, sales by Golden Grain's competitors increased, while Golden Grain's sales decreased." (I.D. 149) We agree that the complaint should be dismissed as tot he territorial discrimination charge, but not for the reasons advanced by the hearing examiner. There is no record support for the abandonment defense. We have no reason to believe that respondents would not resume the territorial discrimination. In fact, respondents have come forward with no assurance that the practice will not be continued, nor have they even argued that the charge should be dismissed because it was discontinued.

The examiner's conclusion that the discrimination could not have the requisite competitive effect because Golden Grain's sales declined while those of its competitors rose is erroneous. Competitive injury may result even though the sales of the allegedly injured parties have increased. The Court in *Utah Pie Company* v. *Continental Baking Co.*, 386 U.S. 685, 702 (1967), said: "[W]e disagree with its [the Court of Appeals'] apparent view that there is no reasonably possible injury to competition as long as the volume of sales in a particular market is expanding and at least some of the competitors in the market continue to operate at a profit." Significantly, the sales of the allegedly injured party increased during the period of the price discrimination, yet the Court did not dismiss the complaint.

Nonetheless, because there is no showing of a causal connection between Major's financial difficulties and the pricing practices of respondents in the Pacific Northwest (the geographical area where the lower prices were charged), we sustain respondents' appeal from the examiner's ruling that a territorial price discrimination of the type

[23] More specifically, the practices alleged were as follows: (1) that respondents substituted their products for that of their competitors, (2) that respondents reduced prices of products to some grocers to gain entry, (3) that respondents engaged in price wars in order to injure competition, (4) that respondents engaged in territorial price discriminations, (5) that respondents sold their dry paste products below cost or at an unreasonably low price, with predatory intent.

proscribed by Section 2(a) of the Clayton Act, as amended, was established.

The examiner's findings respecting the other practices are supported by the record, and we adopt them. He found generally that respondents, to the extent that they engaged in product substitution and the alleged pricing practices, did so defensively. Complaint counsel do not contend otherwise, but argue that it is an unfair method of competition for a dominant and well-established firm (*i.e.*, respondents) to meet each price concession and other promotions of a new entrant (*i.e.*, Major) "on the nose." The new entrant, they say, cannot survive in such circumstances. We need not decide the validity of this argument as the record does not support the underlying factual contention. What the record shows is that respondents engaged in promotions and price concessions in order to put the brakes on their declining market position.

* * * * * * *

The two jurisdictional issues raised by respondents can be quickly disposed of. They are: (1) can respondents be held to have violated Section 5 of the Federal Trade Commission Act because of an acquisition within the scope of Section 7 of the Clayton Act, and (2) can the Commission order divestiture where it finds a violation of Section 5?

Respondents do not maintain that case or statutory law requires, when the challenged practice falls within the scope of Section 7, that that section of the Clayton Act must be specifically pleaded; instead, they urge that they have been prejudiced by the omission.[24] But respondents fail to demonstrate how the omission has prejudiced them, and the record shows that the contrary was the case. Respondents, throughout the hearing, recognized that the individual acquisitions were being challenged as separate Section 7 violations and offered evidence relevant to a Section 7 charge.[25]

As to the second jurisdictional issue raised by respondents, that Section 5 does not give the Commission power to order divestiture, *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963), is dispositive. There the Court said (in considering the

[24] Respondents do not contend that complaint counsel used Section 5 to avoid the burden of proving any substantive provision of Section 7. Indeed, the substantive test applied in determining whether a Section 5 violation has occurred here is not in any way different than the standard customarily applied under Section 7 of the Clayton Act.

[25] With respect to the Mission acquisition, respondents did not offer evidence relevant to Section 7, and we have rejected complaint counsel's challenge of this acquisition. But we did this because the acquisition was not adequately described in the complaint, not because the complaint failed to charge the appropriate statute.

power of the CAB under the Civil Aeronautics Act, at statute, which, like the Federal Trade Commission Act, gives the Board the power to issue a cease and desist order) that the CAB has the power to fashion the appropriate relief, including the power to order divestiture. The Court stated generally, "[T] he power to order divestiture need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority . . . ." 371 U.S. at 312, n. 17. Clearly, then, there can be no doubt that the Federal Trade Commission Act gives this agency the power to, when appropriate, order divestiture.

Complaint counsel appeal from the examiner's ruling that the order be dismissed as to respondent Paskey De Domenico as an individual. Because our order relates solely to respondents' acquisitions and not to the monopoly charges or alleged pricing practices, there is no good reason for applying the order to De Domenico as an individual, and so we sustain the examiner's ruling in this regard.

For the reasons set forth herein, the appeals of counsel supporting the complaint and respondents are denied in part and granted in part. The initial decision, modified to conform with this opinion, will be adopted as the decision of the Commission.

Commissioner MacIntyre did not participate.

Commissioners Kirkpatrick and Jones filed a concurring statement.

CONCURRING STATEMENT

JANUARY 18, 1971

By KIRKPATRICK, *Chairman*, and JONES, *Commissioner*:

We concur fully in the findings and conclusions of Commissioner Dixon's opinion, except as noted hereafter. Specifically, we join in the conclusions that the Major and Oregon Macaroni acquisitions were "unfair methods of competition" in violation of Section 5 of the Federal Trade Commission Act, that the continued holding of the Porter-Scarpelli stock is an incipient violation of the Antitrust laws and therefore a present violation of Section 5 of the Federal Trade Commission Act, and that these violations warrant the order of divestiture issued in this case. But in our view, the supporting basis for our divestiture order is stronger than that developed by Commissioner Dixon; we believe that his opinion substantially understates the share of the market attributable to Golden Grain, and that if that share is properly computed, respondents will be shown to possess monopoly power, achieved as a result of a monopolization

process which can only be remedied by the required divestiture of each of respondents' former competitors.

Monopoly Power

Commissioner Dixon attributes to respondents a 1968 market share of 47.8%, arrived at by combining the market shares of Mission and Major. In our opinion, the market share of Porter-Scarpelli (22.8%) should also be included, for reasons that were recognized by Commissioner Dixon in a somewhat different context.[1] Although Golden Grain holds only 49% of the stock of Porter-Scarpelli, this degree of ownership is sufficient to produce a community of interest between the two companies, and this common interest warrants their treatment as a single firm for market share analysis.[2] As thus treated, the Mission-Major-Porter-Scarpelli share was 70.6% in 1968, which is sufficient to raise a presumption of monopoly power.[3]

---

[1] See pages 172–73, *supra*, wherein Commissioner Dixon discusses the manner in which the respondents' possession of the Porter-Scarpelli stock may substantially lessen competition or tend to create a monopoly.

[2] We reject the examiner's finding that respondents' interest in Porter-Scarpelli constituted an investment only, because there had been neither exercise nor attempt to exercise control over the company. Wholly aside from the question of control, the holding of this stock was bound to affect the operations of both firms in a way that makes untenable a belief in their competitive independence. As Commissioner Dixon has noted, "Respondents can reasonably be expected to hesitate in engaging in vigorous competition with Porter-Scarpelli as it might jeopardize their investment." Thus, respondents' ownership of slightly less than half of Porter-Scarpelli will necessarily affect competitive behavior in a manner that warrants treating them together for structural analysis purposes.

Buttressing our conclusion in this regard is testimony in the record which strongly suggests (1) frequent meetings between executives of Golden Grain and Porter-Scarpelli for discussion of topics which included the price of paste products, and a 5% service and distribution allowance offered by Porter (Tr. 1739–41); and (2) indications of interest by respondents in obtaining majority control of Porter soon after its acquisition of the Porter stock (Tr. 1945, 2000). It is also significant that Porter-Scarpelli no longer sells in the State of Hawaii, as it did before World War II (Tr. 1764); nor does it now produce a convenience dinner as it once did (Tr. 1595-96).

Respondents have pointed to price competition between Golden Grain and Porter with respect to the Safeway account, suggesting that this indicates the competitive independence of these two firms. But it is impossible to determine from the record before us whether these two firms lowered their prices in response to each other or in response to third parties competing against both of them. Respondents also suggest that independence is evidenced by the fact of competing offers to purchase Oregon Macaroni in 1966. But that one instance of independent conduct offers no assurance that independence extends to other more important forms of competition (*e.g.*, pricing), or that *any* independence will continue in the future.

[3] The examiner quoted Judge Learned Hand, in *United States v. Aluminum Co. of America*, 148 F. 2d 416, 424 (2d Cir. 1945), for the proposition that 90% of the market "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four per cent would be enough; and certainly thirty-three per cent is not." The percentage held by respondents, under our analysis, falls somewhere between the "certain" and the "doubtful" measuring points. But as suggested *infra*, there are other factors which add considerable strength to the monopoly power presumption that we consider appropriate, factors cconcerning entry barriers, market performance, addition of the share of Oregon Macaroni, and other structural considerations.

Under our analysis, it is necessary to consider the existence of other factors which may either confirm or rebut the presumption that arises from respondents' market share. The most important such factor in this case is entry barriers. If barriers to entry are low and unimportant, then the existence of numerous potential entrants on the edge of the market would effectively preclude respondents' control of price or exclusion of competition and thus would rebut the presumption of monopoly power. But in this case, the record reveals the existence of high and significant barriers to entry into the dry paste market in the Pacific Northwest, and this fact strengthens the monopoly power presumption based on market share.

Complaint counsel contend that there are three significant barriers to entry relevant to this case: freight costs, other cost barriers (*e.g.*, higher selling costs of new entrants, and smaller sales volume preventing shipment in carload lots), and product differentiation.[4] Respondents contend that entry is "easy," and they dispute the importance of each of the alleged entry barriers, primarily by a showing of economies of scale and locational advantages with respect to flour mills as factors off-setting the cost advantages and consumer preference enjoyed by established firms. The examiner agreed with respondents on these points, and we do not entirely disagree. But in our opinion, the examiner failed to place in proper perspective each of the various factors that are relevant to this issue. The record establishes the following facts: (1) transportation costs inhibit competition from firms outside of the Pacific Northwest area;[5] (2) new entrants face significantly higher selling costs than established firms;[6] (3) successful entry will generally require either a substantial price concession or greatly increased advertising in order to counteract established consumer preferences.[7] On the other hand, the

[4] Complaint counsel alleged as a fourth entry barrier the respondents' pricing practices, but the briefs on appeal are concerned with the other three listed above.

[5] See the discussion of the Creamette Company in the section on Geographical Market, text pp. 158–59 *supra,* indicating that in spite of economies of scale and proximity to flour supply, Creamette's costs at Seattle exceed those of respondents by 3 to 5%, because of the transportation cost factor. (Tr. 2076.)

[6] There was testimony to the effect that extra selling costs could raise the cost of entry into a new market for the first time to as much as 30% more than the cost of selling in an existing market (Tr. 1703).

[7] The record suggests the necessity of a price concession of at least 10% (Tr. 1225–26), and it also indicates that concessions of 20% or higher are not always effective in overcoming the market power of deeply entrenched brand preferences (Tr. 1286, 1709–10). With respect to increased advertising, a representative of LaRosa & Sons, one of the largest macaroni manufacturers in the country, testified that, whereas his firm spends approximately 7% to 8% of its total sales volume each year on advertising, his firm was currently spending more than 20% of its sales on advertising in the newly-entered Los Angeles market (Tr. 3741). LaRosa entered that market in 1962, and it has not yet reached the "break-even point" (Tr. 3744, 3748), indicating that the barrier of product differentiation requires a substantial and long-term investment to be overcome.

record also establishes that (1) proximity to a flour mill (which reduces the cost of transporting raw material) gives to some outside firms certain cost advantages over firms that are located right in Seattle;[8] and (2) there are significant economies of scale which make it feasible for at least some very large macaroni companies with plants on the east coast to sell in the Pacific Northwest, and some of these firms are already selling in that market (albeit with insignificant market shares).[9] But these two factors are, in our view, clearly insufficient to fully outweigh the effects of the entry barriers that were shown to exist. In fact, the existence of significant economies of scale is a double-edged sword; it is an additional entry barrier in some respects.[10] Thus, proper resolution of the entry barrier issue would bolster our conclusion that respondents are in possession of monopoly power.

Respondents contend that Golden Grain's market performance, in terms of profit and price levels, is inconsistent with monopoly power, but the record does not support his claim. Concerning the level of profits, respondents' rate of return on stockholders' equity in the year following the acquisition of Major was 33.5%, compared to the industry average of about 10%. Respondents properly criticize the use of these figures, because they are based on respondents' *consolidated* rate of return for all of its products, whereas the Mission Division accounted for a relatively small percentage of respondents' overall sales.[11] Complaint counsel replies that although the Mission Division accounted for roughly 20% of the firm's overall sales in 1966, it accounted for about 50% of the total profits that year. The record shows that respondents' profits have steadily risen, increasing 20-fold from 1962 to 1966 (CX 627). Profit data derived from CX 70C–D and evidently adopted by respondents on appeal[12] further support a conclusion that respondents' profit levels reflect a noncom-

[8] The record supports the respondents' contention that the differential between the freight that Golden Grain pays on its flour and the freight that a manufacturer located in Minneapolis pays on its finished products is only about ½¢ per pound (Tr. 4718–19).

[9] Evidence in the record suggests quite substantial economies of scale: a firm with a plant size of 4–6 million pounds annually has an average cost of 6¢ per pound, whereas a firm with a plant size of 30 million pounds annually has an average cost of 3.2¢ per pound (Tr. 1250–52).

[10] The economies of scale available to large macaroni companies on the east coast would facilitate entry into the Pacific Northwest only if there were large amounts of excess capacity in the east coast plants, and if expanded output lowered cost sufficiently to offset the freight cost of macaroni to the Pacific Northwest.

[11] Another problem with the use of these figures is, as respondents point out, that they are based solely on stockholder equity, and they thereby ignore the substantial amount of long term loans to the company by the three De Domenico brothers, who own substantially all of the stock.

[12] See Respondents' Answering Brief, p. 85.

petitive market structure. This exhibit indicates profits as a percent of sales for all macaroni producers in the Pacific Northwest as follows:

	1964	*1965*	*1966*
Golden Grain	3.5%	4.0%	3.1%
Porter-Scarpelli	3.4	3.6	0.1
Major Italian	4.6	4.5	3.3
U.S. Macaroni	7.3	8.2	7.6
Oregon Macaroni	2.9	—2.4	—1.2

Note that in all three years, respondents' profit level was exceeded by only Major Macaroni and U.S. Macaroni. Major is now controlled by respondents, so that it is clearly not an independent competitive force in the market. U.S. Macaroni is a family-owned business, so that its profit data is simply not reliable, because of the possibility of insufficient salaries paid to the five owners. This concern is substantiated by record testimony that if U.S. Macaroni were not a family business, it probably would not operate at any profit at all (Tr. 4736, 4725). Thus, the evidence of profits is clearly insufficient to cast serious doubt upon the existence of monopoly power.

With respect to prices, complaint counsel attributes to respondents the blame for the "soaring climb" of retail macaroni prices in Seattle and other cities within the Pacific Northwest beginning immediately after respondents' acquisition of Major Macaroni. There is testimony in the record to the effect that consumers are paying, in Seattle alone, 4¢ per pound, or $800,000 per year, more for macaroni than they would be paying if effective competition existed (Tr. 4511–12). Over the three year period of 1964 to 1966, the amount of the overcharge in the Seattle area is estimated to be $1.7 million to $2.3 million (Tr. 4513). Complaint counsel provided substantial and probative evidence of a direct correlation between respondents' wholesale prices and the prices charged to the public by retail stores. Respondents introduced countervailing evidence to the effect that there is *no* such correlation between wholesale and retail prices. The evidence on this issue is too contradictory and imprecise to permit reliance upon any part of it to rebut the presumption of monopoly power that we consider appropriate in this case.

Two additional factors should not be overlooked, because they further support the presumption, and our conclusion, that respondents possess monopoly power. First, in our computation of market share, we have omitted the share of Oregon Macaroni. There is great uncertainty as to that share. Complaint counsel contend that it is 4.4%, but the examiner found it to be 1.6% at the time of acquisition, and that

may be accepted as the minimum figure. Thus, in reality, respondents' control of the market is greater than represented by the market share figures relied upon above. Secondly, although there is about 30% of the market beyond respondents' control, that part of the market is divided into fragments. The only other firm with an arguably significant market share is U.S. Macaroni, with 14.6%; but there is evidence in the record that U.S. Macaroni lacks the capability of becoming a meaningful countervailing force to the respondents' pricing activities.[13] The remaining share of the market is divided among several "outside" macaroni producers. Some of them have much larger and more efficient plants than respondents, and they enjoy substantial economies of scale. But the fact that such firms have failed to obtain anything more than a very insignificant share of the Pacific Northwest market substantiates our belief that respondents enjoy important advantages over outside firms, and these advantages add to their control of the relevant market.

Willful Acquisition or Maintenance

It is clear that respondents obtained their monopoly power unlawfully, *i.e.*, by "willful acquisition or maintenance, as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *United States v. Grinnell Corporation*, 384 U.S. 563 (1966). In reaching this conclusion, we disavow reliance on any of the alleged pricing practices or other competitive conduct challenged in the complaint, and we share Commissioner Dixon's conclusion that these allegations are not supported by the evidence of record. We also disavow reliance on the Porter-Scarpelli acquisition, because it was "incidental" to the otherwise lawful acquisition of Mission. But the acquisition of Major Italian Foods was a deliberate and decisive step in the attainment of respondents' present market position. We impute to respondents no improper motive or wrongful intent with respect to that acquisition, and we accept the examiner's findings that the acquisition was for a legitimate purpose and that Major was a failing company.[14] But the fact remains that this acquisition was a clear assumption of monopoly power; since it was done consciously and intentionally, it is in-

[13] As noted above, there is testimony to the effect that if U. S. Macaroni were not a family-owned business, it probably would not operate at a profit (Tr. 4736, 4725). This fact suggests that U. S. Macaroni's "profit margin" is probably too fragile to enable that firm to offer any truly vigorous price competition against any major firm in the market.

[14] We need not consider the possible application of a "failing company" defense to a monopolization charge, because, assuming such application, respondents fail to sustain the burden of proof to establish such a defense in this case. Specifically, there is insufficient evidence to support respondents' contention that Golden Grain was the only

dicative of "willful acquisition."[15] For similar reasons, the purchase of Oregon Macaroni, which again eliminated a direct competitor, is clear evidence of the willful maintenance of the monopoly power obtained by virtue of the previous acquisition of Major. But our conclusion of monopolization need not rest on any single purchase or acquisition. The record reveals a *series* of acquisitions, including the acquisition of Mission in 1956,[16] of Major, in 1963, and of Oregon in 1966. This *series* completely eliminated three direct competitors, and substantially dampened the competitive vitality of a fourth (Porter-Scarpelli). The direct result of this repeated practice of acquiring its competitors was the attainment of monopoly power, and it is our conclusion that the process by which it was so attained amounts to unlawful monopolization.

Scope of Order

The usual and generally most appropriate remedy for monopolization is an order of divestiture sufficient to restore competition to the relevant market.[17] Divestiture in this case will be easier and less disruptive than in most cases, because of the fact that respondents' monopoly derived from a series of separate acquisitions, and the acquired companies have retained an element of separate identity. The Commission's order in this case requires the divestiture of all of the stock and assets of Major Italian Foods and Oregon Macaroni, and all of the stock held in Porter-Scarpelli. Under our finding of monopolization, the divestiture of Major is clearly proper; this was the acquisition that contributed most to respondents' monopoly power,

---

[15] Ever since *Alcoa*, it has been clear that the offense of monopolization requires no showing of specific intent. The fact that the acts resulting in monopoly power were motivated by good faith business decisions is no defense if the acts were neither inevitable nor "thrust upon" the defendant. "No intent is relevant except . . . an intent to bring about the forbidden act . . . To read the passage as demanding any 'specific' intent makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing." *United States v. Aluminum Co. of America, supra,* at 432.

[16] It is unnecessary for us to decide the effect of the FTC letter of clearance with respect to the Mission acquisition. We are not concluding that the Mission acquisition was, by itself, unlawful, and nothing in this opinion implies any reversal of the opinion stated in the clearance letter. We are considering the Mission acquisition only as part of a *series* of acquisitions, and we consider that *series* to amount to monopolization.

[17] See *Schine Theatres v. United States,* 334 U.S. 110, 128 (1948):

"In this type of case we start from the premise that an injunction against future violations is not adequate to protect the public interest. If all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact. They could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they have inflicted on competitors. Such a course would make enforcement of the Act a futile thing unless perchance the United States moved in at incipient stages of the unlawful project. For these reasons divestiture or dissolution is an essential feature of these decrees."

and its divestiture will restore to the market a viable and substantial competitive unit. Divestiture of Oregon Macaroni is also clearly appropriate, since its acquisition helped to maintain respondents' control of the market, and its divestiture will provide a convenient means of facilitating the occurrence of a "toehold" entry into the Pacific Northwest market. Divestiture of the stock of Porter-Scarpelli is also appropriate notwithstanding the fact that we would not rely upon its acquisition as evidence in support of the "willful" acquisition element of the monopolization charge. The remedy for monopolization may properly extend beyond the acts and practices specifically found to have contributed to the monopolization. See, *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). Since Porter-Scarpelli is already a quasi-independent competitor in the market, divestiture of respondents' stock interest in that company will insure a continued and greater degree of independence. Finally, to help insure against the re-acquisition of monopoly power, the order should (and does) include a ten-year prohibition on the acquisition of any firm manufacturing macaroni or related paste products without the Commission's prior approval.

As stated above, we are in accord with all of the *essential* findings and conclusions contained in the opinion of Commissioner Dixon, and we fully endorse all aspects of the Commission's order in this case. But we believe that the above analysis of respondents' market position and the means by which that position was acquired and maintained provide additional and significant support for the Commission's disposition in his matter.

Order

This matter has been heard by the Commission on cross-appeals of respondents and counsel supporting the complaint from the initial decision of the hearing examiner, filed April 30, 1969, dismissing in part the complaint charging respondents with violation of Section 5 of the Federal Trade Commission Act. The Commission has determined that the appeals should be granted in part and denied in part, and that the findings of the hearing examiner, modified to conform with this opinion, should be adopted as those of the Commission. Other findings of fact and conclusions of law made by the Commissioner are contained in that opinion. For the reasons therein stated, the Commission has determined that the order entered by the hearing examiner should be vacated and a new order issued by the Commission as its final order. Accordingly,

It is ordered, That respondent, Golden Grain Macaroni Company, a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, within one (1) year from the date this order becomes final, divest, absolutely and in good faith, subject to the approval of the Federal Trade Commission, all stock, assets, or other interests acquired by Golden Grain Macaroni Company, or its subsidiaries, in Porter-Scarpelli Macaroni Company, as a result of Golden Grain Macaroni Company's acquisition of Mission Macaroni Company.

It is further ordered, That respondent Golden Grain Macaroni Company, a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, within one (1) year from the date this order becomes final, divest, absolutely and in good faith, subject to the approval of the Federal Trade Commission, all stock, assets, or other interests, including the option to purchase additional stock or other interests, in Major Italian Foods Company, Inc., as a result of Golden Grain Macaroni Company's acquisition of stock of Major Italian Foods Company, Inc.

It is further ordered, That respondent Golden Grain Macaroni Company, a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, within one (1) year from the date this order becomes final, divest, absolutely and in good faith, subject to the approval of the Federal Trade Commission, all stock, assets, or other interests acquired by Golden Grain Macaroni Company, or its subsidiaries, in Oregon Macaroni Company.

It is further ordered, That none of the stock, assets, properties, rights or privileges to be divested be sold or transferred, directly or indirectly, to any person who is at the time of the divestiture an officer, director, employee or agent of, or under the control or direction of, Golden Grain Macaroni Company or any of its subsidiaries or affiliates, or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of voting stock of Golden Grain Macaroni Company, or any of its subsidiaries or affiliates.

It is further ordered, That for a period of ten (10) years respondent Golden Grain Macaroni Company shall cease and desist from acquiring, directly or indirectly, without prior approval of the Federal Trade Commission, the whole or any part of the share capital or other assets of any corporation engaged in the manufacture of dry paste products within the Pacific Northwest.

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

It is further ordered, That respondents shall, within sixty (60) days from the date of service of this order and every sixty (60) days thereafter until divestiture is fully effected, submit to the Commission a detailed report of their actions, plans, and progress in complying with the divestiture provisions of this order, and fulfilling their objectives. All reports shall include, among other things that will be from time to time required, a summary of all contacts and negotiations with potential purchasers of the stock, assets, properties, rights or privileges to be divested under this order, the identity of all such potential purchasers, and copies of all written communications to and from such potential purchasers.

Commissioner MacIntyre did not participate.

IN THE MATTER OF

HOLIDAY UNIVERSAL INC., ET AL.

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

Docket C-1851. Complaint, Jan. 19, 1971—Decision, Jan. 19, 1971

Consent order requiring an operator of various health club facilities and an advertising agency, both located in Baltimore, Maryland, to cease misrepresenting that the price of any membership is special or reduced or that an increase is imminent, that its health program will alter body size, extend life, prevent heart attacks, and reduce weight without calorie control, that all facilities are available at all clubs and that any service is guaranteed unless all aspects of the guarantee are disclosed, using deceptive "before and after" photographs, making repeated telephone calls to obtain payments on any debt, misrepresenting that any debt has been turned over to an independent collector, failing to disclose that any paper about to be signed is a contract or promissory note, obtaining signature on any contract which fails to provide a four day cancellation clause and a provision that it may be cancelled if the customer moves beyond a 25 mile limit, and misrepresenting that application for membership will be held without acceptance pending further investigation.

COMPLAINT

PARAGRAPH 1. Respondent Holiday Universal, Inc. (hereinafter sometimes referred to as "Holiday"), is a corporation organized, existing and doing business under and by virtue of the laws of the