

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 AGRI-MARK, INC., )  
 AGWAY INC., and )  
 H.P. HOOD, INC., )  
 )  
 Defendants. )

Civil Action No.  
80-174

*filed: 7/16/80*

COMPETITIVE IMPACT STATEMENT

This competitive impact statement, relating to the proposed Judgment submitted for entry in this civil antitrust proceeding, is filed by the United States pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b).

I. The Nature and Purpose of the Proceeding

The complaint in this action was filed on June 27, 1980. The defendants are Agri-Mark, Inc. ("Agri-Mark"), Agway Inc. ("Agway"), and H. P. Hood, Inc. ("Hood"). Agri-Mark, which was formed to participate in this transaction, is the largest cooperative of dairy farmers in New England. Agri-Mark is the successor to Yankee Milk, Inc., formerly the largest dairy cooperative in New England. Hood is New England's largest dairy. The complaint alleges that Agri-Mark's proposed acquisition of certain of Hood's fixed assets would violate Section 7 of the Clayton Act and that a proposed supply agreement between Agri-Mark and Hood would, if executed, violate Section 3 of the Clayton Act. The acquisition of Hood's assets is part of a larger transaction involving Agway, a farm supply cooperative serving the Northeastern United States, including New England.

The challenged transaction was scheduled for completion on or about July 1, 1980. Agway planned to purchase 67% to 100% of Hood's stock. Immediately thereafter Agri-Mark would have purchased all of the fixed assets which Hood uses in the dairy industry and then would have leased these dairy assets back to Hood. Thereafter, Agri-Mark would have supplied Hood with substantially all of its requirements for unprocessed milk pursuant to a supply agreement (the "full supply agreement"), which would run for ten years with two five year options to renew.

The complaint alleges that Agri-Mark's acquisition of Hood's assets would violate Section 7 of the Clayton Act by foreclosing dairy farmers who are not Agri-Mark members from selling milk to Hood, and because the acquisition may have lessened competition in the production, sale, and procurement of raw milk and in the production and sale of fluid milk products. The complaint also alleged that the full supply agreement would violate Section 3 of the Clayton Act by foreclosing dairy farmers who were not Agri-Mark members from selling milk to Hood, which may have substantially lessened competition in the production, sale, and procurement of raw milk.

The complaint requests immediate relief in the form of a temporary restraining order and a preliminary injunction, and permanent relief preventing Agri-Mark from acquiring Hood's assets and preventing Agri-Mark and Hood from entering any supply agreement of an unreasonable duration.

On June 30, 1980, the Court approved a stipulation in which the defendants agreed to delay the completion of the

proposed transactions until the Court could rule on the application for a preliminary injunction. However, the parties reached agreement on the terms of the proposed Final Judgment before any hearing was held on the application.

The principal purpose of this lawsuit has been to preserve in New England the conditions necessary to insure that raw milk is sold to all dairies at the competitive price consistent with governmental regulation of milk prices.

## II. The Nature of the Alleged Violations

Hood is the largest purchaser of milk from independent dairy farmers (farmers not members of any cooperative association) in New England. Agri-Mark is the largest cooperative association of dairy farmers in New England. The transaction as contemplated by the parties would have foreclosed many dairy farmers from selling to Hood and, for the reasons set forth below, may have created a combination powerful enough to dominate the New England milk industry at the producer and dairy levels.

In the transaction contemplated by the defendants, Hood agreed to purchase substantially all of its raw milk needs from Agri-Mark pursuant to a 10 year full supply agreement with two 5-year options to renew. The effect of this full supply contract would be to foreclose Agri-Mark's competitors-- independent dairy farmers and members of competing cooperative organizations--from competing with Agri-Mark for sales of raw milk to Hood for the next 20 years.

Such foreclosure in this case would be of a substantial portion of the market. Hood accounts for 14% of all raw milk purchases from dairy farmers in the New England supply area (the New England states and eastern New York). Agri-Mark's

members account for at least 35% of all milk production in the same area. Foreclosure of this magnitude is well above the Department's Merger Guidelines which state that the Department will ordinarily challenge a merger between a supplying firm accounting for 10% or more of the sales in its market and a purchasing firm accounting for 6% or more of total purchases in that market.

The Department has recognized that the market shares of dairy cooperatives are not as indicative of market power as market shares of industrial concerns because it usually is relatively easy to leave a cooperative and compete with it whenever the cooperative charges supra-competitive prices. However, in this case the Department believes that the Agri-Mark agreements with its members made their collective market share more accurately reflect Agri-Mark's market power. More specifically, when dairy farmers terminate their membership in Agri-Mark, the refund of their substantial investment in Agri-Mark is subject to approval by the Board of Directors, which gave Agri-Mark's Board substantial leverage in attempting to block departures by members. This restraint erected a substantial and real barrier to certain and easy exit from the cooperative.

Agri-Mark's market power would have been enhanced because, under the original acquisition plan, the impact of Hood's foreclosure to non Agri-Mark members would have occurred in the spring. The sale of Hood was announced in March of this year. The spring or flush season is the time of year when milk production is highest relative to demand. This is the most difficult time for dairy farmers to find new outlets for their milk. Thus, at the time the transaction was announced, the 900 independent dairy farmers shipping to Hood were faced with imminent foreclosure from their market at a time of oversupply

of raw milk. The independents were not members of another cooperative which could have assisted them in finding new markets for their milk. As a result, many of them felt compelled to join Agri-Mark without complete information on alternative markets. When these independents joined Agri-Mark, its already substantial market share increased.

Hood's market power would also have been enhanced as a result of the proposed transaction. Many dairies would have been reluctant to engage in hard nosed competition with Hood, which has a 16% share of dairy sales in New England, because of its close association with the dominant Agri-Mark cooperative. This association was all the more competitively dangerous because Hood and Agri-Mark planned to have interlocking Boards of Directors. This interlock would have facilitated Hood and Agri-Mark using each other to reach their own marketing objectives. Hood competitors who are fully or substantially supplied by Agri-Mark would be placed in the difficult position of being supplied by a company which controls their major competitor. Vigorous competition on their part with Hood might tend to jeopardize their milk supply. Also, other dairies not yet supplied by Agri-Mark might find themselves in a similar situation should they attempt to take business from Hood and turn to Agri-Mark for milk.

### III. The Proposed Final Judgment and Its Anticipated Competitive Effects

The proposed Final Judgment deprives Agri-Mark and Hood of the tools which might empower their combination to have undesirable effects in the marketplace. It does so by (1) stripping Agri-Mark of any ability to sustain any artificial increase in prices, (2) preventing Agri-Mark from "locking" members into the cooperative, (3) providing independent producers who had delivered to Hood in the past additional time in which to

find markets for their milk other than Agri-Mark, (4) forbidding Agri-Mark and Hood from entering supply agreements with a duration of more than one year, (5) isolating Hood and Agri-Mark from each other in certain significant respects, and (6) providing other miscellaneous relief.

A. Agri-Mark Cannot Sustain Any Monopolistic Price Increase

Cooperatives in the Northeastern United States generally sell milk to dairies within a Federal Marketing Order \*/ at prices which are the minimum prices established by the United States Department of Agriculture for the Federal Marketing Order. With rare exceptions, raw milk will be sold at the minimum price so long as the supply market is competitive. Where there is an absence of competition, suppliers can and do charge premiums for their raw milk, which premiums may properly be viewed as monopoly profits. The Department of Justice feared that Agri-Mark's affiliation with Hood would at some time contribute to a situation where competition would be reduced and Agri-Mark might acquire market power which would enable it to charge premium prices in the Federal Marketing Order. As explained below, Paragraph IV of the proposed Final Judgment is designed to prevent this from happening by making it unlikely that Agri-Mark will be able to engage in sustained supra-competitive pricing at any time in the foreseeable future. An explanation of the peculiar regulatory scheme in which raw milk is produced and sold makes this clear.

---

\*/ In order to facilitate the orderly flow of milk the United States Department of Agriculture is empowered to issue regulations called "Milk Marketing Orders" pursuant to the Agricultural Market Agreement Act of 1937, 7 U.S.C. § 601 et seq., and has done so in regulations covering Connecticut, Rhode Island, the most populous portions of Massachusetts, Vermont, and New Hampshire (the "New England" Federal Milk Marketing Order).

In New England there is substantially more milk produced than is processed by dairies into fluid milk products. Milk production in excess of the needs of dairies which produce fluid milk products is processed into cheese, milk powder or butter.

Under the Federal Marketing Order, the Federal Milk Marketing Administrator sets a minimum "Class I" price for milk actually processed and sold as fluid milk, and a different minimum "Class II" price for milk used for manufacturing purposes (e.g., for processing into butter or cheese). The Class II price--i.e., the price for milk in excess of that needed on any given day for fluid use--is established at lower levels than the Class I price. These minimum class prices vary over time and are established at different levels in each Federal Order area.

Each month, each handler (for present purposes, we can define "handlers" as dairies) selling processed milk in a defined federal milk marketing area reports to the Federal Milk Marketing Administrator (1) its actual use of milk received, by class, for the prior month, and (2) the total amount of milk supplied to the plant by each milk producer. The handler then pays or accounts to the Market Administrator for the total amount of milk it acquired during that month, based on actual end use, and on the federal minimum price for each use. For example, if the Federal Order price for Class I milk was established at \$12.00 per hundred pounds and the minimum price for Class II milk was \$10.00 per hundred pounds ("cwt"), \*/ a handler which sold 80% of its milk as fluid milk and processed 20% of it into manufactured items

---

\*/ A hundred pounds of milk is equal to approximately 11.5 gallons.

would pay, or account to the Market Administrator, \$11.60  
[.80 x \$12.00 + .20 x 10.00] per cwt of milk received in that  
month.

The Market Administrator then determines from these reports the total amount of milk used as Class I milk and the total amount used as Class II milk by all handlers serving the federal milk market in the prior month. On this basis, the Market Administrator determines a marketwide "blend price" which is paid to each milk producer or marketing cooperative that supplied milk to the above plants. \*/ For example, if 50% of the milk purchased by handlers serving a milk market was used as Class I milk (having a federal order price of \$12.00 per cwt) and 50% of such milk was used as Class II milk (having a federal order price of \$10.00 per cwt), the blend price for that month would be \$11.00 per cwt.

The prices established under the Federal Milk Marketing Order system are only minimum prices. Milk marketing cooperatives are not prohibited from bargaining with handlers for prices above that established under the Federal Order. These over order prices, when unrelated to the specific cost of any service the seller performs, are the "premiums" mentioned above. Premiums generally apply to only milk sold for fluid or Class I use and only the members of the cooperative which negotiated the premium share in these revenues. A cooperative's ability to charge premiums on Class I milk sales is directly related to its market power. That is, to charge premiums on any long-term, market-wide basis a cooperative must control so much of the

---

\*/ The Market Administrator administers a fund to which handlers contribute and from which they receive payments. This fund enables each handler to pay a uniform "blend price" to producers regardless of that handler's particular Class I utilization.

milk supply practicably available to handlers that handlers have no choice but to deal with it. Otherwise, handlers would seek alternative sources, milk that otherwise would have been sold for Class II use with no premium, at a lower price.

In order to sustain premium charges, cooperatives need to prevent dairies from purchasing milk from other sources which do not charge premiums. Because milk is a commodity, raw milk will not be sold in any area on a regular basis at two prices. That is, if dairies can buy milk at a price below that which they are currently paying, their current supplier will be forced to meet the lower price of its competitor or lose the dairy as a customer. \*/

The areas where the various dairies in a market sell packaged fluid milk products are not entirely coextensive. A particular dairy will generally sell its products in competition with a number of dairies in different parts of its sales territory. If one dairy obtains lower priced milk than its competitors, those competitors will pressure their supplier to meet the lower price. However, if the supplier grants price concessions to those competitors, additional dairies, who did not compete in the sales territory of the first dairy who obtained lower priced milk but do compete in sales territories of other dairies now granted price concessions, will demand their own price concessions. In this domino-like fashion price concessions and lower prices tend to spread throughout a market.

Cooperatives in other parts of the United States have devised an effective practice for preventing the intrusion of

---

\*/ The dairy will either switch suppliers or go out of business in the long run. In either event, the dairy will be lost as a customer of the cooperative.

spreading of competition in markets which are characterized by premiums. The practice operates as follows:

Assume that (1) cooperative XYZ charges premiums in an area, and (2) Dairy W, located in that area, starts purchasing milk with a smaller premium, or with no premium from another source. In that situation, Dairy W's competitors will inform XYZ that there is less expensive milk in their area. Dairy W's competitors will demand that XYZ lower its price to them so that they can compete with Dairy W. Rather than simply doing so, however, XYZ will first ascertain in what counties or towns Dairy W sells milk. XYZ will then announce to all dairies that it will sell them milk at whatever price Dairy W is paying, but only for milk which is processed and sold to customers who are located in the counties or towns serviced by Dairy W. That is, XYZ will only lower the price of milk which ultimately sells as packaged milk in the precise area in which Dairy W does business. The benefits of the lower price of milk thus stop at the borders of that area. XYZ is therefore able to preserve its supra-competitive pricing structure in the rest of its marketing area while containing the geographic scope of the lower priced competition. The wholesale and retail price of milk remains high in areas not serviced by Dairy W.

Moreover, even in Dairy W's service area, the lower price of milk is tenuous at best. Often Dairy W's source of milk priced below XYZ's will be either a small group of independent producers, or a cooperative not previously doing business in the area. In order for either group to survive in the new market, growth may be necessary. Dairies know that XYZ's method of containing competition will quickly remove any cost advantage gained by dealing with any group of producers other than XYZ. Dairies also know that XYZ provides milk and services

in an acceptable fashion. There is little incentive for them to deal with XYZ's new competitor which offers no real price advantage and is an unknown factor with respect to quality and services. Thus, Dairy W's new source of supply may wither and die, leading to a return of premium pricing throughout XYZ's marketing area.

If XYZ could not meet the threat to its monopoly profits in this limited way, it would still face a need to meet the competition afforded by Dairy W's new supplier. XYZ could only do so by lowering the price of all milk sold to Dairy W's competitors, not simply that milk specifically traceable to the original and limited area of competitive incursion. By natural competitive progression, this would tend to expand the benefit of lower priced milk to the other areas serviced by these and other competing dairies as they demand and receive price concessions from XYZ to meet the spread of lower priced milk in the marketplace. This ever-widening circle of competitive pricing will lead to the erosion and eventual elimination of premiums throughout XYZ's marketing area. Dairy cooperatives seek to avoid this competitive market condition through the use of the limited price concession practice described above, or some similar practice. Without such practices, they cannot preserve premiums over significant periods of time in any given market.

Paragraph IV is designed to prevent Agri-Mark from using any power it has or may acquire to price milk in a selective and predatory way so as to eliminate or contain competition.

Paragraph IV accomplishes this by providing, in subparagraph A, that Agri-Mark must charge Hood the same price it charges other competing dairies. Similarly, Agri-Mark is enjoined under paragraph IV B from selectively lowering prices so as to retaliate against lower competitive offers. Specifically,

Agri-Mark is enjoined from charging a lower price based upon the geographic areas in which or customers to whom Agri-Mark's customers sell processed milk. If Agri-Mark at some future date establishes a premium and needs to lower its price to meet competitive offers, it must do so throughout the entire market order area, thus assuring a more competitive response than one limited to specific areas or customers. Simply put, Agri-Mark will not be able to build barriers which prevent the spread of competition.

Deprived of the ability to contain competition in the fashion described above, Agri-Mark, or any federation of cooperatives in New England which includes Agri-Mark, will be unable to charge premiums for any significant period of time. A federation without Agri-Mark would lack the membership necessary to charge premiums in the first instance. Thus, through paragraph IV, the proposed Final Judgment deprives Agri-Mark of any market power it might have obtained through its affiliation with Hood or otherwise. We expect raw milk to continue to sell at competitive levels in New England for the foreseeable future.

Finally, since paragraph IV A prevents Agri-Mark from favoring Hood with lower prices than other dairies receive, \*/ we view the proposed Final Judgment as allaying fears of other dairies that Agri-Mark would grant secret price concessions to Hood. Any such concessions would expose both Agri-Mark and Hood, and the individuals responsible, to civil or criminal charges of contempt of court.

---

\*/ Pursuant to a marketing agreement between Agri-Mark and Hood, Hood will pay a portion of its profits to Agri-Mark as an additional price for milk purchased from Agri-Mark. Paragraph IV of the proposed Judgment does not affect this agreement.

B. Agri-Mark Cannot Prevent Members from Leaving the Cooperative

Agri-Mark required dairy farmers joining it to sign one year supply agreements and to agree to pay Agri-Mark a member contribution equal to \$.94 per cwt of raw milk the farmer produced in 1979. Farmers could provide their membership contribution either by paying the entire amount in cash or by financing the payments over a seven year period through Agri-Mark.

Producers will also have an additional financial interest in Agri-Mark. Approximately 50% of Hood's profits will be paid to Agri-Mark. Of this, Agri-Mark will retain 80%, allocating a portion of this to members in proportion to their deliveries to Agri-Mark.

Agri-Mark's member equity plan, which controls the financial relations between the cooperative and its members, provides in part that when an Agri-Mark member leaves the cooperative, the cooperative, over a five year period, will refund the member's membership contribution and any cooperative earnings Agri-Mark had allocated the producer during his or her period of membership. The equity plan also provides that Agri-Mark's board of directors can, in its discretion, alter the repayment provision.

As stated above, Agri-Mark entered agreements with its members which increased its control over them and tended to limit the ease with which they could leave Agri-Mark and market their milk in competition with it. Specifically, Agri-Mark members have made a large lump sum investment in Agri-Mark, approximately 8% of a year's gross income. In addition to this substantial initial investment, Agri-Mark will allocate to its members some of the earnings of Hood. These earnings will remain in Agri-Mark until a member leaves Agri-Mark.

If the initial investment and retained earnings were necessarily available to all who left Agri-Mark, a member could leave without fear of loss. This is not the case in the Agri-Mark plan which provides that repayment of these sums is subject to approval by Agri-Mark's board of directors. The individual member in making a decision whether to leave the cooperative must consider the likelihood of obtaining these funds from Agri-Mark. The Department was concerned that the discretionary powers over repayment given to the Agri-Mark board of directors could have been wielded in such a manner that members would be hesitant to leave the cooperative, despite the existence of market conditions which in other contexts would induce members to leave.

The proposed Final Judgment limits the scope of the board's discretionary power so as to eliminate the incentive for members to remain in Agri-Mark in order to be assured of receiving their initial investment and their allocated earnings. Paragraph V of the proposed Final Judgment provides in substance that Agri-Mark cannot discriminate in paying out these funds according to the reason a member leaves the cooperative. Members who leave the cooperative to retire and who leave the cooperative to compete against Agri-Mark will be repaid in the order of leaving on a time schedule uniformly applied at any given time to all members. Thus, producers gain no advantage regarding the recovery of funds by remaining in Agri-Mark compared to competing with it. Not only does this prevent discrimination against producers who compete with Agri-Mark, but it provides incentives for Agri-Mark to pay these producers promptly.

The active members who elect Agri-Mark's board of directors will have an incentive to force the directors to make repayments on a constant and uniform basis. The members have

friends who are retiring and the members look toward their own retirement. To be certain that in retirement members will receive initial equity contribution and the returns on that contribution, the membership collectively must, through their directors, make payments to all members who leave for reasons other than retirement.

Paragraph V contains two exceptions. Agri-Mark can repay at any time the member equity contribution and allocated retained earnings of any member who had died or who has been adjudged bankrupt. These exceptions should not alter to any substantial degree the desirable effects of paragraph V.

Paragraph VIII of the proposed Final Judgment eliminates one other opportunity for discriminatory action by the Agri-Mark board. Both the Agri-Mark Equity Plan and the Agri-Mark member loan agreement provide that, should a member leave the cooperative prior to paying the entire membership contribution, the remaining payments are immediately due and payable. The Agri-Mark board can at its discretion dispense with this acceleration of payments. Paragraph VIII prevents Agri-Mark from selectively accelerating the debt of those members who want to leave Agri-Mark to compete against it, compared to members who leave Agri-Mark for reasons other than death, disability, natural catastrophe, or retirement at age 65 or older.

C. Hood's Independent Producers Have Additional Opportunities to Find New Markets

The proposed Final Judgment would give Hood independents a reasonable opportunity to find a new market for their milk. It would also permit those independent producers who joined

Agri-Mark in the spring because they could not find an alternative market to leave Agri-Mark and resume selling to Hood for a reasonable time until they find an alternative market.

Paragraph VI C of the proposed Judgment requires Hood to be willing to purchase milk from independent dairy farmers who delivered to Hood in February, 1980, until March 1, 1981. One effect of this provision is to end uncertainty for the Hood independents as to the duration of time Hood will purchase their milk. Last Spring Hood told producers that they would be given a "reasonable opportunity" to find other markets before Hood stopped buying from them. However, Hood did not commit to buy their milk for any specific period of time. Paragraph VI C permits the farmers to rationally search for an alternative market. The fall season, when the supply of milk is lowest relative to demand, appears to be the best time for dairy farmers to find a new market for their milk. The requirement that Hood continue to buy their milk until March 1 allows the producers to search for outlets during the fall. These producers have already had a spring and early summer period to find a new market. The March 1 date gives the Hood independents approximately a full year from the original announcement of the acquisition in March, 1980, to find a new market.

Paragraphs VI C 1, VII, and XI address any independent producers who have joined Agri-Mark. The concern is that all or some of these farmers joined Agri-Mark because they feared foreclosure from selling to Hood and were unable to find alternative markets during the indefinite time they had during the spring flush season. Under paragraph XI A such producers will receive notice of the content of paragraphs VI C and VII

before 15 days after entry of the proposed Judgment. Pursuant to a stipulation between the parties, the notice will be given before July 31, 1980. While Hood and Agri-Mark must, under this Stipulation, take specific actions, the Department retains the right to withdraw its consent to the Proposed Final Judgment after receiving and reviewing comments from the public concerning the proposed Final Judgment.

Under paragraph VII of the proposed Judgment, once the independent who joined Agri-Mark has received notice under paragraph XI A, Agri-Mark must allow the independent to terminate all agreements with Agri-Mark and repay the farmer any equity or membership payments made to Agri-Mark. The producer has 20 days after receipt of the notice under paragraph XI A to mail to Agri-Mark his or her notice under paragraph VII. If the producer terminates his or her agreements with Agri-Mark, paragraph VII requires Agri-Mark to repay any membership or equity payment within 30 days.

Any producers who terminate their Agri-Mark membership agreements are free to market milk anywhere, either directly to a dairy as an independent or through another cooperative. To insure that the producer has a real opportunity to search for an alternative market, the producer may deliver to Hood as an independent producer under paragraph VI C 1 until March 1. Thus, the producer can search for an alternative market through the fall and winter period.

Paragraphs VI C 2 and XI A address the independent producers who ceased delivering to Hood, did not join Agri-Mark, and have commenced marketing milk elsewhere. The Department's concern is that all or some of these producers were caught in the

uncertainty of the acquisition, and unsure of the time they would be allowed to search for a market while they delivered to Hood. Producers caught in this dilemma may have begun to deliver to another dairy on terms less favorable to the farmers than they received from Hood, and less favorable than they could reasonably expect to obtain if they could look for a market outlet for a longer period of time.

Paragraph VI C 2 (a) requires the producer to state in writing that he or she is legally free to ship milk to Hood. Hood argued that this was necessary to avoid suits by other dairies or cooperatives who have entered agreements with such producers binding them to deliver milk and who might claim that Hood tampered with or induced breaches of those contracts.

Paragraph VI C 2 (b) requires these producers to notify Hood of the desire to return to Hood within 20 days of the producer's receipt of the notification of paragraph XI A. The final sentence of paragraph VI C gives Hood 10 days to begin receiving the milk of the producer. This requirement is to give Hood sufficient time to arrange receipt of the milk.

Paragraph VI D requires Hood to purchase milk of the Hood independents at the same non-price terms and conditions of sale and with the same services provided by Hood to independents in February, 1980. Hood has provided a number of services to its independent producers, and this paragraph will require that these services continue until March 1, 1981. It is expected that after the consummation of the acquisition, Hood will terminate its field and service personnel which it previously used to serve its independent producers. Hood will then have to contract, presumably with Agri-Mark, for those services for

its independents. Since Hood by law must pay its independent producers the minimum federal order prices, it was only necessary to address the non-price terms and conditions of sale. This paragraph protects any Hood independent who takes advantage of paragraph VI C to market milk to Hood until March 1, 1981, while looking for another market outlet.

D. The Proposed Final Judgment Limits the Term of Any Hood/Agri-Mark Supply Agreement

The Complaint asked that Agri-Mark be enjoined from entering any supply contract with Hood of an unreasonable duration. Paragraph VI A of the proposed Final Judgment would prevent Agri-Mark and Hood from entering any supply agreement with a duration, even if any and all options to renew are exercised, of more than one year. A one year contract will allow Agri-Mark to supply Hood through the full seasonal cycles of production of and demand for milk. In other cases the Department has recognized the legitimacy of one year contracts between cooperatives and dairies. United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cases ¶ 61,509 (W.D. Mo., 1977) [consent decree, Paragraph VII (A)]; United States v. Associated Milk Producers, Inc., 394 F. Supp. 29, 49-56 (W.D. Mo., 1975) [consent decree, Paragraph IV (e)].

E. The Proposed Final Judgment Provides Other Relief

The proposed Final Judgment in Paragraph VI B would also prevent Hood from hauling raw milk for Agri-Mark. This ensures that other dairies will not need to rely upon Hood for timely delivery of milk.

Agri-Mark will not own Hood, but only its assets. Agway will own all of Hood's stock and thus be able to elect Hood's management. The proposed Final Judgment assures that Agri-Mark and Hood will remain separately controlled. Paragraph IX would

prevent Agri-Mark and Hood from having any common Director, Officer, or management. It would also enjoin any Agri-Mark personnel from discussing prices for raw or processed milk other than as necessary to arrange sales between themselves.

Paragraph X of the proposed Final Judgment prevents any of the Defendants for five years from acquiring any dairy or balancing plant without the consent of the Department or the Court. This will ensure that the Hood transaction does not serve as a springboard for other similar transactions. After five years, any acquisition would of course be subject to the usual limitations imposed by the Clayton Act.

Paragraph XI would require the Defendants to inform relevant personnel of the obligations imposed by the proposed Final Judgment. Paragraph XI E requires Agri-Mark to notify the Department if it suspends repayment of any member equity contribution or allocated retained earnings. This will allow the Department to make certain that any such suspension was not motivated by a desire on Agri-Mark's part to prevent members from leaving the cooperative.

Finally, the proposed Final Judgment has provisions giving the Department the right to inspect the Defendants' books and records to ensure compliance with or detect violations of the proposed Judgment. The proposed Final Judgment has a clause retaining jurisdiction in the Court to issue such orders as may be necessary under the Judgment. The term of the Final Judgment is 20 years.

#### IV. Remedies Available to Private Parties

Entry of the proposed Final Judgment will have no effect on the rights of persons who have been damaged by the alleged violations. Private plaintiffs may sue for money damages or any other legal or equitable remedy.

#### V. Procedures Available for Modification

During the time period provided in the Antitrust Procedures and Penalties Act (a minimum of 60 days following the filing of the proposed Final Judgment and its publication in the Federal Register), interested persons may file comments with Alan L. Marx, Assistant Chief, General Litigation Section, Antitrust Division, Department of Justice, Washington, D.C. 20530, urging that the decree not be entered in the form proposed. These comments, and the United States' responses to them, will be filed with the Court and published in the Federal Register. All comments will be given appropriate consideration by the United States, which remains free to withdraw its consent to the proposed Judgment at any time prior to its entry. In addition, the proposed Judgment provides for retention of jurisdiction over this action by the Court, which will permit the parties to apply to the Court for such orders as may be necessary or appropriate for modification of the Judgment.

#### VI. Alternatives Actually Considered

The prayer for relief in the complaint asks that a permanent injunction be issued preventing "Agri-Mark and its successors and all persons acting on its behalf . . . from acquiring either directly or indirectly any interest in Hood or Hood's assets."

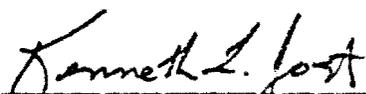
This provision would have permitted any producer who joined Agri-Mark to leave during the 45-day grace period. However, for Agri-Mark to finance its organization it must be able to project revenues derived from members' equity contributions with some degree of certainty. Agri-Mark argued that this provision would have prevented that and substantially impeded its formation. This provision was designed to allow producers who joined Agri-Mark for lack of other outlets to leave. Our primary concern in this regard laid with the former Hood independents. This group of producers will receive the benefits of this proposal through paragraph VII of the proposed Final Judgment. Other provisions of the proposed Judgment dealing with possible lock-in of producers (paragraphs V and VIII) will benefit all Agri-Mark members.

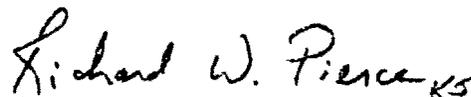
VII. Determinative Documents

There were no documents that the United States considered determinative in formulating the proposed consent decree.

Respectfully submitted,

  
-----  
MICHAEL P. HARMONIS

  
-----  
KENNETH L. JOST

  
-----  
RICHARD W. PIERCE

Attorneys for the United States

Dated: July 15, 1980