IN THE MATTER OF

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION, ET AL.

FINAL ORDER, OPINION, ETC. IN REGARD TO VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2(a) OF THE CLAYTON ACT, AS AMENDED

Docket 9000. Complaint November 26, 1974—Final Order July 25, 1984

For reasons set forth in the Commission's Opinion, this final order reverses the ALJ's initial decision, denies complaint counsel's appeal, grants appeal of respondents and dismisses the complaint charging a New York City conglomerate and its wholly-owned baking company subsidiary with alleged violations of federal law. The complaint had alleged that the baking company had attempted to monopolize the white bread product sales market in five geographic areas and caused competitive injury in those markets by, among other things, engaging in predatory or discriminatory pricing practices for significant periods of time.

Appearances

For the Commission: *Jerry A. Philpott, Renee S. Henning, Stephen E. Nagin, Richard Malatt, Gilda E. Rodriguez, Marimichael O. Skubel* and *Allen M. Hickey*

For the respondents: *John H. Schafer, S. William Livington, Jr., David J. Cynamon, Bruce D. Sokler* and *Jane H. Chalmers, Covington & Burling,* Washington, D.C. and *Craig D. Walley* and *Gordon Thomas,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated and are now violating Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues this complaint charging as follows:

Definitions

1. For the purpose of this complaint, the following definitions shall apply:

(a) *Bread* shall refer to white pan bread and bread type rolls and related products but not to specialty breads.

(b) *Wholesale bakers* are bakers of bread which sell at wholesale to other establishments including groceries, restaurants, hotels and institutions. Bakeries owned and operated by grocery chains which distribute the bakeries' products through the chains' own retail grocery stores are not wholesale bakers. [2]

Respondents

2. Respondent International Telephone and Telegraph Corporation ("ITT") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business located at 320 Park Avenue, New York, New York. ITT is a conglomerate engaged directly and/or through subsidiaries in numerous and diverse businesses including, among others: the development, manufacture, distribution, servicing and operation of electronic and telecommunication equipment and other industrial and consumer products; life, fire and casualty insurance; processing wood pulp; mining; business and consumer services; and the manufacture and distribution of food products and automotive parts. In 1973, ITT had sales of approximately $10.2 billion, making it the ninth largest domestic corporation in terms of sales, and assets of approximately $10.1 billion, making it the eighth largest in terms of assets.

3. Respondent ITT Continental Baking Company, Inc. ("ITT Continental"), is a corporation organized, existing and doing business under the laws of the State of Delaware, with its office and principal place of business located at Halstead Avenue, Rye, New York. ITT Continental is a wholly-owned subsidiary of ITT, which acquired it in 1968 from its predecessor, Continental Baking Company. ITT Continental is engaged in the manufacture, sale and distribution of bread, cakes, snacks such as potato chips, frozen prepared foods, candy and ingredients for the bakery industry. In 1972, ITT Continental's net sales were approximately $865 million. In 1972, ITT Continental would have been ranked as the 165th largest domestic corporation in terms of sales if it were not owned by ITT.

4. ITT controls, approves and benefits from the practices of ITT Continental.

Jurisdiction

5. In the course and conduct of their businesses, respondents are and for a substantial period of time have been engaged in selling bread throughout various States of the United States, and have caused bread baked in various states to be shipped to purchasers in various other states. Thus, respondents are and at all times relevant

herein have been engaged in a continuous and substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Clayton Act, as amended by the Robinson-Patman Act. [3]

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act.

Trade and Commerce

6. The relevant product market for purposes of this complaint is the baking, sale and distribution of bread by wholesale bakers. The wholesale baking of bread is the largest and most significant submarket of the bread baking industry. Relevant geographic markets consist of regional and local markets in the United States where bread is sold by ITT Continental, and aggregates thereof.

7. The baking, sale and distribution of bread is a substantial industry in the United States. In 1972, approximately 15.6 billion pounds of bread including specialty breads were sold in the United States, with a retail value of approximately $3.3 billion. Of this, approximately 87.5% was baked and sold by wholesale bakers.

8. Concentration in the nation's bread industry is increasing. In 1963 the four largest bakers of bread and specialty breads accounted for 24% of the nation's bread sales; the eight largest accounted for 36%. By 1971 the four largest had increased their share to 30% and the eight largest to 40%. Concentration among the nation's wholesale bakers is higher. In 1963 the top four wholesale bakers of bread and specialty breads accounted for 31% of the total sales of the nation's wholesale bakers. By 1970 this had risen to over 37%. Between 1958 and 1972 the number of bakery plants declined by 45%. From January 1972 to mid-1973, 43 wholesale baking firms and 80 wholesale bakery plants closed.

9. Shares of total sales at the national level understate concentration in the bread industry. Due to its short shelf life and high transportation cost, most bread is sold within 150 miles of the bakery. Concentration is significantly higher in local and regional markets than in the nation as a whole, with 4-firm concentration ratios substantially exceeding 50% in many such markets.

10. Barriers to entry into wholesale bread baking are high. Significant start-up costs are associated with a new bakery, particularly with respect to establishing routes and obtaining sufficient shelf space. Because bread shelf space of grocers is limited, the introduction of a new brand means displacement of [4] established brands. Established multiplant wholesale bakers with interstate treasuries histori-

cally have met or bettered price concessions and promotions offered by bakers trying to expand or enter into their markets. Moreover, since bread is a homogenous product which is differentiated on the basis of sales and advertising expenditures, a new entrant who seeks to alter consumer preferences for established brands is placed at a substantial cost disadvantage.

11. ITT Continental is the world's largest bread baker. Its net sales of bread in 1973 were approximately $475 million. This represents a 47% increase over 1968, the year in which ITT acquired Continental Baking Company. In 1970 ITT Continental's net sales of bread were almost half again as large as the next largest wholesale baker, Campbell-Taggart Baking Company. ITT Continental bakes bread in 48 bakeries located in 30 states and the District of Columbia and distributes it through in excess of 300 depots to areas in 46 states occupied by 70% of the population of the United States. ITT Continental's share of the nation's bread industry has grown steadily.

12. ITT Continental's market shares in regional and local markets are substantially higher than its share of national sales. ITT Continental has over 75% of the wholesale baker market in 4 regional or local markets; over 60% in 8; over 50% in 17; over 40% in 37.

13. ITT Continental is also the nation's largest producer of snack cakes, which it markets under the "Hostess" label. In 1973, ITT Continental's snack cake sales were $315 million. In some areas snack cakes and bread are distributed by the same ITT Continental routes.

14. ITT Continental is one of few multistate wholesale bakers. In competition with other multistate wholesale bakers such as Campbell-Taggert Baking Company, American Bakeries Company, and Interstate Brands Corporation, as well as those local wholesale bakers who are still in existence, ITT Continental sells and distributes bread in most of the populous portions of the United States. [5]

15. ITT Continental's wholesale baking business was built and conducted and is now conducted on a national basis. From its headquarters in Rye, New York, ITT Continental centrally purchases raw materials for the production of bread, as well as supplies, equipment, and other needs. Advertising, both national and local, is prepared and placed in media by ITT Continental's headquarters. ITT Continental at all times maintains control, directly from its headquarters or through various regional offices, over the activities of its bakeries, such control being exercised with respect to, among other matters, planning and sales objectives, national accounts, the area in which and the price at which each bakery is permitted to sell, standards of products maintained by said bakeries, all but minor repairs to plants and equipment, personnel policies, and funds collected and disbursed by said bakeries.

Acts, Practices and Methods of Competition

16. ITT Continental and ITT jointly set for ITT Continental its sales and profit budgets and policies, including sales growth goals, which force ITT Continental managers to behave in a predatory manner. Through a requirement for detailed and systematic reports from ITT Continental with respect to all of its significant business decisions, ITT agrees upon, and/or concurs and acquiesces in most of the acts, practices and methods of competition engaged in by ITT Continental, including most or all of those hereinafter set forth.

17. Respondents plan to achieve dominance in wholesale baking in all relevant geographic markets, seeking to attain their objective by engaging in the acts, practices and methods of competition hereinafter set forth, most of which have been and are directed to specific geographic markets.

18. With the intent to lessen, hinder or restrain competition and/or to attain monopolies in wholesale baking in one or more relevant geographic markets, beginning at least as early as 1952, and continuing thereafter up to and including the date of this complaint, respondents and the predecessor of ITT Continental, Continental Baking Company, have engaged in various acts, practices and methods of competition including, but not limited to, the following: [6]

(a) Acquisitions of a number of wholesale bakers;

(b) Since 1962, acquisitions of at least three independent bakers in violation of a Federal Trade Commission order forbidding such acquisitions;

(c) Sales of bread below their cost or at predatory prices for substantial periods of time in various geographic markets;

(d) Subsidization of sales below cost or at predatory prices in various geographic markets by sales at higher prices in less competitive geographic markets;

(e) Discriminations in price, directly or indirectly, between purchasers of bread of like grade and quality;

(f) Paying for services or facilities furnished by selected customers and/or furnishing services to selected customers to induce such customers to maintain and/or increase purchases of respondents' bread;

(g) Furnishing allowances, discounts and other things of value to customers or customers' employees for shelf and/or other merchandising space in grocery stores;

(h) Systematic concentration of advertising and consumer and trade promotions in connection with the sale of bread at predatory prices in various geographic markets; and

(i) Use of its dominant position in the sale of snack cakes and profits resulting therefrom to increase bread sales and to subsidize losses thereon. [7]

Effects

19. The effects of the acts, practices and methods of competition described in Paragraphs 16, 17 and 18 are, among others, to:

(a) Impair the ability of wholesale bakers to compete with ITT Continental;

(b) Induce small wholesale bakers to discontinue the production and sale of bread;

(c) Aggravate the trend towards concentration in wholesale baking;

(d) Deter new entrants and raise barriers to entry into the wholesale baking industry;

(e) Deter existing wholesale bakers from undertaking competitive initiatives;

(f) Inhibit growth of existing wholesale bakers;

(g) Substantially hinder, lessen, eliminate, injure, destroy and/or foreclose actual and potential competition in wholesale baking; and

(h) Increase the probability that respondents will attain a monopoly in the wholesale baking industry in each and all relevant geographic markets. [8]

Violations

20. The acts, practices and methods of competition alleged in this complaint constitute attempts by respondents to monopolize and injure competition in the wholesale baking industry in relevant geographic markets in violation of Section 5 of the Federal Trade Commission Act.

21. The acts, practices and methods of competition alleged in this complaint constitute unfair methods of competition or unfair acts or practices by respondents in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violations of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

22. Each of the allegations in Paragraphs 1 through 5 herein are incorporated in this Count II as though set forth in full.

23. In the course and conduct of their business in commerce, ITT and ITT Continental, now, and for many years past have been in substantial competition with other corporations, partnerships, individuals and firms engaged in the manufacture, distribution and sale of bread.

24. Respondents, in the course and conduct of their business in commerce, as above described, have for a number of years discriminated and now are discriminating in price, directly or indirectly, between different purchasers of bread, by selling bread of like grade and quality to some of such purchasers at substantially higher prices than to other of such purchasers.

Among the methods by which respondents discriminate between said purchasers is the granting of discounts of 5 to 12% and more off the list or regular prices to some customers in a trading area and denying such discounts to competing customers in the same trading area, and to customers in other trading areas. [9]

25. The effect of such discriminations in price as alleged herein may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondents and respondents' customers are respectively engaged; or to injure, destroy or prevent competition with respondents or with purchasers therefrom who receive the benefit of such discriminations.

26. The aforesaid acts and practices of the respondents constitute violations of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Initial Decision by

Miles J. Brown, Administrative Law Judge

May 1, 1981

Introduction

The Federal Trade Commission issued its complaint in this matter on November 26, 1974 (mailed December 16, 1974), charging respondents, International Telephone & Telegraph Corporation ("ITT") and ITT Continental Baking Company, Inc. ("Continental") with unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) and with discriminations in price in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13(a)). [2]

Initial Pleadings

More particularly, the Commission charged that Continental, until its acquisition by ITT in 1968, and Continental and ITT since that time, have engaged in certain practices with the intent to lessen, hinder or restrain competition or to attain monopolies in wholesale baking in one or more relevant geographic markets. The Commission alleged that the practices challenged included, but were not limited to, the following (*See* Complaint ¶ 18):

(a) Acquisitions of a number of wholesale bakers;

(b) Since 1962, acquisitions of at least three independent bakers in violation of a Federal Trade Commission order forbidding such acquisitions;

(c) Sales of bread below their cost or at predatory prices for substantial periods of time in various geographic markets;

(d) Subsidization of sales below cost or at predatory prices in various geographic markets by sales at higher prices in less competitive geographic markets;

(e) Discriminations in price, directly or indirectly, between purchasers of bread of like grade and quality;

(f) Paying for services or facilities furnished by selected customers or furnishing services to selected customers to induce such customers to maintain or increase purchases of respondents' bread;

(g) Furnishing allowances, discounts and other things of value to customers or customers' employees for shelf or other merchandising space in grocery stores;

(h) Systematic concentration of advertising and consumer and trade promotions in connection with the sale of bread at predatory prices in various geographic markets; and

(i) Use of its dominant position in the sale of snack cakes and profits resulting therefrom to increase bread sales and to subsidize losses thereon.

The Commission alleged that the effects of the challenged practices are to (Complaint ¶ 19):

(a) Impair the ability of wholesale bakers to compete with Continental;

(b) Induce small wholesale bakers to discontinue the production and sale of bread;

(c) Aggravate the trend towards concentration in wholesale baking;

(d) Deter new entrants and raise barriers to entry into the wholesale baking industry;

(e) Deter existing wholesale bakers from undertaking competitive initiatives; [3]

(f) Inhibit growth of existing wholesale bakers;

(g) Substantially hinder, lessen, eliminate, injure, destroy and/or foreclose actual and potential competition in wholesale baking; and

(h) Increase the probability that respondents will attain a monopoly in the wholesale baking industry in each and all relevant geographic markets.

The Commission also alleged that respondents have discriminated in price between different purchasers of bread by selling bread of like grade and quality to some of such purchasers at substantially higher prices than to other of such purchasers, the effect of which may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondents and respondents' customers are respectively engaged (Complaint ¶ 24).

In the notice of contemplated relief that accompanied the complaint, the Commission advised that, if the charges alleged in the complaint were sustained, it may, among other provisions, order respondents to divest wholesale baking assets, including bakery plants and other facilities in one or more areas, and require the licensing of brands or trademarks for respondents' bread under such terms as are consistent with the restriction of competition in the relevant markets (Complaint at 11).

In their answer (filed March 21, 1975) respondents admitted certain background facts, but denied all allegations as to any violation of Section 5 of the Federal Trade Commission Act or Section 2(a) of the Clayton Act, as amended. Respondents also put forth as defenses certain prior actions of the Commission inconsistent with the theory of the complaint in Docket 9000 and the fact that certain challenges to their practices should be barred because of undue passage of time. Respondents further asserted that respondent ITT was not responsible for Continental's actions before September 1968, and that after that date it, being a corporation separate and distinct from Continental, has not engaged in the manufacture, sale, or distribution of bread. As to the charges of price discrimination, respondents raised the "cost justification" and "meeting competition" defenses. Finally, respondents asserted that the Commission lacked authority, on the basis of the allegations of the complaint, to secure the relief set forth in the notice of contemplated relief.

Sanctions Order

In the course of extensive post complaint discovery, complaint counsel sought detailed information on which they could recompute cost figures for individual bread varieties, cost figures which they considered essential to sustain the "sales below cost" allegations of the complaint. Respondents, stating that such an investigation was, in their opinion, beyond the scope of the Commission's complaint, on December 10, 1976, [4] refused to produce any further documents to support complaint counsel's efforts to develop a different cost accounting system from that which was employed by Continental during the years covered by the complaint.

Following complaint counsel's application for sanctions available under Section 3.38 of the Commission's Rules of Practice, and the

Administrative Law Judge's order of February 16, 1977, granting the application for sanctions, an order was issued March 22, 1977, imposing sanctions on respondents for failure to produce all documents deemed essential to recompute Continental's costs. The "sanctions order" provided that, for specific geographic markets during specific time periods, complaint counsel were deemed to have established that Continental sold bread below cost no matter how cost is measured. The sanctions order also provided that Continental could not introduce into evidence or otherwise rely upon the documents which it failed to produce and that it could not object to complaint counsel's use of other relevant material and reliable evidence to demonstrate that Continental made sales below cost in the designated geographic markets for the time periods specified.

Respondents were granted leave to file a limited appeal to the Commission on the policy question of whether it would be more appropriate for the Commission to seek district court enforcement of the subpoena as it related to the "withheld cost documents" rather than impose the sanctions for withholding the documents. On June 29, 1977, the Commission issued its order denying respondents' application for review.

Following the Commission's denial of the application for review, respondents made a continuous effort to require complaint counsel to accept their tender of the withheld documents and to obtain an order vacating the sanctions order. Complaint counsel steadfastly refused to accept those documents and respondents' motions were denied. (*See* orders dated November 7, 1977; September 28, 1979, April 15, 1980).

Respondents' Discovery

As complaint counsel's pretrial discovery neared completion at the end of 1977, it was agreed that respondents' discovery directed to Continental's wholesale baker competitors would be held in abeyance until the conclusion of the case-in-chief. Although broad subpoenas were issued to these nonparties in order to ensure preservation of documents, return dates thereon were suspended. After the case-in-chief was concluded, limited returns were negotiated with four of Continental's wholesale baker competitors.

Hearings

Adjudicative hearings commenced June 19, 1978 and 81 days of trial were held intermittently until October 15, 1980. [5] Complaint counsel's case-in-chief used 53 trial days, respondents' answering case used 16 trial days, complaint counsel's rebuttal case used 11-1/2 days and respondents surrebuttal case used 1/2 day. Ten of these hearing dates were devoted entirely to the handling of documentary material.

After the close of complaint counsel's case-in-chief on June 7, 1978, respondents filed numerous motions to dismiss the complaint in certain particulars, all of which were denied (Order Denying Respondents' Motion to Dismiss the Complaint as to International Telephone and Telegraph Company ("ITT"), dated September 21, 1979; Order Denying Respondents' Motion to Dismiss the Seattle phase of the Case, dated September 24, 1979; Order Denying Respondents' Motion to Dismiss the Complaint as to the Price Discrimination Allegations (Count II), dated October 5, 1979)). Earlier motions to dismiss the Denver and Minneapolis phases of the case on the grounds that the evidence would be stale were also denied (9182; order dated January 15, 1979).

Time to File Initial Decision

On October 17, 1980, the Administrative Law Judge closed the record for the receipt of evidence, although the record was reopened on November 4, 1980, to permit the receipt into evidence of certain documents that complaint counsel acquired from respondents after October 17, 1980. On October 27, 1980, the Commission granted a joint motion of counsel for extensions of time in which to file proposed findings and reply briefs. The Commission also extended the time for filing the initial decision until February 27, 1981. On December 23, 1980, the Commission issued an order, on complaint counsel's motion, granting the parties a further extension of time in which to file proposed findings and reply briefs and extended the time for filing the initial decision until March 14, 1981. Proposed findings were filed on January 9, 1981, and reply briefs were filed on February 6, 1981. On March 4, 1981, the Commission granted the Administrative Law Judge's request for an extension of time until April 10, 1981, in which to file the initial decision, and on April 7, 1981, further extended that time to May 1, 1981.

Motions and Abbreviations

Any motions appearing on the record not heretofore specifically ruled upon either directly or by the necessary effect of the conclusions in this initial decision are hereby denied. The proposed findings and conclusions submitted by counsel supporting the complaint ("CCPF") and counsel for respondents ("RPF") have been given careful consideration and to the extent not adopted by this decision, in the form proposed or in substance, are rejected as not supported by the evidence, as argumentative, as immaterial or based on material not in evidence. Other abbreviations used in this initial decision are: CX - Commission Exhibit; RX - Respondents' Exhibit; CC Mem - Complaint counsel's memorandum of law in support of CCPF; RBr - **[6]** Respondents' brief in support of RPF; CC Reply Br. - Complaint counsel's reply brief. and R Reply Br. - Respondents' reply brief.

Collateral Proceedings

Most of the factual and legal issues presented in this case arise from the facts and circumstances relating to Continental's pricing practices in five general market areas; *i.e.,* Denver, Minneapolis-St. Paul, Los Angeles, Northern California and Cleveland-Akron. Continental's practices have been, and in some cases, continue to be, the subject of private litigation. In Denver, a District Court's determination that Continental had violated Section 2(a) of the Clayton Act, as amended, was upheld by the Court of Appeals, *Continental Baking Co.*v. *Old Homestead Bread Co.,* 476 F.2d 97 (10th Cir. 1973), *cert. denied,* 414 U.S. 975. In Minneapolis-St. Paul, private damage suits filed by Zinsmaster Baking Co., Pan O Gold Co., and Tender Krust/Creamy Crust, were settled before trial (CX 299F, 300A), *Zinsmaster Baking Co., et al.* v. *ITT Continental Baking Company,* No. 4–68 Civ. 96 (D. Minn). In Los Angeles, a suit brought by several of Continental's wholesale baker competitors was being prepared for trial during the final hearings in this matter. *See Wm. Inglis & Sons, Inc.* v. *ITT Continental Baking Co.,* (S.D. Cal. No. 78–3604). In Northern California a District Court's jury verdict for plaintiff was reversed by the district judge on a motion by Continental for judgment notwithstanding the verdict, *Wm. Inglis & Sons, Inc.* v. *ITT Continental Baking Co.,* 461 F.Supp. 410 (N.D. Cal. 1978), appeal pending in the Court of Appeals for the Ninth Circuit. In Cleveland, the representatives of the creditors of Laub Baking Co. have filed a treble damage suit against Continental, a matter that was being prepared for trial during the final hearings in this matter, *Melamed* v. *ITT Continental Baking Co.* No. 74–960 (N.D. Ohio). With respect to a sixth market, Seattle, complaint counsel have alleged that Continental engaged in certain anticompetitive practices, although no price discrimination conduct or sales below cost are alleged. Continental's practices in Seattle were also the subject of a private damage suit. The Court of Appeals applied the labor exemption of the antitrust laws and remanded it to the District Court for dismissal, *Granddad Bread Inc.* v. *Continental Baking Co.,* 612 F.2d 1105 (9th Cir. 1979), *cert. denied,* 49 USLW 3493 (January 12, 1981).

Although the record in this matter contains certain materials collected or used in evidence in these other cases, this case is a *de novo* consideration of all issues, factual and legal, raised by the allegations of the complaint in Docket 9000, as modified or explained during the administrative proceedings.

In addition, the Commission investigated Continental's practices in

Denver and Minneapolis, and closed both files [7] without prejudice to the right of the Commission to reopen those investigations. (*See* Attachment A to Respondent's Motion to Dismiss the Denver Phase of the Case; RX 402C). A compliance investigation in Seattle during the early 1970's, relating to a 1964 Commission order prohibiting price-fixing, was closed without action (*See* Order Denying Respondents' Motion to Dismiss the Seattle Phase of the Case, dated September 24, 1979.)

In Camera Treatment

In camera treatment has been afforded many of the documentary exhibits in this case (including some in the rejected file). Although it was generally understood that all *in camera* status would expire on the date of the initial decision in this matter the record contains some exceptions and ambiguities on this subject (3999, 9166, 11466, 11429–49, 11829–30, 11319).

During the adjudicative hearings, counsel for Interstate moved to have Rxs 1051C–D; 1145A–J; 1146A–M; 1147A–B and 1148A–B (rejected) placed *in camera* with certain restrictions on their availability to employees of respondents (10382). These documents contain information about Interstate's marketing strategies and techniques, as well as analyses, and, if made public, may be detrimental to Interstate's business (*See* 10382). Interstate's motion was granted and *in camera* treatment was directed until further order of the Commission (10383, 10688).

First National Supermarkets ("National", the parent corporation of Pick N Pay, a Cleveland, Ohio, chain supermarket) has filed a motion for post-decision *in camera* protection for certain documents that it supplied to the parties for use in Docket 9000. These documents contain the formula by which Continental's wholesale prices of Pick N Pay private label bread products are determined, a formula that is used currently. National contends that this formula, as well as current prices charged by Continental, is highly sensitive business information, the disclosure of which to competitors would be detrimental to National's business. All information which is essential to decide the issues in this matter is contained in the portion of the record that will be open to public inspection. Accordingly, to protect the legitimate business interest of Pick N Pay and National, *in camera* treatment for CXs 973 (portion), 974, 975, 976, 978, 979, 980, 981, 982A–B, 984 A–G, 986 A–C, 2602 A–B and 2601 (A–D, rejected) is extended until the date of the Commission's decision in this matter or until otherwise ordered by the Commission.

There does not appear to be any reason to extend *in camera* treatment for any other document of record. Accordingly, the *in camera* status for all other *in camera* documents expires as of the date of this initial decision. [8]

Preliminary Summary of Facts and Contentions

Although a long and detailed recitation of the facts annotated to the record is presented in this initial decision it seems appropriate to set forth a brief summary of the salient facts and the parties' basic contentions as an introduction to those findings.

The principal producers of bread products are either wholesale bakers or chain grocery stores that operate their own bakeries. Some wholesale bakers are multiplant companies operating a large number of bakeries throughout the United States. There are also wholesale bakers that operate in a few or only in one market area.

Bread bakers usually produce a great number of bread products. White bread constitutes, by far, the largest single bread product, and it is considered to be a homogeneous product. The same dough mix may be used to produce loaves of white bread, hot dog rolls and hamburger buns. These white bread products are generally referred to as "white pan bread." Some other bread products such as whole wheat, rye and pumpernickel breads are usually referred to as "variety" breads.

Wholesale bakers sell bread products to retail grocery stores, restaurants and institutions. They usually deliver bread products to the purchasers' stores or places of business. Chain store bakers, called "captive bakers," distribute their bread products exclusively through their own stores. Although production costs are approximately the same for all bread producers, the chain store bakers' costs of distribution are lower than the delivery costs of wholesale bakers. The retail price of captive label bread is usually lower than the retail price of bread baked by wholesalers.

Wholesale bakers sell bread under different labels and at different wholesale prices. The bread products sold under the wholesale bakers' principal trade name are usually called "advertised label." Wholesale bakers sell bread to chain stores that do not have their own bakeries under the stores' label which is generally called "private label" bread. The wholesale price of private label bread is usually lower than the wholesale price of advertised label bread which permits the grocer to sell it at a retail price comparable to the retail price of captive label bread.

Retail grocers, including chains with captive bakeries usually purchase the advertised label of most of the wholesale bakers doing business in a market area. Bread products are displayed in the grocery store on special bread racks. This display is usually referred to as the "bread table." The position and the amount of space on the bread table which a grocer allots to a wholesale baker will determine the volume of that baker's products that are sold at retail in that store. [9]

Grocery stores operating captive bakeries give their captive label bread the largest space and the best position on the bread table. Grocers purchasing private label bread will give that bread product the largest space and best position on the bread table. The wholesale baker supplying a grocer with private label bread customarily will get the next best position on the bread table for its advertised label bread.

The wholesale and retail prices of the various wholesale bakers' advertised bread are usually identical in any particular marketing area. In fact, no wholesaler sells its advertised label white pan bread at a higher wholesale price than its competitors' wholesale price for the same product.

Notwithstanding the growth in population, the overall demand for bread has been static. Over the years the per capita demand for bread has decreased. In fact, the public's preference for white bread has decreased while the preference for variety bread has increased.

In many marketing areas, competition among the chain stores has resulted in low retail bread prices. As the retail price of captive bread decreases, noncaptive chains demand lower wholesale prices for private label bread. As the retail price spread between private/captive label bread and wholesaler bakers' advertised label bread increases, less advertised bread is purchased by the consumer. If one wholesale baker lowers its wholesale price of advertised label to protect its volume in advertised bread, all other wholesale bakers must match the lower price or they soon will face a loss of volume of their sales.

Another method of protecting the sales volume of advertised label, as well as increasing sales volume, is by obtaining a grocer's private label business and the additional sales of advertised label products that result from obtaining favorable space and position on the bread table.

Economies of scale are important in the baking industry and wholesale bakers must operate their bakeries at approximately 80% of maximum possible production capacity (2 shifts and some overtime) in order to obtain maximum efficiency.

As a result of lower wholesale prices, the profitability of the wholesale bakers is affected adversely. Besides lower wholesale prices, the extent of loss of profitability may also depend on a loss of volume of sales or on the percent of a wholesale baker's business that is in private label products.

Complaint counsel contend that in certain marketing areas Continental has lowered the wholesale price of private label bread or advertised label bread below Continental's fully allocated costs for long periods of time and that as a result [10] other wholesale bakers, usually those operating only in one marketing area, have not been able to continue in business. Complaint counsel contend that such practices have been engaged in with the intent of injuring competition and creating a monopoly in an industry that has high barriers to entry. They also contend that the differences in price that result from respondents' pricing practices constitute price discriminations which have the effect of injuring competition and creating a monopoly. For purposes of antitrust analysis, complaint counsel contend that white pan bread baked by wholesale bakers constitutes a relevant product market, and that price discriminations and below cost selling can be measured on particular bread products within that product market (*See generally* CC Mem; CC Reply Br.).

Respondents contend that there is "chronic" excess capacity in the bread industry, usually caused by the backward integration of chain stores acquiring their own baking facilities, thus reducing the space available to wholesale bakers on the bread tables in a market. In this respect they argue that there are no significant barriers to entry into the bread baking industry. They argue that low retail prices of bread charged by the chain stores are the cause of low wholesale prices of private label and advertised label bread. They also contend that the wholesale bakers must compete for whatever space is available on the bread tables of the grocers who do not have captive bakeries and that the wholesale bakers must match the lowest wholesale price on the market. No wholesale baker can unilaterally raise prices. Respondents contend that they never beat other wholesale bakers' prices, but always responded to the prices offered to grocers by their wholesale baker competitors. They argue that it is not improper for a wholesale baker to sell below its fully allocated costs, in that selling at prices above marginal costs contributes to the cash flow and profitability of a baker and that such pricing makes good business sense.

Respondents assert that variety breads are interchangeable with white bread and that captive bread competes with wholesale baker bread. In this respect, they contend that the relevant market is all bread sold by both wholesale bakers and captive bakers. They also contend that wholesale bakers actually sell a line of bread products to grocers and that the product mix of private label and advertised label bread as well as white bread and variety breads, determines the profitability of any customer's account.

Respondents contend that the withdrawal of undercapitalized wholesale bakers that do not advertise their products is inevitable under the market conditions that exist in the bread industry and that such withdrawal is not the result of their pricing activities. Finally, respondents contend that their market share of the bread industry is decreasing and that there is no way that they or any wholesale baker can achieve a monopoly position therein (*See generally* RBr.; R Reply Br.). [11]

Expert Testimony

Both sides presented the testimony of economic experts in support of their respective theories of the case. Complaint counsel's expert witnesses were Dr. Richard G. Walsh, a professor of economics at Colorado State University (8015), Dr. Stanley E. Boyle, a visiting professor of economics and independent consultant (7892), Dr. Rodney D. Patterson, also a professor at Colorado State University (7707), and Dr. Lee E. Preston, a professor of business and public policy at the University of Maryland (11574). Respondents' expert witness was Dr. Michael L. Wachter, professor of economics at the University of Pennsylvania (10386). Only Dr. Walsh has made specific studies of the baking industry, and he published a major work on the subject in 1963 (8017 *et seq.*).

The expert witnesses testified on a number of issues that have been raised in this case including their opinions on market (monopoly) power, relevant product markets, excess capacity, barriers to entry and whether certain pricing practices should be considered predatory instead of being seen as predictable and reasonable business responses to industry conditions. For example, Dr. Wachter testified that in an industry where there was excess capacity and low barriers to entry pricing below fully allocated costs and above marginal costs (or average variable costs) in the short run were to be expected (10421, 10453, 10650). He stated that under such circumstances, predation would not be an economically sound business choice, because it would be highly improbable that the firm could recapture the loss in profits through higher prices in the future (10483, 10625, 10655). In addition, several expert witnesses expressed opinions on whether divestiture would be an adequate remedy if the allegations of the complaint were sustained.

For the most part, the expert testimony is general and theoretical in nature and is not directed to the specific fact situations that exist in the several local marketing areas which have become the subject of this proceeding. In addition, the various opinions seem to be inconsistent in many respects. Accordingly, except for providing some understanding of technical economics concepts, this testimony is not very helpful in assessing the legality of Continental's pricing practices under the several statutes involved. However, it would appear that such expert testimony may be of great value to the Commission when it makes its policy determination as to the future regulation, if any, of respondents' conduct in the baking industry.

Introduction to Findings of Fact

Having reviewed the entire record in this proceeding, and having considered the demeanor of the witnesses who testified at the adjudicative hearings together with the [12] pleadings, admissions, proposed findings, conclusions and briefs submitted by complaint counsel and counsel for respondents, I make the following findings of fact based on the record considered as a whole. Because the record contains much duplication of factual material, not all references possible may be included in the citations to the record, especially where the parties do not differ significantly in their understanding of such facts.

Findings of Fact

Respondents

1. Respondent ITT is a Delaware corporation with its principal place of business at 320 Park Avenue, New York, New York. ITT is a conglomerate engaged, indirectly and through subsidiaries, in numerous and diverse businesses including, among others: the development, manufacture, distribution, servicing and operation of electronic and telecommunications equipment and other industrial and consumer products; life, fire and casualty insurance; processing wood pulp; mining; business and consumer services; and the manufacture and distribution of food products and automotive parts. In 1973, ITT had sales of approximately $10.2 billion and it was ranked ninth among domestic corporations in the Fortune 500 in terms of sales (Complaint ¶ 2; Answer ¶ 2; CX 2051).

2. Respondent Continental is a Delaware corporation with its principal place of business at Halstead Avenue, Rye, New York. Continental is a wholly owned subsidiary of ITT which acquired it in 1968 from its predecessor, Continental Baking Company. Continental is engaged in the manufacture, sale and distribution of bread, cake, snacks such as potato chips, frozen prepared foods, candy and ingredients for the baking industry. In 1972, Continental's net sales were approximately $865 million (Complaint, Answer ¶ 3). If it had been a separate entity, Continental would have been ranked 177th in the "Fortune 500" in terms of sales (CX 2051). In 1972, some of Continental's subcompanies or divisions were Morton's Frozen Food, Pearson Candy Company, Gwaltney (meats), and Panaplus (ingredients) (9905 Dierker).

3. In 1973, Continental baked bread in 48 bakeries located in 30 states and the District of Columbia and distributed it through over 300 depots to areas of 46 states. In 1973, Continental's sales of bread were approximately $445 million and the 1973 dollar sales of bread

were about 35% above its 1968 annual sales (*See* Complaint, Answer ¶ 11).

4. Continental Baking Company was founded in 1924 by the consolidation of 90 baking companies (463 Woodward). By 1978 Continental had 61 plants, 31 of which baked bread exclusively and 7 of which baked cake exclusively (468 Woodward). Since 1924, Continental Baking Company and its successor Continental have been the largest bread baker and snack cake baker in the [13] United States (464, 472–73 Woodward). In 1974, Continental's geographic coverage for bread products was approximately 70% of the U.S. population (471 Woodward; CX 116C). It served approximately 80% of the U.S. with cake (CX 116C).

5. In the early 1970's Continental's bakeries were grouped into 7 regions which are sometimes identified by the location of the regional office: New York, Atlanta, Detroit, Chicago (2), San Francisco, Los Angeles (473–79 Woodward). Each functional official at the bakery level *i.e.,* bakery manager, bakery sales manager, etc. has a counterpart at the regional level to whom he reports (474, 478, 480–81 Woodward; *see* 3164–65 Frielink). The regional office personnel have staff functions instead of line functions. The regional vice president has profit responsibility for his region (473 Woodward). Each regional vice president transmits a monthly management letter to the President of the Bakery Division in Rye, New York (479 Woodward).

6. Continental's Rye Headquarters purchases all major commodities (ingredients) used by its bakeries. It also prepares advertising copy and places advertising with various media. New product development and laboratory work is performed by headquarters personnel. Rye personnel also assist the various regional offices with labor negotiations, in making sales to national accounts, or multiple outlet accounts, and in making sales to certain "institutional accounts" such as hotel chains and military installations (660–61 Meyn).

7. Continental has a very sophisticated money management system by which the cash generated at the various plants is withdrawn each day and moved to Rye, N.Y. and then to ITT in New York City (1324–25 Willmont).

8. The day-to-day accounting is conducted at the individual plants and the results are combined or summarized at the regional offices and forwarded to Rye headquarters (490 Woodward). Since 1973, Continental has employed a Standard Cost system in its individual bakeries. Before implementation of this cost system, Continental developed estimated costs from a test cost program (528–29 Woodward).

9. Continental produces a full line of bread and "snack cake" products (467 Woodward). Continental's bread labels include Wonder, Home Pride Butter Top, Fresh Horizons, Country Fair and Country

Style (467, 493–94 Woodward). Continental's cake labels include Hostess and Twinkies (467–68 Woodward).

Continental's Wholesale Competitors

10. After Continental, the largest wholesale baking companies in the bread industry are Campbell-Taggart, American Baking Company ("American"), Interstate Brands Corporation ("Interstate"), Flowers Bakery and Metz Baking Company (514 Woodward). Today, Continental, Campbell-Taggart and Interstate are the "primary national bakers" (CX 4 (116)). **[14]**

11. Campbell-Taggart was formed as an offshoot of Continental in the late 1920's. In 1974, it had approximately 70 bakeries (CXs 69R, 2107). Many of these bakeries were located in the smaller cities of the South, Southwest, Midwest and Far West (CX 3 (105); *see also* CX 69R, Z–20). Campbell-Taggart serves approximately 30% of the U.S. population (CX 69F). Continental and Campbell-Taggart generally do not sell in the same geographic markets, although major overlapping markets are San Francisco, Denver, Sacramento, Kansas City, Memphis and Indianapolis (CX 3(105); *see also* CX 69R, Z–20). Although Campbell-Taggart performs in-depth services for the various functional departments of its bakeries, the local baking subsidiary companies operate as separate legal entities (CX 69Z–15; 1006–6 Z Mackaman). Campbell-Taggart's labels include Colonial, east of the Mississippi River, and Rainbo, Manor and Kilpatrick, west of the Mississippi River (10063–65 Mackaman; CX 2107). Continental has rated Campbell-Taggart as "excellent" in product quality and management (*See* CX 2107).

12. American operates approximately 20 plants located generally in the Northeastern, Central and Southwestern parts of the United States (CX 2107; *see also* CX 9 (204)). In 1973, Continental considered that American was "retrenching" and in 1979 Continental regarded American as the weakest of its national competitors (CXs 2107; 8 (038)). American's labels include Tastee and, on the west coast, Langendorf (8855 Murray).

13. Interstate operates approximately 30 bakeries located in the Eastern, Central, Southwestern and Northwestern United States (CX 2107). In 1973, Continental considered that Interstate was "retrenching" (CX 9 (154)). Continental generally regarded Interstate as a weaker competitor than Campbell-Taggart, but considered it to be strong in marketing approach and creativity (CX 2107; *see* CXs 2 (087); 4 (133)). Interstate's labels include Millbrook, Butternut, Weber and Blue Seal (3942 Heuter; 4706 J. Walsh).

14. As late as 1972, Ward Baking Company had 15 bread producing plants but was not regarded by Continental as a strong competitor

(CXs 2 (087); 4 (133); 9 (204)). Apparently Ward is no longer considered to be in the bread baking business (9425–26, 9376, 9532 Gase).

15. Flowers serves the Southeastern United States from approximately 21 plants. Continental regarded Flowers very highly (CX 2107). During the times relevant in this case, Flowers and Continental apparently did not compete in the sale of bread products, at least not in the six marketing areas studied in this case (*See* 514 Woodward; 10267 Jakaki).

16. Metz has approximately 14 bakeries located in the North Central region of the U.S. (10200 Metz). Its principal label is Old Home (10201 Metz). [**15**]

17. Major bakery cooperatives are Quality Bakers of America ("QBA"), W. E. Long, and American Bakers Cooperative (8053–54 R. Walsh; 514–15 Woodward). These cooperatives are management service associations organized on a nonprofit basis to provide the kind of services that a multiplant corporation might provide to its individual plants, including counseling services on production, engineering or accounting problems. Many independent bakers belong to cooperatives (8053 R. Walsh; *see* CX 3 (108); 10266–69 Jakaki; 11199 Schaus). The cooperatives also have advertised labels. Members of QBA can use the label Sunbeam and members of W. E. Long can use the label Holsum in many marketing areas (490–91 Woodward; RX 1039).

18. It is estimated, based upon information supplied by wholesale bakers to the Commission in 1970, that the shares of the national wholesale bakers' bread and bread type rolls national market were as follows: Continental 14.2%; Campbell-Taggart 9.7%; American 7.9% and Interstate 5.6% (*See* RX 1042 *in camera*).

Captive Bakers

19. In addition to the wholesale bakers, many retail grocery chains operate their own bakeries and produce bread which they sell in their own retail outlets (10208–09 Metz). In some marketing areas the chain store or "captive bakers" may be the largest producers of white pan bread.

Bread Baking

20. The bakery products produced by large wholesale bakers include white bread, hamburger buns and hot dog rolls, variety and hearth breads such as whole wheat, rye, pumpernickel and raisin breads, brown and serve rolls, specialty rolls such as Parker House rolls and English muffins, French bread, bread stuffing, snack cakes, doughnuts, pastries, sweet rolls and fresh pies (RX 1000C&E). White pan bread ("white bread") is white bread that is baked in a pan to the standards set by the government and it is considered to be a homo-

geneous product no matter who bakes it (499–500, 508 Woodward; *see* 7909 Boyle).

21. White pan bread is produced by either a conventional process (which entails the mixing of each batch of dough separately) or a continuous mix (which permits a continuous mixing of the dough) (518–19 Woodward). Although the continuous mix process became popular in the 1960's, the present trend is back to conventional mix process because it is more flexible in the production of variety breads and because it produces white bread, the texture of which may have better consumer acceptance (519–20 Woodward; *see* 3358–59, 3396 Frielink).

22. In the conventional mixing process, a sponge is produced. It ferments. Other ingredients are added after **[16]** fermentation. The mixture is then passed through equipment to be scaled, divided and placed in a pan to be baked. In the continuous process the ingredients are fed into a mixer or processing unit. The dough continues in a steady stream without fermentation, then it is scaled, divided and placed in a pan and baked (724 Meyn). Hearth breads are baked on a hearth, that is, a solid surface. Regular pan bread is baked in a pan on a shelf oven over a flame which is applied to the pan (724 Meyn). Continental uses special pans to produce hearth type breads (725 Meyn). Continental also uses a "brew system" which enables it to produce bread with properties of the conventional mix process by the continuous mix method (3199–3200, Frielink).

23. Economies of scale are important in the baking industry and wholesale bakers must operate their bakeries at approximately 80% of maximum production capacity (2 production shifts and some overtime) in order to obtain maximum efficiency (11204–05, 11223–24 Shaus; *see* 10295, 10300 Jakacki). Independent wholesale bakers are generally as efficient, if not more efficient, than the large multiplant wholesale bakers (11199–11200 Shaus).

Bread Distribution

24. Continental and other wholesale bakers sell bread principally to retail grocery stores. Wholesale bakers also sell to restaurants, hotels, institutions, and other customers (467–68 Woodward). It is estimated that Continental's sales to restaurants and institutional accounts, which consisted predominantly of buns and rolls was approximately 13% of its total route sales (RX 1039; *see also* CX 2361 B).

25. Continental and most other wholesale bakers distribute bread though a system of route salesmen who deliver bread to retail grocery stores and restaurants. These route deliveries are made from the bakery or from depots or agencies to which bread is transported in

large trailer trucks from the bakery for transfer to route trucks (482–3, 525 Woodward; 3167 Frielink).

26. Bread is usually sold on a guaranteed sales basis, that is, the wholesaler takes back loaves that are not sold within a few days. These loaves are called "stales" and the service is called "stale return." Sometimes bread is sold on a "no return" basis at a lower wholesale price (*See, e.g.,* CXs 207; 1714F; 1515 Z–95). Bread that is returned is usually placed in the bakery "thrift store" for resale at a reduced price (664 Meyn) or sold to farmers as feed (1120–21 Brout). Continental sets 48 hours as the shelf life of its Wonder label bread (726 Meyn; 1120 Brout). The driver-salesmen provide "rack service" to grocery stores. They physically place the fresh bread on the grocery store shelves two or three times a week and take away the stale returns.

27. Driver salesmen are members of the Teamster Union. Most union contracts provide that their compensation be based on **[17]** a certain salary plus commission. Chain store bakers usually distribute bread products by semitrailer to the "door" of their retail outlets; the bread is placed in the grocery shelves by store employees. Drivers of semitrailers usually belong to a different "local" of the Teamsters Union. They are paid on a straight hourly rate (726 Meyn). Generally, the costs of producing white bread are uniform among bakeries, but chain store bakers enjoy a distribution cost advantage because of the difference in delivery methods (*Id.;* CX 22(ii); 902–03 Stolle).

28. Because of the relatively small area that a bakery can serve with fresh bread, bread is marketed and sold on a local basis. No major baker competes in every market. The competitive conditions, price levels, identity and number of competitors differ from marketing area to marketing area. The pricing in one market generally has no direct impact on prices in other markets. There is no dispute that the relevant geographic markets are generally local (Answer ¶ 6).

29. Most wholesale bakers, including Continental, market an "advertised label" or "primary label" line of bread products sold under the brand name owned and usually promoted and advertised by the wholesaler. "Wonder" is Continental's principal advertised brand and accounts for the bulk of Continental's white bread sales (RX 1039 (*in camera*); 490–91 Woodward; *see* 649 Meyn).

30. Continental and many other wholesale bakers also sell bread packaged under the "private labels" of retail grocery chain stores. The brand name is owned by the retailer and the retailer promotes and advertises the bread. Wholesalers sell private label bread at lower wholesale prices than their advertised label, and private label bread is sold by the retailer at a lower retail price than advertised label bread (490–98 Woodward; *see* 727 Meyn). A private label program

usually includes at least the popular size loaves of white bread, hot dog rolls and hamburger buns (3177–78 Frielink; 4537 A. Gordon; 4734 J. Walsh; *see e.g.,* CX 1526B–C).

31. In addition, wholesale bakers sometimes sell "secondary" label bread. Secondary label bread usually sells at a price comparable to private label and is often provided to independent grocers that are too small to have an economical private label program (491, 494 Woodward; 650–51 Meyn). Some wholesale bakers will supply bread to a retail chain store packaged in a "controlled" label owned by the wholesale baker to which that chain store customer is granted exclusive use in a particular marketing area (650 Meyn; 4148 Heaps). Controlled label bread is usually sold at a private label wholesale price (*Id.*).

32. Bakeries owned by retail chain stores are called "captive" bakeries and the bread baked and sold in the chain's **[18]** retail outlets is called "captive label" bread. It is estimated that 50% of the white bread produced and sold in the U.S. is sold under either private label or captive label (604 Woodward).

33. Shelf position and the amount of shelf space in the retail grocery store are the most important factors in the marketing of bread, in that a better shelf position will sell more bread and larger shelf space will sell more bread (504–05 Woodward; 690–91 Meyn; 854–55 Vail). In addition, the consumer franchise (consumer acceptance of the labeled product) is an important factor. The grocer determines the allotment for bread shelf space among his various suppliers (652–53 Meyn). A preferred position for bakery products is the position that is exposed to the major flow of traffic past the bakery products display (656, 692 Meyn). It is customary for a grocer to allot the preferred position and the largest amount of shelf space to his private label bread and the next best position to the supplier of that private label bread which the supplier will use to merchandise his advertised label (506–08 Woodward; 656 Meyn). Chain stores with captive label bread will allot the preferred position and the largest amount of shelf space to the captive label bread (10137–38 Nissen; 10210–11 Metz).

34. Most grocers including chains who have their own bakery will usually carry a limited quantity of the advertised labels of all the wholesale bakers selling in a particular marketing area in order to meet consumer demand. Restaurants and institutions, on the other hand, usually purchase bread products from only one wholesaler.

35. Although all white bread is virtually a homogeneous product with regard to quality, nutrition, palatability and physical features, wholesale bakers, by advertising their primary label bread, are able to create a consumer franchise for their brands. Because of this consumer franchise, a retail grocer is able to sell advertised white bread

at a higher retail price than brands that do not have a consumer franchise (CX 104; *see* 8184 R. Walsh).

36. Historically, the retail price of captive label bread is below the price of advertised label bread, and private, controlled, and secondary label breads are used by chain stores, which do not have their own bakeries, to compete at the retail level with the captives. Wholesale bakers sell bread products under private controlled and secondary labels at a lower wholesale price than the wholesale price of advertised label. A large retail price spread between captive and private label bread, on the one hand, and advertised label bread, on the other, will result in a loss of sales of advertised label bread. If this price spread is reduced the captive and private label products will lose sales and there will be an increase in sales of advertised label bread (*See* 10139 Nissen; 10239–40 Metz). **[19]**

Bread Industry Trends

37. During the 1960's and 1970's, the bread industry has enjoyed little, if any, growth (522, 605 Woodward; 1022 Sweeney), and in recent years the per capita consumption of bread has decreased (522, 605 Woodward; 10088 Mackaman; 11224 Schaus). The market for standard white bread has declined from 8,808 million pounds in 1967 to 8,657 million pounds in 1972, and further decreased to 7,327 million pounds in 1977 (CX 1355, (E-15); RX 1000E). White bread has accounted for an increasingly smaller portion of total bread sales. White bread represented 79% of all bread sold in 1947, 61% in 1967, and 59% in 1971 (CX (178, 192)). On the other hand sales of variety breads have increased (10162 Nissen; 10231 Metz; 11234 Schaus).

38. Although total white bread sales have decreased, the total of private and captive label bread sales have grown. In this respect the private and captive label share of white bread sales nationally increased from 18% in 1960 to approximately 36% in 1971, and Continental expected that that captive and private label share of the white bread marketshare would increase to 50% by 1977 (604 Woodward; CXs 4(130), 21(9); 94A). In 1971, Continental estimated that one third of the white bread that was not sold under an advertised label of wholesale bakers was baked by captive bakers, while two-thirds was private label bread baked by wholesale bakers (CX 4(130)).

39. The cost of ingredients and labor increased sharply during the early 1970's. Because Federal Price Controls often precluded commensurate wholesale price increases, numerous small bakers were forced out of the market by the resulting cost-price squeeze (8992–94 Brown; 1020–05 Metz; 10132–33 Nissen). As many as 140 independent bakers withdrew from the market in the 1972–1974 period (10205 Metz; *see also* 11214 Schaus). Between 1969 and 1974, 83 bread baker-

ies that competed in the areas served by Continental went out of business (CX 37C).

40. Individual geographic markets in the bread industry are highly concentrated. According to Continental's 1972 Business Plan, in 75 Markets surveyed, the average white bread market share of Wonder and the leading wholesale baker competitor was 59.7%, in a universe that included private label and captive label bread. Excluding private label and captive label bread, the average two-firm share in advertised label white bread would be over 75% (*See* CX 4(131)).

41. There have been few new entrants into the wholesale baking industry during the 1970's (*See* 10171 Nissen; 10282–83 Jakacki). The number of captive bakers, which grew dramatically in the 1960's, has decreased in the 1970's (10140–42 Nissen; 10202–03; 11230–31; 11236, 11243 Schaus).

Continental's Sales and Profits

42. Although Continental's share of total bread sales on a national basis has not increased, but remained between 11% and **[20]** 12% from 1967 to 1977, its advertised label's share of the overall white bread market increased from 15.4% in 1975 to 20.1% in 1978 (*See* CXs 1355; 2162B; (*in camera*); RXs 1000; 1142 (*in camera*)). Respondents estimated that as of February of 1973, Continental had a 32.7% share of the *advertised label segment* of the white bread market (CX 9(203); CX 1371B).

43. Continental's dollar sales of all bread products increased from $309 million in 1967 to $609 million in 1977. Continental's pretax profit on bread as a percentage of sales for the period 1964 through 1977 were as follows (RX 1142 *in camera*):

1964	4.5
1965	3.8
1966	4.6
1967	5.1
1968	4.8
1969	4.5
1970	5.7
1971	4.1
1972	(0.5)
1973	(1.5)
1974	0.5
1975	2.3
1976	0.9
1977	3.0

Continental's Costs

44. Before 1973–1975, when it installed a Standard Cost Accounting system, Continental did not maintain ongoing records of the cost incurred in producing particular varieties or labels, but instead maintained records on the total costs for the weekly operation of each bakery. Continental did attempt to estimate the costs of producing any new variety or label on its Form 452B (*See* 9688–93, 9887 Dierker).

45. The bread industry has a relatively low ratio of fixed to variable costs (10486–87 Wachter; 11633 Preston). Apparently, Continental's variable costs in 1971 were approximately 80% of its revenues (*See* CX 262D (*in camera*); CX 747 (*in camera*); *see also* CX 2104–Z–24). For purposes of this initial decision, it will be assumed that Continental's variable costs were 80% of its total allocated costs. Distribution and selling costs for wholesale bakers were relatively high. For example, in 1973, Continental's distribution costs were 35% or more of the total costs on all route sales of bread (CX 58B; CX 106; CX 747 (*in camera*)).

Market Shares

46. Each year Bruskin and Associates, an independent research organization, conducts a telephone survey for **[21]** Continental in most of the markets where Continental competes in the sale of bread products (768 Hackett; 595–98, 602 Woodward). The purpose of this study is to ascertain bread producers' share of the markets, including private label and captive label bread, and to generate market trend information (768 Hackett; 630 Woodward). Although these studies tend to understate private label shares, they are fairly accurate measures of market shares on a national and regional basis and are relied upon by Continental to determine competitors' shares of individual markets. However, the samples are too small to provide accurate market shares for a local market and should be used only to determine trends in such markets (*See* 771–72 Hackett; 602, 614, 630 Woodward). The Bruskin studies (sometimes referred to as "Bread Metrics" (CXs 135–143)) form the basis for most of the market share data that appear in Continental's business reports and planning documents (*See e.g.*, CXs 11 (137); 2167B (*in camera*)).

ITT's Involvement

47. After it became part of ITT in 1968, Continental changed its reporting, business planning and budgeting systems to conform to ITT's methods (1328–29 Willmont). Continental became subject to ITT's high growth philosophy (896–97 Stolle). ITT's influence made Continental's management more responsive and alert to identifying

opportunities and problems. Woodward, Continental's president during the early 1970's, stated (636 Woodward):

> *** ITT's strength is an extremely effective management system. We are working very closely with ITT headquarters and its staff. ITT is a good risk taker, provided you effectively support your plan. They have made us more aggressive in our outlook toward opportunities . . . ITT expects its units to grow 15% a year in profits.

ITT personnel with oversight responsibilities for Continental were aware that the growth in private label bread was preventing Continental from meeting its growth objectives (CX 25A–C; *see* CXs 3(091); 5(018)). ITT was directly involved in establishing strategies for gaining additional private label sales and in evaluating Continental's pricing strategies (CXs 90J; 128B; *see* CX 58B). ITT knew that Continental sold private label products below cost (CX 94B–D).

48. In May 1971, ITT initiated a study to investigate the impact of private label (including captive label) merchandising upon Continental's bread business (796, 802 Butler). The primary purpose of the study was to generate an independent confirmation of Continental's internal strategies and to gain information on captive label businesses including their inside manufacturing costs and their distribution costs (761 Hackett; 802 Butler; 916 Stolle). McKinsey & Co. was chosen to conduct this study because they had good business relationships with a [22] number of retail chain stores (908 Stolle). Although Continental was attempting to meet the problems of captive label merchandising, ITT did not think it was doing enough (913–14 Stolle).

49. McKinsey personnel held many conferences with Continental personnel (805 Butler). At one such meeting, according to notes taken by R. Ronald Daniel, the McKinsey partner responsible for the study, the question arose as to whether Continental should hold the line on prices in hopes of driving weaker competitors from the market (CX 28S; *see* CX 28T). In the final report submitted to ITT in October 1971, McKinsey identified a number of issues that warranted further intensive analysis, one of which was the question of whether "holding retail prices [would] hasten the exit of wholesale competitors?" (CX 21 at 3–3; *see* CX 20Z–51–Z–63). According to Continental officials, Continental did not adopt any new strategies as a result of the McKinsey report (607 Woodward; *see* 1349–50 Willmont).

Denver Marketing Area

50. Complaint counsel challenge certain pricing actions engaged in by Continental in the Denver, Colorado, area during the period 1963 through 1969. More particularly, complaint counsel challenge Continental's private label agreement with Associated Grocers, a voluntary cooperative of independent grocers, and the effects of sales made

pursuant to that agreement upon competition among wholesale bakers in the Denver area (CCPF 8–1–8–193; CC Mem. 71–95).

51. Continental's Denver bakery was part of its Southern California (Santa Monica) region which also included bread bakeries located in San Diego, San Pedro (DiCarlo), Beverly Hills and Salt Lake City (4677–78, 4693–94, 4751 J. Walsh).

52. The other major wholesale bakers selling white bread in the Denver market were Interstate, Campbell-Taggert, Old Homestead and Star Bread Company (6986 Downing). Star was primarily a baker of variety bread and it was not a great factor in the white bread market (6863–66 Downing). All white bread sales in the Denver market were made from plants located in that market. *Continental Baking Co.* v. *Old Homestead Bread Co.,* 476 F.2d 97 (10th Cir. 1973), *cert. denied,* 414 U.S. 975 (*"Old Homestead"*).

53. Continental's Denver bakery sold products, including white bread, in most of Colorado, Southeastern Wyoming and Southwestern Nebraska (CXs 1401E; 1427G; 1718Z–37 Ward).

54. In the late 1950's, Continental operated bakeries in Denver and Pueblo, Colorado (CX 1723D Barsch). In 1962, Continental replaced these two plants with a new bakery located in Denver (6864 Downing; CX 1723H Barsch). This new bakery was twice as large in floor area and could produce twice the amount [23] of bakery products as its two old bakeries combined (RX 831Z–7, Z–16 Hildebrand). When it began operations, the new bakery produced at a rate of 33 million pounds of bakery products per year, which was only at 50% of its capacity (*Old Homestead, supra,* 104). In 1962, Continental's Denver plant sustained a loss of $600,000 (CXs 1401F; 1427K).

55. During the period 1960 to 1968, the Denver bakery produced bakery products under the following labels: Wonder, Tender Crust, Oak Farm, County Fair, Home Pride, Daffodil, Profile, Frenchef, Mrs. Wright's, Jills and Hostess (CXs 1427E; 1401B). It sold private label bread to Associated Grocers, Red Owl and Southland Corporation (7–11 stores) (CXs 1423B–7, B–56, N–71–72 Vanwyk).

56. Interstate had entered the Denver market by acquisition in the late 1950's and built a new plant which was completed about 1960 (6863, 6984, 6986 Downing). Its main advertised label bread was Butternut (6863, 6887–88 Downing).

57. Campbell-Taggart built its Denver plant some time in the 1950's (6986 Downing). Its advertised label bread was Rainbo (6865, 6887–88 Downing).

58. Old Homestead, established in 1892, was a pioneer in the Denver bakery market (6852–53 Downing; CX 1706N Roberts). For many years it enjoyed excellent shelf position in grocery stores because it

Rheinfrank; 7075 Tipton). In 1962, Old Homestead changed its baking process from the conventional mix to continuous mix process and as a result it became very efficient in white bread production (6859–60 Downing). Old Homestead also operated a bakery in Colorado Springs (Star Baking Co.) and a bakery in Cheyenne, Wyoming (7048–50 Downing, Jr.).

59. Star, (not to be confused with Old Homestead's subsidiary of the same name), which was primarily a variety bread baker, was the leading wholesale baker in sales to restaurants and institutions (7099 –7101 Cauble).

60. In 1963, the total of independent wholesale bakers' sales in the Denver market was approximately $14 million. Continental had the largest share with about 35%, Old Homestead was second with about 29%, Campbell-Taggart had about 18% and Interstate about 16% (*Old Homestead, supra,* at 105).

61. Safeway, King Soopers, and Millers were major grocery store chains in the Denver area that operated their own captive bakeries (6873–78 Downing; 7082–3 Tipton). It was estimated that these three chains accounted for about 75% of the grocery retail business in the Denver market (6878 Downing; 7237–38 Johnson). In volume of white bread sales, the bakery operations of King Soopers and Safeway were larger than the combined volume of all the wholesale bakers (7663 Stevens). [24]

62. The largest selling size of white bread in the Denver market was the 1 lb. expanded loaf (7326 Aldrich).

63. Before 1964, wholesale bakers did not compete on the basis of the wholesale or retail prices of their products (7629 Stevens; 7087 Tipton). There were meetings or communications between them prior to any price move, which all the wholesale bakers took at the same time (6971–73 Downing). Competition among wholesale bakers was usually limited to salesmen's personalities and their relations with various grocers (7614, 7628–33 Stevens). The wholesale price of 1 lb. white advertised bread fluctuated between 16¢ and 20¢ during the early 1960's and, in July 1964, the price was increased to 20.5¢ (CX 1477A–C).

64. The relative stability of wholesale price from 1960 to 1964, combined with rising costs of production, caused Old Homestead to operate at a loss of approximately $83,000 in 1964 (CX 1510B; 7573–74 Williamson).

65. Before July 1964, none of the wholesale bakers sold private label bread (*Old Homestead, supra,* at 102). In the early 1960's, when Red Owl entered the Denver retail grocery market, it sought a private label program, but no wholesale baker was willing to bake private label for Red Owl (6963–64 Downing). Red Owl acquired a baking

facility and produced its own bread until early 1965 (6963–64 Downing).

66. Associated Grocers is a cooperative of independent retail grocery stores. It was formed to purchase in quantity for its members and it performs wholesaler and other functions for its members (7470–71 McCutcheon; 6878 Downing). In 1960, grocers paid an entry fee in the nature of a deposit to join Associated Grocers and application approval was made by its Board of Directors on the basis of financial condition, location and accessibility for delivery. Some applications for membership were turned down (7472 McCutcheon; 7181 Johnson).

67. Although the majority of the Associated Grocers members were located in Colorado during the 1960's, it also served grocer-members in Wyoming, Kansas, Nebraska and New Mexico (7471 McCutcheon). Associated Grocers' members accounted for about 4% of the retail grocery business in the major cities in the Denver area, including Boulder and Colorado Springs (7293–94 Johnson).

68. In 1961 and 1962, Associated Grocers advised the wholesale bakers in the Denver area that it was interested in obtaining either a private label program or in acquiring and operating its own bakery (7185–87 Johnson). Although at first all the wholesale bakers refused to supply private label bread, in late 1963 or early 1964, Interstate began serious private label negotiations with Associated Grocers (7186, 7246–47 Johnson). When Continental learned of these negotiations, Ralph Ward, Regional Vice President, contacted Lenhard Johnson of Associated Grocers and began negotiations for a private label program (CX 1718 R. Ward; 7248, 7257 Johnson). [25]

69. On July 1, 1964, Associated Grocers organized a company named Five States Supply Company ("Five States") for the purpose of the private label bread program. In practice, only members of Associated Grocers could become members of Five States. They were charged a $100 refundable membership fee per store and were required to agree to comply with the Five States Bylaws (CX 1519; 7183–84, 7300 Johnson). Five States had no separate employees, offices or facilities and operated through Associated Grocers which handled its billings and payments (7183 Johnson; 7473 McCutcheon).

70. The private label bread supplied to the Five States members was labeled "Tender Crust", Five States having secured exclusive use of this trademark (CX 1522D). The Five States Bylaws provided that the member grocers would exert their best efforts to sell the Tender Crust labeled products, would give first position on the grocers' regular bread rack to Tender Crust label bakery products, would give second position to the advertised label of the wholesale bakery supplying Tender Crust products, and would price Tender Crust products at the

same retail price as any other comparable bread product (CX 1522D–E).

71. Under the date of August 10, 1964, Continental entered into a written agreement with Five States to supply its member grocery stores with private label Tender Crust and other bakery products (CX 1526). That document provided, in pertinent part, that Five States (CX 1526 B):

4.***[agrees] to make available to [Continental] preferred space on [its] member bakery products racks for the display of [Continental's] regular Bread, Cake and Sweet Goods products so that the full sales potential of these advertised brands can be realized. [Five States further agrees] in requesting [its] members to cooperate with [Continental] in arranging special weekly promotions on said advertised bread items.

5. Deliveries of all products to [its] member stores pursuant to this agreement shall be made by [Continental's] regular Wonder and Hostess route salesmen from their regular delivery trucks. ***

72. Private label products were to be the 1 lb. expanded white bread, the 1 1/4 lb. round top white bread, 1 1/4 lb. sandwich bread and hamburger buns and hot dog rolls. The agreement provided for three methods of delivery at different prices. For example, the wholesale price for 1 lb. expanded bread with stale returns was 17.5¢; with no stale returns was 16¢ and on a store drop shipment was 15¢ (CX 1526 B, D. ¶¶ 7, 8, 9). At that time the wholesale price for Wonder 1 lb. expanded white bread was 18.5¢ (*Id.*). **[26]**

73. Paragraph 12 of the agreement provided that the wholesale price set by Continental would rise if any general price increases of controlled label bread occurred in the market (CX 1526D). Paragraph 13 of the agreement provided (CX 1526D):

In the event prices on any of [Continental's] regular advertised products shall, in response to a general price decrease in any market, fall below the prices in effect as of June 1, 1964, then any private label price set forth in paragraphs 7, 8 and 9 shall be reduced in that market to a price at least one cent below the prices on [Continental's] comparable advertised item.

74. The Tender Crust program, including prices, were always conducted under a written agreement and each agreement was in effect until amended (7199 Johnson). After 1964, all deliveries included rack service with or without stale returns (7203 Johnson).

75. Continental obtained the Tender Crust business because it was willing to enter into a written agreement with Five States (7265–66 Johnson).

76. During the 1960's Continental representatives were invited to and frequently attended meetings of Five States Board of Directors (7213–14 Johnson). In 1964 and 1965, Five States newsletters urged

Associated Grocers members to join Five States and to participate in the Tender Crust program (CX 1518G). Continental personnel served as liaison with Five State members and helped them with bread rack arrangements and solicited new members (7211 Johnson). During the 1960's, Continental wrote, typed, made copies, and mailed the Five States newsletters. Five States would supply Continental with information for its newsletter. Paper for the newsletter was kept at Continental's Denver plant (7209, 7213 Johnson).

77. The newsletter advised Five States members of the retail prices on Tender Crust, of the weekend specials and also urged the Tender Crust grocers to maintain those retail prices (CX 1518A–Z–25).

78. At the beginning of the Tender Crust program all labels of comparable bread were identically priced at retail. The wholesale price of Tender Crust was by contract, lower than the price of the other labels (7221 Johnson; CX 1723–Z–5 Barsch). The automatic one cent price differential between Wonder and Tender Crust was created to discourage other wholesale bakers from attempting to compete with the Tender Crust program (7233 Johnson).

79. In September of 1966, Campbell-Taggart began selling a white bread loaf under the label Rainbo Buttermilk at the same price as Tender Crust. Pursuant to its agreement with Five [27] States, Continental granted a 6% discount so that the wholesale price of Tender Crust would be below the wholesale price of Rainbo Buttermilk (CX 1727Z–66–67 Vanwyk).

80. At other times the difference in price between Wonder bread and Tender Crust bread was more than one cent (CXs 1537, 1539, 1549). A 1967 agreement between Continental and Five States provided for a 3¢ differential and a 2.25% central billing discount on Tender Crust purchases (CX 1571).

81. In September 1967, Continental, in response to a 10% discount offered by Campbell-Taggart, instituted its "sliding scale discount" on sales of Tender Crust products. Discounts of 7%, 9% and 11% were granted on certain volumes of purchases. The wholesale list price of Wonder bread was 1¢ greater than the wholesale list price of Tender Crust and a 2% central billing discount was in effect on Tender Crust purchases (CX 1549B). On November 6, 1967, the wholesale price of 1 lb. Wonder bread was reduced from 21¢ to 16¢ and the wholesale price of the comparable loaf of Tender Crust was reduced from 20¢ to 15¢ (CX 1652 Z–47).

82. On November 16, 1967, the wholesale price of 1 lb. white bread to Continental's other private label customers was reduced from 20¢ to 15¢ (CX 1652Z–50). To grocers entitled to 11% discount and the 2% central billing discount, the net price was 13.05¢, or an 18.4% price differential compared to the 16¢ Wonder bread price.

83. Complaint counsel's chart showing Continental's wholesale prices and the percent of differential between Wonder bread private label bread is incorporated into this initial decision, as it appears on the following page. **[27a]**

Net Prices (in cents) of the One Pound Loaf of WPB Produced by CBC Under the Wonder, Tender Crust, Red Owl, Gem, Oak Farm, Magic Bake, and Janet Lee Labels in the Period 1964-1969.

Date	Wonder	Tender Crust	Oak Farm	Red Owl	Gem	Magic Bake	Janet Lee	Price Difference (cents)	% of Price Difference	Source
July 1964	18.5	17.5 (Plan 1)						1	5.4	CX 1526
		16 (Plan 2)						2.5	13.5	
		15 (Plan 3)						3.5	18.9	
Oct. 1965	17.5	16.5						1	5.7	CX 1727-Z-27 CX 1652-Z-5
Mar. 1966	19	18						1	5.3	CX 1652-Z-11, 13
July 1966	21	20						1	4.8	CX 1652-Z-13, 15
Sept. 1966*	21	18.8						2.2	10.5	CX 1537
Oct. 1966**	21	18.4						2.6	12.4	CX 1539
Aug. 1967	21	18.4	20	20				2.6	12.4	CX 1553A
Sept. 1967***	21	18.2 (7% & 2%)						2.8	13.3	
		17.8 (9% & 2%)						3.2	15.2	CX 1549
		17.4 (11% & 2%)						3.6	17.1	
Nov. 1967***	16	13.65 (7% & 2%)	15	15	15			2.35	14.7	CX 1549
		13.35 (9% & 2%)						2.65	16.6	CX 1652-Z-47, 50
		13.05 (11% & 2%)						2.95	18.4	
Jan. 1968	21	18	18	18	18			3	14.3	CX 1652-Z-53,55
Mar. 1968	17	13.05****				13.05****		3.95	23.2	CX1696D CX 1578
Sept. 1968	20						18	2	10	CX 1650
April 1969	22						17.,6	4.4	20	CX 1649
July 1969	18	15.7						2.3	12.8	CX 1577

* CBC's 6% discount on Tender Crust

** CBC's 2% discount on Tender Crust

*** CBC's sliding scale discount on Tender Crust

**** Tender Crust and Magic Bake subject to discounts of 10% and 3%

[28] 84. The Tender Crust weekend specials were in effect from the original Tender Crust agreement of August 1964 through at least 1970 and were offered by Continental every week (7205–06 Johnson). At first they were offered under the Wonder label, and later, at the request of Five States, under the Tender Crust label (7207–09 Johnson). Some of these specials were bread items, such as sandwich or wheat loaf or hot dog rolls and hamburger buns (CX 1699E; 7023–24 Downing; 7206 Johnson). These specials were offered at reduced wholesale prices and were sold at retail at reduced prices (CX 1518; *see e.g.,* 7207 Johnson).

85. In the third quarter of 1967, Continental's total cost for the 1 lb. expanded loaves of Wonder bread and Tender Crust white bread were 19.62¢ and 16.59¢, respectively (CX 1722Z–19–Z–20 Swan). The average variable cost for Tender Crust would be 13.27¢, applying the 80% ratio adopted for the purposes of this decision. Accordingly, the 13.05¢ wholesale price on Tender Crust 1 lb. white bread was below Continental's average variable cost. Many other wholesale prices were below Continental's fully allocated costs (Admission, Set 6 (amended) Item 9)).

86. At the outset of the Tender Crust program 50 stores had become members of Five States. There were more than 100 member stores in Five States by early 1965, and more than 150 had joined the program by February 1967. Five States had 200 member stores by January 1969. At that time Associated Grocers had 415 member stores (CXs 1515Z–22, Z–62; 7214 Johnson; *see* CX 1423B–6 Vanwyk).

87. In 1966, Continental's sales of Tender Crust products to the Five States grocers amounted to $670,000. In 1966, such sales were between $670,000 and $1,000,000 and in 1968 were over $1,000,000 (7217–18, 7291–92 Johnson; CX 1515–Z–22, 62). In the first four weeks of 1965, Continental sold an average of 60,000 loaves per week of the 1 lb. expanded size. In December 1967, when the so-called "sliding scale" was in effect, sales of 1 lb. Tender Crust averaged 90,000 loaves per week (CX 1727G Vanwyk).

88. In 1967, the total of independent wholesale bakery sales in the Denver market was still approximately $14,000,000. Continental had the largest share with 51.2%, Campbell-Taggart had 22.1%, Interstate had 20.1% and Old Homestead had 6.3% (*See Old Homestead, supra,* at 105).

89. When the Tender Crust program came to a grocery store that Old Homestead serviced, Old Homestead immediately lost shelf position, space and volume (CX 1706 Roberts; 7079 Tipton; 7327–29 Aldrich). In the Five States grocery stores, Tender Crust and Wonder bread occupied 75% of the bread rack (CXs 1706E–G Roberts; 1717C–D Chapman; 7328–29 Aldrich; 7398 Phillips). In some Five States

member stores Old Homestead lost the account completely (7616, 7618, 7620 Stevens; 7356–57 [29] Rheinfrank). The erosion of Old Homestead's market position was a continuing process that started in August 1964 (CX 1706H Roberts; 7669 Stevens).

90. Continental's weekend specials also had a very detrimental effect on Old Homestead. These specials greatly increased Old Homestead's stale percentage, which became one of the worst elements of Old Homestead's costs (6924–25 Downing).

91. Continental's plant manager thought that there was a possibility that Old Homestead would go out of business (*See* CX 1423B–71 Vanwyk; *see also* 6939–41 Downing). On December 31, 1967, Old Homestead withdrew from the baking industry (6851 Downing).

92. On December 18, 1967, Continental announced price increases to be effective January 2, 1968. One pound advertised bread was increased to 21¢, secondary label was increased to 19.5¢ and private label increased to 18¢ on a no stale return basis. All discounts were eliminated (CX 1569; RX 1150). In March 1968, prices were reduced, 1 lb. Wonder to 17¢ and 1 lb. Tender Crust to 13.05¢ (CXs 1696D; 1578).

93. Continental, Interstate and Campbell-Taggert each made a profit on their bread operations in Denver in 1967 (CX 1401F). Only Old Homestead showed a loss in that year (CX 1510C). 1967 was the first year since 1960 that Continental made a profit, *i.e.,* $14,000 (CX 1401F).

94. Continental retained the Tender Crust private label business until the middle of 1978. At that time Interstate offered a lower price and became Associated Grocer's supplier of private label bread. However, in November 1979, Tender Crust, dissatisfied with Interstate, solicited bids from the wholesale bakers and Continental again became the supplier of Tender Crust (9562–64 Nuziard).

95. From the various reports on production and market surveys it appears that in the 1970's Campbell-Taggert has become the largest wholesale bread baker in the Denver market with Continental and Interstate about equal (9543, 9554 Nuziard; *see* CXs 1385–89; RXs 1024 (*in camera*); 1031 (*in camera*); 1032A–B (*in camera*); 1044 (*in camera*); 1051A–D (*in camera*); *see also* RX 843A.). Oroweat purchased Star of Denver in 1977 (7103 Cauble). Continental's Regional Vice President testified that during the last ten years Safeway and King Soopers have a share of approximately 85% of the retail grocery business in the Denver market (9543–44, 9546 Nuziard). Recently, both of these large chains have constructed large new bakeries in Denver (9546–51 Nuziard).

96. It is found that during the period 1964 to 1968 Continental discriminated in price between purchasers of its advertised bread and purchasers of its private label bread and that during most of this

period those lower discriminatory [30] prices were below Continental's fully allocated costs. It is further found that in the last quarter of 1967, Continental's lower discriminatory prices were below its average variable costs. In most instances, these lower prices were not granted to meet the equally low price of one of Continental's competitors. It is found that Continental's pricing practices contributed substantially to the failure of Old Homestead and that as a result thereof the wholesale white bread market has become more concentrated in the Denver, Colorado, market area.

97. Complaint counsel also contend that the discriminations in price between competing Tender Crust customers which resulted from Continental's sliding scale discount program in effect in September, November and December of 1967 caused the type of injury to competition between such customers proscribed by Section 2(a) (*See* CX 2101 Stip; CC Memo. 93). The maximum price difference was 8/10th of one cent and 4% of $400 worth of purchases, *i.e.*, $16 (*See* CXs 1549; 1652Z–47, Z–50). This maximum price difference was in effect between September 16, 1967 and November 6, 1967. These discriminations were eliminated on January 2, 1968.

98. During this period Continental had many Tender Crust customers in Denver, in other cities in Colorado and in Wyoming (*See* CX 1652Z–48Z49; 1523). Although it is highly probable that some of the Five State grocers (the purchasers of Tender Crust) competed with each other, there is nothing in the record to demonstrate that Tender Crust purchasers at the different discount rates of the sliding scale actually competed with each other.

99. Given the small amount of the price difference challenged as well as the relatively short period of time that it was in effect, it cannot be found on this record that the effect of such price differences may be to substantially injure competition between retail grocers.

Minneapolis (Twin Cities Trading Area)

100. Complaint counsel challenge certain pricing practices engaged in by Continental in the so-called Twin Cities Trading Area ("TCTA") in Minnesota during the period 1966 through 1969 (*See* CSCPF 9–1–9–177; CC Mem. 96–115). This market area includes the Twin Cities of Minneapolis and St. Paul, and seven counties surrounding them (CX 306; 6075 Alton).

101. Continental's Minneapolis bakery was part of one of its "Chicago" regions which also included bakeries located in Rochester, Minnesota, Davenport and Sioux City, Iowa, Omaha, Nebraska, Milwaukee, Wisconsin, and Chicago ("Shiller Park") (CXs 220A; 307B).

102. The other major wholesale bakers selling white pan bread in

the TCTA from 1965 to 1970 were American, Zinsmaster Baking Company ("Zinsmaster"), Pan O Gold Baking Company ("Pan O [31] Gold"), Creamy Crust Baking Company ("Creamy Crust," a subsidiary of Tender Crust, Eau Claire, Wisconsin) and Emrich Baking Company ("Emrich"). Emrich sold primarily to restaurant and institutional accounts (6077 Alton; 6189 Peterson; 6338 Monahan; 6556 Coolidge; 8714 Williams).

103. In the late 1960's, Continental's Minneapolis bakery used a continuous mix process as well as a special conventional mix process, to produce mostly white bread and bun varieties (CXs 208A; 303A–B; 8761 Williams; *see* 8975–77 Brown). It ran approximately 63 bread routes from its plant or from agencies located in the Minnesota communities of St. Paul, New Hope, Willmar and Sauk Center as well as Eau Claire, Wisconsin (CX 200F–F; *see* CX 250A–p; 6319 Hueller). It also supplied Continental's Rochester bakery with some bakery products (6298 Glass; *see* CX 200B–D).

104. Continental's Rochester bakery used a conventional mix process and produced white bread, dark bread varieties and buns, rolls and doughnuts (6282 Glass; CXs 208A, 304A–B). It had agencies located in the Minnesota communities of Owatonna and Mankataz, and in La Crosse, Wisconsin (CX 200G–H). It supplied bread products to Continental's Minneapolis bakery as well as many other Continental bakeries (6298 Glass; *see* CX 200B–D).

105. The Rochester market area was considered separate from the TCTA. The areas served by Continental's Minneapolis and Rochester bakeries did not overlap and bread prices in Rochester and Minneapolis-St. Paul were unrelated to each other and fluctuated independently (6289–90, 6299–6300 Glass; 8697–98 Williams; 8820 Brown).

106. Continental's advertised bread was sold under the Wonder label while its largest selling secondary label was Wonder Country Style (CX 208B–C). The Minneapolis bakery sold private label to three large chain stores: Applebaum, Penny's and Kroger (8783 Williams).

107. American had bakeries in Minneapolis and St. Paul (6290 Glass). It was the largest wholesale baker in the TCTA and sold its advertised bread under the Taystee label (6196 Peterson; 6321 Hueller; 8684 Williams; 8813 Brown). It used the continuous mix process during the 1966–1969 period (6210 Peterson). It ran approximately 80 routes out of its plants and agencies (6138 Alton). American also sold bread under private label (RX 407B).

108. In the late 1960's, Zinsmaster had two bakeries in the TCTA, one in Minneapolis and one in St. Paul. The Minneapolis plant was operated as a Kosher plant and baked primarily white bread and Zweiback toast (6181–82 Peterson). The St. Paul plant baked buns, rolls and sweet goods (6182 Peterson). Zinsmaster was considered to

be the largest seller of advertised bread in the TCTA, which it sold under the Master label (6196 Peterson). It used a conventional mix process which apparently gave it an **[32]** advantage over American and Continental, both of which used the continuous mix process (6210 Peterson). Zinsmaster sold secondary bread under the Thrifty, Oven-Glo and Sky Line labels. It did not sell private label bread in the TCTA (CX 268I; 6183 Peterson).

109. In 1966, Pan O Gold, which had a bakery in St. Cloud, Minnesota, bought Regan Bakeries Inc., including a bakery in Minneapolis (6068–71 Alton). It also purchased the Twin Cities sales operation of Eddys Bakery Company (6070 Alton; *see* RX 1072Q). Thereafter it sold primary bread under the Holsum label, and secondary bread under the American Beauty, Holsum, Better Buy and Eddy's Cabin Style labels (6080–82 Alton). It also sold private label bread to chain stores including Country Club (20 stores; Country Club label) and Super Value (30 stores; Favorite label) (CX 283C–F; 6113–15, 6081–82 Alton). Pan O Gold used a conventional mix process (6210 Peterson). Most of its white bread sales were made either under private labels or secondary labels (RX 411E–G; 6150–51, 6163 Alton; 6517 Reinartz).

110. After Creamy Crust merged with Tender Krust in 1960, it discontinued baking operations, and was supplied with bakery products by Tender Krust (6381, 6389–90 Lindebck). It sold advertised bread under the Bunny Bread label and secondary bread under the Creamy Crust label (6385 Lindebak). It also supplied private label bread to the following major chain stores: Shopper's City, Johnson Brothers, Piggly Wiggly (Sunset Gold label) and Walsh's (6334–35 Monahan; 8729 Williams). Approximately 90% of Creamy Crust's sales were made under private label (6336, 6347–48 Monahan). It was the first wholesale baker to offer private label bread to the chain stores in the TCTA (6357 Monahan).

111. In 1966, the approximate market shares of the wholesaler baked white bread market in the TCTA were American, slightly over 30%; Continental, slightly under 30%; Zinsmasters, 20%; Pan O Gold, 15%; and Creamy Crust 5% (6339, 6550–52 Monahan; 6195–98 Peterson; 6117–18, 6138 Alton; 6424–25 Coolidge; *see* CX 270K). It appears that Zinsmaster and American were leaders in sales of advertised white bread with Continental in third position (6196–97, 6248–49 Peterson). Continental appears to have been the largest seller of secondary and private label white bread (*See* CX 204 J–K).

112. Two major chain stores had "captive" bakeries in the TCTA in 1966: Red Owl and National Tea (6190–91 Peterson). Holiday Discount Stores, a two store chain selling general merchandise, operated a bakery in one of them in 1966. It produced a "poor" loaf of bread by a fast and cheap process (6192 6245 Peterson; 6439 Coolidge; CX

2355B, C Coolidge). In 1966, the captive bakeries sold about 30% of the white bread in the TCTA (6120–21 Alton). In addition to these captive bakers there were many "in-store" bakeries. In 1968, Penny's opened its own bakery, in which it baked buns, rolls and sweet goods. **[33]** It is estimated that the captives and in store bakeries accounted for 50% of the white bread sold in the TCTA (6120–21 Alton).

113. The highest volume white bread loaf sizes sold in the TCTA were the 1 1/2 lb. round top and sandwich loaves (6115 Alton; 6190 Peterson; *see* CX 204C–L).

114. During the period 1966 to 1970, Continental was considered to be the price leader among the wholesale bakers in the TCTA, because historically it was the first wholesale baker to increase or decrease the wholesale price of bread (6339, 6362 Monahan; 6387, 6408 Lindebak; 6229 Peterson; *see* 8965 Brown). Continental was also considered to be the price leader in the Rochester market (6387 Lindebak).

115. No wholesale baker could sell bread products in the TCTA at a wholesale price higher than its wholesale baker competitor's price for a comparable product (6352–53 Monahan; 6408 Lindebak; *see* 6211 Peterson).

116. Although there was always keen competition among retail grocers in the pricing of white bread products, by the middle of 1966 the retail price spread between private label bread and advertised label bread had been reduced to about 5¢ (RX 1072D). The wholesale price for a 1 1/2 lb. loaf of advertised label bread was 28¢ and the retail price of that loaf was 35¢. The wholesale price for secondary bread was 24.5¢ and the retail price for secondary bread was 31¢. The wholesale price for private label bread with rack service was 23.5¢ and the prevailing retail price for private label bread was 29¢ (RX 1073J).

117. In November 1966, Holiday Discount Stores opened a new store in Fridley, Minnesota, a community in the Northern suburbs of the Twin Cities. Its retail price for bread baked in its own bakery was 21¢. The chain stores reduced their retail price on private label bread from 29¢ to 21¢. Penny's, to which Continental supplied private label bread, advertised its 21¢ retail price. Although Holiday raised its retail price to 23¢ on November 12, it reduced it to 21¢ shortly thereafter (CX 315; 8938–40 Brown; *see* RX 1072W, 1073J; 6246 Peterson).

118. On December 15, 1966, Continental reduced the wholesale price of its secondary label Country Style white bread from 24.5¢ to 20¢ in TCTA (CX 207C; RXs 1072V, W; 1073 J). At that time, the fully allocated costs of manufacturing and distributing Wonder Country Style from the Minneapolis plant was 23.45¢ (CXs 204Q, 249). At the 20¢ wholesale price for this secondary bread, each loaf was sold at 3.45¢ below Continental's fully allocated costs. For over two months, or until February 23, 1967, Continental's wholesale price for Wonder

Country Style white bread remained below its fully allocated costs (CXs 207C; 204Q; 249). [34]

119. Continental's Minneapolis plant stated that this price reduction was to meet the competition from Red Owl and Holiday (RX 413A; *see also* CXs 300B, 295C).

120. At the time the Wonder Country Style was being sold at wholesale at 20¢ in the TCTA, it was sold in the Rochester trading area at 24.5¢, and Continental's advertised Wonder bread was sold at 28¢ in both the TCTA and the Rochester trading area (CX 207C).

121. After Continental reduced its wholesale price for Wonder Country Style it reduced the wholesale price of private label bread to its three large chain store accounts (CX 202F; *see* CXs 207C; 209P). The record shows that the losses incurred by Continental's Minneapolis plant increased substantially after these price reductions were made (CX 308D,I,N,S).

122. On March 7, 1967, Zinsmaster introduced a 1 1/2 lb. "split top" loaf of white bread, for a "premium" wholesale price of 30¢. Continental had been successful with this product in Chicago selling it at the premium price of 31¢ (6116–17 Alton; CX 202Q). On March 24, 1967, Continental introduced its own split top loaf with a wholesale price of 23¢ (CXs 207C, 316, 318). Pan O Gold also introduced a similar split top loaf under the "Bonanza" label in March 1967 (6116 Alton; CX 283C–E). Zinsmaster stopped selling its split top loaf on May 20, 1967, because of a sales decline after Continental's split top loaf came on the market at a lower price (CX 300 D; RX 409B; 6221–62 Peterson). Continental used a mechanical device to split the bread (8705–06 Williams; 8815 Brown). The Minneapolis plant ordered production of two "loaf splitters" on December 16, 1967 (CX 310).

123. The retail price was continued into mid-1967, with Red Owl, Penny's, Johnsons and Shopper's City advertising special low prices on white bread (CX 319; RX 1073J–K). By July 1967, an 8¢ to 16¢ differential had developed between the retail price of Wonder advertised bread (as well as other advertised bread) and the retail price of private label (including captive label) bread in the TCTA (RX 406; 8687–88 Williams; 8816 Brown). This resulted in a loss in volume of advertised label sales for all wholesale bakers (8816 Brown; 8687–88 Williams; *see e.g.*, RX 405A–C).

124. On June 28, 1967, Pan O Gold's Minneapolis plant was damaged by a severe wind storm and it did not bake bread for six weeks (6097–98 Alton). During that period it supplied about 15% of the white bread sold by it in the TCTA from its Pipestone and St. Cloud plants (6099 Alton). It purchased bun products from American and Zinsmaster (6101–02 Alton), sandwich bread from Emrich and most of its white bread from Red Owl's captive bakery (6102–03 Alton).

Although Alton testified that Continental refused to supply Pan O Gold with bread products (6103), Williams, who became Continental's Minneapolis plant manager the weekend of the storm, testified that Continental never received [35] a request from Pan O Gold (8696). In any event, Continental did not supply bread products to Pan O Gold during the period its Minneapolis plant was out of production.

125. After a strategy meeting between Continental personnel from the Minneapolis plant, Chicago Regional Office and Rye Headquarters, Continental on July 24, 1967, reduced the wholesale price of its 1 1/2 lb. Wonder advertised bread (round top and sandwich) by 8¢ a loaf, from 28¢ to 20¢ in the Twin Cities metropolitan area, reduced the wholesale price of Wonder Country style from 21.5¢ to 18¢, and reduced the Wonder split top white bread from 23¢ to 20¢ (8733–37 Williams; CX 207C; *see* RX 1073P). These price reductions were met by other wholesale bakers on their advertised and secondary bread. Zinsmaster lost all sales to Penny's on July 24, 1967, because it didn't reduce its prices immediately (6222–23 Peterson; 6431–32 Coolidge).

126. Continental officials testified that they hoped that a short term price reduction would preserve its advertised bread franchise, that they expected that all wholesalers would benefit from increased sales of advertised bread, and that bread prices would eventually return to higher levels (RX 406; 8690–91, 8698 Williams; 8817–8820 Brown).

127. In July and August, 1967, in conjunction with the price reduction on Wonder bread, Continental engaged in a newspaper advertising campaign in the Twin Cities area announcing a 10¢ reduction in the retail price of advertised bread and a 4¢ reduction in the retail price of Wonder Country Style, its secondary bread (*See* CXs 222–227, 314A–D; 6106–07 Alton; 8695, 8764–67 Williams). Similar advertisements were published in the outlying Minnesota and Wisconsin communities (CX 221F–J; CX 222F–N).

128. At the time of the July 24, 1967, price drop on Wonder round top and sandwich breads, the fully allocated costs of manufacturing and distributing these products from Continental's Minneapolis bakery were 25.12¢ and 25.13¢, respectively. The price reduction to 20¢ was therefore, below Continental's fully allocated costs by more than 5¢ and, pursuant to the formula adopted for this case, was apparently below average variable costs (80% of 25.12¢ equals 20.1¢) (*See* CX 204Q; 249; Finding 45, *supra*). The so-called July 24, 1967, prices were in effect for approximately a month and a half, or until September 11, 1967, when the wholesale price of advertised label bread was increased to 23¢. Thereafter, for a period of ten months the prevailing wholesale price in the TCTA for Wonder round top and sandwich white bread was over 2¢ per loaf below Continental's fully allocated costs (CXs 207C, 204Q, 249; *see* 8798 Williams).

129. At all times from July 24, 1967, until July 21, 1969, the Wonder round top and sandwich white bread were sold at wholesale in the Rochester trading area for 28¢ and Country Style was sold at wholesale for 24.5¢ in the Rochester area (CX 207C). [**36**]

130. The retail price war continued and on October 5, 1967, Continental reduced its wholesale price on 1 1/2 lb. private label round top and sandwich bread to its three chain store accounts by 4¢ (CXs 202F, 209P, 245C, D, 309A–D). The prevailing wholesale price to Applebaums on rack service and stale return was reduced from 19.5¢ to 15.5¢ (CX 309A). The actual wholesale price, including a 2% central billing discount, was 15.15¢ (*See* CX 318).

131. At the time of the October 5, 1967 price reduction the fully allocated cost of manufacturing and distributing Pantry Pride round top and sandwich bread to Applebaum from Continental's Minneapolis bakery was 19.81¢ and 19.56¢, respectively (CXs 204R, 249). The wholesale price of 15.19¢ was below Continental's fully allocated costs and, pursuant to the formula adopted for this case, was apparently below Continental's average variable costs (80% of 19.56¢ equals 15.6¢). The October 5, 1967 prices remained in effect for approximately two months, until November 9, 1967 (CXs 207C, 204R, 249).

132. Between the weeks of October 7, 1967 and November 11, 1967, Continental's Minneapolis bakery sustained a net loss in profits before taxes of $45,336.85 (CX 250 K-P).

133. On March 14, 1968, Pan O Gold announced a 3¢ per loaf increase on advertised and secondary bread and an increase of 2.5¢ on private label to become effective March 25 (6506, 6518 Reinartz; 6115 Alton; CX 283C-E). On March 20, 1968, Continental announced an increase of 1.5¢ on secondary and private label to become effective on April 1, (6506–07, 6518 Reinartz; 8701 Williams; CXs 229A, 230B, 232B, 233B, 234B, 235I, 245H; RX 416; *see* RX 1074C). The other wholesale bakers followed Continental's price increase, and Pan O Gold met Continental's price. Zinsmaster did not consider Pan O Gold to be a significant factor in the advertised bread market (6230 Peterson).

134. On April 2, 1968, Zinsmaster instituted a treble damage suit against Continental for its pricing practices in the TCTA (CX 299F; 6436–37 Coolidge).

135. On July 3, 1968, Continental announced an 1.5¢ price increase on primary, secondary, and private label bread, effective July 15, 1968 (CX 207C).

136. On December 2, 1968, Pan O Gold announced a wholesale price increase of 3.5¢ on advertised and 3¢ on secondary to become effective on December 23, 1968 (6507–09 Reinartz). Continental did not follow this price move, but announced, before December 23, that it would

increase its wholesale prices by 1.5¢ and 2¢, on advertised and secondary labels respectively (6509 Reinartz). The other wholesalers, including Pan O Gold, increased their prices to match Continental's prices (6509, 6514 Reinartz). [37]

137. On July 21, 1969, Continental raised the wholesale prices of Wonder advertised bread again and the wholesale prices of the 1 1/2 lb. loaf of Wonder round top and sandwich and the split top loaf were 28¢ a loaf (CX 207C). These were the prices prevailing in the Rochester area (CXs 202H, 207C).

138. During the period of "low" prices on advertised bread, the profits of all the major wholesale bakers including Continental were substantially decreased (CXs 248, 250; RXs 1073P, 1074D, I, 6112, 6142–45 Alton; 6509 Reinartz; 8775–76 Williams). Zinsmaster lost profits during this period and was forced to curtail its advertising (6226 Peterson; RX 1074D). Pan O Gold lost sales and estimated a loss of profits of $1,600,000 (6112, 6142 Alton; 6509 Reinartz). It discontinued all advertising and capital expenditures except those for emergency repairs (6113 Alton). In 1970, it went through a "Chapter 11" bankruptcy proceeding (6145 Alton). Creamy Crust suffered a net loss for bread sales in the TCTA each year during the period; its loss rising from $13,748 in fiscal year 1967 to $70,391 in fiscal year 1968. In 1969, Creamy Crust lost $11,767 (6386 Lindebak; CX 294F; RX 410D).

139. The treble damage suit instituted by Zinsmaster and joined in by Tender Krust/Creamy Crust in July 1968 and Pan O Gold in 1969, was settled and certain agreed-upon damages were paid to the plaintiffs by Continental. Pan O Gold received $200,000 (6145 Alton). In addition, the Court entered an order on January 11, 1971, prohibiting the parties from selling bread products at different prices in an extensive area of southern Minnesota, an injunction that was to be in effect for four years (CX 299).

140. Although Continental reported in 1971 that it had surpassed American as the number one seller of white bread, it appears that American is the largest producer of white bread in the TCTA today (*See* CX 4(131); 10227–28, 10242 Metz). In 1978, Metz Baking Company purchased Zinsmaster and in early 1980 was in the process of constructing a new bakery in Minneapolis (10202, 10242 Metz). Metz and Continental are about equal sellers of bread products, following American. Heileman Brewery has purchased Pan O Gold and Emrich (10227 Metz). Pan O Gold's old Minneapolis bakery has been closed and sales to the TCTA are made from the St. Cloud plant (8794 Williams; 10262 Metz). Creamy Crust is no longer in Minneapolis (8793 Williams). The captive bakeries continue to maintain very strong positions in the market (RX 1078D; 8716 Williams; 10209–10, 10222–23 10227 Metz).

141. Minneapolis is still a private label bread market. Variety breads have taken over much of the bread market and sales of white bread have declined. Continental now concentrates its efforts on its sales of advertised bread (8707–13 Williams). [38]

142. On December 10, 1968, the Commission's Bureau of Restraint of Trade (now Bureau of Competition) advised Continental that the Commission had received a complaint concerning the pricing of Continental's products in the Twin Cities trading area alleging violation of Section 2(a) of the Clayton Act (RX 404A). After Continental had submitted certain information, the matter was closed by the Commission on October 27, 1970, without prejudice to the right of the Commission to reopen the matter if and when warranted by the facts (RX 403G; *see* RXs 402–404).

143. As to the TCTA, it is found that Continental discriminated in price among its customers and that the effect of such discrimination may have substantially injured competition between Continental and its wholesale competitors. It is also found that the lower prices to certain customers were below Continental's fully allocated costs and, in several instances, were below its average variable costs. It is also found that Continental's lower discriminatory prices were not made to meet the equally low price of a competitor, but were made with the express intention of restructuring the wholesale bread market in the TCTA. In this respect, it is found that Continental maintained its lower discriminatory prices over long periods of time when it knew or had reason to believe that its wholesale competitors were suffering large economic losses and, perhaps, were being irreparably injured in their ability to compete in the sale of advertised label bread, secondary bread, and private label bread in the TCTA. Finally, it is found that the wholesale baking segment of the white bread market in the TCTA has become more highly concentrated over the years.

Seattle Marketing Area

144. Complaint counsel challenge certain actions taken by Continental in the Seattle marketing area during the 1960's and early 1970's. Unlike the other five marketing areas studied in Docket 9000, the Seattle phase of the case does not contain allegations of illegal price discriminations. (CCPF 10–1–10–44; CC Mem. 116–119; CC Reply Br. 76–78).

145. Continental's Seattle bakery is part of the Northern California Region (Redwood City) which also included bakeries located in Portland, Oregon, Spokane, Honolulu, San Francisco, Sacramento and Oakland (3163 Frielink).

146. The Seattle marketing area includes generally the metropolitan areas of Seattle and Tacoma (*See* CX 1191).

147. Other wholesalers in the Seattle area during the last half of the 1960's included American, Gai's Baking Co. ("Gai's"), Hansen, and Oroweat (6621 Vail). Another baker, Ruth Ashbrook ("Ashbrook") produced bread for Associated Grocers, a voluntary cooperative association, and distributed bread products to members of the cooperative. Gai's was primarily a [**39**] variety bread baker until it built a new plant in the late 1970's and began producing large volumes of white bread (9327 Frielink).

148. During the mid 1960's, Safeway was the only captive baker in the Seattle area. Later Fred Meyer sold captive label bread in Seattle, bread that was baked in its Portland, Oregon bakery (6683 Vail; 9303–04, 9328 Frielink).

149. At all times relevant herein, Continental was shipping bread baked in the Seattle bakery to Alaska (6581–83 Stip.).

150. It appears that Continental's share of the wholesale white bread market in the Seattle area was approximately 25% in the early 1970's (*See* CCPF 10–6; CX 135).

151. The most popular sized loaf of white pan bread sold in the Seattle area during the late 60's and early 1970's was a 22.5 oz. loaf (4368–69, 4377 Salle; 6622–23 Vail).

152. In 1963, George T. Vail and Boyd Hall, who had been selling bread house-to-house, began selling bread at wholesale in the Seattle area (6612 Vail). At first they purchased bread from Ruth Ashbrook, but this source of supply was terminated after a short while, due to certain pressures by Local 227 of the Teamsters Union (*See* 6615, 6672–73 Vail). Thereafter, and until 1972, Vail purchased bread from the Mother Hubbard Bakery in Abbotsford, Canada (6616–17 Vail; *see* 4379 Salle). Vail and Sandland, who replaced Hall as Vail's partner, formed the Granddad Bread Company, and the so-called Canadian bread was sold by them in the Seattle market under the Granddad label (6612, 6616–19, 6626, 6628–29, 6643 Vail; 6780 Sandland).

153. Vail and Sandland drove to Canada, picked up the Granddad bread products (white bread and whole wheat bread), trucked such products to the Seattle area and sold and delivered them at wholesale prices to grocers on a store drop delivery basis (*See* 6673–74 Vail; 6815 Sandland). Granddad packaged its bread in fold-up, reusable cartons that held 16 loaves. Granddad bread could be merchandised directly from these cartons (6625 Vail; CX 1188 (52) Eastey).

154. Granddad's method of transport and delivery, as well as a favorable exchange rate on the Canadian dollar during the 1960's, permitted Granddad to sell its bread at significantly lower prices than the wholesale prices charged by the wholesale bakers in Seattle (6673–74, 6696–97 Vail; 6815 Sandland). Granddad bought the bread from [illegible] at 15¢ per loaf (6618 Vail). It cost Granddad about

2¢ a loaf to transport the bread from Canada (6673 Vail). In 1964–1965, Granddad charged its grocery customers 18¢ per loaf (6621, 6632 Vail; *see, e.g.,* CX 1194). Those customers usually sold Granddad bread at retail for 5 loaves for $1.00 or less (6631–32 Vail; 6754 Hinshaw). **[40]**

155. In 1964–1965, the wholesale price of the wholesale bakers' advertised labels was 28¢, based on a conventional 20% discount from the prevailing retail price of 35¢ (6632 Vail; CX 1197 (5) Thompson).

156. The fact that Granddad was nonunion caused it considerable difficulty throughout its existence with Local 227 of the Teamsters Union in Seattle which represented the driver-salesmen of all the wholesale bakers (6676, 6684–85 Vail; 6792–94 Sandland).

157. Early in Granddad's existence, Vail and Sandland made arrangements whereby they would purchase Hostess Cake products from Continental for Mother Hubbard and "back haul" those products to Abbotsford (6648 Vail; 6819 Sandland). Granddad was the only firm with an ICC permit to haul goods between Seattle and Abbotsford (6649 Vail; 6818 Sandland). Alternative modes of shipping involved a transfer at Vancouver. The delay incurred by such transfer adversely affected the freshness of the cake products as finally delivered to the Mother Hubbard bakery (CX 1196(165) Taylor; 1197 (204–05) Thompson; 6738 Vail). After Thompson, the plant manager of the Seattle bakery, questioned the financial arrangement whereby Vail and Sandland paid for the cake products, Mother Hubbard began paying Continental directly for those products (CX 1197 (197–98, 205) Thompson).

158. Granddad bread was equal in quality to that of other wholesale bakers (6629 Vail; *see* 6754 Hinshaw; CX 1188 (57–58) Eastey). Granddad's business "started booming right away" after it started getting bread from Canada (6626 Vail). In 1964 and the early part of 1965, Granddad sold about 40,000 loaves a week in the Seattle area (6626–30 Vail).

159. In early 1965, Continental introduced a 22.5 oz. secondary loaf of white bread called Wonder Country Style "to meet the competition of Canadian Bread, Pink Elephant and other baking companies" (CX 1022B; 6627 Vail). Pink Elephant was a home delivery baker (6612 Vail). This secondary loaf was priced to sell at retail for 4 loaves for $1 (6635 Vail). At that time neither American nor Hansen were selling secondary label bread (6713–14 Vail).

160. As a result, Granddad lost substantial sales volume in the stores that retailed both Wonder Country Style and Granddad (*See* 6633–35 Vail). During this period, Continental employees offered one grocer, Hinshaw a better price on Wonder secondary label if he would give Continental an "exclusive" and "exclude" Granddad's from the

store (6756–57 Hinshaw). Hinshaw rejected both offers (6758 Hinshaw).

161. Continental also ceased doing business with several grocers who refused to stop carrying Granddad bread (CX 1195 (8–9, 14, 15) Lundstrom; 4370–81 Salle). [41]

162. Despite the competition from Continental's secondary label and private label bread which appeared in Seattle in 1966, Granddad increased its sales to single-owned non-chain grocery stores and by the middle of 1968 was selling to 70% of those stores in the greater Seattle area (6781–83 Sandland) at which time it reached one of its two volume peaks (6782 Sandland).

163. In early 1968, Granddad's wholesale price was 22¢ a loaf and Granddad's bread was being retailed at 4 loaves for $1.00, a price that was below the retail prices of other wholesale bakers' products (6641 Vail). A general price drop on private label and secondary label bread in late 1968, which lasted for five months, "almost wiped [Granddad] out of business" (6642–44 Vail). The price of advertised bread was not reduced during this period (6644 Vail).

164. Sometime between February 27, 1969, and March 4, 1969, the wholesale price of Continental's, Hansen's and American private label and secondary label bread increased (CXs 1003; 1005; 1006; 1192 Stip.; 1197 (175–176) Thompson). Granddad raised its wholesale price back to 22¢ and started to make money again and increased its volume of sales (6646 Vail).

165. During the last quarter of 1968, Continental's Seattle bakery incurred a monetary loss on its bread production and sales (RX 703B).

166. In the spring of 1969, Thompson, Continental's Seattle bakery plant manager from 1966 until 1977, met with Taylor, the plant manager of Mother Hubbard (CX 1197 (125, 129) Thompson). Thompson told Granddad's supplier that "the Granddad price was not in keeping with the standard market price of what bread seemed to be" (CX 1196 (166–173) Taylor). Shortly thereafter, Vail and Sandland met with Thompson in the latter's office at the Continental bakery (6784–85 Sandland). Granddad's officials testified that Thompson asked them what the backhaul business meant to Granddad, advised them that bread prices were going to be increased again shortly and that Granddad should go along with the price increase so that everyone could make money. They further testified that Thompson told them that if Granddad did not raise its prices, Continental would reduce prices to five cents a loaf like it had done in other parts of the country (6648–49 Vail; 6785–86 Sandland). They testified that Thompson also told them that Granddad should not seek any more business (6649 Vail; 6786 Sandland). Thompson denied making such state-

ments, but admitted that he had discussed the backhaul business with Vail and Sandland (CX 1197 (200–02) Thompson).

167. Granddad did not raise its prices and did not stop seeking new business. Shortly after the meeting in Thompson's office, Granddad got the K-Mart account which added 13,000 loaves per week to Granddad's volume. About a week later, Granddad got the Food King account which added 8000 loaves a week (6650–51 Vail; *see* 6786 Sandland), at which time it reached its second volume peak (6782 Sandland). **[42]**

168. Also sometime after the meeting in Thompson's office, Continental discontinued the backhaul business with Granddad but reinstated it within six weeks because Mother Hubbard complained about the poor service it was getting from the transport through Vancouver (CXs 1196 (165) Taylor; 1197 (204–05) Thompson; 6652, 6719 Vail; 1197).

169. Also about that time, Thompson had a survey prepared to determine how much Granddad bread was being sold and where it was being sold. Thompson recognized that Granddad was a "factor in the market" and "could cause some problems" (CX 1197 (180–84) Thompson).

170. Granddad had displaced a secondary label of Hansen when it acquired the K-Mart account. Joe Collins, secretary of Local 227 of the Teamsters Union, pressured K-Mart to discontinue carrying Granddad bread (67947 Sandland; 6706–07 Vail). Granddad also lost Johnny's IGA when the Union threatened to picket that store for carrying Granddad bread (6705–07 Vail; *see* RX 700).

171. Granddad ceased buying bread products from Mother Hubbard in 1972, when it purchased the Pink Elephant bakery (*See* 4379 Stolle). The favorable exchange rate between the United States and Canadian dollar had disappeared and Vail and Sandland thought they could produce bread more cheaply themselves. They withdrew from the market shortly thereafter. In 1972, Hansen closed its Seattle bakery and consolidated its baking operations in its Portland plant (RX 707D).

172. Although Continental's sales of white bread in units increased during the period 1970 to 1973, since then the volume has returned to the 1970 level (RXs 1025, *in camera,* 1031 *in camera*). Ashbrook is the leading seller of white bread products and Gai's is the leading bread baker in the Seattle area. Continental is second to Ashbrook in white bread sales (9302–05 Frielink). Complaint counsel estimate that Continental has over 30% share of the wholesale white bread market in Seattle (*See* CCPF 10–44).

173. It is found that none of Continental's actions in Seattle, as demonstrated on this record, are sufficient to support a conclusion

that Continental, as a single firm, engaged in conduct that could be construed as an attempt to monopolize or as an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. Although it could be inferred that Continental's secondary label prices during the 1968 price war were below its fully allocated costs, there is nothing in the record to show that it initiated these low prices. Complaint counsel do not allege any illegal price discriminations. In my opinion, the introduction of secondary label bread into a market is not illegal. Merely competing with Granddad is not an illegal attempt to monopolize. All of the other events relied on by complaint counsel involve efforts of salesmen to sell their products. The withdrawal of [43] Continental's business from certain stores did not injure either the grocers or Granddad. It would appear that the volume of business in Continental products involved in those stores was minimal and Continental's claim that it was not economical to continue to service these accounts was probably reasonable under the circumstances. Moreover, it appears that Granddad's principal adversaries in Seattle were Local 227 of the Teamster Union, Hansen, and the driver salesmen of all the wholesale bakers.

Los Angeles-Ventura Marketing Area

174. Complaint counsel challenge certain pricing practices engaged in by respondents in Southern California generally, and in the Los Angeles and Ventura areas in particular, during the period 1966 through 1974 (CCPF 11-36-11-138; CC Mem. 120-128; CC Reply Br. 79-92).

175. Continental's Beverly Hills and DiCarlo (San Pedro, California) bakeries were part of its Southern California or Los Angeles Region (Santa Monica) which also included bakery plants located in San Diego, Denver, Colorado, Ogden and Salt Lake City, Utah, as well as the Hostess Cake Kitchen, a cake bakery, also located in Los Angeles (CXs 518; 519; 4550 A. Gordon; 4677-78, 4693-94, 4751 J. Walsh). Continental considered Los Angeles and Ventura as part of the same market, served by the same major competitors (4747, 4805-06 J. Walsh).

176. The Beverly Hills plant had both conventional mix and continuous mix process lines whereas DiCarlo Bakery was a conventional mix plant. The San Diego Bakery, originally a continuous mix plant, was converted to conventional mix in the 1970's (4691-92, 4723-24 J. Walsh). These bakeries supplied each other with bakery products (4688-92 J. Walsh).

177. Continental sold bread products produced by its Beverly Hills and DiCarlo bakeries to customers located in Arizona (9617 Nuziard).

These products were sold and delivered through its San Diego bakery (3182–83 Frielink; 4697 J. Walsh; 4759 Stip.).

178. The Beverly Hills bakery had over 200 bread routes originating from its plant or from depots in its marketing territory. The DiCarlo Baking Company served its smaller marketing territory with approximately 80 routes (*See* CX 518; *see also* RX 290; 4828–29 J. Walsh). Although these two bakeries called on some of the same grocery customers, they did not generally sell products wrapped in the same labels to the same customer (4697, 4749, 4844 J. Walsh). The two plants did not generally serve the same institution, school or restaurant accounts (4697–98 J. Walsh).

179. During the period 1966 through 1974, Continental's labels at its Beverly Hills Plant were Wonder Bread, Wonder Country Style, Holsum, Profile, Home Pride White and Wheat and Wonder Wheat. The labels used by the DiCarlo plant were **[44]** DiCarlos Bread, O Settlers, DiCarlo Parisian French, DiCarlo Sour Dough French, DiCarlo Taix bread, and until 1974, Big D and Mr. Big (4683–84 J. Walsh).

180. The other major wholesale bakers of white pan bread and rolls distributing products to grocery stores and restaurants in the market area serviced by Continental's Beverly Hills and DiCarlo bakeries in the late 1960's and early 1970's were Interstate, American, Prosser Baking Company ("Prosser") and Gordon Baking Company ("Gordon") (4522–23 A. Gordon; *see* 9598–99 Nuziard).

181. By the 1970's Interstate had five or six bakeries in Southern California, two of which produced white pan bread (4527 A. Gordon; 10959 Vander Geissen). Interstate closed its Long Beach, California bakery in 1974 and its Santa Barbara bakery in 1964 or 1965 (RX 1051A-C *in camera*). Interstate sold its bread under the Weber, Blue Seal, Millbrook and Log Cabin labels (4706, 4782 J. Walsh; 10959 Vander Giessen). Roman Meal, Hollywood and Jack LaLanne breads were also baked by Interstate (4769 J. Walsh).

182. American Baking Company, which had acquired Langendorf Bakery around 1964, had four bakeries in the Los Angeles area, two of which were located in Los Angeles, with the others located in San Bernadino and Pasadena, California (8852–55 Murray). American served both the Los Angeles and Ventura markets as well as San Diego and Bakersfield (4527 A. Gordon; 8855 Murray). By 1974, American had closed three of its four plants and, in December 1974, American terminated its grocery routes and withdrew from the grocery white pan bread business, redirecting the sales efforts of its Los Angeles Bell Gardens plant to the restaurant trade, concentrating on fast food establishments (RX 377; 8867–68 Murray; 4996 G. Gordon; 4897–98 Mitchell; 4713–14 J. Walsh; *see* 9608 Nuziard).

183. Gordon was founded in 1906 as a family business. Although the business was sold to Interstate in 1930, the Gordon family continued to operate the bakery for Interstate until 1936 when Gordon repurchased it. The bakery, modernized in 1963, used the conventional mix process (4510–15 A. Gordon; 4924 G. Gordon). In 1966, the Gordon Bakery was running two shifts with some overtime (4519 A. Gordon).

184. The Gordon plant, located in the center of Los Angeles, distributed its products in the greater Los Angeles area including Santa Monica, South Laguna, San Bernadino and San Fernando, California (CX 516; CX 519; 4511–12, 4583, 4661 A. Gordon; 4919, 4950–51 G. Gordon; *see* 4661 A. Gordon).

185. Gordon's primary product, the 1 lb. expanded loaf, was distributed under the Gordon label as well as several private labels (4520, 4522–23 A. Gordon; *see* 4517 A. Gordon). It also sold bread to grocery stores under the Springfield label through Certified Grocers, a grocery-owned cooperative (RX 207A-B; 4607–[45]09, 4521 A. Gordon). In the mid 1960's, Gordon's had a market share of 3%–5% (4917 G. Gordon).

186. Prosser was established in early 1939 (4983 Prosser). Its plant was located in Ventura, California, a coastal community located approximately 65 miles northwest of Los Angeles (CX 517; 4984 Prosser). Prosser distributed its products in the coastal area from Paso Robles south to Burbank and eastward to the San Fernando Valley (CX 517; 4987–89 Prosser). It sold bread products under the Banquet Bread, and Family Bread labels (4993–94, 5006–07, 5111–12 Prosser). During the period in which Gordon made Springfield bread for Certified Grocers, Prosser made and distributed that label in the Ventura area (RX 207A-B; 4619 A. Gordon; 5044–45 Prosser). Prosser's plant, which used the continuous mix process had been expanded and modernized in 1964, and, in 1966, was operating two full shifts plus overtime (4985, 5002 Prosser).

187. Some other wholesale bakers included Eagle Baking Company which sold exclusively to restaurants and went out of business on February 27, 1971 (CXs 481, 483; 4523–24 A. Gordon; 4707, 4715, 4771–72 J. Walsh), Modern Baking Company, which produced variety breads and sold some white sandwhich bread to grocery stores (4524 A. Gordon; 4711 J. Walsh), and Oroweat Bakeries, primarily a variety bread baker which sold some white pan bread to grocery stores (CX 460N; 4533 A. Gordon; 4783 J. Walsh). Several San Diego bakers sold white pan bread in sections of the Los Angeles market (4710 J. Walsh). Golden Creme, a cooperative bakery owned by several grocers, sold bread to members of the cooperative and other grocers. It was purchased by Food Fair in 1971 and became Food Fair's captive bakery (4523 A. Gordon; 4747, 4772 J. Walsh).

188. Interstate was the largest producer of white pan bread in the Los Angeles area during the period 1966 through 1974, with the Weber label as the largest selling brand (RX 228A-B; 4646 A. Gordon; 4782 J. Walsh; *see* 8887 Murray; 9567, 9607–08 Nuziard). Continental and Interstate's shares of wholesale bread business with grocery stores were approximately the same by 1974 (9607–08 Nuziard).

189. In 1966, the captive bakeries in the Los Angeles area were Safeway, Ralph's and Vons. Lucky opened its captive bakery in 1967 (4585 A. Gordon; 4772–74 J. Walsh). By 1974 other major grocery supermarket chains were operating their own captive bakeries. Food Fair had purchased Golden Creme. Alpha Beta, which had discontinued its captive bakery in 1961 in favor of private label bread, resumed baking its own bread in early 1972. Albertson's started baking its own bread in 1973 or 1974 (RXs 239A; 246B; 367A; 4523, 4526, 4532, 4539 A. Gordon; 4747, 4772–73 J. Walsh; 9568 Nuziard).

190. Particularly after 1966, most supermarket chains which did not have captive bakeries purchased private label bread from wholesale bakers (4523, 4534, 4539 A. Gordon; 4772–73 **[46]** J. Walsh; *e.g.,* CXs 409; 412; 416–421; 429–430; 442–445; 447–452).

191. The most important loaf size in the Southern California area was the 1 lb. expanded loaf of white bread (8854 Murray; 4734 J. Walsh; 4995 Prosser).

192. Continental considered that it was generally the leader of price increases in Southern California on advertised label and private label bread. (CX 490B).

193. Before 1966, the major grocery chains did not have many outlets in the Ventura area (4997–99 Prosser; *see also,* 5002, 5069–71 Prosser). Prosser had a 40% share of the Ventura market in 1960 while its competitors, operating from depots in the Ventura area, had lesser shares: Interstate 30%; Continental 20%; and American 10% (4989, 4993, 5004 Prosser).

194. Jordano's, Williams Brothers, Scolari's, Santa Cruz, B&D, McDaniel's and Bayles were Prosser's most important grocery store customers in 1966 (5007 Prosser). Prosser did not sell private label bread to grocery stores and 70% of its sales were of its primary label bread, Prosser Banquet (5007 Prosser). Grocery store customers accounted for approximately 50%–60% of Prosser's sales (5099–5100 Prosser; *see also,* CX 505A-I; 5055–58 Prosser).

195. As the major grocery chains expanded into the coastal area, the major wholesale bakers, including Continental, began granting discounts to the other grocery stores, discounts which Prosser met (RX 363F-H; 5009 Prosser; *see* 5131–32 Thompson; 5160 Hauser; *see also,* 5040 Prosser).

196. In 1966, Prosser still had 40% of the market and Continental

had increased its share to 30%, whereas Interstate share had declined to 20% and American share remained at 10% (5008 Prosser).

197. During 1966, Prosser developed, proposed, and successfully negotiated a private label program for the approximately fifty Food Fair Grocery Stores in the Los Angeles area, some of which he had been supplying with Prosser Banquet label bread. Prosser began distributing private label bread to Food Fair's eleven stores in the Ventura, Santa Barbara and San Fernando area. He leased a warehouse in central Los Angeles from which he planned to distribute private label bread to the rest of the Food Fair stores in the Los Angeles area (CX 519; 5010–12 Prosser; 5136–38, 5141 Ashton).

198. Plans to establish a Los Angeles depot, as were the plans to serve Food Fair stores in Los Angeles, were abandoned by Prosser after discussions with representatives of Interstate and Continental (5014 Prosser; 5137–40 Ashton). Prosser did continue to serve some Food Fair stores in the San Fernando Valley while Continental, and later, Interstate, supplied [47] private label bread to Food Fair's Los Angeles stores until it purchased the Golden Creme Bakery (CX 444A-J; RX 354M; 4747 J. Walsh; 5014 Prosser; 5139–40 Ashton).

199. In late 1966 Continental, Interstate and American reduced their wholesale prices of 1 lb. expanded advertised label bread by 6¢ (5019–24 Prosser). At the same time, these wholesale bakers reduced their prices on eight-pack hot dog and hamburger buns (5026 Prosser). Prices did not increase until March 19, 1971 (5025 Prosser).

200. Beginning in 1966 and continuing at least through 1968, Continental engaged in widespread sampling of Prosser's restaurant accounts (5026, 5028–29 Prosser; 5122–23 Thompson; *see* CX 424A-B, D, K, Z–6, Z–9, Z–16–18; *see also* CX 2361A-I; RX 378B, D, F; 5028–29, 5077–78 Prosser).

201. In 1967 Continental introduced its secondary bread under the Holsum label in the Ventura area (5031 Prosser *but see* 5101–03 Prosser (1964 or 1965)). The secondary label 1 lb. expanded white bread, which later was replaced by private label bread, was sold at a retail price of 5 loaves for $1.00. In 1966, Prosser's fully allocated cost of baking and distributing 1 lb. expanded bread was 20¢–21¢ (5006 Prosser). Prosser lost much shelf space in its principal accounts to Continental's Holsum label (5035–42 Prosser).

202. As a result of these pricing moves by Continental and the other wholesaler bakers Prosser lost many restaurant and grocery store customers. Prosser's sales were reduced to some of its principal grocery accounts, Prosser was required to grant discounts to hold business, and Prosser sold bread products at net prices below its costs (5027–44, 5050–51, 5079, 5099–5100 Prosser; 5123–24 K. Thompson; 5149–50 Hauser).

203. In November 1969, after Gordon replaced Continental as the supplier of Certified Grocers' Springfield private label bread, Gordon entered into an arrangement whereby Prosser would bake and distribute Springfield Bread to grocery stores in Prosser's marketing area (RX 207; 5044 Prosser). Prosser, however, did not get the Springfield private label business in many of the grocery stores Continental had previously supplied with Springfield bread. The stores substituted Continental's secondary label, Holsum for Springfield, apparently at a better price (5045–46 Prosser).

204. In June of 1970, Continental Beverly Hill bakery advised its Regional Office that future sales opportunities might open up because "[C]ontinued selling pressure may force withdrawal of some wholesale competition from the market. Weak bakers in the market are American, Prosser and Eagle" (CX 410B). "[E]liminating competition" was included in the report "[A]mong the methods for obtaining sales" (CX 410J). [48]

205. In 1970 and 1971 Prosser lost more grocery and restaurant customers when he could not meet or hold prices at Continental's levels since they were below Prosser's cost. In 1971 Prosser's fully allocated cost for 1 lb. expanded bread was 22¢ compared to 20–21¢ in 1966 (5006, 5051–53 Prosser; *e.g.*, RX 280A-U; CX 441N, Z-9, Z-22, Z-26, Z-188, Z-189, Z-228-339; 4799–4803 J. Walsh). In 1970 Continental's price of around 18¢ for private label 1 lb. expanded bread was 4¢ below Prosser's fully allocated costs (5042 Prosser). In 1971 Prosser tried to meet Continental and Interstate prices by selling private label bread to Williams Brothers and Jordano's. Prosser lost those accounts when he tried to raise the 18.5¢ price to cover his fully allocated costs of 22¢ (5051–53 Prosser).

206. In 1970 Continental was ranked first in the sale of the dominant 1 lb. expanded loaf in the Ventura area (5146 Ashton). In 1971 Continental's share of the Ventura market was 40%, Interstate ranked second at 30%, Prosser had 20%, and American 10% (5062 Prosser; 5146–47 Ashton).

207. By 1971 Prosser's weekly route average had fallen to approximately $1000 from $1400 in 1966 and the number of routes had declined to 23 from 39 in 1966 (5002, 5038 Prosser). Prosser's bakery was profitable until 1967 and ran at a loss until it closed, with the exception of 1969 in which the company showed a marginal profit (CX 505A-I; 5057–58 Prosser).

208. Prosser discontinued its wholesale routes on November 20, 1971, and after baking Pepperidge Farm Bread for a time, Prosser ceased all operations on February 20, 1973 (4983, 5054, 5059–60, 5063 Prosser; *see* CX 505A).

209. Continental made plans to fill the vacuum left by Prosser's

imminent exit by expanding its routes and coverage in the Ventura area. One driver testified that he was offered positions with Continental even before it became evident that Prosser would soon close (CX 480C; *see* CX 480F; CX 470D; 5125–27 Thompson; *see generally* CX 483; RX 365A-B).

210. Sometime after Prosser went out of business, Continental discontinued sales of Holsum in the Ventura area (9614 Nuziard; *see also* 9676 Nuziard).

211. Continental has established itself very firmly in the Ventura market since Prosser withdrew. Continental now has the greatest share of that market (10945–46 Vander Giessen).

212. The introduction of secondary and private label bread in the Los Angeles area by the major wholesale bread bakers also had an adverse effect on Gordon's sales (4549 A. Gordon). In 1966 or 1967 Gordon's lost the Market Basket account, which comprised approximately 20% of the bakery's volume, to American which offered private label at a price below Gordon's cost. Gordon then sought a private label program at Boy's Markets and redirected his sales efforts to fast food restaurants (4556–57 A. Gordon). **[49]**

213. Until the loss of the Market Basket account, Gordon had not sought other private label business, since it felt such business was not profitable. The Boys account, marginally profitable to Gordon's when first obtained, did not continue to be profitable because Gordon was forced to lower net wholesale prices below its costs to meet periodic offers from Continental (4563–65, 4570–71 A. Gordon; 4894–96 Mitchell). Gordon started the private label account with Boys because it needed the volume (4563–65 A. Gordon). Gordon's sales to Boys amounted to approximately 35,000 to 40,000 units per week and totalled yearly sales of approximately $900,000 (4562 A. Gordon; 4891 Mitchell).

214. Gordon's obtained the account at Jack-In-The-Box, a rapidly expanding fast food chain (4558–59 A. Gordon). Continental eventually acquired the account which it served at prices below Continental's costs (CXs 465; 466; CX 491A). In January 1974, Continental lost over $82,000 from its sales to Jack-In-The-Box and over $4000 from sales to Denny's (a similar fast food operation)(*Id.*). In March and October 1974, Continental still reported losses on the Jack-In-The-Box account (CXs 491D, E; 465; 466).

215. When Gordon took over the Certified Grocers Springfield Bread account from Continental in 1969, Continental offered the grocers it had been selling Springfield bread, reduced prices on secondary label bread. As a result, only 50% of the grocers continued with the Springfield program (4555 A. Gordon).

216. After Continental began to lose the Alpha Beta private label

business in 1971, it actively pursued private label business (*See* 4547 A. Gordon; CXs 53A; *e.g.*, CXs 409; 412; 416–421; 429–430; 442–445; 447–452).

217. Continental discriminated in price between Wonder products and private label bread (CX 400). For example, Continental's wholesale price on the 1 lb. expanded Wonder advertised label loaf was 23.4¢ during the period from June 1970 to June 1972 (CX 400) whereas the wholesale prices on the same sized private label products were 20¢ to Alpha Beta and 21.7¢ to Albertsons. In May 1973, the wholesale price on 1 lb. expanded Wonder was 26.4¢, and the private label wholesale prices were 23¢ to Stop N Go and 19.5¢ to both Market Basket and Heritage House (CX 400Z–30; Z–47).

218. As a result of Continental's efforts to obtain a larger share of the secondary and private label market, Gordon's lost much shelf space for its primary line bread, since Gordon's was no longer able to control the bread table (4515–16, 4537–38, 4560–61, 4597 A. Gordon; *see* 4719–20 J. Walsh).

219. Respondents' "Profit by Variety" study for its Beverly Hills bakery shows that almost all of Continental's private label white bread, including the 1 lb. expanded loaves, were **[50]** sold at wholesale prices below Continental's fully allocated costs (*See* CX 441).

220. In August 1973, Continental noted a "strong probability" that American and Gordon would be forced to withdraw from the marketplace resulting in an increase in Continental's market share of 5% to 6% (CX 7 (L–2)).

221. During the 1972–1973 period Gordon supplied branded bread to Hughes Markets' twenty-five stores (4936–37 A. Gordon; 5068 Prosser (including one in Oxnard)). In 1973 Continental offered Hughes a private label program and obtained the account. Continental was aware that the loss of bread table space at Hughes would put Gordon out of business. Hughes accepted Continental's offer of 17.5¢ for 1 lb. expanded bread (RX 278 A-E; 4796–99, 4840 J. Walsh). This account was projected to yield $10,000 weekly in sales (RX 278A).

222. An examination of Continental's Profit by Variety study relating to the Hughes private label account reveals that Continental was selling all of the products which Continental supplied under Hughes private label below fully allocated cost. Some of the items were close to being below variable cost as well (CX 441 K, T, Z–20, Z–28, Z–37, Z–42, Z–52, Z–137, Z–139, Z–220, Z–221).

223. In March 1974, Beverly Hills sales to Hughes totalled $65,303.18 of which $19,639.86 (29.66%) was for Wonder bread products. The sales of Wonder Bread (assuming a profit) would not have been enough to offset the unprofitable private label program sales (CX 461B; CX 493A).

224. On June 22, 1974 Gordon leased its baking plant to Certified Grocers in order to avoid going bankrupt (4510, 4520–21, 4575 A. Gordon). Thereafter Certified produced Springfield private label bread for the member grocers. The bread products produced by Certified included only white bread and bread type rolls and the Springfield label products were delivered on a store drop basis without returns by salaried employees, similar to the distribution methods of captive bakers, except that Certified did not control the shelf space of its members. (*See* 11334–46 Andikian; *see also* 10297 Jakacki). In addition, Certified sold some private label bread (other than Springfield), and solicited this portion of its business in competition with the other wholesale bakers (4608 A. Gordon; 11340–43 Andikian). Certified did not sell advertised label bread and did not sell to restaurants or institutional accounts (11337–38 Andikian).

225. Thus, in 1974, with the withdrawal of American from the grocery segment of wholesale baking and the withdrawal of Gordon from the advertised label business, Interstate and Continental became the dominent wholesale bakers in the Los Angeles area (4529–32, 4574 A. Gordon). Each had approximately 40% of the white bread market (4531–32 A. Gordon; *see* CX 493A). **[51]**

226. It is found that, during the period 1966 through 1974, Continental discriminated in price between purchasers of its advertised label bread and purchasers of its secondary label and its private label bread and that during most of this period the lower discriminatory prices were below Continental's fully allocated costs. In most instances, these lower prices were not granted to meet the equally low prices of any of Continental's competitors. It is found that Continental's pricing practices contributed substantially to the failure of Prosser, to the withdrawal of American from the wholesale bakery business, and to the transfer of Gordon's baking operation to Associated Grocers. As a result, the wholesale white bread market has become more concentrated, with two multiplant bakers sharing most of that market.

Northern California Marketing Area

227. Complaint counsel challenge certain pricing practices engaged in by Continental in the Northern California marketing area during the period 1972 through 1974. More particularly, complaint counsel challenge the low wholesale prices at which Continental sold private label products to chain store grocers throughout that marketing area from July 1972 until 1974 (CCPF 12–1–12–222; CC Mem. 129–137).

228. The Northern California marketing area included the San Francisco Bay area, the central valley of California from Fresno to

Reading as well as Reno and the Lake Tahoe area (7914 Stip.; *see* CX 781; 3251–52 Frielink).

229. Continental's San Francisco, Sacramento and Oakland bakeries sold bread products in this Northern California marketing area. These bakeries were part of Continental's Northern California Region (Redwood City) which also included bakeries located in Honolulu, Portland, Seattle and Spokane (3163 Frielink).

230. Other wholesale bakers in this marketing area in the early 1970's were Campbell-Taggart which had six plants, American, William Inglis and Sons Baking Co. ("Inglis") and Welsh Baking Company ("Welsh") located in Reno (3852 Albrecht; 3183–84 Frielink).

231. Continental's Oakland bakery produced variety and pan white breads. Its San Francisco and Sacramento bakeries produced cake products as well as variety and white pan breads (3162–63, 3175 Frielink; 4139–40 Heaps). In 1974, the San Francisco bakery was converted into a cake producing plant and Sacramento's cake production was transferred to the San Francisco bakery (3163 Frielink). These bakeries supplied bread products to each other (3161–63, 3175 Frielink).

232. Continental's advertised label was Wonder while its secondary labels were Country Style and Home Pride (3175, **[52]** 3180 Frielink). In 1970, Continental's private label customers were United Grocers, a voluntary cooperative of retail grocers ("Bonnie Hubbard" label) (3214 Frielink; CX 771A-B), Albertson's in California and Nevada (3185–86, 3218 Frielink), Wentz Markets, Cola Markets and Mayfair (CX 610A).

233. At all times relevant hereto, Continental sold bread products produced by its Bay Area bakeries to grocery customers located in Nevada (CX 610A).

234. In the relevant time period, Campbell-Taggart had two subsidiaries in the Northern California marketing area, Rainbo and Kilpatricks. Rainbo operated four plants located in Chico, Sacramento, Modesto and Fresno (3184 Frielink). Its advertised label was Rainbo. In late 1970, Campbell-Taggart was selling private label products to United Grocers and Farmers Market located in the northern part of the marketing area (CXs 771B; 610A).

235. Kilpatricks operated two plants located in San Francisco and Oakland (3184 Frielink; 4956, 4965 Roberts; *see* CX 785). Its advertised label was Kilpatricks (3356 Frielink). From 1970 to 1974 Kilpatricks sold private label to Alpha Beta (4961 Roberts).

236. In the early 1970's American had one bakery in the Northern California area located in San Jose. It distributed bread products throughout the Northern California Marketing area (CX 784; 3852 Albrecht). American's advertised label was Langendorf while its larg-

est private label customers were Mayfair and K Mart (CX 610A; 3336 Frielink).

237. Inglis had one bakery located in Stockton (CX 782; 3416–17 Sitter). This plant was rebuilt and modernized in 1957 and it used a continuous mix process (3717–19 W. Inglis). In 1966, Inglis acquired the Sunlite bakery located in San Jose, but transferred the production of that plant to San Jose in 1969 (3417 Sitter; 3728–29, 3753, 3784 W. Inglis). Inglis' advertised label was Sunbeam and it sold some bread products under the Sunlite label (3340 Frielink; 3416–17 Sitter; 3611 Jones). In 1970, its private label customers were Farmers market and Save Mart (CX 610A).

238. Welsh, located in Reno, sold bread products under the Welsh and Sheepherder labels (3340 Frielink; 3515–16 Biechner; 3956 McGinley. It was purchased by American in 1971 (3466–69 Biechner; 3957 McGinley). It had tried to enter the Sacramento area in the late 1960's, but was not successful (3466–69 Biechner).

239. Interstate, which had entered the Northern California market in 1954 by purchasing bakeries in Sacramento and Oakland, sold these bakeries in 1967 and 1969, respectively, and withdrew from the market (3941 Hunter). **[53]**

240. In October 1972, the approximate market shares of the wholesale bread market in the Northern California area were Campbell-Taggart 40%; Continental 30%; American 25%; and Inglis 5% (RX 103C; 4046 McCarthy).

241. Continental was considered to be a price leader in the Northern California area in that its wholesale price increases were usually followed by other wholesalers (3891–92 Johnson).

242. The principal captive bakers in Northern California in the early 1970's were Safeway, Lucky Stores and Alpha Beta (3228, 3353 Frielink; 3429 Sitter; 3871 Albrecht). By 1974, Safeway's market share of all white bread was 2.7% in the Sacramento area and 11.0% in the San Francisco/Oakland area. In 1974, Lucky Stores' share of the total white bread market was 9.0% in the Sacramento area and 6.8% in the San Francisco/Oakland area. Lucky Stores used the Lucky and Harvest labels. The combined shares of Safeway and Lucky Stores were 17.8% in San Francisco/Oakland area and 11.7% in the Sacramento area (CX 141).

243. From 1970 to 1974, the 1 lb. expanded loaf of white bread was the largest volume private label product in the Northern California area and was the focus of price competition among the wholesalers as well as the retail grocers (3514 Biechner; 3676 Jones).

244. Private label and captive label bread became an important factor in the Northern California market area in the latter part of the 1960's (3877–78 Albrecht). The first significant private label program

was the "Bonnie Hubbard" program which Continental negotiated with United Grocers Cooperative, the largest grocery cooperative in the Northern California market (3214 Frielink; CX 771A). Although the wholesale price for the 1 lb. expanded loaf of Bonnie Hubbard private label bread was originally announced as 20¢ with stale returns and 19¢ without stale returns, before the program started on July 1, 1968, Kilpatricks offered to sell its advertised label bread to Albertsons at 18¢. Continental lowered its price on 1 lb. expanded bread to 18¢ at the start of the Bonnie Hubbard program (4135–39, 4196 Heaps; 3214 Frielink; RXs 61A; 62). The other major wholesalers also lowered their wholesale price to 18¢ (RX 61A).

245. Continental supplied Bonnie Hubbard bread to United Grocer's members until mid–1970, when Campbell-Taggart replaced Continental (3214, 3333 Frielink; 4186, 4189–90 Heaps; CX 771A-B). Continental gave up the Bonnie Hubbard program because it was not profitable (3214, 3217 Frielink).

246. Continental actively sought private label business of the member grocers before and after its participation in the Bonnie Hubbard program (CXs 623A-B; 630A-B; 689A-B). From 1960 to mid 1970, Continental sold private label bread to various retailers at wholesale prices either identical to, or lower than, the price at which it sold Bonnie Hubbard label bread **[54]** (3216–19 Frielink; *e.g.*, CXs 604A-B; 605A-B; 606A-C; 607A-B; 613A-K).

247. As a result of the vigorous price competition among wholesale bakers the discounting of wholesale prices to retailers became prevalent (CXs 614A-C; 619A-C; 621A-B). Discounts were offered on private label as well as secondary and advertised label bread (3215–18 Frielink; CXs 610B; 759Z–24–Z–28; *see*, 4184–88 Heaps).

248. From mid-1969 until September 16, 1970, the prevailing wholesale price for 1 lb. expanded private label white bread was 17.2¢ per loaf. Inglis considered this price to be "below the cost of doing business" (RX 61A). From September 16, 1970, until July 10, 1972, the prevailing wholesale price for the 1 lb. expanded loaf of private label white bread was 18¢ (3376 Frielink; CXs 722; RX 2B).

249. On July 10, 1972, Continental reduced its wholesale price for the 1 lb. expanded loaf of private label white bread to 17.2¢ and this price was the prevailing wholesale price for over one year until August 20, 1973 (3221–25 Frielink; CXs 676; 722). This price was offered to all of Continental's private label customers in the Northern California market area as the company had maintained a single price policy for private label accounts since 1970 (3221 Frielink; 4149 Heaps). Such a uniform price for private label bread was unique to the Northern California market area. The other major wholesale bakers gave

private label discounts in meeting particular competitive offers (3618–19 Jones; 4007, 4013 McCarthy; 4962 Roberts).

250. Although Inglis, American and Campbell-Taggart (Rainbo Chico bakery) had sold 1 lb. expanded bread at prices below 18¢ before July 10, 1971, to several of their private label customers, these customers were located in a relatively small portion of the Northern California area (RX 31). None of the other wholesalers had offered the 1 lb. expanded bread below 18¢ to the entire Northern California market before Continental's offer of July 10, 1972 (CXs 647A; 676; RXs 90A-C; 31; 33–40; 63A; 3380–82 Frielink; 3460–61 Sitter; 3979–89 McGinley).

251. Although all of the wholesale bakers in Northern California had similar costs, it appears that Continental's costs during the period 1966 through 1972 were consistently higher than the industry average (CXs 747; 753 *in camera;* 3192 Frielink; 3607 Jones). Wholesale bakers' costs of producing and distributing white bread increased each year from 1966 to 1974 CXs 648F; 655; 687C; 688B; 689A; 691B; 747 *in camera;* 3265, 3373–74 Frielink; 3607–08, 3618, 3628 Jones).

252. In 1966, Continental stated that its fully allocated costs of producing and selling 1 lb. expanded white bread was 19.58¢ per loaf (CX 740A-B). Thus, from at least July 10, 1972, when it lowered the wholesale price of 1 lb. expanded bread to 17.2¢, Continental was knowingly selling that bread product **[55]** below its fully allocated costs in Northern California (*See,* 3214, 3217 Frielink).

253. Continental's losses (in thousands) on bread products during the years 1971 through 1974 were as follows (RX 3 (1971–1974); CX 1301C (1972 and 1974):

	1971	1972	1973	1974
Oakland	(66)	(141)	(435)	(416)
Sacramento	(32)	(199)	(645)	(639)
San Francisco	(192)	(470)	(1145)	(710)
Total	(290)	(810)	(2429)	(1765)

In four years Continental lost over $5 million on bread sales in Northern California.

254. American's plant in San Jose was an extremely efficient, highly automated, modern plant (3854 Albrecht). On May 9, 1973, American determined that the total cost of producing and selling 1 lb. expanded white bread was 25.53¢ (CX 751B). Accordingly, Continental was selling its 1 lb. expanded bread considerably below American's fully allocated costs (*Compare* CX 722 *with* 751B). In fact, assuming Continental's costs were comparable to American's, the 17.2¢ price was below Continental's average variable costs pursuant to the for-

mula adopted for this case in Finding 45, *supra,* (80% of 25.53¢ equals 20.42¢).

255. Inglis' production costs were lower than Continental's because it used the "continuous mix" process whereas Continental was using the "Continental brew process" (3199–3200, Frielink; 3724–25 W. Inglis). During 1973, Inglis' fully allocated costs of baking and distributing 1 lb. expanded white bread was between 25.3343¢ (January 1973) and 29.939¢ (September 10, 1973). Thus, Continental was selling its private label 1 lb. expanded bread at a wholesale price considerably below Inglis' fully allocated costs (CX 722; 3617–18 Jones).

256. During this time period, Continental guaranteed its wholesale prices to existing and prospective customers and predicted that the weaker companies would have difficulty surviving in view of the state of the market (CX 606B; 607A; 3267 Frielink). Also during this time period and through 1974, Continental specifically recognized that American and Inglis were continually growing weaker, that their financial condition was not stable and that it intended to eliminate certain of its competitors from the Northern California market or portions thereof (CXs 616D; 619A; 666B-C; 686; 688B; 4165–67 Heaps).

257. For example, in a 1974 business plan, drafted in 1973, Continental's San Francisco plant manager predicted that 1974 would present great opportunities. He stated that "[w]e are gaining more market domination for our products and as we do so, **[56]** our competitors fall back, and grow weaker" (CX 666B). Continental's regional business plan summary for Northern California predicted that "[c]urrent conditions in the industry may cause some bakers to close their plants." Continental's strategy was to "aggressively seek to increase sales tonnage through new varieties and through the assignment of specific target accounts to all sales management personnel" (CX 688B). In a 1974 business plan, dated June 23, 1977, Lund, manager of the Oakland bakery, targeted Louis Stores, an Inglis private label account, to advance Continental's private label program (CX 689B). In the same business plan Heaps targeted Save Mart, also an Inglis account, for Continental's private label business (CX 665G).

258. By 1972, Continental had acquired a number of chain grocers as private label customers. They included Brentwood Markets, Eagle Thrifty, Albertsons, Stop N Shop, Shop N Go, Ralphs, Bazar, Waremont, Wertz and Mayfair (CX 720; 3225 Frielink).

259. In response to private label offers to its customers by Continental before July 17, 1973, Inglis lowered its price to meet Continental's offers (*See* CXs 722; 669; 3495–3509 Biechner; 3609–10 Jones).

260. In November 1972, the Campbell-Taggart and Continental Bakeries were closed by a labor strike. American and Inglis supplied the Northern California market with bread products, although, dur-

ing most of the strike period, they only produced the 1 1/2 lb. advertised label loaf on which they made more profit than if they had produced private label or the 1 lb. expanded loaf of advertised label bread (CXs 2205C-D Jones; 2207F-G Albrecht).

261. On July 17, 1973, Inglis sent out a "discount elimination letter" to its customers in an attempt to increase its profits (3511–12, 3547–49 Biechner; CX 764). American was the only other major wholesaler to follow Inglis' price move. Inglis and American thereafter lowered their prices to the prevailing 17.2¢ wholesale price (3500–01, 3511–12, 3547–49, 3553 Biechner; 3627–34 Jones; *see* CX 764). At the time of Inglis' letter, Federal price controls were in effect (*See* RX 75).

262. In a period following the Inglis "discount elimination letter," Continental made a concerted effort to acquire private label business (RX 500G-I Letson; 4250–51 Konkel; 4389–92 Posesto; 4270–71 Teel; 4080–82 Miller; 3510 Biechner; *e.g.*, CXs 769Z–46; 769Z–50).

263. During all relevant times. Continental's wholesale prices for its advertised label bread was substantially higher than the prices for private label. For example, from July 10, 1972 until August 6, 1973, Continental's wholesale price for its 1 lb. expanded Wonder loaf was 25¢, and from August 6 until **[57]** August 20, 1973, its wholesale price was 26.5¢ (CX 721). During this period, its price of the comparable private label product was 17.2¢ (CX 722). During this period the difference in price between the 1 1/2 lb. loaves of white private label and advertised Wonder label was at least 9¢ (CXs 721; 722).

264. Inglis first began to experience serious financial problems in the late 1960's and in 1969 filed for bankruptcy under Chapter 11 proceedings. The Inglis family personally loaned the Inglis Company approximately $4.5 million in an effort to "save" the business (3734, 3739–40, 3770 W. Inglis). It was well known in the baking industry in Northern California that Inglis had failed to make a profit from 1965 to 1976, except for the year 1972 when it supplied bread products to retail grocers during the labor strike against Campbell-Taggart and Continental (*See also* 3761–62 W. Inglis).

265. During the early 1970's, American withdrew from seven major areas of the Northern California market, including Sacramento, Bakersfield, Reno, Ukiah and Ft. Bragg. Thereafter American concentrated its operations in the San Jose area (3957–59, 4005 McGinley; 4160 Heaps). In addition to the high costs of distribution, American attributed its territorial withdrawal to the long period of price erosion in Northern California (4006 McCarthy), lack of consumer acceptance, and the expansion of captive label bakeries (*See* 4006–07 McCarthy; 3961 McGinley).

266. Between 1970 and 1975 American's net bread sales decreased from approximately $21,000,000 to approximately $17,700,000. Conti-

nental's bread sales increased from approximately $16,600,000 to $21,600,000 (RX 115A). Campbell-Taggart's sales increased from approximately $26,400,000 to $60,700,000 and Inglis had a slight increase from $9,800,000 to $10,800,000 (RX 115A).

267. By 1974, the only two major wholesale bakers of white pan bread selling in the entire Northern California marketing area were Continental and Campbell-Taggart (4159–60 Heaps).

268. In 1975, Continental made a net profit for the first year since 1970 (RX 3). In 1976, Inglis withdrew from the market, Campbell-Taggart purchasing the plant and assets (9291 Frielink).

269. It is found that during the period 1972 to 1974, Continental discriminated in price between purchasers of its advertised bread and purchasers of its private label bread and that during most of this period the lower discriminatory prices were substantially below Continental's fully allocated costs. The lower prices were not made in good faith to meet the equally low prices of any of Continental's competitors. It is found that Continental's pricing practices contributed substantially to the failure of Inglis and that Continental knew or should have known that Inglis would be injured by its discriminatory sales below cost. As a result, the wholesale white bread market has become more concentrated. **[58]**

270. Complaint counsel also challenge certain wholesale price differences charged by Continental to certain customers in Nevada between 1972 and 1974 on 1 lb. expanded and 1 1/2 lb. loaves of white bread. More particularly, complaint counsel allege that price differences of as much as 12.4¢ (or 38%) between certain independent grocery stores on their purchases of 1 lb. expanded Wonder and 1 lb. private label bread sold to their chain store competitors had the adverse effects on competition between retailers proscribed by Section 2(a) of the amended Clayton Act (CCPF 12–187; CX 2101B Stip.).

271. Continental's private label customers in the Nevada portion of the Northern California market were Albertson's, Mayfair and Eagle Thrifty (3185–86 Frielink; CX 610). Continental's Wonder customers in Nevada included Clarkson's Market and Miller's Superette and Park Grocery stores (4498–4500 Clarkson; 4313, 4315 Miller).

272. Clarkson and Miller paid substantially more for their Continental-produced 1 lb. expanded Wonder label than did Albertson's, Eagle Thrifty and Mayfair for private label bread of like grade and quality. During 1972 through 1974, the difference in price ranged from 7¢ in January 1972 to 12.4¢ in February 1974 (CXs 674; 721; 722; 733; RXs 1; 2; *see also* CXs 631; 625; 636).

273. Bread was a high volume sales item for Clarkson's and 5% of its business was in sales of bread (4503–05 Clarkson). During 1972 to 1974, Clarkson's purchased only Wonder products from Continental.

Clarkson never received any discounts, rebates, free goods, or cash in connection with the purchase of Wonder bread. Continental never offered private label or secondary bread to Clarkson's (4500–04 Clarkson).

274. Clarkson's usually purchased between $400 to $600 worth of white bread each week, 60% of which was purchased from Continental (Clarkson 4500). Clarkson had an overall net profit objective of 2–3% and a few percentage points difference in the wholesale price of bread was important (Clarkson 4503–05).

275. Mayfair was the closest grocery store to Clarkson's, located approximately 1.5 miles away. Albertson's and Eagle Thrifty were approximately 2 miles from Clarkson's. Continental supplied Albertson's and Eagle Thrifty with private label bread from 1972 to 1974 and Mayfair from January 1972 until December of 1973 (4502 Clarkson; CX 720).

276. The Savetime Park Grocery (Park Grocery) and Superette are grocery stores in Sparks, Nevada, operated by Ben Miller (4312–13 Miller). From 1972 to 1974, Miller's two stores competed with the larger chains, including Albertson's and Eagle Thrifty (4319–25 Miller). There was a Safeway store across the street from one of Miller's stores (4318 Miller). **[59]**

277. During 1972 to 1974 all of Park Grocery's and Superette's purchases from Continental were packaged under the Wonder label (4313–16 Miller). Bread was an important item for these stores (4320–22 Miller). Miller's stores purchased approximately $1500 in white bread products each week. One third of that amount was Continental's Wonder bread (4315 Miller). Miller always paid the wholesale list price for Wonder white pan bread and never received any free goods or cash payments from Continental on his purchase of bread (4316–18 Miller).

278. From 1972 through 1974, there were times when Miller's stores had to sell bread at cost or below cost to meet the retail price of their chain store competitors, Eagle Thrifty, Albertson's and Safeway (4321–22 Miller).

279. It is found that Continental discriminated in price between competing grocery customers in the Nevada area, and that such discriminations were, at times, substantial. The lower discriminatory prices were granted on sales of private label bread to chain stores. It is found that the effects of such discriminations, when in the magnitude of 10 to 12¢ a loaf (or 30% to 35%), may be to substantially injure competition between grocers paying the higher price for advertised label bread and chain stores paying the lower price for private label bread.

Cleveland

280. Complaint counsel challenge certain pricing practices engaged in by Continental in Northeastern Ohio during the period 1970 through 1974. More particularly, complaint counsel challenge Continental's private label agreement with Pick N Pay and the effects of that agreement upon competition in the greater Cleveland marketing area (*See* CCPF 13–1–13–466; CC Mem. 138–166).

281. Continental's Akron and Youngstown bakeries were part of its Detroit region which also included bakeries known as Detroit Wonder, Detroit Hostess, Toledo Wonder, Toledo Hostess, Cleveland Hall, Columbus Wonder and Dayton Certified. Continental's Cleveland Hall bakery produced cake and sweet goods only (5173 Miller).

282. The other wholesale bakers selling white pan bread in the Northeastern Ohio area in the early 1970's included Interstate, American, Ward, Laub, Schwebel, Nickles, Orlando, Tonys, Genest, Firth and Keystone (5194–95, 5216–18 Miller; 5278 Schreck; 5537 Stonbraker). The major wholesaler bakers in the Cleveland area were Continental, Interstate, Ward, Laub and Nickels (9352 Gase; *see* 5194 Miller; 5318 Meehan; 5387 Kravitz). American was not considered to be a factor in the Cleveland market (5538 Stonbraker). Nickels and Orlando, a small baker of specialty items, sold primarily to the restaurant trade in the early 1970's (5705–06 Bronczek; 9353 Gase; 5537 Stonbraker). **[60]**

283. The Akron and Youngstown market areas were considered separate from the Cleveland Market. Competitors, competitive conditions and prices sometimes varied from area to area during 1970 through 1974 (5194–95, 5216–18 Miller; 5248–50 Shreck; 9361 Gase). In Akron, the major wholesale bakers were Continental, Nickels, Schwebel, Millbrook, American and Ward (9358–59 Gase; *see* 5195 Miller). In Youngstown, the major wholesale bakers were Schwebel, Continental, Nickels and Keystone (9359–60 Gase).

284. In the early 1970's, the Akron bakery used a continuous mix process and baked only white bread (9361 Gase; CX 993"S" Davis). It ran approximately 100 bread routes from its plant or from agencies located in the Ohio communities of Cleveland, Canton, Mansfield and New Philadelphia (CXs 992L, 993D Davis; 5160–70 Miller). In 1971, the Akron bakery's bread sales were approximately $110,000 per week (5207 Miller).

285. The Youngstown bakery used a conventional mix process and baked hot dog and hamburger rolls and a wide assortment of variety breads (9361 Gase). It ran bread routes from the plant and from agencies located in Vanport and Franklin, Pennsylvania and Andover, Ohio (CX 922J; 5233 Shreck;). Approximately 70% of Young-

stown's sales were to grocery customers (5232 Shreck). In 1973, Youngstown's weekly route sales of white bread were approximately $35,000 (5236 Shreck).

286. Continental's Akron and Youngstown bakeries supplied each other with products and they were also supplied with additional varieties by other Continental bakeries (5259–62 Shreck; 5171–74, 5183, 5198–5200 Miller).

287. The Akron bakery sold bread products under the Wonder, Wonder Country Style, Home Country Fair, Nancy Martin and Edwards labels (CX 2695; 5188–90, 5192–93 Miller). It sold private label products to the following chain stores: Pick N Pay, Stop N Shop, Open Pantry, T&A Saveway; Acme and Stop-N-Go (*See* CCPF 13–85 - 13–98).

288. Interstate purchased Nabisco's Bread Division in 1968 (5301–01 Meehan). Its Cleveland plant is usually referred to as the "Millbrook" plant (5302 Meehan). This plant used a continuous mix process (5303 Meehan; *see* 9462 Gase). In 1973, it had approximately 68 routes, none of which were exclusively restaurant routes. The greater portion of its sales were in Cuyahoga County, Cleveland (5309 Meehan). It sold bread under the Millbrook and Good Cheer labels as well as private label bread under the Convenient, Stop N Shop and BiRite labels (5311, 5468–69 Meehan). Millbrook's largest selling loaf size was the 22 oz. loaf, which was 2 oz. lighter than other wholesale bakers' popular 1 1/2 lb. loaf (5480 Meehan). **[61]**

289. Laub, which was owned by the Georgetown Investment Company in 1970, had three bakeries (5528 Stonbraker; *see* RX 305). The Toledo bakery was fully automated and baked only white bread (5529 Stonbraker). Its Sandusky bakery produced only hot dog and hamburger rolls (5528–29 Stonbraker). The Cleveland plant was a conventional mix plant and produced mainly variety breads and rolls (5528 Stonbraker). In 1971, Laub had approximately 40 restaurant routes and 70 grocery routes in the Cleveland area. Approximately 58% of its sales were to restaurants, and included such products as hard rolls, buns, club bread, special sandwich bread, Jewish sour rye and pumpernickel (5533–34 Stonbraker; *see* 5701 Bronczek). Laub's largest volume product sold to grocery stores was a 20 oz. open top loaf of white bread. It also sold a 1 1/2 lb. open top loaf and a 1 1/2 lb. sandwich loaf, as well as many ethnic breads (5535 Stonbraker; *see* 9380 Gase). Laub had the most extensive commercial line of bread and roll products in the Cleveland area (5779 Bateman). Laub had sold private label bread to Savemore, but lost that account to Ward in 1972 (5608 Stonbraker).

290. Ward had a bread bakery in Cleveland. That plant operated at a loss prior to June 1973 (5756 Bateman). It was operating two full

shifts at that time (5774 Bateman). During the period June 1972 through June 1973, Ward had gained some grocery store business and reduced its losses "quite a bit" (5783 Bateman). Ward closed its Youngstown bakery in 1971 and its Cleveland bakery in 1978 (*See* 5368 Parks). It continued to supply its customers in the Cleveland area from its Toledo and Detroit bakeries (9425–26 Gase).

291. American had a cake plant in Cleveland and bread plants in Akron and Toledo. In 1973, it closed the Akron plant (5538 Stonbraker).

292. Schwebel was located in Youngstown and sold bread and rolls, hard rolls and hearth products in the Ohio communities of Youngstown, Niles, Warren, Canton and Cleveland. When Laub closed in January 1974, Schwebel entered the Cleveland restaurant market at the request of some customers who did business with Schwebel in Youngstown. Schwebel operated four restaurant routes from its Cleveland depot (*See* 5808–16 Schwebel).

293. Nickels, headquartered in Warren, Ohio, had five plants by the end of 1974. They were located in Navarro, Lima and Martins Ferry, Ohio, and Elkhart, Indiana, and in 1974 it purchased Tony's bakery, located in Fremont, Ohio, near Sandusky. Although Nickels sold a small quantity of bread products to grocery and restaurant customers in Cleveland prior to 1974, it increased its Cleveland restaurant business after Laub closed its bakery (5893–98, 5901 Gerber). Tony's bakery may have made some sales in Cleveland (5895, 5900 Gerber).

294. Genest Midwest took over the Bond Baking Company of Canton, Ohio, in the early 1970's (5898–99 Gerber). Genest **[62]** withdrew from the Cleveland area in 1970 or 1971 and went out of business in Canton in 1972 (5899 Gerber; *see* 5217 Miller).

295. The record contains little information on Keystone or Firth except that these bakeries were located in Pennsylvania and that they sold bread products in the Youngstown market area (5275, 5279–80 Shreck; CX 994A-F Fischer).

296. In 1971 Millbrook was the leading wholesale baker seller of white bread to grocery stores in the Cleveland area. Ward was second and Continental and American were tied for third and Laub was last (9352 Gase; *see* 5194 Miller; 5318 Meehan; 5387 Kravitz). Laub was the leading seller of white bread to restaurants with over 50% share of that market. Ward was second with 20% and other wholesalers had the remaining business (5705–006 Bronczek; 9353 Gase). Continental was the leading seller in the Akron area, having a slight edge over Nickels (9358–59 Gase; *see* 5195 Miller). In 1971 Schwebel led Continental in sales in the Youngstown area (9359–60 Gase).

297. In 1970, the following chain stores operating their own captive bakeries did business in Northeastern Ohio: Pick N Pay, Fisher-Fazio,

A&P, Kroger and Lawsons (9352, 9431, 9435 Gase; 5315 Meehan; 5219–22, 5225 Miller). Pick N Pay and Fisher Fazio were the largest chain stores. Combined they accounted for over 50% of the grocery store sales in the Cleveland market area (CX 968C, F; *see* 9429–30 Gase; 5380 Kravitz). Other major chain stores were Stop N Shop, L'il Shopper, Savemore, BiRite, Heinen's, Open Pantry, Eagle, Super Value, Convenient East, Convenient West, and K Mart (5309–10 Meehan; 5535–36 Stonbraker).

298. The most popular loaf sizes of advertised bread in the northeastern Ohio area were the 20 oz. loaf of white bread and the 1 1/2 lb. loaf of white sandwich bread (9490 Gase; *see* Stonbraker). The most popular private label white bread were the 1 lb., the 20 oz. and the 1 1/2 lb. loaves (CX 2695; CX 261B, E; 5419–20 Kravitz).

299. During the period 1971 to January 1974, Continental was never the price leader upward in the Cleveland market in either the grocery trade or the restaurant trade (5544 Stonbraker). Generally, a major wholesale baker could not charge a higher wholesale price that other wholesale bakeries without losing substantial sales (5216, 5225 Miller). However, for a period of approximately a year, Millbrook did sell bread for a 1¢ higher wholesale price than Continental (5370 Meehan).

300. In 1967, five of the major bakeries in Northern Ohio were indicted for conspiracy to fix prices (RX 301A-E). A civil action was filed simultaneously by the Department of Justice, also alleging a price-fixing conspiracy (RX 302A-G). In 1969, both actions were settled (RX 302H-Q). Cleveland was a static bread market in the early 1970's and the volume of bread sales by the two principal captive bakers (Pick N Pay and Fisher **[63]** Fazio) was increasing (5613–14, 5619 Stonbraker). The spread between the retail price of advertised bread and captive label bread was increasing (5614–15 Stonbraker). There was excess bread bakery capacity that could service the Cleveland market, especially Continental's Akron bakery which was operating at about 50% of capacity, *i.e.*, one and 1/4 shift (5619 Stonbraker; 10047 Signore; CX 2634A-B; CX 2633A-F) The restaurant business, especially the fast food segment, had been growing (5658 Stonbraker).

301. In mid–1971, Continental began an aggressive program to increase its restaurant and institutional business in the Cleveland market by offering products at prices reflecting substantial discounts from its list prices (9383–84 Gase; 5545 Stonbraker; 5675 Bronczek). In this way Continental acquired the business of several large accounts previously serviced by Laub or Ward (5677 Bronczek). For example, Continental acquired the business of Interstate United at Cedar Point, an amusement and recreation facility located near San-

dusky, Ohio, for the summer season of 1972, by offering a 12% discount from 1970 wholesale prices ostensibly meeting Laub's price offer (5551 Stonbraker; *see* CX 956A-B). Bronczek testified that Laub never offered such a discount (5680). Continental supplied bread and hamburger and hot dog rolls from its Toledo bakery. Laub had supplied Cedar Point with bread from its Toeldo bakery and buns from its Sandusky bakery (5553 Stonbraker). Continental retained the Cedar Point business in 1973, offering a 15% discount (*See* CX 2101A-B). In the 1970's, that account was a high volume account for the five month resort season worth approximately $50,000 annually to the bread supplier (11455–56 Bell; 5556 Stonbraker).

302. Laub also lost the Sky Chef account to Continental which offered a 12% discount (5557 Stonbraker). Laub had not offered Sky Chef a 12% discount (5573 Stonbraker; *see* CX 909 (136)) and Bateman testified that Ward had not offered Sky Chef a 12% discount (5757). That account was worth about $26,000 a year in sales.

303. Laub also lost the following accounts to Continental and the annual volume of sales listed: Hospitality Inns - $18,000 (5574 Stonbraker); Ponderosa Chain - $104,000 (5575–78 Stonbraker); and Red Barn - $30,000 (5683–84, 5677 Bronczek). Laub also lost other restaurant and institutional accounts on the basis of price (5685, 5696 Bronczek; 5579, 5582, 5584–87 Stonbraker). During this period Laub discontinued 8 restaurant routes, reducing its total routes to 54 grocery-restaurant combination routes (5588 Stonbraker), whereupon Continental increased the number of its routes from 1 to 13 (5589 Bronczek).

304. After 1970, the wholesale bakers granted discounts to their grocery and restaurant customers on advertised label products. Millbrook's usual discount was 5% to meet competition (5322, 5326–29 Meehan; *see* CX 931A-Z-21). Interstate [64] granted Pick N Pay a 12% discount directly from its Kansas City office (5328–29 Meehan). Laub also granted a 5% discount to selected customers, although it would grant up to 10% to meet competition (5543 Stonbraker; 5683 Bronczek; *see* CX 962A-N). Gase testified that Laub had the "cheapest prices in town" (9381). Ward reduced its discounts in November 1972 (5785 Bateman). Genest was considered to be a price cutter in the Cleveland market before it withdrew in 1970 or 1971 (5541 Stonbraker).

305. Continental learned, in early 1972, that Pick N Pay was considering closing its captive bakery and buying private label bread products from a wholesale baker (*See* CX 968C). At that time Continental was seriously considering closing its Akron and Youngstown bakeries. The Akron bakery, which was operating at about 50% capacity, was operating at a pre-tax loss of over $3000 per week (CX 2634A-B; CX 2633 A-F). Signore, Regional Vice President of Continen- [illegible] region, opposed these closings (CX 2635A-B; *see* CX

2633A-D). In his view a Continental private label program for Pick N Pay would create a substantial profit for the Akron bakery and "would completely open up the Cleveland marketing area and would, in fact, make [Continental] the [dominant] factor on the market" (CX 2683B).

306. National Supermarket's purchase of Pick N Pay delayed Continental's negotiations for the private label business (*See* CX 969H; *see also* RX 304). In fact National Supermarkets contacted Continental about the private label subject before the purchase (9966–67 Vail). After Kravitz became president of Pick N Pay, Vail and other Continental personnel from Rye Headquarters and Signore had many discussions with Bogomolny and Kravitz (9986 Signore; *see* 9974 Vail; 5397–98 Kravitz; *see also* CX 835). One specific condition for any private label arrangement, as conveyed to Vail, was that Continental (or any other wholesale bakery that obtained Pick N Pay's private label business) would have to compensate Pick N Pay for the value of its captive bakery (9968, 9971 Vail).

307. Thereafter Signore became Continental's principal negotiator (9986, 10032 Signore; *see* CXs 886, 85, 807, 836). Although the early discussions contemplated delivery of private label products to Pick N Pay's Cleveland warehouse for store delivery by Pick N Pay, later negotiations centered on a store door delivery of private label products by Continental. Store door delivery by a wholesale baker became feasible when Continental secured a modification of the wholesale bakers contract with the local Teamsters Union that would permit any wholesale baker in circumstances where a captive bakery ceased operations, to make store door delivery by salaried employees, instead of employees working on commission (9986–88 Signore; 9399 Gase; 5871–73 Bogomolny; *see* CXs 805A, 809).

308. Signore was of the opinion that Laub, Omar (Fisher Fazio's captive bakery located in Columbus, Ohio), Ward, Nickels and Schwebel were capable of supplying Pick N Pay with private **[65]** label bread (9990). Millbrook was not considered to be in a position to supply private label to Pick N Pay because it was operating at full capacity (9989–90, 10051 Signore). Continental's Akron bakery was 29 miles from the Pick N Pay warehouse. Continental believed that it had the best capability in the area to produce the volume of bread products necessary to supply Pick N Pay with private label (CX 968D, G).

309. During the negotiations between Continental and Pick N Pay, Continental personnel were advised by Kravitz that Pick N Pay had received offers for the private label business from other bakers at prices lower than those offered by Continental (9992, 9994, 10051 Signore; *see* 9982 Vail). Most of these offers had been made in 1972 when warehouse delivery was being discussed (*See* 9993, 10031 Si-

gnore; 5394, 5446 Kravitz; 5817 Schwebel; 5868 Bogomolny; CXs 809, 884). The record shows that Omar, Ward, Laub, Millbrook, Schwebel, and Nickels, as well as Continental, had responded to Pick N Pay's request for bids in 1972 (*See* 5393–95; 5408 Kravitz; 5817 Schwebel; 5869 Bogomolny; CX 884). Signore did not know the details of the offers made to Pick N Pay by any of the other wholesale bakers (9994, 10031 Signore).

310. Although there was some delay in the negotiations in early 1973, Vail was confident that Continental would be Pick N Pay's supplier of private label bread (CX 884). By June 1973, Continental was the only serious contender for this business. Bogomolny testified that Continental's proposal "overall was a lower price proposal than the others" (5870). Laub had not made an offer on the store door delivery arrangement in June 1973 (5594–95 Stonbraker; 5451 Kravitz; 5883 Bogomolny). Omar had not made a firm proposal with prices for store door delivery (5881 Bogomolny). In any event, Pick N Pay had substantial misgivings about placing itself in a position of dependence for bakery products on its principal competitor, Fisher-Fazio, for which Kravitz and Bogomolny had once worked (5869, 5880 Bogomolny). Neither Ward nor Millbrook had pursued the matter after their initial response to Kravitz (5777 Bateman).

311. On July 13, 1973, Pick N Pay and Continental finalized their private label agreement. The written agreement (CX 803) detailed the varieties to be provided by Continental under the Edwards label drop shipped to the store door and established the following prices for the white bread products:

Variety	Price
1 lb. White Bread	$.145
1 1/4 lb. White Bread	.1575
1 1/2 lb. White Bread	.19
8 Pack Hamburger Buns	.17
8 Pack Hot Dog Buns	.17

312. The agreement provided that the private label products would be of a quality comparable to Continental's Wonder **[66]** products. It also provided that Continental would supply a full-time merchandiser to promote and develop the full potential of Pick N Pay's Bakery Department. It provided for an increase (or decrease) in the price of the private label products if flour prices rose (or fell), the amount of price increase (or decrease) to be determined each quarter by a specific formula. This clause was subsequently revised by oral agreement to provide for review of flour costs on a monthly basis (CX 2608F). The agreement also provided that it would remain in effect for three years

and was renewable, although it could be terminated by either party with 90-days advance notice.

313. Not mentioned in the agreement was Continental's commitment to reimburse Pick N Pay for promotions of private label products commensurate with the estimated book value of the Pick N Pay bakery (*See* 9971–73, 9982 Vail; CX 984A-C, *in camera*). Continental actually paid Pick N Pay approximately $210,000 as promotional allowances, sometimes referred to as "proof of performance", from 1973 through the first three months of 1976 (CX 2682; 984A-C *in camera;* 2602A-B *in camera*). Continental also provided Pick N Pay with unit billing, which was a billing by specific varieties (10035 Signore). Continental also hired Bill Owens who had handled Pick N Pay's bakery order desk. Thereafter he performed the same service for Continental in handling the Pick N Pay account (10017 Signore; 9406 Gase).

314. Other verbal arrangements not mentioned in the agreement included a 2¢ allowance to Continental for transportation and delivery of Pick N Pay's outside purchases of certain private label products, the agreement that Continental would lease Pick N Pay's transport truck and bread racks and dollies for three years and the provision that Continental would pay rent for the Pick N Pay warehouse for one year (CX 2603G; *see* 10021–22, 10033–34 Signore; 5412 Kravitz; 9407–09 Gase). Continental also agreed to provide the Pick N Pay stores with cake display racks at a total cost of $19,000 (CX 800B). Continental was also obligated to deliver to Pick N Pay stores certain private label sweet good products that Pick N Pay was purchasing from other suppliers, the largest, Big Bear, located in Columbus, Ohio (10020–21 Signore; 5418 Kravitz).

315. According to Continental officials, studies conducted by the Detroit Regional office and Rye Headquarters during Continental's negotiations with Pick N Pay (studies which could not be located during this litigation) showed that the Pick N Pay private label business would be profitable to Continental on the basis of fully allocated costs (9996–10002 Signore; 9402 Gase). Continental had expected to make a "profit" of $6000 to $7000 per week on sales of private label to Pick N Pay (10002 Signore; CX 883C; *see* CX 805A). His estimate was for Akron and the other three plants producing Pick N Pay private label products, but did not include full fixed overhead costs (CX 2639R). In addition, it did not include the "proof of performance" payment of approximately $70,000 per year, and did **[67]** not include certain costs that would be incurred using the Pick N Pay warehouse, equipment and trucks.

316. Meehan testified that he doubted whether Millbrook could have made a profit if it sold 1 lb. bread at 14.5¢ per loaf (5334; *see* CX

930A-C, E). Stonbraker testified Laub could not have made a profit on store delivery at that price (5598; CX 849A-N). Bateman testified that Ward could not have made a profit at the prices quoted in CX 803, if it had selling and delivery costs (5768–69).

317. Continental, as Pick N Pay's private label supplier, acquired the first position on the bread table (after the private label bread) for its advertised bread, which amounted to one half of the space allotted for all advertised bread (5457–58 Kravitz; 9412–13 Gase; *see* 5890–91 Bogomolny). In addition, Continental received authorization for a number of Wonder varieties that it had not theretofore been selling to Pick N Pay (9930–31 Dierker; 10026–27, 10047 Signore; 9412–13 Gase). The volume of sales in Wonder bread products increased approximately $20,000 per week (10027 Signore; 5891 Bogomolny; CX 845A-C).

318. The resetting of the bread table in the Pick N Pay stores after Continental became the private label supplier was still controlled by Pick N Pay (5888 Bogomolny; 9411 Gase; 5410, 5448 Kravitz; 10016, 10023 Signore). Less space was allocated to the Edwards label than had been allotted for Pick N Pay's captive label (10027 Signore). Millbrook lost its number one position for advertised bread to Continental and lost a considerable amount of shelf space (5338 Meehan; 5415, 5450 Kravitz). Although Laub gained both space and authorization for varieties, it did not sell popular loaf sizes of white bread to Pick N Pay (5590–91, 5602–03 Stonbraker; *see* 5888 Bogomolny; 10024 Signore; 9413 Gase; RX 3009B-Z–122). Laub had complained to Pick N Pay about its shelf space assignment and because of a long time friendship between Kravitz and Beyer, Laub's president, Laub was given more rack space (5416, 5450–51 Kravitz; 10024 Signore; *but see* 5633 Stonbraker). Laub's sales to Pick N Pay in all products dropped from over $10,000 per week to $7,000 per week (5603 Stonbraker; *see* RX 3009B-Z–122). Laub's sales of its large white bread milk loaf dropped from over $1200 a week to under $900 per week (*See* RX 3009B-Z–122). Stonbraker testified that Laub also lost important exposure to the consumer for its advertised products in Pick N Pay stores (5605).

319. The distribution of private label products to Pick N Pay turned out to be much more expensive than Continental had anticipated (9409 Gase). Because of limited loading facilities at the Akron plant, Continental had to use the Pick N Pay warehouse as a depot from which to deliver the private label products to the Pick N Pay stores (*See* 9404–06 Gase). There was an "explosion of orders" both on sweet goods and in private label bread (10020 Signore). The volume of Big Bear sweet goods purchased by Pick N Pay was three times the amount **[68]** forecast and Continental was required to use more trucks

and more employees to handle this product (10021 Signore; 9404–06 Gase; CX 976B, *in camera*). Because of Pick N Pay's special promotions on its private label products, the volume of white bread was also greater than forecast and Continental was required to run two shifts at its Akron plant on overtime on numerous occasions (10039–42 Signore; *see* 5419 Kravitz; CX 976B, *in camera*). In addition, the price of flour, as well as other ingredients, and the price of gasoline and production energy increased dramatically (5336 Meehan; 5424 Kravitz; CX 976A-B, *in camera*). Continental experienced some service problems in its delivery of private label products to the Pick N Pay stores (10044 Signore).

320. After a couple of months it became apparent that the Pick N Pay program had not realized the profit that was expected to show (CX 882). In the fall of 1973, Continental began a series of studies of its Pick N Pay business (*See* CXs 2628; 882). One of the first studies revealed that during the four week period ending August 25, 1973, the Akron Bakery sustained a $16,000 loss on its Pick N Pay business (CX 800B).

321. Only three Pick N Pay private label varieties showed a positive profit after variable costs, although these three varieties, all produced at Akron, accounted for 42% of the total Pick N Pay private label sales (CX 800C). Ingredient prices had a dramatic effect on Akron profits. Before production for Pick N Pay began the average price of ingredients was 9.3¢ per lb., but in August the average price of ingredients was 11.16¢ per lb. (CXs 800C; 2639R, T; *see also* CX 883A-C).

322. Three Continental Form 452Bs dated December 28, 1973, showed that Continental's prices to Pick N Pay on the 20 oz. loaf of white bread and the 24 oz. of white sandwich bread were below incremental costs (CX 2632C-F), whereas the price to Pick N Pay on the 1 lb. loaf of white bread was below fully allocated costs but above incremental cost (CX 2632A-B). A similar analysis on the Pick N Pay private label bun products produced at the Youngstown bakery shows that the 8 pack hamburger buns and 8 pack hot dog buns were sold below full cost, but above incremental costs (CX 2639H-K).

323. On March 1, 1974, Continental moved from the Pick N Pay warehouse to another facility in Cleveland, ceased paying for temporary employees and began using its own vehicles and drivers for redistributing private label products to the Pick N Pay stores (CX 2639S).

324. Continental's in-depth analysis of the Pick N Pay account covering a four week period during May 1974 showed sales below cost on almost all private label varieties (CXs 2663C-N; 2664A-D; 2665A-B; 2673–75). This analysis showed a total unfavorable figure of $38,550 for the private label segment of the Pick N Pay account (CX 2663D).

At that time the wholesale prices of the three Pick N Pay private label varieties produced [69] at the Akron bakery were as follows (CX 2673 A):

16 oz. White	.1825
20 oz. White	.1950
24 oz. Sandw	.2275

The sales to Pick N Pay of these three items shows a total unfavorable figure of $33,528 (CX 2673A). According to Frederick Breines, on an incremental basis, Continental "basically broke even on the total [Pick N Pay] business" showing a $16,000 loss on Pick N Pay private label and a $15,100 profit on sales of branded products (*See* CX 2608B). In his opinion, the loss on private label products, both produced and purchased, resulted from not charging high enough prices to recover transportation, warehouse, delivery and administrative expenses (CX 2608C). Since the contract was signed in July 1973, there had been three price increases totalling 3.75¢ per unit (CX 2608E). In making this analysis, Breines was not aware of the "proof of performance" payments that were to be made to Pick N Pay at a rate of about $70,000 per year (*See* CX 2693A-B).

325. According to Breines, Continental would have to obtain a net price increase of 4.28¢ per unit to break even on the Pick N Pay private label products produced by Continental (CX 2614A; *see also* CX 2636T).

326. Following a meeting in mid June 1974 between Vail and Kravitz, Gordon Thomas, by letter dated June 27, 1974, made Continental's proposal for a renegotiated agreement. Although containing most of the provisions of the July 1973 agreement, this proposal incorporated a more sophisticated formula for price changes, relating to all costs on products produced by Continental including ingredient cost changes in sugar and shortening, as well as flour. Ingredient cost were to be calculated every month and other costs calculated quarterly. The proposal also provided for actual costs incurred in transporting private label products that Pick N Pay purchased from other suppliers. The proposed agreement also contained a provision that Pick N Pay would notify Continental three days in advance of any special promotion of private label products (CX 975A-D *in camera*). The base prices for June 1974 set forth in the proposed agreement were as follows (CX 975B *in camera*):

Variety	Base Price
1 lb. White Bread	.2244
1-1/4 lb. White Bread	.2407
1-1/2 lb. White Bread	.2829

327. In Continental's analysis of its June 1974 business with Pick N Pay, the private label products produced by Continental showed an unfavorable result of $40,884 or a loss of 4.34¢ per unit (CXs 2679A-B; 2680A-D). [70]

328. After extensive negotiations and exchanges of views and information (*See* CX 2607A-C; CXs 979A-D - 983 *in camera;* 2616, 2617), Continental and Pick N Pay entered into an amended agreement on September 25, 1974, to become effective on October 7, 1974 (CX 829A-H). This amendment generally adopted the features contained in Thomas' proposal of June 27, 1974 (CX 829D; *see* CX 2616B). The base prices on Pick N Pay label products were established as follows (CX 829B):

Variety	Base Price
1 lb. White Bread	.1792
1 1/4 lb. White Bread	.2117
1 1/2 lb. White Bread	.2242

329. In his memorandum dated August 26, 1973, explaining the possible impact of this agreement on annual profits before taxes, Breines had presented the following projection to Continental's top officials (CX 2616A):

	Annual PBT Full Load	($000's) Direct only	Direct Plus Plant Overhead
Private Label Produced	$(139)	$204	$(75)
Branded	135	200	135
Total	(4)	$404	$60
Memo: Proof of Performance	$(70)	$(70)	$(70)

It should be pointed out that this is the first analysis of Continenal's Pick N Pay business in the record in Docket 9000 in which the proof of performance", *i.e* promotional payments, is included. In a ecently discovered document it appears that Breines first learned of e arrangement about June 11, 1974 (*See* CX 2693A-B).

330. Breines also reported (CX 2616B):

e prices negotiated represent an average increase of .67 cents on all products except z. white, 20 oz. butterball and the 8 cl. hamburger buns. On these items we negotiat- 2.67 cent increase on the 20 oz. white (48.8% of total volume) and the butterball

(6.1% of total volume) and a 1.33 cent increase on the 8 cl. hamburger bun (11.9% of total volume).

331. In his suggestions as to additional areas for profit improvement under the topic "Better Mix Management", Breines stated (CX 2616C):

On a full load basis we have approximately five products that are either breaking even or making 8.0 to 13.4% profit based on the new pricing. Three of these items are "variety products"—family rye, hearty rye and wheat bread. The other two products are 16 oz. [71] white and 8 cl. egg hot dog buns. These items now only account for 21.7% of the total mix.

332. After the modified agreement was executed, the prices to Pick N Pay were adjusted monthly pursuant to the formula set forth therein. The price changes for Continental-produced product may be summarized as follows (CX 974A-R, *in camera*):

	10/21/74	12/16/74	1/20/75
1 lb. white	.1845	.1863	.1920
1-1/4 lb. wh.	.2180	.2201	.2268
1-1/2 lb. wh.	.2308	.2331	.2402
8 Pk Ham	.2239	.2261	.2330
8 Pk. Hot	.2102	.2123	.2188
	2/17/75	3/17/75	4/9/75
1 lb. white	.1960	.1937	.1904
1-1/4 lb. wh.	.2316	.2289	.2250
1-1/2 lb. wh.	.2452	.2424	.2383
8 Pk Ham	.2379	.2351	.2312
8 Pk Hot	.2234	.2208	.2170

333. Continental's analysis of the Pick N Pay private label business for five weeks in December 1974 covering Continental-produced product showed a loss of $34,588. The wholesale value of these products was $221,444, the "cost to doors" was $212,606. Distribution costs totaled $38,992 (CX 2678A-B).

334. Analysis of Continental's Pick N Pay private label business for January 1976 showed a full load loss before taxes of $25,500 and an incremental profit before taxes of $14,300. Continental's overall business in private label and Wonder/Hostess label showed a full load loss before taxes of $17,100 and an incremental profit before taxes of $51,700 (CX 2690 A-B; *see* CX 2669 A-C, CX 2670 A-G). The work sheets also showed that Continental's prices on the 24 oz. Giant Sandwich loaf and the 8 Pack hamburger buns were below Continental's incremental costs (CX 2669A).

335. Work sheets covering the first three months of 1976 showed

that Continental's prices were also below incremental costs for three other bun varieties baked by the Youngstown bakery (CX 2668B).

336. Statistics for July 1976, showed a loss on the private label Pick N Pay business in Continental produced product on both a variable and full load basis (CX 2661C). Statistics for August 1976, showed a loss on a full load basis and a profit on a variable cost basis (CX 2686A-B). [72]

337. During the period 1971 - 1979 quarterly sales by Continental to Pick N Pay may be summarized as follows (CX 2686 A-B):

Sales Period	Bread Sales to Pick N Pay	
Ending	Main Line Quarterly	Private Label Quarterly
12/11/71	$ 48,373	-
6/10/72	30,433	-
12/3/72	33,566	-
6/23/73	28,925	-
12/15/73	140,075	$654,316
6/22/74	125,788	723,099
12/14/74	143,117	541,229
3/26/75	107,900	520,700
6/30/75	115,400	687,500
9/24/75	125,300	591,000
12/25/75	133,400	595,800
3/26/76	141,700	541,400
6/25/76	150,000	581,800
9/24/76	243,600	606,200
12/31/76	259,000	610,200
3/26/77	239,500	603,700
6/25/77	255,800	602,100
9/24/77	266,800	791,400
12/31/77	299,800	672,500
3/31/78	257,700	575,200
7/1/78	271,300	661,900
9/29/78	259,600	605,600
12/30/78	273,500	568,000
3/31/79	284,600	500,200
6/30/79	315,100	562,600
9/29/79	319,200	553,400
12/29/79	325,800	566,600

338. During 1973 and 1974, Continental sold its advertised label bread (Wonder) to a number of chain stores located in Northeastern Ohio, most of which were in direct competition with Pick N Pay. The 14.5¢ price on a 1 lb. white bread afforded Pick N Pay was not offered to any other customer of the Akron plant in July 1973, nor was the opportunity to accept store door delivery optional for all customers (CX 993M-N Davis).

339. The wholesale list prices on branded products may be summarized as follows (*See* CX 912):

	12/27/72	5/23/73	7/25/73
1 lb. Country Style	.24		.265
20 oz. White	.34		.355
24 oz. White	.37		.385
8 pk. ham	.34	.355	
8 pk. dog	.34	.355	

	8/17/73	11/12/73	1/14/74 **[73]**
1 lb. Country Style	.295		.31
20 oz. White	.395		.405
24 oz. White	.425		.435
8 pk. ham		.39	.405
8 pk. dog		.39	.405

	2/18/74
1 lb. Country Style	
20 oz. White	
24 oz. White	
8 pk. ham	.435
8 pk. dog	.435

340. Pick N Pay promoted Edwards label bakery products weekly (10025 Signore). Meehan testified that the retail price of Pick N Pay's private label bread was "more competitive" after Continental began supplying it and Pick N Pay ran more promotions on its private label bread (5341–42). Stonbraker testified that retail price competition between Pick N Pay and Fisher-Fazio immediately after Continental began supplying Pick N Pay had an adverse effect on all branded bread sales (5607–08). However, Signore testified that Continental's private label agreement with Pick N Pay did not have any effect on the retail pricing of bread in the Cleveland market (10025). On August 6, 1974, Vance of Continental reported that the bakery manager of Fisher-Fazio blamed Continental for the low bread prices in Cleveland because it had not "forced the price up to Pick N Pay." As punishment Fisher-Fazio cut Wonder's shelf space in its stores in half (CX 828).

341. On January 8, 1974, Laub ceased its bakery operations (5610–11 Stonbraker). Upon Laub's exit from the restaurant market, Nickels began an aggressive effort to obtain a substantial portion of the restaurant business in the Cleveland market (9355–56 Gase). Schwebel also entered the Cleveland restaurant market at the request of some of its customers (5808–16 Schwebel; 9356 Gase). Nickels gained some grocery business in the Cleveland market (9356 Gase). Both Nickels and Schwebel have increased their plant capacity in the last decade (9354–57 Gase).

342. In 1980 the ranking of the wholesale bakers in the Cleveland marketing area in sales to grocery stores was Millbrook, Continental,

Ward, Nickels, Schwebel and American. Including captive bakers, Fisher-Fazio had a third place ranking behind Millbrook and Continental (9354 Gase). A&P no longer has a captive bakery and has almost withdrawn from the Cleveland market, and Kroger sold captive bread to only six stores that do not do business under the Kroger name (9354, 9372 Gase). Millbrook and Continental are now considered to be the "price leaders" in the Cleveland market (9446–47 Gase).

343. In sales to the restaurant trade, Nickels is the first ranked wholesale baker followed by Millbrook, with Schwebel, [74] Continental and Ward sharing the balance about equally (9354 Gase). Continental's share of the restaurant market has not grown since 1971 (9355, 9383 Gase).

344. Continental's total sale of white bread in Cleveland has declined slightly since 1974, with branded sales declining and private label sales increasing (9371 Gase). In the last two years, Continental has increased its promotion of its Wonder branded bread (9372).

345. Although the wholesale prices of private label white bread and branded bread have increased since 1974, the spread between them has also increased (9373 Gase).

346. Continental closed its Youngstown plant in 1976, and transferred the Youngstown production to its Columbus and Toledo bakeries (9377 Gase). The Akron bakery, which is now a conventional mix plant, has not been profitable since 1972 (9401 Gase).

347. It is found that Continental discriminated in price between Pick N Pay on private label white bread and all of its other customers located in Northeastern Ohio and Pennsylvania. The lower discriminatory prices to Pick N Pay were below Continental's fully allocated costs at all times between July 1973 and September 1974 and when the proof of performance payments are taken into consideration, it appears that these low prices to Pick N Pay were below Continental's incremental costs and its average variable costs.

348. It is found that Continental knew or should have known that no other wholesale baker had offered Pick N Pay as low prices as did Continental on the private label products.

349. As a result of Continental's discriminatory pricing, as well as certain pricing practices designed to capture restaurant and institutional customers, competition between Continental and other wholesale bakers has been substantially and unfairly injured. In addition, concentration in the wholesale baking of white bread has increased since 1970.

350. Complaint counsel also challenge Continental's price discriminations from July 1973 through 1974 on purchases by Pick N Pay of private label products and purchases by Valu King, of private label, controlled label, advertised label and secondary label products (*See*

CX 2102 Stip.). Complaint counsel contend that such discriminations had the adverse effects upon competition between these unfavored purchasers and Pick N Pay prescribed by Section 2(a) of the Robinson-Patman Act, as amended.

351. There is no question but that Continental discriminated in price as alleged and that the discriminations were substantial (*See* Set 3 Adms. 36–60). **[75]**

352. Stop N Shop is a voluntary association of Cleveland supermarket owners who purchase and advertise collectively in order to compete effectively with the major chain stores (5493 Caster). During 1973 and 1974, the 20 Stop N Shop supermarkets were supplied in bread products by Millbrook, Continental, Laub and in a few stores, Ward (5495 Caster). It purchased approximately $4,000 worth of Wonder products per week and paid the wholesale price less 5% (5496–98 Caster; *see* CX 846). It also purchased private label bread from Millbrook and private label buns, hot dog and hamburger, from Continental (5498 Caster; CX 959). Although its sales of private label bread were greater than either Millbrook or Wonder advertised labels, sales of these advertised labels combined was greater than sales of private label (5503–04 Caster).

353. The list price to Stop N Shop for Continental's private label products were as follows (CX 912):

	before 7/25/73	7/25/73	8/18/73	1/14/74	2/25/74
8 Pk Ham	.203	.228	.265	.272	.30
8 Pk Dog	.203	.228	.265	.272	.30

354. Sometime between 1970 and 1973, Continental offered Stop N Shop private label bread at 17¢ to 17.5¢ per 1 lb. loaf. Although Caster would have recommended private label from Continental at the price which it charged Pick N Pay in 1973, he doubted whether the store owners would have accepted store door delivery service (5500, 5505 Caster; *see* CX 803).

355. In 1973 and 1974, Stop N Shop was able to "answer and compete" with any advertised price by Pick N Pay (5501, 5506 Caster).

356. BiRite Advertising Association was a group of approximately 30 independent supermarkets in greater Cleveland (5508 Rubin). BiRite carried the advertised labels of Millbrook, Wonder and Laub and also carried Bond's while it was still doing business in Cleveland (5509–10 Rubin). BiRite purchased all the white bread loaf sizes and 8 pack buns from Continental (5509–10 Rubin) and paid list price less a 5% discount (5509–11 Rubin). Its purchases from Continental were between $3000 and $5000 per week (5510 Rubin).

357. In 1973 and 1974, BiRite purchased private label bread and

buns from Millbrook. It paid approximately 18¢ for the 1 lb. loaf (5512, 5516 Rubin). Rubin did not believe he had ever received a better offer from Continental (5513). He testified that if he had been offered the same prices as afforded Pick N Pay in 1973, he would have tried to arrange for BiRite to "work with the program" (5514). BiRite's retail prices on bread were identical to the retail prices of Pick N Pay and Fisher-Fazio (5516 Rubin). Rubin thought BiRite was not able to buy on the same basis as some of his competitors (5519). **[76]**

358. In the 1970 to 1974 period, A&P's Cleveland division had 100 stores, approximately 30 of which were located in the greater Cleveland area (5845 Reed). Most of A&P's bread products were captive label; only 16% of the bread rack was open to the wholesale bakers (5851 Reed). Continental, Ward, Laub, Millbrook, Schwebel, Keystone and Nickel supplied various A&P stores in certain areas of the Cleveland division (5833 Reed). All of A&P's bread suppliers, including Continental, offered a 5% discount (5835 Reed). The A&P stores in the Cleveland Division purchased a total of between $4000 and $5000 per week from Continental (5840 Reed).

359. Between 1968 and early 1970, A&P requested bids from wholesale bakers for private label (5842 Reed). Continental's offer was not as low as the prices which it charged Pick N Pay in 1973 (5843 Reed; *see* CX 803A). A&P did not start a private label program at that time.

360. In 1974, Valu King Supermarkets was a voluntary group representing approximately 40 supermarkets located in a 60 mile radius of Youngstown (CX 992G; 5819 Tamarkin; 5256 Shreck). Continental sold a full line of Wonder bread and bun products to Valu King, the 18 oz. Wonder Loaf being one of the most popular white bread products (5820 Tamarkin). Continental provided full rack service to Valu King (5822 Tamarkin). Most Valu King stores paid list price less 7% discount of purchase of Wonder products (5823 Tamarkin). Other suppliers including Schwebel, Valu King's major supplier, granted 7%, except Keystone which offered 5% (5824 Tamarkin). Schwebel supplied Valu King with private label bread (5829–30 Tamarkin). Continental never offered Valu King private label bread at the prices afforded Pick N Pay in 1973 (5828 Tamarkin; CX 803). Mr. Tamarkin testified that bread was one of the most price sensitive items in the grocery industry (5829). Valu King did not compete with Pick N Pay (5828–29 Tamarkin).

361. In the early 1970's Kroger had 60 stores served by Continental's Akron plant, some of which were located in the Cleveland market (*See* CX 914A).

362. Open Pantry had 42 stores served by Continental's Akron plant and was one of Continental's private label customers (*See* CX 900, 914B; Set 3 Adm. 56–58; 9366, 9503, 9507–08 Gase).

363. It is found that Continental's lower discriminatory prices such as those granted to Pick N Pay on its private label products may have had the effects on competition between competing grocers that is proscribed by the statute.

Discussion

Prior Proceedings

Although this initial decision is based solely on the administrative record in Docket 9000, references are made by [77] complaint counsel and respondents to a series of administrative and court proceedings involving Continental and the Federal Trade Commission relating to antitrust matters. These proceedings may be summarized as follows:

On May 11, 1962, the Commission issued an order pursuant to a consent agreement requiring Continental to divest itself of one bakery that it had acquired in 1958, and barring for 10 years Continental's further acquisition of an interest in any bread producer, unless permitted by the Commission. *Continental Baking Co.,* 60 F.T.C. 1134 (1962).

On December 31, 1963, the Commission dismissed a complaint against Continental that was issued in October 1959, charging violations of Sections 2(a) and 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, on the grounds that Continental had proved that the challenged discriminatory prices had in each instance been granted in good faith to meet the equally low price of a competitor within the meaning of Section 2(b) of the statute. *Continental Baking Co.,* 63 F.T.C. 2071, 2162 (1963).

On February 28, 1964, the Commission issued an order prohibiting Continental and others from engaging in price fixing activities, as found to have taken place in the Seattle marketing area. *Bakers of Washington, Inc.,* 64 F.T.C. 1079, 1099 (1964), *aff'd sub nom., Safeway Stores, Inc.* v. *Federal Trade Commission,* 366 F.2d 795 (9th Cir. 1966), *cert. denied,* 86 U.S. 932 (1967).

On September 24, 1973, the United States Court of Appeals for the Tenth Circuit affirmed a District Court ruling that Continental had violated the terms of the 1962 consent order by acquiring an interest in two bread producers. This suit was a civil penalty action filed by the Department of Justice on the Commission's behalf. *United States* v. *ITT Continental Baking Co.,* 485 F.2d 16 (10th. Cir. 1973), *reversed on the question of the amount of penalties, United States* v. *ITT Continental Baking Co.,* 420 U.S. 223 (1975).

On December 12, 1973, the Commission issued an order to show cause why the 1962 consent order barring Continental's acquisition of any interest in bread producers should not be extended for a five year period. On November 26, 1974, the Commission rejected an Administrative Law Judge's recommendation that the 1962 consent order be extended for a 5 year period and dismissed the order to show cause. *ITT Continental Baking Co.*, 84 F.T.C. 1349, 1400 (1974). On that same day, November 26, 1974, the Commission issued the complaint in this proceeding, Docket 9000.

This Proceeding

Interpreting the complaint in this case in light of certain statements contained in the Commission's decision [78] dismissing the order to show cause, respondents contend that complaint counsel have made no serious effort to support the broad charges in the complaint to the effect that exits of wholesale bakers from the baking industry have been the result of ITT forcing Continental to behave in a predatory manner, that respondents plan to achieve dominance in wholesale baking in all relevant geographic markets, and that respondents, since 1952, have operated with the intent to lessen, hinder or restrain competition and to attain monopolies in wholesale baking (RBr. 2).

In respondents' view, complaint counsel have abandoned the complaint's broad charges of a nationwide program of predation and instead have "adopted the theories, contentions, and proof developed by lawyers in private litigation" involving six marketing areas. Respondents contend that "[t]rivial disputes over technical lawfulness of isolated transactions simply cannot sustain the basic charge made in the complaint that respondents have been predatorily attempting to take over the whole bread business throughout the nation" (RBr. 4–5).

Respondents contend that, at this stage of the administrative proceeding in Docket 9000, it is apparent that the broad allegations of the complaint have no factual or legal support and that such allegations are based upon a fundamental misapprehension of the nature of the competition faced by wholesale bread companies such as Continental (RBr. at 1).

I do not think that complaint counsel's approach to the issues raised by the complaint is as limited as respondents appear to argue. Although the primary emphasis is placed on respondents' practices and the effects of such practices upon competition in six marketing areas, complaint counsel have presented some evidence about Continental's bakeries in other marketing areas. However, in its 1974 decision dismissing the order to show cause, the Commission stated that it would not infer a lessening of competition in local marketing areas from trends in concentration at a national level, especially where there is admittedly no national geographic market. The Commission also pointed out that, although the exit of bakers from any market and the resulting increased concentration might be due to changes in technology and the industry members' adjustments thereto, it was the Commission's responsibility to "make very sure indeed that the larger members of the industry are not using any of the techniques prohibited by the antitrust laws to achieve a still *higher* level of concentration". The Commission added that the "critical issue of competitive injury must be resolved on the basis of changes in the structure of actual rather than hypothetical markets." (84 F.T.C. at 1396, 1399; Commission's emphasis).

In my opinion, the instant proceeding is consistent with the Commission's concern about the changing structure of the bread industry in local marketing areas. **[79]**

Price Discriminations

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, *** and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

Complaint counsel claim that, in the five separate marketing areas of Denver, Minneapolis-St. Paul, Southern California, Northern California, and Northwest Ohio, Continental has discriminated in price between purchasers of its white bread products and that such price discriminations have had the effects proscribed by the statue on competition between Continental and other wholesale bakers in the respective markets, and constitute primary line violations of the statute.

Respondents contend (RBr. 40–44) that complaint counsel have not demonstrated that the challenged pricing practices were predatory, have not demonstrated that the alleged injury was the result of price differences in commerce, have not demonstrated that the lower prices were subsidized by higher prices, or that the intensity of competition has actually been diminished in any of the markets involved (*See* R Reply Br. 49–51). Respondents contend that the Robinson-Patman Act must be construed to protect competition, not competitors, and that the exit of a handful of marginal bakers, the diversion of business from one seller to another or the lessening of profits is not sufficient to establish the injury element of a *prima facie* case (RBr. 43–44).

Respondents also contend that the Commission's price discrimination charge is "completely out of line" with more recent Commission enforcement of the Robinson-Patman Act (RBr. 40, n.1).

Section 2(a) prohibits price discriminations when the effect "may be substantially to lessen competition *** or to injure, destroy or prevent competition or tend to create to a monopoly in any line of commerce." It has long been considered that the statute seeks "to reach such discriminations 'in their incipiency' before the injury to competition is effected." *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U.S. 726, 738 (1945). The prohibition of the statute goes to the price discrimination itself and the probable result of the price **[80]** discrimination if it is not stopped or prohibited. Each case, therefore, must be adjudicated on its own merits, and, generalizations taken from previous cases are not necessarily controlling.

Commerce

In my opinion, complaint counsel have met the jurisdictional requirements of the statute. Admittedly, Continental is engaged in commerce. In each market area considered, Continental's local plant made sales of Wonder advertised label white bread at the higher price across state lines. Accordingly, the holding in *Gulf Oil Corp.* v. *Copp Paving Co.,* 419 U.S. 186, 200 (1974), relied upon by respondents, is not applicable here. The Denver plant sold Wonder advertised label bread in Wyoming, the Minneapolis and Rochester, Minnesota, plants sold Wonder advertised label bread in Wisconsin, bread baked by the Beverly Hills and DiCarlo plants in Southern California was sold in Arizona, the San Francisco, Oakland and Sacramento, California, plants sold Wonder advertised label bread in Nevada, and the Akron and Youngstown, Ohio, plants sold Wonder advertised label bread in Pennsylvania.

Actually all of Continental's sales which are the subject of this proceeding are in commerce. Notwithstanding the local nature of each of Continental's bakery operations, each grocery store purchaser is doing business with a corporation located in New York. Not only does Continental's headquarters engage in purchasing ingredients and supplies for the local bakeries, but its personnel engage in sales negotiations on behalf of local bakeries. It also finances the operations of each bakery, and creates and places the national advertising which makes possible the higher wholesale and retail prices for Wonder advertised label bread. *See Holland Furnace Co.* v. *Federal Trade Commission,* 269 F.2d 203 (7th Cir. 1959), *cert. denied,* 361 U.S. 932 (1960).

Lower Price is Subsidized

In this respect, the higher price for Wonder advertised label bread clearly subsidizes the lower prices for private label and secondary label whatever the pecularities of any individual market may be. In my opinion, the effects of a price discrimination on competition may be measured by the effects of the lower price on competition as well as the effects of the amount of the discrimination itself. This is especially true where the lower prices are below the seller's fully allocated costs.

Like Grade and Quality

It is undisputed that bread products are commodities of like grade and quality, *i.e.,* that Continental's advertised label white bread is the same bread product as its private label [81] or secondary label white bread. It is also undisputed that competing wholesale bakers' white bread is the same product as Continental's white bread, whether wrapped in advertised, private or secondary label. The only significant difference is the loaf size. In this respect, wholesale bakers almost invariably sell a line of products to their grocery customers, which may include a mix of white bread sizes and shapes.

Products

Continental claims that wholesale bakers and grocers do not negotiate for private label bread products on the basis of one product, but rather on the basis of all private label items as well as advertised label products. In this respect, they challenge any Robinson-Patman analysis that concentrates on one item for purposes of determining the amount of the price discrimination or the effect of the price discrimination.

One of the peculiarities of the bread industry is that certain loaf sizes of white bread are the high volume products. Although the most popular loaf size varies from market to market, grocers concentrate in marketing the popular sized loaf. In these circumstances, wholesale bakers and grocers negotiate on the basis of the price of the largest selling item. In addition, the wholesale baker considers the length of a production run that will be involved in producing the most popular item. In my opinion, it is proper to determine the amount of discrimination and its effect on competition by looking to the prices of the one bread product that dominates the market. *See Kroger Co.* v. *Federal Trade Commission,* 438 F.2d 1372 (6th Cir. 1971), *cert. denied,* 404 U.S. 871.

Predatory Pricing—Injury to Competition (Primary Line)

I agree with the parties that the principal issue in determining whether Continental's price discriminations are unlawful as charged, is whether Continental's conduct was predatory. Predation is now considered to be a crucial element in primary line discrimination cases, although the Commission has indicated that market analysis may be sufficient in a particular case to raise the probability of injury to competition, proscribed by the statute. *See Beatrice Foods Co.* 76 F.T.C. 719, 799 (1969), *aff'd sub nom. Kroger Co.* v. *Federal Trade Commission,* 438 F.2d 1372 (6th Cir. 1971), *cert. denied,* 871.

In the circumstances of each of the five market areas considered for Robinson-Patman enforcement in this case, it is clear that Continental knew or should have known that the consequences of its price discriminations would be to eliminate one or more of its competitors or substantially to injure competition and would result in further concentration in the wholesale baking industry. In most instances Continental knew that the lower discriminatory prices were below its fully allocated costs and below its competitors' fully allocated **[82]** costs. Moreover, in certain situations Continental knew or should have known that the prices of certain products were below its average variable costs. *See Utah Pie Co.* v. *Continental Baking Co.,* 386 U.S. 685, 698–700 (1967).

In Denver, through the Tender Crust program with Associated Grocers which granted a lower price on private label bread, Continental secured a substantial portion of the shelf space available to the wholesale bakers. The expected pricing reactions of competing wholesale bakers resulted in greater price discriminations and in Continental's sale of private label products well below its fully allocated costs. Continental knew or should have known that its lower prices were also below its wholesale baker competitors' fully allocated costs. At one time price discriminations were as great as 18% of the wholesale price of Continental's advertised Wonder loaf. Continental knew or should have known that Old Homestead would not be able to successfully compete under these conditions. In fact, Old Homestead ceased doing business as a wholesale baker shortly after the 18% discriminatory price was established by Continental. In the circumstances, such price discriminations are predatory in nature and their effects may be to (and actually did) substantially lessen competition between wholesale bakers.

In the TCTA, Continental reduced its price of Wonder advertised label by 8¢ a loaf when it established a wholesale price of 20¢ while maintaining a 28¢ wholesale price in Rochester, Minnesota. The 20¢ wholesale price on Wonder advertised label was below Continental's fully allocated costs. Continental's express purpose in initiating this price discrimination was to regain its volume of sales of advertised label bread with the expectation that retail prices of private label and captive label bread would thereafter be increased. Such a price increase would reduce the retail price spread between advertised label and private label bread and permit a price increase of advertised label bread *without* a loss in sales. However, the low retail prices of private label and secondary label bread, in turn, were due, in part, to Continental's low discriminatory prices to its private label customers and purchasers of its secondary label bread.

Continental knew or should have known that its low discriminatory price on advertised label bread would seriously reduce the profitability of its wholesale competitors by lowering the wholesale prices of advertised bread below its wholesale competitors' fully allocated costs or by substantially reducing its competitors' volume of secondary and private label sales. Continental knew that most of Zinsmaster's sales were advertised label bread, whereas most of Pan O Gold and Creamy Crust's sales were private label and secondary label bread. Continental also knew or should have known that the independent wholesale baker competitors would not be able to continue competing in the TCTA at such low wholesale price levels. Such price discriminations are predatory in nature and [83] their effects may be to substantially lessen competition between wholesale bakers.

In the Los Angeles (Southern California) market, Continental discriminated in price between purchasers of its Wonder advertised label and purchasers of its private label and secondary label bread. During the latter part of the 1960's and early 1970, the lower discriminatory prices in the Ventura area were below Continental's fully allocated costs and below Prosser's fully alloted costs. Continental knew that Prosser was a weak competitor and knew that Prosser could not survive if it was required to sell at such low wholesale prices. In fact, Prosser withdrew from the wholesale baking business in 1971.

In late 1971 and 1972, Continental sold private label bread in the Los Angeles area at low, discriminatory prices that were below Continental's fully allocated costs. With these low discriminatory prices, Continental obtained many new private label customers and foreclosed much available shelf space from competing wholesale bakers, including Gordon and American. It also offered the lower discriminatory prices to Gordon's only private label customer, requiring Gordon to lower its wholesale price below its fully allocated costs to retain that customer. Continental knew that Gordon and American were weak competitors and would not be able to compete at wholesale price levels below fully allocated costs. In fact, in 1974, Gordon withdrew from the wholesale baking industry, leasing its bakery to the Associated Grocers Cooperative, which thereafter produced its own private label bread for its member grocers. Also in 1974, American discontinued selling to grocery stores and concentrated its efforts on sales to restaurant customers.

Continental's price discriminations are predatory in nature and their effects may be to (and in fact did) substantially lessen competition between wholesale bakers.

In Northern California in 1972 Continental offered a 17.2¢ wholesale price on private label bread which was substantially lower than the wholesale price on its Wonder advertised label. This lower price was below Continental's fully allocated costs. Continental knew that Inglis, which had filed a bankruptcy petition in 1969 and which it considered to be a weak competitor, would not be able to compete effectively at such low wholesale price levels. Such a price discrimination is predatory in nature and its effect may be to (and in fact did) substantially lessen competition between wholesale bakers.

In the Cleveland area, Continental discriminated in price between purchasers of its Wonder advertised label and Pick N Pay on its purchases of private label bread. During the last half of 1973 and during most of 1974, the wholesale prices on Pick N Pay private label products were below Continental's fully allocated costs and close to, if not below, Continental's average variable costs. Continental knew or should have known that its weaker wholesale baker competitors in [84] the Cleveland marketing area would not be able to compete in a market of low retail bread prices which were a result of Continental's low discriminatory prices to Pick N Pay. Such price discrimination is predatory in nature and its effect may be to (and actually did) substantially injure competition between wholesale bakers.

Good Faith Defense

The Robinson-Patman Act permits certain price discriminations notwithstanding their proscribed effect. Section 2(b) provides:

> That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price *** to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor.

The "good faith" requirement of Section 2(b) has been interpreted as meaning that the grantor of the lower discriminatory price must "show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.,* 324 U.S. 746, 759–60 (1945).

Respondents argue that in every instance where they granted a lower discriminatory price in the five marketing areas under consideration for Robinson-Patman enforcement, Continental believed that it was meeting the equally low price of a competitor. However, on the basis of the record in this proceeding, Continental has not made out its meeting competition defense.

In Denver, the agreement to sell Tender Crust at a wholesale price at least 1¢ below the wholesale price of Wonder advertised label bread was to be afforded without regard to a specific competitive offer. Subsequent pricing under modifications of the original Tender Crust agreement always established a wholesale price on Tender Crust below the wholesale price of competing wholesale bakers. Such conduct does not meet the requirements of Section 2(b).

In the TCTA, Continental's lower discriminatory price on its Wonder advertised label bread was not intended to meet any offer of a competing wholesaler to any of Continental's grocer customers. Moreover, the discriminatory prices given to its private label customers on private label bread were to meet Continental's customers' competition with captive bakers. These situations do not meet the requirements of Section 2(b).

In Southern California, the record is not clear which wholesale baker initiated the lower prices on advertised label [85] bread in the Ventura area in the late 1960's or whether such prices were discriminatory. It appears that Continental, Interstate and American matched each other's lower prices. However, it appears that Continental granted lower discriminatory prices on its secondary label in the Ventura area without regard to its wholesale baker competitors' prices. In addition, such prices were below Continental's fully allocated costs as well as below Prosser's wholesale price and fully allocated costs. The record is clear, however, that Continental's lower discriminatory price to Hughes on the largest volume loaf size of private label bread was below Interstate's offer. The requirements of Section 2(b) were not met.

In Northern California, Continental offered a 17.2¢ wholesale price on private label bread to all chain stores throughout the marketing area. The only other 17.2¢ price offered on a comparable product were on sales of private label bread by other wholesaler bakers to grocers in a few local areas. The 17.2¢ price was below Continental's fully allocated cost. Accordingly, Continental was knowingly undercutting the price of its competitors to many individual grocery stores and did not meet the requirements of Section 2(b).

Finally, in Cleveland, Continental's contract with Pick N Pay in 1973, and as renegotiated in 1974, set wholesale prices of private label products that were below Continental's fully allocated costs and which were below any competitive offer. Continental knew or should have known that it was not meeting any competitors' price offer and, accordingly, the requirements of Section 2(b) were not met.

There have been many other interpretations of the "good faith" element of Section 2(b), other than the question of whether the seller acted reasonably in determining the actual amount of the competitive offer he was allegedly meeting. For example, it has been held that 2(b) applies only to individual price concessions and not to systematic or generalized price discriminations. *Federal Trade Commission* v. *Cement Institute* 333 U.S. 683 91948); *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.,* 324 U.S. 746 (1945); *Federal Trade Commission* v. *Standard Oil Co.,* 355 U.S. 396 (1958). There is a question as to whether 2(b) is applicable where the discriminations are used aggressively to obtain new business or more business, instead of protecting one's business with a customer. *Standard Oil Co.* v. *Federal Trade Commission,* 340 U.S. 231, 249–50 (1951); *Great A&P Co.* v. *Federal Trade Commission* 440 U.S. 69 (1979); *Standard Motor Products, Inc.* v. *Federal Trade Commission,* 265 F.2d 674 (2d Cir. 1959). And it should seriously be considered whether discriminatory sales below cost to obtain new business could ever be considered a good faith meeting of the equally low price of a competitor. *See Sunshine Biscuits,* 59 F.T.C. 674, 678 at 679–81 (1961), *rev'd,* 306 F.2d 48 (7th Cir. 1962). In my opinion, Continental also has failed to meet the requirements of Section **[86]** 2(b) for one or more of these other reasons in each of the five marketing areas in which it granted the challenged price discriminations.

Respondents contend that the good faith meeting of competition defense has already been adjudicated in their favor, citing the Commission dismissal of the Section 2(a) price discrimination matter in 1963. *Continental Baking Co.,* 63 F.T.C. 2071 (RBr. 47). It appears that the evidence in that proceeding concerned specific discounts granted from Continental's list prices to 20 retail grocery customers. All but two of those customers were shown to have been, at the time the discounts were granted and thereafter throughout the period covered by that case, receiving at least as high discounts from one or more of Continental's competitors. The other two grocery customers had been offered, and had available to them, discounts from Continental's competitors at least as high as those granted by Continental. The circumstances in the instant case under which the lower discriminatory prices were granted are markedly different than the circumstances involved in the prior proceeding. Not only has Continental not met the basic requirements of the statute in the instant case, but Continental has also failed to demonstrate compliance with its own policies on meeting competition, because competitive offers were not documented with respect to the private label arrangements in most instances.

Cost Justification Defense

Respondents contend that the Wonder-Tender Crust price difference in the Denver marketing area was cost justified (RPF 168–169). They rely upon a study prepared by Lloyd Swan for use in the *Old Homestead* trial in 1971 (RPF 169; CXs 1722 Swan; 1728). The comparison made by respondents for cost justification purposes is between the profits Continental ostensibly made on Wonder advertised label bread and Tender Crust private label bread. There is no dispute that Mr. Swan calculated hypothetical costs applying percentages to the list prices in effect during relevant periods. It is doubtful whether such allocations of costs are adequate for purposes of cost comparisons. Continental did not keep records in those days from which it could calculate the actual costs of producing and selling any single variety of bread product.

Moreover, the price differences shown on the Forms 452B were usually one cent. The actual price differences shown on this record during the last quarter of 1966 through December 1967 ranged between 2.2 and 3.6¢. In many instances, the difference in profit between Wonder advertised label bread and Tender Crust private label bread were not as great as the price difference between them. In my opinion, respondents have not carried their burden to demonstrate a cost justification defense. They do not appear to assert such a defense for any other price discrimination challenged in this proceeding. **[87]**

Competition

One of respondents' defenses to the "primary line" Robinson-Patman allegations is that the competing wholesale bakers that withdrew from the baking business during or shortly after Continental engaged in the challenged price discriminations were marginal firms who were not advertising their products, who were mismanaged, inefficient, under capitalized, and doomed to failure irrespective of what Continental did (*See* RBr. 43). In effect, Continental is contending that its pricing actions, considered necessary for its own survival, are not illegal because they happened to hasten the departure of competitors. Realistically, however, the survival in a local market of a company operating a large number of bakeries in many markets at the expense of the early withdrawal of a local bakery is exactly the type of situation the Robinson-Patman Act was intended to prevent. The resulting concentration of market power is the indicia of a lessening of competition and the type of competitive injury with which the statute is concerned.

Respondents also contend that the degree of effective competition in each of the markets has not diminished over the years and that, accordingly, enforcement of the Robinson-Patman Act is not in the public interest. But, as stated before, the Robinson-Patman Act was to prevent those price discriminations in their incipiency that may be to substantially lessen competition. It is found that respondents' price discriminations are such that, if permitted to continue, or if resumed or pursued in other markets, may have the effect of lessening competition between wholesale bakers. The record in this case is clear that effective competition between wholesalers in the five markets substantially was diminished over time.

Enforcement Policy

I do not agree that the Commission's lack of Robinson-Patman enforcement against sellers since the *Kroger-Beatrice* decision in 1969 reflects a Commission judgment as to the lack of public interest in such enforcement. The complaint issued by the Commission in Docket 9000 contained a Robinson-Patman price discrimination charge. It was complaint counsel's duty to pursue that matter should the facts and circumstances warrant, and it is the duty of the Administrative Law Judge to adjudicate the issues presented. It is a grave mistake for any businessman to believe that the Commission's temporary inaction grants him a license to disregard the prohibitions of statutes such as the Robinson-Patman Act.

Price Discriminations—Injury to Competition (Secondary Line)

It is well settled that substantial price discriminations on products sold to competing grocery store customers may be to substantially injure competition between them. *See United Biscuit Co. of America* v. *Federal Trade* [88] *Commission,* 350 F.2d 615 (7th Cir. 1965), *cert. denied,* 383 U.S. 926; *Federal Trade Commission* v. *Morton Salt Co.,* 334 U.S. 37 (1948); *Foremost Dairies Inc.* v. *Federal Trade Commission,* 348 F.2d 674 (5th Cir. 1965), *cert. denied,* 382 U.S. 959. It has also been held that where a price differential between an advertised brand and private label brand reflects no more than the consumers' preference for the advertised brand, such price discrimination does not create the injury prescribed by the statute. *See Bordon Company* v. *Federal Trade Commission,* 381 F.2d 175 (5th Cir. 1967). In the instant case, the price discriminations arising from the private label prices afforded Pick N Pay in Cleveland and the chain stores in the Reno area appear to be more than a difference which merely reflected consumer preference between advertised label and private label bread. It is found that Continental's pricing practices in Cleveland and Reno constituted secondary line injury violations of the statute.

For reasons already stated, respondents' lower discriminatory prices in the Cleveland market area and in the Reno portion of the Northern California area were not granted in good faith to meet the equally low prices of a competitor within the meaning of Section 2(b) of the Clayton Act, as amended.

Attempt to Monopolize

Section 5 of the Federal Trade Commission Act provides in pertinent part:

> Sec. 5(a)(1). Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
> Sec. 5(a)(2). The Commission is empowered and directed to prevent persons, partnerships, or corporations, *** from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

It is well settled that Section 5 covers conduct that either violates the prohibitions of the Clayton Act and the Sherman Act or conduct that could lead to unreasonable restraints on competition if not prohibited. *See Federal Trade Commission* v. *Brown Shoe,* 384 U.S. 316, 321 (1966); *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683 (1948).

An illegal attempt to monopolize, constituting a violation of Section 2 of the Sherman Act, involves a "specific intent" to control prices or destroy competition in a relevant market, predatory or anticompetitive conduct directed to accomplish those ends, and a dangerous probability of success. *Purex Corp.* v. *Proctor & Gamble Co.,* 596 F.2d 881, 890 (9th Cir. 1979); *Janich Bros., Inc.* v. *American Distilling Co.,* 570 F.2d 848, 853 (9th Cir. 1977); *Golden Grain Macaroni Co.,* 78 F.T.C. 63, 164 (1971), *enforced in part,* 472 F.2d 882 (9th Cir. 1972), *cert. denied,* 412 U.S. 918 (1973). **[89]**

These criteria are not mutually exclusive but rather are interrelated. Evidence of conduct may shed light on intent and the probability of success. Evidence of a company's purpose may reveal whether the conduct is reasonably related to legitimate business needs. *See Janich Bros.,* 570 F.2d at 853; *Transamerican Computer Co.,* v. *IBM Corp.,* 481 F.Supp. 965, 989 (N.D. Cal. 1979).

With respect to the "dangerous probability" issue, there is conflict in the law as to what degree of market power, or proximity to monopoly status need be shown before a finding of liability can be made. *Compare Greyhound Computer Corp., Inc.* v. *IBM Corp.,* 559 F.2d 488, 496, 504 (9th Cir. 1977) *with United States* v. *Empire Gas Co.,* 537 F.2d 296, 305 (8th Cir. 1976), *cert. denied,* 429 U.S. 1112 (1977).

It is generally accepted that monopoly power exists when an industry member has the power to raise prices or exclude competition when it so desires, and that such monopoly power is unlawful if it is willfully maintained or acquired as distinguished from arising from growth or development as a consequence of superior product, business acumen or historical accident. *Purex Corp.* 596 F.2d at 890; *Golden Grain Macaroni Co.,* 78 F.T.C. at 157.

Contentions of the Parties

Complaint counsel contend that Continental's predatory pricing practices, including price discriminations and sales below cost, along with other instances of predatory conduct, demonstrate that Continental intends to destroy competition between wholesale bakers and intends to gain monopoly positions in local wholesale white bread markets. Complaint counsel argue that, absent some remedial action, Continental may be successful in gaining such monopoly positions (CC Br. 16–33).

Respondents contend that complaint counsel's attempt to establish a relevant market limited to white bread produced by wholesale bakers is not realistic (RBr. 22–27). They point out that captive bakers which produce an identical white bread product are a dominant competitive factor in the bread industry, especially in the six markets which are the subject of this case (RBr. 23–24). Respondents contend that the retail prices established by the captive bakers have a controlling effect on the wholesale bakers' wholesale price of advertised label and private label bread in that the captive label bread and wholesaler baked bread compete directly for the consumer dollar (*I.d.; See* R Reply Br. 60–61). Respondents also contend that white bread by itself is not a proper product market because other bread products are acceptable substitutes, as demonstrated by the fact that during the 1970's there has been a substantial decrease in the consumption of white bread whereas the consumption of variety breads has increased during the same period (*See* RBr. 26–27). **[90]**

Respondents argue that Continental's pricing practices were not predatory, but merely responded to the competition of the captive bakers. They contend that there is "chronic" excess capacity in the bread industry created by the growth of the captive bakers, as well as the decreased consumption of bread, and that the wholesale bakers' competition for the shrinking available shelf space has created chaotic conditions in certain markets in the bread industry (RBr. 5–6; *see* R Reply Br. 61–62). Respondents also contend that in such circumstances, to sell below fully allocated costs, but over "marginal" or "variable" costs, is a reasonable business decision, in that such sales contribute to a positive cash flow and to the overall profitability of the business (*See* RBr. 36–37).

Finally, Respondents claim that entry into the bread baking business is easy and, accordingly, there is no way that Continental could achieve a monopoly position in any bread market (RBr. 31, 33–35; *see* R Reply Br. 66–67). They argue that the wholesalers must respond to the grocers' demand for low cost private label bread or face the possibility that those grocers will become captive bakers (RBr. 10, 31).

Relevant Product Market

In my opinion, wholesale baked white bread has such distinctive product and market characteristics that it may be considered a relevant market or submarket upon which to determine the effects of Continental's challenged practices in the context of an alleged attempt to monopolize case. Quite clearly, concentration of the wholesale white bread business in the hands of one wholesale baker in a marketing area would constitute a monopoly. Any retail grocer which did not have its own bakery would have to buy white pan bread from one source. Moreover, retail grocers could not remain competitive by selling only bread products other than white pan bread.

Captive bakers do not compete in selling to grocery stores; they limit distribution through their own retail outlets. Wholesale bakers, on the other hand, compete with other wholesale bakers in the sale of bread products to grocers.

White pan bread is the most important bread product to the large wholesale baker. The quantities involved permit long production runs which maximize efficiencies and increase profitability. The record shows that many bakeries concentrate their production efforts in white pan bread and that the volumes of white bread produced and sold do, in fact, reflect the profitability and competitive strength of wholesale bakers. For example, Continental's Akron and Minneapolis bakeries appear to have been exclusive white bread bakeries.

These white bread products are also the most important bread products to the grocer. The largest and best shelf space **[91]** is allocated to these products. Most private label arrangements concentrate on white bread and negotiations are usually centered on determining the wholesale price of the most popular loaf size of white bread in a particular marketing area.

The fact that wholesale baked white bread is sold at retail by grocers in competition with captive label bread, either from the same bread table, or from the bread tables of competing grocers, does not place captive bakers in competition with wholesale bakers at the wholesale level of competition. Delineation of wholesale baked white bread as a relevant market conforms to the requirement that a relevant market be an area of effective competition and is consistent with the realities of competitive practice in the market place. *See L. G. Balfour Co.* v. *Federal Trade Commission,* 442 F.2d 1 (7th Cir. 1971).

No Chronic Excess Capacity

The record does not show that there was "chronic" excess capacity in the bread baking industry, during the relevant periods, at least not in the six market areas that are examined in this record. The practical production capacity of a bakery consists of two shifts and some overtime or approximately 80% of the maximum production possible. Capacity is not, as Continental suggests, measured by the maximum output possible. Bakers need reserve capacity to handle unusual demands that occur from time to time and from season to season.

The excess capacity that is indicated in this record existed where Continental built a new plant (Denver), was operating a plant at a little over one shift and sustaining a loss over a number of years (Akron), or was losing a large private label customer which built a captive bakery (Los Angeles). Accordingly, the competitive conditions in those markets seemed to have been generated by Continental's attempt to "fill" or "over fill" the optimum efficent capacity of its plants. The question here is whether Continental's aggressive price discriminations involving below cost pricing to take business from its competitors in order to fill its plants is really a response to excess capacity.

Barriers to Entry

The record does not demonstrate that it is easy to enter the wholesale bread baking industry. Although there are no technical barriers, there are certain market barriers, the most important of which is the creation of a consumer franchise. For unless a wholesale baker has an acceptable advertised label, it will not be able to obtain the necessary bread shelf position and space to fill a modern bakery. The record shows that practically no wholesale baker has entered a market in the 1970's except by acquisition of an existing baker. The only new entrants have been several large chain stores that have built their own captive bakeries. However, the record also shows that a number of large chain stores closed **[92]** their captive bakeries during the 1970's, and that the trend toward captive baking has abated.

Another barrier to entry into the wholesale baking business may be the propensity of the large multiplant companies to engage in below cost pricing in particular markets. Such parallel behavior was practiced in the Denver, Minneapolis, Los Angeles and San Francisco markets. The record shows that a local bakery cannot survive in such a competitive atmosphere. The margin of profit and the return on investment are not great enough to attract capital expenditures in such an unstable atmosphere as exists in the wholesale baking business.