IN THE MATTER OF

HEUBLEIN, INC., ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 8904. Amended Complaint, Nov. 16, 1976—Order, Oct. 7, 1980*

This order dismisses the Commission's November 16, 1976 amended complaint which alleged that the effect of Heublein, Inc.'s acquisition of a controlling interest in United Vintners, Inc. substantially lessened competition or tended to create a monopoly in the production, distribution and/or sale of wine in the United States. The Commission, in dismissing the complaint, held that the small lessening of actual competition resulting from the merger and the evidence in the record were insufficient to establish a violation of antitrust law.

Appearances

For the Commission: *Nelson M. Ishiyama, Laurence O. Masson* and *Mary L. Azcuenaga.*

For the respondent: *George J. Caspar,* Farmington, Ct.; *Richard E. Walton,* San Francisco, Ca.; *Lloyd W. McCormick, William H. Armstrong* and *Warren E. George, McCutchen, Doyle, Brown & Enersen,* San Francisco, Ca.; *J. Wallace Adair, Ralph J. Savarese, John DeQ. Briggs, III* and *Raymond A. Jacobsen, Jr., Howrey & Simon,* Washington, D.C.

AMENDED COMPLAINT

The Federal Trade Commission, having reason to believe that Heublein, Inc. (hereinafter "Heublein"), and Heublein Allied Vintners, Inc. (hereinafter "Vintners"), respondents herein, have violated the provisions of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and that the above-named respondents, Allied Grape Growers (hereinafter "Allied"), and United Vintners (hereinafter "United"), respondents herein, have further violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), through the acquisition by Heublein of a controlling interest in United, and that a proceeding in respect thereof would be in the public interest, hereby issues this amended complaint (hereinafter "complaint") pursuant to Section 11 of the amended Clayton Act and

* Original Complaint issued Nov. 27, 1972.

Section 5 of the Federal Trade Commission Act, stating its charges as follows:

I.

DEFINITIONS

1. For purposes of this complaint, the following definitions will apply:

A. *All wine.* All wine is a recognized industry term for expressing total production, distribution and/or sale statistics for table, dessert and sparkling wine. There are recognized statistical subdivisions in the wine industry, for example, imports and domestic wine or premium and standard wine. For simplification, however, the market share percentages used in this complaint are for "all wine" production, distribution or sale. [2]

B. *Table or dinner (hereinafter table) wines.* Table wines are still (non-effervescent) wine products. Their alcohol content is not over 14% by volume.

C. *Dessert or sweet (hereinafter dessert) wines.* Dessert wines are still wine products with over 14% alcohol by volume.

D. *Sparkling wines.* Sparkling wines are effervescent wine products. Their alcohol content usually ranges from 10 to 14% by volume.

II.

ACQUISITION

2. On or about September 17, 1968, as a result of negotiations commenced earlier during 1968, the Board of Directors of Allied and representatives of Heublein reached an agreement in principle whereby Heublein would acquire a controlling interest in United, a wholly-owned production and marketing subsidiary of Allied. The acquisition was approved by Allied's membership in late 1968. On or about February 21, 1969, the acquisition was completed, giving Heublein a controlling interest in United through its control of Vintners.

3. Under the terms of the acquisition agreement, Allied's members received shares of Heublein common stock valued at approximately $7,521,000, Heublein Series A preferred stock valued at approximately $20,319,000, and Heublein Series B preferred stock valued at approximately $5,000,000. Pursuant to the acquisition agreement, United was converted to a corporation with the same name and became a wholly-owned subsidiary of Vintners, a corpora-

tion organized for the purpose of this transaction. The members of Allied received all of the Class B common stock of Vintners, constituting 18% of Vintners' outstanding stock, and Heublein received all of Vintners' Class A common stock, which constituted 82% of Vintners' outstanding stock. The members of Allied formed a second non-profit cooperative association with the same name, succeeding to all assets and liabilities of its predecessor. All outstanding shares of Vintners' Class B common stock were contributed by the members to the new Allied organization.

III.

HEUBLEIN, INC.

4. Respondent Heublein is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its principal office and place of business located at 330 New Park Ave., Hartford, Connecticut. At all times relevant herein, Heublein sold and shipped its products in interstate commerce and thus it was engaged in commerce as "commerce" is defined in the Clayton Act, and was engaged in or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act. [3]

5. At the time it acquired a controlling interest in United, Heublein was a major industrial corporation, a national leader in the sale of alcoholic beverages and a seller of specialty food products. Net sales for its fiscal years ending June 30 were: $1,466,095,000 in 1975; $1,283,002,000 in 1974; $1,013,115,000 in 1973; $922,190,000 in 1972; $629,845,000 in 1971; $586,295,000 in 1970; $523,799,000 in 1969 and $487,767,000 in 1968. In 1969, Heublein was the fifth largest company in the United States selling alcoholic beverages.

6. Notable among Heublein's distilled liquor products are vodka, gin, rum, tequila, Scotch and Canadian whiskey. Its Smirnoff vodka is the largest selling brand of vodka in the country and the second largest selling brand of liquor made in the United States. Heublein originated and continues to dominate the growing domestic market in the production and sale of prepared cocktails.

7. At the time of the acquisition of a controlling interest in United, Heublein was a competitor in the wine industry. Although its sales of wine produced in the United States were small, Heublein was a major wine importer. In 1967, it imported 1,100,000 gallons. This was approximately 5% of all the wine imported into the United States. Lancer's Vin Rose', produced in Portugal, was the nation's leading imported table wine in 1968 and continues to be one of the

nation's leading imported table wines. Heublein has had world distribution rights for this product since 1965. In addition, it was and is the sole importer of Harvey's Sherries & Ports, a line of dessert wines. Harvey's Bristol Cream Sherry was and is the leading imported sherry in the United States. Heublein also imported the Bertani line of wines from Italy, the Vinya and Quinta wines from Portugal and many others.

8. Since purchasing a controlling interest in United in February 1969, Heublein has expanded the company's production facilities, number of wine products and vineyard acreage. In addition, in June 1969, Heublein acquired the Beaulieu Vineyard of Napa, California and its distributor affiliate (hereinafter Beaulieu). Although small, Beaulieu is regarded as one of the nation's best wineries. For the year prior to the acquisition, it had sales of $1,589,087. Also, in 1969, half of the members of the St. Helena Cooperative of St. Helena, California agreed to divert their grapes from the St. Helena Winery to United. Further, in 1969 Heublein began the annual Premiere National Auction of Rare Wines. In addition to selling rare wines, the auction also sells "futures" in anticipated production of Heublein's wines. Finally, Heublein purchased Regina Grape Products Co. of Etiwanda, California in January 1971. Regina is primarily a producer of wine vinegar.

9. Heublein is an aggressive merchandiser and distributor of its products. It is one of the nation's major advertisers with an expenditure of approximately $35,000,000 in 1970 and $103,700,000 in 1975. In 1970 it was the second largest advertiser among companies in the liquor business. In 1975 it was the largest such advertiser. [4] Heublein's budget for its wine advertising is both substantial and expanding. Heublein distributes its alcoholic beverage products to state liquor agencies in the 18 states that monopolize the sales of such products and to approximately 600 independent wholesale distributors in the remaining 32 states, the District of Columbia and the territories of the United States.

IV.

ALLIED GRAPE GROWERS

10. Respondent Allied is an incorporated agricultural cooperative association organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal office and place of business in Fresno, California. At the time of the sale of a controlling interest in United, respondent Allied was in the business of acquiring grapes in California and other states and

producing and marketing wines made therefrom through its wholly-owned subsidiary United. Said wines were sold throughout the United States. Since the sale of a controlling interest in United, respondent Allied has been engaged in the business of acquiring grapes in California and other states for sale to United for the production of wine to be sold throughout the United States. Therefore, at all times relevant herein, Allied was engaged in or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act.

11. As a result of its agreements with Heublein, Allied retains an 18% interest in United through its ownership of shares in Vintners, the sole shareholder of United.

12. Allied claims the contractual right to designate 8 members or 40% of the authorized number of directors of United, whichever is greater, for whom Vintners is obligated to vote. At the present time, eight members of the United board of directors are designees of Allied.

V.

UNITED VINTNERS, INC.

13. Prior to its acquisition by Heublein, respondent United was a wholly-owned subsidiary of Allied, an incorporated agricultural cooperative association organized, existing and doing business under and by virtue of the laws of the State of California. United is now a corporation organized, existing and doing business under and by virtue of the laws of the State of California. At all times relevant herein, United has had its principal office and place of business at 601 4th St., San Francisco, California. At the time of the acquisition, United was the sole operating entity of Allied, as all of Allied's production and marketing assets were held by United. When control of United was acquired by Heublein, United continued to hold and operate substantially all of said assets. At all times relevant herein, United sold and shipped its products in interstate commerce and thus it was engaged in commerce as "commerce" is defined in the Clayton Act and was engaged in or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act. [5]

14. At the time of its acquisition, United was the nation's second largest seller of wine products. Net sales for its fiscal years ending August 31 were: $96,009,189 in 1968; $91,026,634 in 1967; and $86,231,076 in 1966.

15. Prior to its acquisition, United crushed the grapes delivered by Allied's approximately 1,600 members and processed and distrib-

uted the resulting wine. It also purchased some grapes from nonmembers. Approximately 30% of United's distribution was done through its own wholesale operations. The remainder of its sales were made by about 370 independent wholesale distributors. Allied retained a portion of the proceeds from the wine sales as a part of its capital fund and distributed the remainder to its members in proportion to the market value of the grapes each had delivered. Although the acquisition has caused some change in the procedure for determining grower compensation, United's function of crushing grapes, producing wine and distributing it has remained basically unchanged.

16. At its various wineries, United produces wines of all types, including table, dessert and sparkling. Most of these products are sold under brand names owned by United, for example, Italian Swiss Colony and Inglenook.

17. Subsequent to the acquisition, Heublein has expanded United's assets. A new glass plant near United's winery at Madera, California provides most of United's bottle requirements. In addition, a new plant for producing sparkling wines has been completed at Madera. The new facility doubled United's capacity for producing such wines. Finally, Heublein has delegated responsibility for the distribution of some of its imported wines to United.

VI.

HEUBLEIN ALLIED VINTNERS, INC.

18. Respondent Vintners is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business at 604 4th St., San Francisco, California. Vintners was organized for the purpose of this acquisition and all of its stock is held by Heublein and Allied. Its sole asset is 100% of the stock of United. Through United, Vintners is in the business of producing and marketing wines throughout the United States. Since its formation, Vintners has been engaged in commerce as "commerce" is defined in the Clayton Act, and has been engaged in or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act.

VII.

TRADE AND COMMERCE

19. The product markets affected by Heublein's acquisition of a controlling interest in United are wine production, distribution and/or [6]sale generally, as reflected by "all wine" statistics, and wine's three product subcategories: table, dessert and sparkling; all of which are concentrated and nation-wide in geographic scope.

20. Wine sales in the United States are in the midst of a major expansion. They have increased from 145,186,000 gallons in 1955 to 267,084,000 in 1970 and to 367,574,000 gallons in 1975. Sales of table and sparkling wines by California wineries, wineries in other states and importers have all shared in the expansion. Sales of dessert wines, however, have decreased since 1955.

21. Wine sales in the United States are dominated by two wineries. In 1967–68, E. & J. Gallo Winery (hereinafter Gallo) and United made over 40% of the wine sales in the United States. Gallo's sales were slightly higher than United's. The third largest wine seller, Roma Wine Company (hereafter Roma), had less than 4% of the market.

22. An even higher concentration exists among California wineries that produce over 70% of the wine sold throughout the United States. In 1967–68, Gallo and United's production accounted for almost 60% of the wine produced in California and commercially sold throughout the United States. Roma, the third largest California producer, had less than 5% of California's national wine sales.

23. There are major barriers to entry to any firm wishing to make a significant entrance into the wine business. New winery equipment and the grapes for wine production are expensive. In addition, the return on investment is slow. The high cost of advertising presents a second barrier to any winery wishing to sell on a national or even regional basis. Consumer appeal, created by advertising, is an important element in the marketing of wine products.

24. Distribution represents another barrier to entry. Liquor distributors are selectively licensed, if not directly controlled, by state governments. Each state, the District of Columbia and the federal government have their own laws regulating liquor distribution. Thus, a winery is more limited in the distribution channels it may select than a non-liquor company. In addition, there is always the potential that a liquor company will require an independent wholesaler to carry and/or promote a full line of its liquor and wine

products. A wine company, not possessing such leverage, is at a disadvantage.

VIII.

EFFECT OF THE ACQUISITION

25. The effect of the acquisition by Heublein of a controlling interest in United may be substantially to lessen competition or to tend to create a monopoly in the production, distribution and/or sale of wine and its three product subcategories in the United States, [7] in violation of Section 7 of the Clayton Act, as amended; and the effect of the agreement by which Heublein, Allied and Vintners undertook to eliminate the actual and potential competition between Heublein and United may be to restrain trade unreasonably, and to hinder or have a dangerous tendency to hinder competition unduly, thereby constituting an unfair act and practice in commerce, in violation of Section 5 of the Federal Trade Commission Act. These effects may occur in the following ways:

A. Actual and substantial potential competition in the production, distribution and sale of wine may have been eliminated; high levels of concentration may be increased.

B. The entry and growth of new wineries and the expansion of existing wineries may have been retarded, limited, discouraged or even prevented.

C. Independent wineries may have been retarded, limited, discouraged or even prevented from purchasing better quality wine grapes as well as vineyard acreage for their production.

D. Independent wineries may have been deprived of an opportunity to compete for distribution rights and, thereby, ultimate sales to consumers to the detriment of the general purchasing public.

E. Mergers between potential entrants and viable wineries may result from the anticompetitive pressures resulting from Heublein's acquisition of a controlling interest in United.

F. Mergers between actual competitors producing and selling wine may result from the anticompetitive pressures resulting from Heublein's acquisition of a controlling interest in United.

IX.

VIOLATION

By reason of the foregoing, Heublein's acquisition through Vintners of a controlling interest in United, constitutes a violation of

Section 7 of the Clayton Act, as amended, and the agreement among Heublein, Allied and Vintners by which the acquisition was accomplished, constitutes a violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY ALVIN L. BERMAN, ADMINISTRATIVE LAW JUDGE

JULY 2, 1979

PRELIMINARY STATEMENT

The Commission's amended complaint, issued in November 1976, charged that Heublein, Inc. ("Heublein") and Heublein Allied Vintners, Inc. ("Vintners") violated Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and that Heublein, Vintners, Allied Grape Growers ("Allied") and United Vintners, Inc. ("United") violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) in connection with the acquisition by Heublein of a controlling interest in United.[1]

In its complaint, the Commission defined the relevant market as "all wine" which encompassed the total production, distribution and/or sales statistics for "table", "dessert" and "sparkling" wines which, in turn, were alleged to be recognized statistical subdivisions of the "wine industry". Table (or dinner) wines were defined as still (non-effervescent) wine products with alcohol content of not over 14 percent by volume; dessert (or sweet) wines were defined as still wine products with over 14 percent alcohol content by volume; and sparkling wines were defined as effervescent wine products with an alcohol content usually ranging from 10-14 percent by volume.

The challenged acquisition was alleged to have been consummated on or about February 21, 1969. Following is a summation of the specific allegations.

Heublein is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its principal office and place of business located in Hartford, Connecticut. At all relevant times, it was engaged in commerce or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act.

At the time of the acquisition, Heublein was a major industrial corporation, a national leader in the sale of alcoholic beverages

[1] The original complaint, issued in November 1972, had named only Heublein as a respondent and had charged it only with violation of Section 7 of the Clayton Act by reason of its acquisition of a controlling interest in United.

(being the fifth largest company in the United States so engaged) and a seller of specialty food products. Among its distilled liquor products was Smirnoff Vodka, the largest selling brand of vodka in the country and the second largest brand of liquor produced in the United States. Heublein originated and dominates the growing domestic market in the production and sale of prepared cocktails. In addition to selling a small amount of wine [3]produced in the United States, Heublein was a major wine importer. Its imports included Lancers Vin Rose which was produced in Portugal and was the nation's leading imported table wine in 1968. It continues to be one of the nation's leading imported table wines. Heublein was and is the sole importer of Harveys Sherries and Ports, a line of dessert wines which includes Harveys Bristol Cream Sherry which was and is the leading imported sherry into the United States.

Heublein is an aggressive merchandiser and distributor of its products. It is one of the nation's major advertisers. It was the second largest advertiser among companies in the liquor business in 1970 and the largest such advertiser in 1975. Heublein's budget for wine advertising is both substantial and expanding. It distributes its alcoholic beverage products to state liquor agencies in the 18 states that monopolize the sale of such products and to approximately 600 independent wholesale distributors in the remaining 32 states, in the District of Columbia, and in the territories of the United States.

Allied Grape Growers is an incorporated agricultural cooperative association organized, existing and doing business under and by virtue of the laws of California with its principal office and place of business in Fresno, California. At the time of its sale to Heublein of the controlling interest in United, Allied was in the business of acquiring grapes in California and other states and producing and marketing wines made therefrom through United, its wholly-owned subsidiary. At all times relevant herein, Allied was engaged in commerce or its business affected commerce, as "commerce" is defined in the Federal Trade Commission Act.

Prior to the acquisition of the controlling interest of United by Heublein, United was a wholly-owned subsidiary of Allied. United was the sole operating entity of Allied; all of Allied's production and marketing assets were held by United. At all times relevant herein, United had its principal office and place of business in San Francisco, California, was engaged in commerce as "commerce" is defined in the Clayton Act and was engaged in or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act.

At the time of its acquisition, United was the nation's second largest seller of wine products. United crushed the grapes delivered by Allied's approximately 1,600 members and processed and distributed the resulting wine. It also purchased some grapes from nonmembers. Approximately 30 percent of United's distribution was accomplished by its own wholesale operations with the remainder through about 370 independent wholesale distributors. Since the merger, United's function of crushing grapes, producing wine and [4] distributing wine products has remained basically unchanged. United produces wines of all types, including table, dessert and sparkling, and sells most of its products under brand names which it owns, for example, Italian Swiss Colony and Inglenook.

Heublein Allied Vintners, Inc. ("Vintners") is a corporation organized, existing and doing business under and by virtue of the laws of California with its principal office and place of business in San Francisco, California. Vintners was organized for the purpose of the acquisition and all of its stock is held by Heublein and Allied. Its sole asset is 100 percent of the stock of United. Through United, Vintners is in the business of producing and marketing wines throughout the United States and since its formation has been engaged in commerce as "commerce" is defined in the Clayton Act and has been engaged in or its business has affected commerce as "commerce" is defined in the Federal Trade Commission Act.

Under the terms of the acquisition agreement, United was converted from an agricultural cooperative association to a corporation with the same name, organized, existing and doing business under and by virtue of the laws of the State of California. It became a wholly-owned subsidiary of Vintners, the corporation organized for purpose of the transaction. Allied's members received all of the class B common stock of Vintners which amounted to 18 percent of Vintners' outstanding stock. Heublein received all of Vintners' class A common stock which constituted 82 percent of Vintners' outstanding stock. The members of Allied formed a second non-profit cooperative association with the same name which succeeded to all assets and liabilities of its predecessor. All outstanding shares of Vintners' class B common stock were contributed by the members to the new Allied organization. In summary, United, which had been a wholly-owned production and marketing subsidiary of Allied was reorganized as a for profit corporation with 100 percent of its stock owned by Vintners; and as a result of the various organizations and reorganizations recited in the complaint, Vintners was created as a corporation owning 100 percent of United with Heublein owning 82 percent of Vintners and Allied owning 18 percent.

Since the acquisition in February 1969, Heublein has expanded

United's assets and production facilities, the number of its wine products and its vineyard acreage. A new glass plant near United's winery at Madera, California, provides most of United's bottle requirements. A new plant for producing sparkling wines has been completed at Madera, doubling United's capacity for producing such wines. Heublein has delegated responsibility for the distribution of some of its imported wines to United. [5]

In June 1969, Heublein acquired the Beaulieu Vineyard of Napa, California ("Beaulieu"), and its distributor affiliate. Although small, Beaulieu is regarded as one of the nation's best wineries. Also in 1969, half of the members of the St. Helena Cooperative of St. Helena, California, agreed to divert their grapes from the St. Helena Winery to United. In 1971, Heublein purchased Regina Grapes Products Company of Etiwanda, California which is primarily a producer of wine vinegar.

The product markets alleged to have been adversely affected by Heublein's acquisition of a controlling interest in United are wine production, distribution and/or sale generally and wine's three product subcategories: table, dessert and sparkling, all of which are concentrated and nationwide in geographic scope. Wine sales are alleged to be in the midst of a major expansion with sales of table and sparkling wines by California wineries and wineries of other states and importers having shared in the expansion. Sales of dessert wines, however, have decreased since 1955.

Wine sales in the United States are alleged to be dominated by two wineries: Gallo Winery ("Gallo") and United. In 1967-68, these two companies accounted for over 40 percent of the wine sales in the United States with Gallo's sales being slightly higher than United's. The third largest wine seller, Roma Wine Company, had less than 4 percent of the market.

It is alleged that there are major barriers to entry to any firm wishing to make a significant entry into the wine business inasmuch as new winery equipment and the grapes for wine production are expensive and the return on investment is slow. A second barrier to any winery wishing to sell on a national or regional basis is the high cost of advertising. Consumer appeal, created by advertising, is an important element in the marketing of wine products. Another barrier to entry is distribution. Liquor distributors are either directly controlled or selectively licensed by state governments. Each state, the District of Columbia, and the federal government have laws regulating liquor distribution. Thus, a winery is more limited in the distribution channels it may select than a non-alcoholic beverage company. Further, there is the potential that a liquor company will require an independent wholesaler to carry and/or promote a full line of its liquor and wine products to the detriment of competing wineries. Therefore, a wine company not possessing such leverage is at a disadvantage.

The effect of the merger was alleged as follows:

> The effect of the acquisition by Heublein of a controlling interest in United may be substantially to lessen [6]competition or to tend to create a monopoly in the production, distribution and/or sale of wine and its three product subcategories in the United States, in violation of Section 7 of the Clayton Act, as amended; and the effect of the agreement by which Heublein, Allied and Vintners undertook to eliminate the actual and potential competition between Heublein and United may be to restrain trade unreasonably, and to hinder or have a dangerous tendency to hinder competition unduly, thereby constituting an unfair act and practice in commerce, in violation of Section 5 of the Federal Trade Commission Act. These effects may occur in the following ways.
>
> A. Actual and substantial potential competition in the production, distribution and sale of wine may have been eliminated; high levels of concentration may be increased.
>
> B. The entry and growth of new wineries and the expansion of existing wineries may have been retarded, limited, discouraged or even prevented.
>
> C. Independent wineries may have been retarded, limited, discouraged or even prevented from purchasing better quality wine grapes as well as vineyard acreage for their production.
>
> D. Independent wineries may have been deprived of an opportunity to compete for distribution rights and, thereby, ultimate sales to consumers to the detriment of the general purchasing public.
>
> E. Mergers between potential entrants and viable wineries may result from the anticompetitive pressures resulting from Heublein's acquisition of a controlling interest in United.
>
> F. Mergers between actual competitors producing and selling wine may result from the anticompetitive pressures resulting from Heublein's acquisition of a controlling interest in United. [7]

Respondents in substance denied the material allegations of the complaint. In addition, Heublein and United alleged that for a number of years competition in several segments of the wine industry has been dominated by Gallo and that prior to the challenged acquisition, United was declining competitively and, but for the acquisition, was destined to remain an ineffective competitor.

As noted above, Allied was not named as a party in the original complaint. Allied, however, had moved for leave to intervene in order to protect its interest in United in the event divestiture were ordered, particularly in the light of a supply contract that (1) granted Allied the right to supply United's grape requirements for up to 80 years and (2) gave Allied the right of first refusal in the event Heublein were to divest itself of its interest in United. While affirming the administrative law judge's denial of Allied's application to intervene in the matter for all purposes, by order of June 26, 1973, the Commission granted Allied the right to participate in the proceeding with respect to the issue of relief. As also noted above, Allied was named as a party in the amended complaint.

Near the close of presentation of the defense by Heublein, United and Vintners (collectively referred to as "HUV"), Allied formally renounced all claims under the supply contract including the right of first refusal in the event Heublein should be required to divest itself of its interest in United. This resulted from an agreement reached among the respondents following decision in a private suit in a United States district court[2] in which Allied had sued Heublein for certain relief and Heublein had counterclaimed for, *inter alia,* relief from the supply contract. Following resolution of the private suit in favor of Heublein, Allied determined not to appeal and sold its 18 percent interest in Vintners to Heublein. Heublein then owned 100 percent of Vintners and, through Vintners, 100 percent of United. Allied abandoned all claims formerly made in this case (See RX 1248A–Z4).[3] [8]

Relying upon the foregoing, Allied, on September 13, 1978, moved that it be dismissed from the proceeding. On September 25, 1978, ruling was deferred until the initial decision. At CB 3, complaint counsel state that inasmuch as Allied no longer owns an interest in Vintners, it is no [9]longer necessary to retain Allied as a respondent

[2] *Allied Grape Growers* v. *Heublein, Inc.,* Civ. No. C-75-0456 (D. Cal., filed July 21, 1978).

[3] Among the abbreviations used herein are the following:

CB - Complaint counsel's brief (post-trial memorandum)
CP - Complaint Counsel's Proposed Findings of Fact, Conclusions of Law and Order
CPF - Complaint counsel's proposed finding in CP—followed by its number(s)
CR - Complaint Counsel's Reply to Respondents' Proposed Findings of Fact and Conclusions of Law
CRPF - Complaint counsel's proposed finding in CR—followed by its number(s)
CX - Commission exhibit, followed by its number and the referenced page(s)
HUV - Collective reference to respondents Heublein, United and Vintners
RAX - Exhibit of respondent Allied, followed by its number and the referenced page(s)
RP - HUV respondents' Proposed Findings of Fact, Conclusions of Law and Order
RPF - HUV respondents' proposed finding in RP—followed by its number(s)
RR - HUV respondents' Reply To Complaint Counsel's Proposed Findings of Fact, Conclusions of Law and Order
RRPF - HUV respondents' proposed finding in RR—followed by its number(s)
RX - Exhibit of HUV respondents followed by its number and the referenced page(s)
Tr. - Transcript of hearings, followed by the page number(s)

for the purpose of obtaining effective relief. Complaint counsel, therefore, do not oppose Allied's motion to be dismissed as a respondent.

On December 13, 1978, Vintners moved for dismissal of the complaint against it showing that, on November 9, 1978, Vintners merged into Heublein and ceased to exist. By order of January 3, 1979, ruling was deferred until the initial decision. At CB 3, complaint counsel state that, under these changed circumstances, it is no longer necessary to retain Vintners as a respondent for the purpose of obtaining effective relief and they do not oppose Vintners' motion to be dismissed as a respondent.

On December 13, 1978, United moved that it be dismissed from the proceeding showing that following, and as a consequence of, Heublein's acquisition of 100 percent of Vintners and Vintners' merger into Heublein, Heublein now owns 100 percent of United. By order of January 3, 1979, ruling was deferred until the initial decision. At CB 3, complaint counsel state that under these changed circumstances, it is not necessary to retain United as a respondent for the purpose of obtaining effective relief and they do not oppose United's motion to be dismissed as a respondent.

At RP 138–39, HUV assert that the overall all wine market was not alleged in the amended complaint as a product market but that the term was simply used for purposes of statistical reference; and that this is at odds with "complaint counsel's present theory of the case." I do not so read the complaint. An overall reading shows that it clearly treats "all wine" as a product category or market and "table", "dessert" and "sparkling" wines as submarkets or subcategories. For example, Par. 19 of the amended complaint alleges:

19. The product markets affected by Heublein's acquisition of a controlling interest in United are wine production, distribution and/or sale generally, as reflected by "all wine" statistics, and wine's three product subcategories: table, dessert and sparkling; all of which are concentrated and nation-wide in geographic scope.

The reference to " 'all wine' statistics" does not detract from the clear specification of product markets and submarkets. [10]

Again, Par. 25 of the complaint alleges, in part:

The effect of the acquisition by Heublein of a controlling interest in United may be substantially to lessen competition or to tend to create a monopoly in the production, distribution and/or sale of wine and its three product subcategories in the United States, in violation of Section 7 of the Clayton Act, as amended; . . .

Further, "complaint counsel's present theory of the case" is no different from that presented by complaint counsel and contested by respondents throughout the entire trial of this matter.

Extensive hearings were held during which a large volume of testimony and documentary evidence was received. Official notice was taken of a number of matters at the request of both complaint counsel and respondents.

This initial decision is based upon the entire record including proposed findings of fact and conclusions of law and supporting memoranda filed by the parties, as well as their replies. The undersigned has also taken into account his observation of the witnesses who appeared before him and their demeanor. Proposed findings not herein adopted, either in the form submitted or in substance, are rejected either as not supported by the evidence or as involving immaterial matters. [11]

FINDINGS OF FACT[4] AND DISCUSSIONS

I. GROWTH IN WINE CONSUMPTION

1. In 1960 an estimated 158.1 million gallons of wine were consumed in the United States, or 1.46 gallons per adult of legal drinking age. In 1968 total United States consumption had increased to an estimated 205.1 million gallons, or 1.74 gallons per adult. 1969 adult per capita consumption of wines was 1.87 gallons for a total estimated United States consumption of 225.5 million gallons. In 1977 an estimated 390.4 million gallons of wine were consumed in the United States, representing an adult per capita consumption rate of 2.69 gallons (1978 Wine Marketing Handbook, p. 20; officially noticed per order dated September 27, 1978).

2. Consumer expenditures in 1960 for wine in the United States were estimated to be $751 million, climbing to an estimated $1,053 million in 1968 and $1,184 million in 1969. Consumer expenditures in the United States for wine in 1977 reached an estimated $3 billion dollars (1978 Wine Marketing Handbook, p. 20; officially noticed per order dated September 27, 1978).

3. Wine consumption in the United States is skewed towards individuals under 50 years of age (CX 125Z-42, Z-44). The greatest wine usage level is among households where the household head is 25 to 49 years of age (CX 231V), although there is some evidence that those 21-24 years of age consume 20-50 percent more wine per capita than do their older counterparts (CX 125Z-44).

4. A 1970 Bank of America study forecast that 40 million young

[4] Findings of fact, for the most part, are made in numbered paragraphs. Discussions and applications of findings, as well as consideration of legal and other matters, appear where deemed appropriate. Some follow particular findings which pertain thereto; others follow all of the numbered findings. Findings which appear in unnumbered paragraphs are, nevertheless, findings.

adults will have reached drinking age during the decade of the 1970's and will make up more than 27 percent of the adult United States population in 1980, and, of the adult population of 145 million in 1980, 70 million will have acquired their wine tastes during the 1960's and 1970's (CX 288B). [12]

5. The American wine drinking public has become more and more attuned to drinking table wine (CX 366J). The 1976 edition of *Impact,* a wine industry trade publication, summarized: "Table wine has come of age in the United States. Americans, particularly those in the 25-35 age group, are beginning to drink wine as an inherent part of their life style" (CX 367N).

6. The Bank of America's 1970 publication stated: "[T]he bank and the industry are in complete agreement that the popularity of wine in American cultural, culinary, and ceremonial tastes and preferences is accelerating unmistakably" (CX 288A).

II. THE PARTIES

A. Heublein

7. Heublein is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its principal office and place of business located at Farmington, Connecticut (Amended Complaint and Heublein's Answer, ¶ 4).

8. Heublein sells its products nationwide (CX 4). At all times relevant herein, Heublein sold and shipped its products in interstate commerce and was thus engaged in commerce as "commerce" is defined in the Clayton Act, and was engaged in or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act (Amended Complaint and Heublein's Answer, ¶ 4).

9. Heublein was incorporated under the laws of Connecticut in 1915. It was the successor to a family business founded in the 1860's. It became a public corporation in 1959 (CX 3A, 56Z-4; Tr. 3920, 4022-23).

10. Heublein entered the vodka business in 1939 when it purchased the American Smirnoff Company. At that time, American Smirnoff was selling 6,000 cases of vodka a year in this country (Tr. 3975).

11. In the early 1940's Heublein built a vermouth plant in Hartford, Connecticut (Tr. 3981).

12. In 1957, Heublein obtained the exclusive agency for importing the Harveys line of ports and sherries (CX 48L; Tr. 3985). [13]

1. Heublein, As of the Time of the Acquisition, Was a Major Industrial Corporation and National Leader in the Sale of Alcoholic Beverages and a Seller of Food Products

13. In 1966, Heublein entered the ranks of "Fortune's 500" largest corporations and ranked in the top 100 for its earnings growth rate. By 1967, Heublein had moved up from 371st to 346th place in terms of sales, and it ranked 76th in growth in earnings per share (CX 48E, 49G).

14. In 1968, according to Forbes Magazine's 21st annual report on American industry, Heublein led the 500 largest United States corporations in profitability, defined as a company's return on stockholders' equity. Heublein ranked fifth for its five-year average of profitability and third among the top ten companies that were "the most adroit users of capital." The magazine also noted Heublein's five-year average 21.2 percent return on total capital and 15.8 percent five-year growth in earnings per share (CX 38B).

15. In 1967, Heublein was the largest importer of wines into the United States (CX 48K). At the time of the acquisition, Heublein was the fifth largest domestic producer of alcoholic beverages (CX 55V, 327J, K).

16. In 1968, Heublein was principally engaged in the sale of spirits and beer. These products accounted for 52 percent and 39 percent, respectively, of Heublein's total sales (CX 135B, 49T). Heublein's vodka sales accounted for 2/3 of its total spirits sales. The company ranked first in the sale of vodka (CX 9T, U, V, 55T, U, V, 319J; Tr. 9289).

17. In fiscal year ending June 30, 1968, Heublein had net sales of $383,972,000, net income of $14,567,000 and earnings per share of $1.11 (CX 49T). In fiscal year 1969, the year of the acquisition, Heublein had net sales of $520,855,000, net income of $16,570,000 and earnings per share of $1.27, all adjusted to reflect the acquisition (CX 50U). Heublein's assets as of June 30, 1968, were $141,171,000 (CX 49E, U).

18. In fiscal year 1969, Heublein had record sales and earnings in the established lines of its business for the ninth consecutive year. Total sales exceeded a half billion dollars for the first time in Heublein's history, a year ahead of plan (CX 50E). [14]

19. In 1969, Heublein's stock sold at 20 times net earnings per share, which was very favorable at the time (Tr. 9166).

20. In fiscal year 1969, Heublein had a growing international business spanning more than 100 countries (CX 50E).

21. By 1967, as reported to its stockholders, Heublein had a "full

line of alcoholic beverages" including well-known whiskey imports (CX 48J).

22. In fiscal year ending June 30, 1969, Heublein spirits were distributed principally under the following brand names:

Vodka
- Smirnoff Vodka*
- Relska Vodka*
- Popov Vodka*
- Arrow Vodka*
- Koskorva Vodka*

Gin
- Milshire Charcoal Filtered Gin*

Whiskies
- Bell's Scotch Whisky
- McMaster's Scotch Whisky
- Black Velvet Canadian Whisky
- McMaster's Canadian Whisky
- Tullamor Dew Irish Whisky

Prepared Cocktails
- Heublein Cocktails*
- Heublein Banquet Cocktails*
- Club Cocktails*

Cordials, Liqueurs and Brandies
- Arrow Cordials & Flavored Brandies*
- Irish Mist Liqueur
- Bisquit Cognacs
- Felipe II Spanish Brandy

Tequila
- Jose Cuervo Tequila
- Matador Tequila

Rum
- Don Q Rum
- Eldorado Rum

Asterisks denote brands produced by Heublein (CX 55T). [15]

23. In its fiscal year ending June 30, 1969, excluding wines of United and Beaulieu, Heublein distributed wines under the following brand names:

Harveys Bristol Cream Sherry
Harveys Other Sherries and Ports
    Amontillado Cocktail Sherry
    Bristol Fino Sherry
    Bristol Milk Sherry
    The Director's Bin Port
    Gold Cap Port
    Hunting Port
    Shooting Sherry
    Tico Cocktail Sherry
Heublein Vermouth Sweet and Dry
Lancers Vin Rose
Quinta Red Table Wine
Vinya Rose Table Wine
Bertani Verona Italian Table Wines
Bouchard Pere & Fils Burgundy and Bordeaux Table Wines
Byrrh Aper
Chateau Bottled Bordeaux Table Wines
    Chateau Bouscaut (Graves)
    Chateau St. Georges (St. Emilion)
Harveys Selection Table Wines (France and Germany)
Hungarian Wines
    Tokay
    Egri Bikaver
Paul Jaboulet Aine Rhone Table Wines
Rheinhof German Table Wines
Valle Freres French Table Wines (CX 50Z-2)

24. Prior to the acquisition, Heublein was importing a number of other wines in limited quantities (Tr. 4319-23, 4339-40).

25. At the time of the acquisition, Heublein's principal beer brand was Hamm's. It also sold Waldech and Buckhorn beer and was introducing a new malt liquor under the Velvet Glove label (CX 55U).

26. At the time of the acquisition, Heublein had a line of specialty food products the principal brands of which were A.1. Sauce, Escoffier brand sauces, Snap-E-Tom tomato cocktail, Ortega sauces and chili products, and Grey Poupon mustard (CX 55V).

27. Heublein's leading alcoholic beverage was and is Smirnoff Vodka. From 6,000 cases at the time of acquisition of American Smirnoff Company in 1939 (Finding 10, *supra*), by 1968, Smirnoff sales approximated 22.4 percent of the United States vodka market.

Heublein's share of the national vodka business, including all of its vodka brands, was approximately 30.2 percent (Tr. 9291). [16]

28. Smirnoff had a record of outstanding success. Vodka consumption increased in little more than a decade from virtually nothing to 10.4 percent of total distilled spirits consumption by 1965. Smirnoff was the leader in making vodka a national favorite and contributed virtually all of the consumer promotion in the early years. By 1966, Smirnoff outsold every brand of scotch, gin and bourbon in the United States and was the fourth largest brand of any type of distilled spirits in the United States (CX 47D).

29. At the time of the acquisition, Smirnoff was the world's largest selling vodka and the second best-selling brand of liquor internationally (CX 43A, 49Q, S). In fiscal year 1968, sales of Smirnoff internationally reached four million cases (CX 49I).

30. By fiscal year 1968, Smirnoff was the third best selling distilled spirits brand in the United States and was gaining on second place (CX 49I).

31. In fiscal year 1969, Smirnoff continued to improve its position in the United States distilled spirits industry (CX 50F) and increased its overseas sales at a rate twice that in the United States (CX 50R).

32. According to the Nielsen Report, Smirnoff was the number one selling brand of all alcoholic beverages in 1977 in the three leading markets of the United States — Los Angeles, Chicago and New York (Tr. 9296–99).

33. Heublein Cocktails, reported by Heublein in 1966 to its stockholders as "undisputed leaders in the marketplace" (CX 47G), had dominated the growing prepared cocktail market since the turn of the century (CX 50I). By fiscal year 1969, they commanded more than twice the sales of the next most popular brand (CX 50J). In 1969, Heublein had approximately 50 percent of the United States market (Tr. 4995).

34. Another of Heublein's leading products was Harveys Bristol Cream Sherry (CX 46E). By fiscal year 1969, Harveys had become the leading imported sherry in the nation, accounting for one-third of all imported sherry (CX 50I). It is one of the most prestigious of all internationally known wines (CX 48K; Tr. 2893).

35. By 1966, Harveys full line of ten sherries and ports were carried in many liquor stores because the line was a "call" item (CX 48L).

36. At the time of the acquisition, Heublein's line of Arrow Cordials was the second best selling line of cordials and brandies in the country (CX 50E). [17]

37. Heublein's Lancers Vin Rose was a light, bubbly wine

packaged in a distinctive crock container, and advertised as a good choice to serve on all occasions. A Portuguese wine, Lancers Vin Rose had become a demand item in almost all restaurants and hotels. It was on more wine lists than any other imported or domestic wine (CX 48K, 49M).

38. By 1969, Lancers Vin Rose was the best selling imported wine in the United States and its sales were increasing (CX 50F).

39. In fiscal year 1969, Heublein's Jose Cuervo Tequila and Matador Tequila together accounted for more than 50 percent of the tequila market (CX 50I).

40. In fiscal year ending June 30, 1969, Heublein reported that its Consumer Products Division, formerly the Food Division (CX 49 O), had had an unusually good year with all its specialty foods (CX 50E). A.1. Sauce, for example, continued to dominate the meat sauce market (CX 50J).

2. Heublein, a Growth Company

41. Heublein at the time of the merger was described as a "growth company" by its Chief Executive Officer, Stuart Watson:

> It's been said that truly innovative growth companies are few indeed. These are the ones distinguished by a three-fold capacity. They are able to increase the growth of their existing products, and to underwrite the costs of new products and acquisitions, while increasing their over-all sales and earnings (CX 34D).

42. Heublein was able to plan what Mr. Watson termed "a major acquisition," the acquisition of United, while increasing the forward momentum of its existing business. In 1968, Heublein considered itself to be in a "unique position" to capitalize on opportunities for future growth with its line of products that included some of the fastest growing categories of foods and spirits, its expanding plants and facilities and its planning capability (CX 34G).

43. As noted in its 1968 Annual Report, "Heublein's steady growth over the years has derived from the progress of its established business and from the acquisition of others with good potential" (CX 49G). [18]

44. Heublein represented itself as a growth company. For the five-year period up to 1968, Heublein had an average annual growth rate in sales of 10 percent and an average annual growth rate in profits of 12 percent. The price per share of its common stock had risen from \$8 5/8—\$11 (adjusted for splits) in 1963 to \$26—\$40 1/4 in 1968 (CX 263; Tr. 2697).

45. Heublein's case sales of Harveys Bristol Cream Sherry had

increased 84 percent during the five-year period through 1968 and its sales of Lancers had gone up 294 percent (CX 264; Tr. 2463).

46. In the period from 1963 through 1968, Heublein had the following successes with what it termed *"new ventures"*: case sales of Arrow cordials increased 62 percent; barrel sales of Hamm's Beer increased 9 percent; dollar sales of Coastal Valley Products increased 89 percent; and case sales of Lancers wine increased 294 percent (CX 265; Tr. 2476–77).

47. Heublein's case sales of Smirnoff increased 43 percent from 1963 to 1968 and the volume sales of A.1. Sauce increased 73 percent during the same period (CX 267; Tr. 2699).

48. During the same period, Heublein's dollar sales increased 52 percent, its earnings per share increased 103 percent, the market price of its stock increased 254 percent and its dividends per share increased 250 percent (CX 266; Tr. 2477, 2699, 2700).

49. As reported in Heublein's 1969 annual report, covering the fiscal year in which the acquisition took place, Heublein's Spirits and Wine Division increased "case sales and dollar volume as much as 17 percent" (CX 50F). Smirnoff Vodka set new records and continued "to exceed the growth rate of the distilled spirits industry by some 33 per cent" and to enjoy a major share of the growing United States vodka market in the face of toughening competition (CX 50F). Lancers case sales increased again and demand outstripped production (CX 50E, F). Arrow cordials and brandies "made important advances in [Heublein's] drive to overtake first place in this growing after-dinner drink category" (CX 50F). Heublein's recently introduced line of Club Cocktails, in its first full year in the national market had doubled Heublein's consumer cocktail business (CX 50E). Black Velvet, Don Q Rum and Jose Cuervo Tequila all increased in sales (CX 50E). Jose Cuervo's rate of growth tripled that of the total distilled spirits market, and Don Q sales had increased by 28 percent since that brand was acquired by Heublein (CX 50I). Harveys increased in unit sales some 22 percent (CX 50I). Heublein's sales to the transportation business grew (CX 50J), with sales of Smirnoff and Heublein Cocktails on international air carriers up 21 percent (CX 50R). Sales to the military increased 25 percent in response to an aggressive marketing effort by Heublein (CX 50J). In the Consumer Products Division, which [**19**]grew 20 percent in case sales (CX 50J), A.1. Sauce grew in dollar sales 20 percent over the last year, its growth over the preceding decade having been an "exceptional" 300 percent (CX 50J). Escoffier brand sauces also showed gains and Snap-E-Tom Tomato Cocktail increased 40 percent over the previous year (CX 50J, M). Grey Poupon Dijon Mustard had

increased its share of the mustard market some 33 percent in three years (CX 50M).

(a) Growth through New Products and Lines

50. Prior to the merger, Heublein had extensive research and development projects under way in food and liquor. These included the constant testing of new products of its own and of its competitors, and the development of new products (CX 46H).

51. Heublein originated the prepared cocktail at the turn of the century (CX 50I; Tr. 4994, 4995).

52. Heublein developed a new full-flavored cocktail with an alcoholic content between the Heublein full-strength cocktail and beer. It was the first pre-mixed cocktail to be packaged in a can. The product gained immediate consumer acceptance in the four states in which it was test-marketed and was introduced in the national market in fiscal year 1969. Heublein started with six flavors and introduced three more in fiscal year 1969 (CX 48I, 50I).

53. Based upon the success of Club Cocktails, Heublein introduced eight flavors of its full-strength cocktails in 8-ounce cans in fiscal year 1969 (CX 50J).

54. In fiscal year 1968, the year before the acquisition, Heublein marketed twenty new products (CX 49F).

55. Heublein introduced Smirnoff Silver to upgrade its price line and to top some of the recently imported vodkas (Tr. 4431–32).

(b) Expansions in Capacity

56. In 1969, Heublein announced that it had entered into a joint venture to build a new winery near Lisbon, Portugal (CX 50F). The agreement had been signed on October 11, 1968, when Heublein and Fonseca (Jose Maria da Fonseca Sucrs.,—Vinhos, S.A.R.L.), the supplier to Heublein of Lancers, Vinya and Quinta wines, entered into a joint venture under the name Internacional (J.S. da Fonseca Internacional—Vinhos, Limitada), to secure land and construct and operate a wine production facility capable of producing a minimum of 750,000 cases of wine per year (CX 63, [20]65E). The $1.6 million plant was capable of being expanded further as needed (CX 34G). Under a separate management agreement, Fonseca assumed the management duties of the joint venture with responsibility for production and related matters such as locating, developing and maintaining an adequate supply of grapes and wine (CX 64A–E). Heublein joined in the venture to assure an adequate supply of Lancers and to help the Fonsecas with financing (Tr. 4330). The wine

is produced by various wineries in Portugal, then finished and bottled at the Fonseca facilities (Tr. 4332). Heublein's initial investment in the facility was approximately $500,000 (Tr. 4492).

57. Heublein's ownership interest in the production facility joint venture with Fonseca is 49 percent. Its interest in the marketing joint venture with Fonseca is 51 percent (CX 56Z–10, Z–13). Heublein owns the Lancers trademark (RPF 149).

58. In fiscal year 1965, Heublein began construction of a $4,500,000 plant in Allen Park, Michigan with a 2,500,000 case per year capacity. The plant began producing Heublein spirits in 1966 and, in 1968, Heublein invested $600,000 to expand it to service growing markets (CX 38B, 46G, 47C).

59. In 1967, Heublein reported a planned multi-million dollar expansion of the Hamm's brewery in Los Angeles that would increase its capacity to 840,000 barrels per year (CX 48E). In fiscal year 1969, a 72,000 square foot loading area was added to the Hamm's St. Paul plant, and Hamm's entered into a joint venture with Continental Can to build a $1,950,000 can-producing facility (CX 50E, N, Q).

60. In fiscal year 1968, Heublein spent nearly $8 million to increase production capacity at major plants (CX 49F, G).

61. Almost immediately after acquiring United, Heublein announced plans for a new production facility for sparkling wine to be completed in 1971 (CX 50Q).

62. Heublein in 1969 engaged in an $18 million joint venture with the Indian Head Company to build a glass plant, the Madera Glass Company, to serve United. Heublein and Indian Head each contributed $2 million in equity and $1 million in operating capital. Heublein arranged for a $5 million loan from the Aetna Insurance Company and, by giving certain guarantees, was able to arrange for $6 million in additional loans from a group of banks (Tr. 9219–24, 9304). An additional $3 million was borrowed from the government (Tr. 9305). Heublein was to contribute any additional operating capital that might be needed (Tr. 9223). See Findings 217–20, *infra,* for additional details. [21]

63. The glass plant joint venture resulted in savings for United in the cost of glass (Tr. 9224). By 1972, the Madera Glass Company made a $1.8 million profit (Tr. 9226).

(c) External Growth

64. Heublein acquired a majority interest in Arrow Liqueurs Corporation in April 1964 for $6 million, and it acquired the

remaining minority interest in Arrow in June 1965. Arrow distributes Scotch and Canadian whiskeys, cordials and brandies (CX 12, 460, 47H).

65. In January 1965, Heublein, in accordance with its self-described "active acquisition program" (CX 46G), purchased Vintage Wines, Inc. for $2,125,000 (CX 61). At that time, Vintage Wines had numerous arrangements with suppliers from several foreign countries for distribution and sale in the United States of a variety of wines and certain distilled spirits (CX 62A, C, U–V), in addition to having several registered trademarks of its own (CX 62A, B, J–K). Heublein acquired the right to import these wines under a contract agreement (Tr. 4424–25). In addition, Vintage Wines had arrangements to import wines for certain retailers under the retailers' private labels (Tr. 4426–27). Lancers Vin Rose was the leading product of Vintage Wines (CX 46E, G, 351). Heublein purchased the Lancers trademark (Tr. 4289). Excluding Lancers, Vintage Wines sold about 100,000 cases of wine in 1969 (Tr. 4443). In 1968, the year prior to the acquisition of United, sales of Lancers Rose in the United States rose to approximately 360,000 cases (some 879,000 gallons) (RX 17I; Tr. 8703–04). In March of 1970, a white Lancers known as Lancers Vinho Bronco was introduced. A red Lancers, Lancers Rubio, was added in Heublein's fiscal 1974 (RPF 147).

66. In November 1965, Heublein acquired all of the common stock of the Theo. Hamm Brewing Co. (CX 47Q). Heublein's Hamm's beer operation performed well for several years (CX 47E, I, 48G, 49G, M, O). In fiscal year 1971, Hamm's was still profitable and expanding into new markets (CX 52N). Hamm's first loss was reported in fiscal year 1972 (CX 53F). Hamm's was sold in fiscal year 1974 (CX 359Y).

67. During the 1966 fiscal year, Heublein became the exclusive United States importer and distributor of Bertani Italian Wines (CX 47C).

68. During the 1966 fiscal year, Heublein secured United States rights to Grey Poupon Dijon Mustard, which it had previously manufactured and marketed under a licensing agreement (CX 48E). [22]

69. In 1966, Heublein acquired the exclusive United States rights to import and distribute Jose Cuervo, S.A., the world's largest selling brand of tequila (CX 47C, 48I).

70. In June 1967, Heublein became the sole United States distributor of Chateau St. Georges bottled Bordeaux table wines (CX 71).

71. Effective January 1, 1968, Heublein acquired, for $150,000, all of the outstanding common stock of Don Q Imports, Inc., the sole

United States distributor for the leading rum brand in Puerto Rico (CX 49K, T).

72. In October 1968, Heublein entered into a joint venture marketing company with the Fonseca family in which Heublein had a 51 percent interest (Tr. 4328). The venture was to market and sell wines worldwide (CX 67).

73. In October 1968, Heublein also entered into a formal agreement with Internacional whereunder the two companies would work together to develop and produce new Portuguese wines under trademarks originated or acquired by Heublein for sale by Heublein in the United States (CX 65H).

74. The Fonseca joint venture was very successful and the Fonseca Winery capacity has been enlarged to one or one-and-a-half million cases per year (Tr. 3957, 4333). The expansion was self-financed from the cash flow of the enterprise (Tr. 4492).

75. In fiscal year 1968, Heublein acquired exclusive long-term rights to United States sales of Black Velvet Canadian Whisky by agreement with Gilbeys (Canada) Ltd. (CX 49G, K).

76. In fiscal year 1968, Heublein acquired the United States distribution rights for Kiku-Masamune Sake, Japan's leading brand of sake (CX 49M).

77. On February 21, 1969, Heublein acquired a controlling interest in United, the acquisition challenged by the complaint in this case.

78. This was followed on June 5, 1969, by the acquisition of Beaulieu Vineyard (Tr. 331).

79. In fiscal year 1970, Heublein acquired all of the outstanding common stock of Grape Factors, Inc. (CX 52Z–3).

80. In January 1971, Heublein acquired Regina Grape Products Co., a producer of wine vinegar products (CX 52K, Z–3). [23]

81. In fiscal year 1971, Heublein merged with Kentucky Fried Chicken Corporation, whereby that company became a subsidiary of Heublein. Heublein thus obtained a strong position in the expanding fast foods market (CX 52C, Z–3).

82. In 1973, Heublein made two acquisitions in Brazil. First it acquired Drury's, an alcoholic beverage company and six months later it acquired a brandy company called Dreher (Tr. 9167).

83. In August 1973, Heublein acquired Davis Food Service, Inc. (CX 360Z–8).

84. In fiscal year 1974, Heublein Wines International was established as a unit within the Smirnoff Beverage and Import Co. In the same year, it became the exclusive United States distributor of

two lines of European wines, Cordier and Schloss Reinhartshausen (CX 359I).

(d) Growth and Diversification Policy

85. When Heublein became a public company in 1959, the underwriters thought that vodka accounted for too large a share of the company's business (Tr. 3987). Early in the 1960's, vodka accounted for approximately 75 percent of Heublein's gross sales (Tr. 3986-87).

86. Heublein was an aggressive company and it wanted to grow and diversify (Tr. 4438). At the time it acquired United, Heublein had a history of growth that it wanted to continue (Tr. 3988, 4944, 8677, 9028). Heublein proclaimed as corporate goals in fiscal year 1969 record growth in sales and earnings per share, and successful introduction of profitable new products (CX 50E).

87. By the spring of 1968, Heublein had formalized a top-level New Corporate Development group, headed by its Executive Vice President, which was responsible for growth planning through the development of new business and through acquisitions (CX 45B, 49G). Heublein's external development or acquisition program was active long before it became a formal department (Tr. 4426-31).

88. It was generally thought at Heublein that any acquisition would have to be of a company having a growth rate equal to or better than its existing business (Tr. 4392).

89. Heublein wanted to get into lines of business that it understood or could easily come to understand (Tr. 4439). [24]

90. Mr. John Martin, then Chairman of the Board and Chief Executive Officer of Heublein (Tr. 3972), testified that in the early 1960's Heublein already had an acquisition program to find new businesses and products compatible with Heublein's marketing skills, including its channels of distribution, in order to expand the kinds of businesses it was in. "We had an avaricious intention to expand our business and obviously acquisitions were part of it" (Tr. 3987-88).

91. Heublein was interested in acquiring products sold through supermarkets or the channels of distribution through which Heublein distilled spirits products were sold (Tr. 3928-29).

92. In connection with his responsibilities for external development at Heublein, Mr. Kelley, Executive Vice President, evaluated opportunities with companies in the food and beverage business. Wine was one of the areas of opportunity Heublein considered (Tr. 4945-46).

93. In 1969, Heublein generally was interested in diversifying only in the package goods or consumer goods business, but only in companies with a reasonable growth rate relative to Heublein's growth rate (Tr. 9164). Entry into the domestic wine business was the fulfillment of one of Heublein's three corporate goals. The others were record growth in sales and earnings-per-share, and the successful introduction of profitable new products (CX 50E).

94. Heublein planned to continue to grow in product categories where its marketing skills could assure success (CX 34G).

95. In about 1966, Heublein's long-range planning group decided that there were four categories they were interested in to diversify the Heublein business. One of those four categories was wine (Tr. 4461-66).

Additional findings which detail Heublein's interest in wines and in expanding in that market as well as actions taken in that regard prior to the challenged merger appear *infra* (Findings 787-94, 798, 809-28).

(e) Heublein's Expansion of Its Wine Business Subsequent to the Merger

96. On June 5, 1969, Heublein acquired Beaulieu Vineyard in California (Tr. 331).

97. Heublein also maintained its interest in developing foreign imported wines after it purchased United (Tr. 4485-86). [25]

98. In May 1969, Heublein became the sole United States distributor for the sale of the Bouchard Burgundy Wines produced by Bouchard Pere & Fils (CX 70).

99. On December 31, 1969, Heublein entered into an agreement to sell and distribute certain brands of Rhone Valley table wines produced by Jaboulet on an exclusive basis in the United States (CX 77).

100. In July 1970, United Vintners assumed the sole distribution rights in the United States for the Monimpex Hungarian wines (CX 74). In March 1973, Heublein assumed the rights for such wines (CX 75).

101. In February 1971, United Vintners became the sole distributor in the United States of German wines of Rhine origin and potentially of certain other German wines produced by Scholl and Hillebrand (CX 76).

102. In 1972, Mr. B.C. Solari, then President of United Vintners, went to several European countries to look at new wine prospects for Heublein (CX 225A-B; Tr. 4726-31). In June 1972, he reported to

Stuart Watson, Heublein's Chief Executive Officer, that he had worked out a possible arrangement for Heublein with respect to the Paterno line of wines. He also reported having spoken to the Becarro people in Italy and stated his intention to find out more about Yugoslavian products (CX 87).

103. Shortly thereafter, Heublein became the sole United States distributor of Paterno and Gancia wines under the Gancia and Mirafiore labels (CX 88-92). The wines included were Gancia and Mirafiore Asti Spumante, Vermouth, Chianti and Veronese wines and Sicilian Gold (CX 92B). Heublein also obtained a right of first refusal to 50 percent of any interest in the assets of Fabiano or any other Italian wine producer that Paterno might obtain (CX 92F, 323).

104. In January 1973, Heublein terminated Vino Chianti Ancilli, for which it had been exclusive agent, because Heublein had obtained the exclusive distribution rights in the United States for the wines noted above which were competitive to Ancilli (CX 72-73).

105. After the acquisition of United, Mr. Solari went to Brazil on Heublein's behalf to explore the possibility of raising grapes suitable for making wine (Tr. 4732-33).

106. In fiscal year 1971, Heublein introduced Vino Branco (a counterpart of Lancers Rose), Cold Duck and a cinnamon-flavored apple wine called Zapple (CX 52D). [26]

107. In fiscal year 1974, Heublein introduced Lancers Rubeo and widely advertised all three Lancers wines on television and in consumer and trade magazines (CX 359I).

108. Heublein was interested in developing different types of wines at the Lancers facilities (Tr. 4338).

109. New wines have been developed at the new winery facility in Portugal built by the joint venture in which Heublein participated (see Findings 56, 57, *supra*). Some of the experimental wines developed were Beijo Beijo, Jacare and Allegria (Tr. 4336-37). Heublein currently owns the Jacare label (Tr. 9999). Two line extensions for Lancers were developed and produced there, Lancers Vino Branco and Rubeo. Both are currently being imported into the United States (Tr. 4337-38). The joint venture makes Zazie wine for United Vintners (Tr. 8463).

110. Heublein imports and sells about 40,000 cases per year of the eight different types of burgundy wine in the Bouchard line and about 30,000 cases per year of the ten different Hungarian wines in the Monimpex line. These wines are sold through Heublein's Smirnoff Sales Company (Tr. 4429-30, 8829).

111. Heublein also imports limited quantities of Paraquita and Muscatel produced by the Fonseca family (Tr. 4334).

(f) Heublein's Continued Overall Post-Acquisition Growth

112. Heublein ranked 209th in terms of sales and 238th in terms of assets among the Fortune 500 for 1972 (CX 58L). By 1976, Heublein had risen to 176th position in terms of sales and 213th position in terms of assets (CX 369G).

113. In calendar year 1976, Heublein's growth in spirits was six times that of the industry as a whole. Heublein accounted for half of the total industry growth of 1 percent that year (Tr. 9260, 9262).

114. Heublein's fortunes took a downward turn in 1977. This, however, was due to an unusual convergence of external business factors such as downward trends in the wine industry and the alcoholic beverage industry and a severe economic financial crunch in Brazil (Tr. 9177-78). Heublein's chief executive officer believes that the difficulties Heublein experienced in 1977 are not symptomatic of a weakness in Heublein's business and the upward turn of sales in 1978 tends to bear this out (Tr. 9257; CX 543Z-10). Heublein's earnings per share rose in 1978 by 17 percent over 1977 (Tr. 9254). 1977 was the only year in which Heublein's earnings per share dropped (Tr. 9255). [27]

115. Heublein's Chairman and chief executive officer acknowledged that, except for 1977, Heublein has been classified as a growth company and a successful consumer package goods company (Tr. 9174).

116. By 1978, Heublein had grown in a few years from the fifth largest company in the United States spirits industry to the second largest. It was growing faster than any other spirits company with such a broad product line (CX 543F).

117. In 1978, Heublein's net sales were $1,577,114,000 and its net income was $56,529,000. Earnings per share were $2.66 (CX 543Z-10). As of June 30, 1978, Heublein's total assets were $861,388,000 (CX 543Z-19).

3. Heublein's Marketing Strength

118. Heublein's major brands and product lines are under the direction of product, merchandising and advertising managers. Heublein employs a full range of marketing techniques (CX 56Z-10).

119. Heublein's policy is to perform full marketing functions for products it handles rather than to act merely as sales agent (CX 46E, H, 65J).

120. In 1975, Heublein's Chairman identified two of four of Heublein's major strengths as (1) its marketing ability and (2) its unique position in the fastest-growing segments of the food and

alcoholic beverage business (CX 360F). Prior to the merger, it had the reputation of being a successful marketing company (Tr. 4958).

121. Shortly after it introduced canned, pre-mixed Club Cocktails, a new liquor category, Heublein reported "INSTANT SUCCESS"—that it had 90 percent distribution in its markets, a mark equalled only by a few brands of distilled spirits in the nation (CX 35B).

122. By 1967, Heublein's greatest single annual expenditure was $36,512,000 for advertising, merchandising and sales promotion. "The creative and effective use of the total marketing expenditure resulted in expanded activities at slightly lower overall costs." Heublein's advertising expenditure was used with multiple effect across its product line (CX 48M).

123. In the year ending June 30, 1968, Heublein's advertising expenditures were $8,562,000 (CX 24). [28]

124. Advertising, merchandising and sales promotional expenditures continued to constitute one of Heublein's largest expenditures, accounting for approximately $76,000,000 in fiscal year 1972, up from $68,000,000 the year before (CX 56Z–10). In 1962, the figure had been just under $25,000,000 and in 1966, it exceeded $35,000,000 (CX 47F).

125. Heublein used advertising effectively to increase sales (CX 38B, 46G, 47I, 48I, 50F, I, M, N, Q, R).

126. Heublein either set the trends or established itself as a leader in keeping pace with the trends. It marketed new products and capitalized on changing consumer tastes (CX 47D, 48E, F, J, 49G, H, I, K, M, 50E, F, I, J, M, Q).

127. Heublein also capitalized on the trend toward increased travel and became a leader with ship, rail and airline accounts (CX 44B, 48I, 50J).

128. In the year in which Heublein acquired United, it continued to emphasize marketing as it had in the past (CX 50E, F, J, M, Q).

129. Shortly after the acquisition, Heublein named Mr. Bonomo, described in Heublein's 1969 Annual Report as "an experienced marketing executive," as President of United (CX 50Q).

130. Heublein attributed many of its successes in the marketplace to "particularly effective marketing efforts" (CX 46E, 47G, 48I, L, M, 49K).

131. Heublein, as of the time of the merger, planned to continue in product categories where its marketing skills could assure success (CX 34G).

132. Heublein had expertise in mass advertising—advertising in great bulk, on a large or national scale (Tr. 9037).

133. Both Harveys and Lancers are high margin products with

high advertising to sales ratios (Tr. 3699; See Findings 696-97, 734-37, *infra*).

134. Heublein had a marketing services organization called the Venture Group that was available to do merchandising and sales promotional work at the retail level. The Venture Group handled the field introduction of new products, coordinated new products research and development, developed and executed marketing programs and handled sales to national accounts, including airlines and hotel chains (CX 359H; Tr. 8904-05, 3306-07). The Venture Group handled United's wines and Heublein's spirits (Tr. 3307). The Venture Group, for example, developed the name for T. J. Swann, a United product (Tr. 8582-83). [29]

135. Heublein is currently trying an arrangement whereby one sales group handles certain national accounts such as airlines, chain hotels and chain restaurants for both its spirits products and the products of United (Tr. 8905). Some of the national accounts are the Hilton Hotels, Holiday Inn and Pizza Hut (Tr. 3307).

136. As stated by Heublein's General Counsel, a "major amount" of Heublein's marketing expenditures is in unmeasured media, primarily merchandising material. With the caveat that these expenditures are difficult to ascertain, Heublein estimated that they amounted to approximately $10 million in each of fiscal years 1970 and 1971 (CX 332B).

137. As of the time of the merger, new product development and strong marketing were part of Heublein's business philosophy (CX 260).

138. In 1965, Heublein relied on its self-asserted "reputation in the industry as perhaps the most astute and successful merchandisers of alcoholic beverages" in its efforts to obtain the distribution and marketing rights for Jose Cuervo Tequila. Heublein asserted that its success in marketing other products had been a result of modern marketing concepts and aggressive selling programs (CX 178A).

139. Harveys Bristol Cream was stated by Heublein to be "the first quality Sherry to be advertised on U.S. television." By fiscal year 1967, advertising and promotion expenditures on Harveys Bristol Cream had been increased to the point that they were then greater than for all other sherries imported into this country (CX 48L).

140. Between its 1965/66 and 1970/71 fiscal years, Heublein's per case advertising expenditures for Lancers rose from $.57 to a projected $4.44 (CX 116B, I, W).

141. Of brands of vodka utilizing outdoor media advertising in

the United States in 1976, Smirnoff lead the list with expenditures of $1,634,200 out of a total of $4,092,900 spent by vodka marketers for outdoor media. The second largest such advertiser spent $329,100 (CX 383F).

142. Of brands of vodka utilizing newspaper advertising in the United States in 1976, Smirnoff topped the list with expenditures of $832,900 out of a total of $2,912,954 spent by vodka marketers for newspaper advertising. The second largest such advertiser spent $582,357 (CX 383F).

143. Of brands of vodka utilizing magazine advertising in the United States in 1976, Smirnoff headed the list with expenditures of $4,067,353 out of a total of $6,147,804 spent [30]by vodka marketers for magazine advertising. The second largest such advertiser spent $896,245 (CX 383F).

144. In the United States in 1976, Smirnoff Vodka's $4,067,353 magazine advertising expenditures were larger than magazine advertising expenditures for any other brand of distilled spirits. Johnny Walker and Canadian Club ranked second and third respectively with expenditures of some $3,600,000 each. Heublein Cocktails ranked tenth with expenditures of $2,102,771 (CX 383M).

145. Of brands of prepared cocktails utilizing magazines, newspapers and outdoor media for advertising in the United States in 1976, Heublein prepared cocktails (including Hereford Cows and Kickers) had the largest advertising expenditures of any brands advertising in one or more of these media (CX 383L).

146. Of brands of tequila utilizing magazine advertising in the United States in 1976, Jose Cuervo topped the list with expenditures of $1,258,819 out of a total of $2,555,385 spent by tequila marketers for magazine advertising. The second largest such advertiser spent $369,833 (CX 383I).

147. Of brands of tequila utilizing outdoor media advertising in the United States in 1976, Jose Cuervo ranked second with expenditures of $410,700 out of a total of $1,298,700 spent by tequila marketers for outdoor media advertising. The largest such advertiser spent $451,900 (CX 383I).

148. *Advertising Age* reported that Heublein was the second largest advertiser among liquor companies and the 44th largest advertiser overall in 1970 (CX 57). In 1972, Heublein had risen to first rank among liquor companies in terms of advertising and 29th overall (CX 59). In 1976, Heublein was still ranked first among liquor companies and had risen to the 16th largest advertiser overall (CX 370).

While HUV assert that *Advertising Age* advertising data for

Heublein are incorrect (RR at 243–45), the relative ranking of companies is of probative value since uniform methods for ascertaining advertising expenditures would have been utilized for each company listed.

B. United Vintners

149. Prior to its acquisition by Heublein, United was an incorporated agricultural cooperative organized, existing and doing business under and by virtue of the laws of the State of California, the sole member of which was Allied. United was converted to a corporation in order to permit its acquisition by Vintners by means of a tax free exchange of shares (CX 9C–G). [31]

150. United, at the time of the acquisition, was a corporation organized, existing and doing business under and by virtue of the laws of the State of California and is such a corporation now (CX 221C; Heublein's Answer V, 13 (p. 9)).

151. United, at all times relevant herein, has had its principal office and place of business in San Francisco, California. At all times relevant herein, United has sold and shipped its products in interstate commerce and was engaged in commerce as "commerce" is defined in the Clayton Act and was engaged in or its business affected commerce as "commerce" is defined in the Federal Trade Commission Act (Heublein's Answer V, 13 (pp. 9–10)).

152. In the course of the acquisition transaction, a "new" Allied cooperative was formed to succeed to the rights and obligations of "old" Allied. The two cooperatives had substantially the same membership and the same rights and obligations with respect to its grower-suppliers (CX 9D, F; Tr. 2503–04). United, prior to the acquisition, held all of the production and marketing assets of "old" Allied and has continued to hold substantially all of those assets (Heublein's Answer V, 13 (pp. 9–10)).

153. United Vintners was formed by Louis Petri when his Petri Wine Company purchased the Italian Swiss Colony business in 1953 (Tr. 2371; CX 209C). United was owned by Louis Petri until 1959, when he sold the company to Allied for $24 million (Tr. 2372).

154. The brands of United which came with Allied's acquisition were Italian Swiss Colony, Petri, G&D (Gambarelli & Davito) Margo, Greystone, Mission Bell, Lejon and Hartley (Tr. 2372; C 209B).

155. Among the facilities which Allied acquired by virtue of i 1959 purchase of United were wineries at Lodi, Clovis, and As Allied had previously purchased (in 1951) the Escalon and Made

plants from Louis Petri and had been operating them to produce wines for the Petri Wine Company (Tr. 2371-73; CX 209C).

156. From 1959 to 1968, United acquired additional brands and facilities. The Cella wineries at Reedley and Oakville and the Cella and Parma brands were acquired in 1961 for $1 million (Tr. 2385, 2388; CX 209B). In 1964, United acquired the Inglenook winery at Rutherford together with the Inglenook brand for approximately $1.1 million (Tr. 2385). At that time, Inglenook was well-known and had a reputation for high quality wines (Tr. 2394, 2677). John Martin, chairman of Heublein's executive committee, testified that he was informed that Inglenook was one of the two best Napa Valley premium wines (Tr. 4027). Inglenook sales went from 60,000 gallons in 1964, the year in which it was acquired by United, to 174,000 gallons in 1968 (Tr. 2395; CX 138C). [32]

157. Prior to the acquisition of a controlling interest in United by Heublein, United crushed the grapes delivered by Allied, processed the juice into wine and sold the resulting wine throughout the United States (Heublein's Answer V, 14 (pp. 10-11); CX 355; Tr. 2371).

158. In 1968, the year prior to the acquisition, United had eight wineries located throughout California and four bottling facilities in California. United also leased facilities in Chicago and Newark, New Jersey at which it bottled wine shipped from California (Tr. 2388-89; CX 55Z).

159. At the time of the acquisition, United sold wines principally under the Italian Swiss Colony, Inglenook, Petri, Lejon (sparkling wines and brandy), G&D, Margo and Bali Hai labels (CX 55Y, 209B). It also sold wines under a number of other labels including Tipo, Hartley (brandy), Bravo, Chateau Louis, Vai Bros., Marca Petri, Santa Fe, Arriba, Paree, Silver Satin, Cappella, Rhineskeller, Golden Spur, Hombre, Pombano, Parma, La Finesse, Padre, Jacques Bonet, Fior di California, Mission Bell and Greystone. In addition, United old bulk wine to bottlers for bottling under United's franchised ıbels and under the bottlers' own private labels. In 1968, United ıld approximately 4 million gallons of bulk wine to franchised ıttlers for bottling under United's labels; it bottled bulk wine at its rect sales operations in Newark, Chicago and Los Angeles; and it ld bulk wine to other wineries (CX 22, 209C; RX 1206V; Tr. 2611, 38-71, 9524-26).

60. In 1968, United produced wines of all types including dessert ıes, table wines, sparkling wines, flavored wines, vermouth and ndy, as well as grape juice and wine vinegar. Most of the products e sold under brand names owned by United. It sold wines under

proprietary names such as Bali Hai and Silver Satin (CX 55Y). It sold wines at all consumption levels "from rare estate bottled vintages to popular priced varieties" (CX 50Q). All of these products were produced in United's wineries in California (CX 55Y).

161. In 1968, United sold its products to approximately 370 wholesale distributors (CX 55Y). In addition, United owned its own wholesale operations in the New York City, Cleveland, Southern California, Santa Barbara and Fresno areas, and parts of the Chicago area. These company-owned operations accounted for approximately 30 percent of United's sales (CX 55Y). United also sold its products to state and local agencies which control alcoholic beverage distribution in the so-called "control"[5] states (CX 55Y). [33]

162. Prior to the acquisition, United was a leading advertiser in the wine industry. United's advertising expenditures in its 1968 fiscal year for its Italian Swiss Colony brand alone were $3,657,000 (CX 231Z-63). This exceeded the 1971 advertising expenditures of all companies in the wine industry except Heublein (including Italian Swiss Colony) and Gallo (CX 231, 300L-M). This level of wine advertising expenditures was not reached by any other company until 1975, when Schenley for the first time exceeded it with an expenditure of $4,061,162 (CX 385M; see also CX 300K-M, 376L-O, 383L-O). B.C. Solari, United's President and Chief Executive prior to the acquisition and for two years thereafter, was "regarded [in a Heublein analysis] as one of the most astute merchandisers in the wine business today." He was said to be matched by only Ernest Gallo as a marketer of wine (CX 209D).

163. United's advertising expenditures in the 1960's for Italian Swiss Colony were:

1963/64	$3,701,000
1964/65	2,567,000
1965/66	2,702,000
1966/67	3,678,000
1967/68	3,657,000
1968/69	3,829,000
1969/70	4,110,000

(CX 231Z-63)

[5] "Control" states (Montana, Utah, Wyoming, Iowa, New Hampshire, Pennsylvania, West Virginia, Mississippi, and Montgomery County, Maryland) are those in which all wine sales are made under the direction of government officials (RPF 405 n. 1).

United was clearly one of the two top advertisers in the wine industry in each of the years listed above.[6]

164. United's financial condition as of 1968 was assessed by Paul Warnick, a CPA and partner (now retired) with Touche Ross and Company, the independent auditor for United and Allied. Mr. Warnick was responsible for the annual audits and certification of Allied's financial statements. He was a specialist in the field of agribusiness. Mr. Warnick summarized his assessment of United's financial condition as of August 31, 1968, the year prior to the acquisition, by stating that United "was a strong financial company" (Tr. 10879-80, 10883-84, 10926). [34]

165. United was consistently profitable from 1960 to 1968. Its proceeds varied principally with the variations in the market cost of grapes, as shown in the following table:

United Vintners, Inc.: Net Proceeds in Excess of Quoted Average Market Price for Grapes, 1960-1968 (FY's ending August 31)

1960	$2,796,922	(CX 547G)
1961	2,924,056	(CX 548G)
1962	1,673,736	(CX 549G)
1963	3,182,289	(CX 550G)
1964	6,659,591	(CX 551G)
1965	2,552,125	(CX 552G)
1966	5,118,805	(CX 553G)
1967	4,451,564	(CX 554G)
1968	3,301,356	(CX 555G)

For the 10-month period ending June 30, 1969, the figure was $1,359,438 (CX 556E).

166. United increased its dollar sales in each succeeding fiscal year during the 1960-1968 period. United's sales were:

1960	$51,089,141	(CX 547G)
1961	52,961,849	(CX 548G)
1962	65,663,911	(CX 549G)
1963	76,902,616	(CX 550G)
1964	80,144,988	(CX 551G)
1965	81,506,227	(CX 552G)
1966	86,231,076	(CX 553G)

[6] In 1970, the third largest advertiser, Schenley had advertising expenditures of $2,577,779.

1967	91,026,634	(CX 554G)
1968	96,009,189	(CX 555G)

United's sales for the 10-month 1969 fiscal "year" (ending June 30, 1969) were $95,461,271 which is the equivalent of $114,553,500 for a 12-month period (CX 556E). [35]

167. According to a Heublein submittal to the Federal Trade Commission (CX 328J, K, L, M), United's gallonage of wine shipments from 1960 to 1969 and its share of shipments of all wine produced in the United States for those years is as follows:

(in 000's)

	All Wine		Table Wine[7/]		Sparkling Wine		All Other Wine[8/]	
	Gallons	%	Gallons	%	Gallons	%	Gallons	%
1960	28,211	18.5	6,557	13.8			21,654	21.3
1961	33,467	21.0	8,463	16.7			25,004	23.8
1962	31,987	20.8	7,754	15.0			24,233	24.6
1963	37,628	23.3	10,230	18.2			27,398	27.1
1964	39,518	23.2	11,556	18.7			27,336	26.5
1965	41,495	23.9	12,708	19.5			28,102	27.5
1966	38,953	22.5	12,029	17.6	840	11.3	26,084	26.7
1967	40,830	22.2	13,838	18.1	1,142	13.0	25,850	26.2
1968	42,279	22.1	15,889	19.2	1,317	12.8	25,073	25.5
1969	46,048	21.8	20,388	21.0	2,418	17.6	23,242	23.2

7/ United's table wine figures include refreshment or pop wines. As found in Findings 438-48, *infra*, refreshment wines do not belong in the table wine submarket.

8/ As explained by Heublein (CX 328C), this consists primarily of dessert wines -- still wines over 14 percent alcohol by volume.

[36]168. Allied was optimistic in 1968 about the future of United. Robert McInturf, President and a founding member of Allied, testified that as of 1968 the outlook for sparkling and table wines was optimistic. The industry as a whole including United was experiencing increases in the sale of table wines (Tr. 2406). Buddy Iwata, Secretary of Allied and a member of Allied's executive committee since the 1950's was optimistic in 1968 about the future growth of United. Based upon the prospects for the wine industry and United's history of profitability, he was optimistic about United's future profitability as well (Tr. 2670–71, 2678–79).

169. In 1969, United shipped 19,450,100 gallons of table and refreshment wine or 16.2% of the total industry shipments of such wines. The third ranked firm in 1969 had less than one-fourth the table and refreshment wine shipments of United (CX 373Z–2).

170. United's 1969 table and refreshment wine shipments of 19,450,100 gallons had never been matched by any company other than Gallo and United itself through 1976 (CX 366Z–1).

171. United's 1968 table and refreshment wine shipments were 15.4 million gallons, or 15.6% of all such wine shipments (CX 373Y). [37]

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172. While United, sometime after September 1970, took steps to increase its refreshment wine business (Tr. 7778, 7796-97), it had already, prior to the merger, been able to capture a significant share of this newly developing market, as demonstrated by the following table:

Refreshment Wine Shipments
(Derived from RX 15, 27)

	1967		1968		1969 9/	
	Gallons (000s)	%	Gallons (000s)	%	Gallons (000s)	%
Gallo	1563	56.20	3354	66.03	8321	58.30
United	1063	38.26	1752	32.92	5562	38.97
Robinson-Lloyds	75	2.7	97	1.82	154	1.08
Monsieur Henri	25	.9	55	1.03	110	.77
Mogen David	24	.86	26	.48	38	.26
Monarch	24	.86	32	.6	54	.38
Leonard Kreusch	4	.14	4	.07	6	.04
Gibson			1	.02	23	.16
Guild					3	.02

9/ 1969 figures are included since the post merger activities reflecting an increase in effort and "updating" of United's facilities to produce refreshment wines were not instituted until after September 1970.

[38]173. United, therefore, prior to the merger was demonstrably capable of competing in a newly growing market area and of capturing a major share of that market. While second to Gallo, it was clearly a dominant company in comparison with any other competitor to the point of outselling the number three competitor many times over.

174. United's wine was produced by United in its own wineries (Tr. 9327, 10710–12). United's 1969 shipments were made from grapes crushed in 1968 or earlier (Tr. 7894–95).

175. In the early 1960's, Allied learned from the sales trends of United, from reports made by United's management at board meetings and from Wine Institute industry statistics that table wines were increasing and dessert wines were decreasing in importance (Tr. 2585, 10712–13).

176. As a result of this awareness, Allied took steps to prepare United for the increased production of table wines. In 1962, the crushing capacity at its main plant at Madera, California was doubled and the storage capacity was increased through the addition of many 600,000 gallon stainless steel tanks. Refrigerated production equipment was also added at that time. The improvements in 1962 were valued at over $3 million (Tr. 2388, 2620, 2636–37, 10714–15, 10718; CX 549S). Additional improvements were made at Madera in 1964 when a new bottling plant and warehouse for cased wine were added. Improvements at Madera in 1964 were valued at over $2.1 million (Tr. 2637, 10727–28; CX 483A–B, 551S).

177. The Escalon, California winery of United was converted from a dessert to a table wine winery prior to the acquisition (Tr. 2619–20). As part of its ongoing program of conversion to table wines, United carried out a three-year expansion program at Escalon which added cooperage and refrigeration (Tr. 10728; CX 484B). In 1964, one million gallons of new tanks were added at Escalon (Tr. 10729–30; CX 484B). The expenditures for improvement at Escalon in the 1964–1967 period were as follows:

	1964	$ 188,486	(CX 551S)
	1965	680,545	(CX 552R)
	1966	503,666	(CX 553R)
	1967	279,205	(CX 554R)
(1964–67)	Total	$1,651,902	

178. By 1968, the annual capacity of the Escalon plant had been increased to 13,562,000 gallons, which would have ranked that one

winery alone as the 14th largest company in capacity in 1976 (CX 55Z, 366Z-10). [39]

179. In 1964, United purchased the prestigious Inglenook winery, which produced table wines exclusively. It then added a bottling plant to Inglenook's Rutherford winery. United's Oakville winery, which it had purchased in 1961, was then improved and put into service in 1966 to produce table wines for Inglenook (Tr. 2388, 10728-29; CX 484B). The Oakville winery today produces Inglenook table wines which are bottled at the bottling plant at Rutherford (Tr. 9333, 9793).

180. The Asti winery of United was largely a producer of table wines (Tr. 2636). From 1962 to 1968, constant improvements were being made at Asti. The expenditures for improvements at Asti were:

	1962	$ 318,929	(CX 549S)
	1963	277,454	(CX 550R)
	1964	115,939	(CX 551S)
	1965	371,003	(CX 552R)
	1966	382,941	(CX 553R)
	1967	233,223	(CX 554R)
	1968	206,079	(CX 555P)
(1962-68)	Total	$1,905,668	

181. United, prior to the acquisition, had plans for a new table wine brand, Napa Valley Winegrowers. It was expected that the brand would sell 1.5-2.5 million cases within five years of its introduction (CX 228A, B).

182. Prior to 1968, in anticipation of the increased importance of table wines, Allied had initiated a program of acquiring grapes which would be suitable for table wines. It had held discussions with its members to encourage the planting of the grape varieties which would be needed to produce table wines and had worked on a grape breeding program to develop grape varieties which would lend themselves to the production of table wines (Tr. 2419-21, 10714).

183. Grape Factors, which in the early 1960's supplied grapes needed by United which were not available from Allied's members, was no longer needed after 1964 (Tr. 2628).

184. United's shipments of branded products ranked it first or second in every wine product market and submarket in every year (except sparkling wines in 1968, when United ranked third) from 1967 to 1972 (CX 373).

185. Italian Swiss Colony was one of the top brands in the industry. In United's fiscal year 1969/1970, Italian Swiss Colony

shipments of approximately 12 million gallons would have ranked that single brand as the second ranking company in the industry (CX 231C, 373H). Italian Swiss Colony was the second largest brand in the industry [40]in September 1970 (Tr. 7778, 7986). Italian Swiss Colony was sold nationwide in the preacquisition period and had been a national brand as early as 1953 (Tr. 2207-08, 2392-93).

186. Allied, as of 1968, had completed paying Louis Petri for United Vintners. Payment of the purchase price of $24 million was completed a year and a half ahead of schedule (Tr. 2433-34, 2686).

187. United's sales since the acquisition have continued to increase at a healthy pace. United's sales of approximately $96 million in 1968 have increased to ________ in 1978 (CX 555G, 565F *in camera*). See *In Camera* Addendum.

188. United's total shipments of wine have also increased since the acquisition—from approximately 38 million gallons in 1968 to approximately 56 million gallons in 1976 (CX 373D; RX 1257).

189. According to Heublein's 1976 Annual Report, "With new products, new values and aggressive marketing both Beaulieu Vineyard and United Vintners had record years. For the fourth consecutive year, U.V. increased its share of the U.S. wine business" (CX 361F). The Heublein 1978 Annual Report also reported that United "increased its market share and had the second most profitable year in its history" (CX 543F).

190. At the time of the acquisition, United had products in virtually all product categories. In table wines, United's brands included Inglenook, Italian Swiss Colony, Petri, and G&D. It also had Bali Hai, a refreshment wine (CX 472C; Tr. 2393-97). In dessert wines, United had Italian Swiss Colony, Inglenook, Petri and Lejon (for vermouth) (Tr. 2393-94; CX 472C). In sparkling wines, United had Lejon and Jacques Bonet (Tr. 7900; CX 472C).

191. Soon after the acquisition, there was a shift in emphasis among products. Richard Oster, who became United's President in September 1970, made an effort to emphasize refreshment wines (Tr. 7778, 7796-97). The major priority in United's marketing was to shift the emphasis to Annie Green Springs, a refreshment wine (Tr. 3308-09).

192. During the same time period after the acquisition, some of the existing brands and items were discontinued (Tr. 7783).

193. In June 1972, Oster informed Allied's members that United was in the enviable position of being the only true full-line wine marketer in the United States (Tr. 8001). He also informed Heublein that United was the "strong number two factor" in the United States wine industry (Tr. 8000). [41]

194. After the acquisition, United introduced a number of new brands. In 1972, it introduced the Annie Green Springs brand of refreshment wines (CX 53G, 247D), and sold 1,000,000 cases in the first six months after national introduction (CX 371). By United's fiscal year 1974, the brand was selling 3 million cases per year and by 1975, it was selling 4 million cases per year. It sold 10 million cases in the three years following its introduction (CX 359L, 360N; Tr. 9838–39).

195. In fiscal year 1974, United introduced the T.J. Swann brand of refreshment wines (CX 359L). By 1975, T.J. Swann sales were approximately 2 million cases per year (Tr. 9839). By 1977, the T.J. Swann case volume was ________ cases (CX 585B *in camera*). T.J. Swann was a highly profitable brand for United. Its product line earnings were expected to be ________ in 1977 (CX 585Z–14 *in camera*). Though marketed by United, this brand is owned by Heublein (Tr. 2511; CX 358C). See *In Camera* Addendum.

196. Sangrole was a sangria-type product introduced by United during Richard Oster's presidency (Tr. 7946). Mr. Oster was President of United until September 1973 (Tr. 7778). The introduction of Sangrole was a success (Tr. 7946). Sangrole continued to be sold in 1978 (CX 585A, B).

197. Bali Hai was a refreshment wine originally introduced in 1963 (Tr. 7908, 7913). Subsequent to the acquisition, approximately in 1971, Bali Hai was repackaged and renewed activity was placed behind it. In that year, $1 million was spent in advertising Bali Hai (Tr. 3707–08).

198. United markets Jacare, a line of three table wines introduced in United's 1977 fiscal year (Tr. 8509; CX 585Z–35).

199. United markets Zazie, a refreshment wine. Zazie is imported from Portugal where it is made at the Heublein-Fonseca joint venture winery (Tr. 8463, 8509, 9842). Although marketed by United, Zazie is not imported by it (CX 446).

200. Italian Swiss Colony was the largest brand of United at the time of the acquisition (Tr. 2390). Its name was changed to Colony, though the wines are still called Italian Swiss Colony (CX 536F; Tr. 8429). Italian Swiss Colony (or Colony) is still one of the basic brands of United and is the largest in volume (Tr. 9502; CX 585Z–16 thru Z–22). A highly successful line of varietal wines has been added under the Colony label (CX 361D). [42]

201. Petri also remains one of the basic brands of United (Tr. 9502; CX 34C). Lejon and Jacques Bonet, the brands of sparkling wine at the time of the acquisition, continued to be emphasized

thereafter (Tr. 7900). They remain the basic sparkling wine brands of United today (Tr. 9502).

202. Inglenook is one of the fastest growing major brands of California wine and, according to Heublein's 1977 Annual Report, in fiscal year 1977 had a case volume increase of more than 30 percent. Inglenook, in fiscal 1978, became the fastest growing major brand in the industry with a growth of almost 50 percent and sales of almost 4 million cases (Heublein's 1978 Annual Report, CX 543N). It was estimated by United (two months before the end of United's fiscal year) to have shipments of ________ cases in 1978, up from actual shipments of ________ in 1977 (CX 585C *in camera*). See *In Camera* Addendum.

203. Inglenook's Navalle line was successfully introduced by United in 1971 (Tr. 8462). In fiscal year 1978, Navalle shipments were 3.4 to 3.5 million cases or 85-90 percent of all Inglenook shipments (Tr. 8525-26). The Navalle product line earnings were estimated (two months before end of fiscal year 1978) to be ________ on sales estimated at ________ in fiscal year 1978 (CX 585G *in camera*). The comparable figures for fiscal year 1977 were product line earnings of ________ on sales of ________ increases of over ____ percent from the previous year (CX 585Z-12, Z-13 *in camera*). See *In Camera* Addendum.

204. Heublein (through United and under United brands) produces and markets wines of all types, including table wines, dessert wines, sparkling wines and flavored wines including vermouth. Italian Swiss Colony and Colony are two of United's most popular brands and are distributed throughout the United States. Inglenook wines, marketed in the Cask, Estate, Vintage and Navalle lines, are distributed nationally (CX 358C). Proprietary names are used for refreshment wines such as Annie Green Springs, T. J. Swann and Jacare (CX 358C; Tr. 9824).

205. United has distribution in all 50 leading metropolitan markets and has approximately 435 distributors (Tr. 9621, 9872).

206. In the two largest markets for wine in the United States, New York City and Los Angeles, United owns its own wholesale distribution operation (Tr. 9718-19; CX 533A). United's wholly-owned wholesale operation in New Jersey serves all of New Jersey as well as New York City (Tr. 9643-44). United's Southern California wholly-owned wholesale operation serves all of Southern California (CX 533). United's own wholesale operations in addition [43]serve three of the top 15 markets for wine (CX 533A-C). The six markets of the top 15 served by United's owned distributors accounted for 21.5%

of wine sales in 1976 (CX 379U). These distribution operations sell wines only (Tr. 9718–19).

207. In order for a wine company to operate its own directly-owned distribution system, it must have a strong brand and a large scale of operations (Tr. 3312). United has 145 salesmen in its Southern California distributor and about 90 in the New York/New Jersey distributor (Tr. 9928).

208. Despite the fact that United's own wholesale distribution system is operating at a loss, it constitutes an advantage to the overall winery operations (Tr. 9720–23).

209. United's wineries are as follows:

Location	Area (Sq. Ft.)	Function
Asti	363,200	Winery, bottling
Clovis	271,400	Winery, brandy production
Escalon	144,700	Winery
Lodi	115,700	Winery, brandy production
Madera	775,800	Winery, bottling
Oakville	50,000	Winery
Reedley	221,500	Winery, bottling
Rutherford	230,576	Wineries, bottling (CX 358H)

210. Capacities and production as of the time of the acquisition were:

Location		Annual Capacity	Production (Year ending Aug. 31, 1968)
Asti	(winery)	9,269,000 gal.	4,115,522 gal.
	(bottling)	1,300,000 cases	884,360 cases
Clovis	(winery)	15,216,000 gal.	6,514,292 gal.
Escalon	(winery)	13,562,000 gal.	8,096,519 gal.
Lodi	(winery)	4,227,000 gal.	3,738,680 gal.
Madera	(winery)	25,015,000 gal.	12,782,157 gal.
	(bottling)	9,000,000 cases	8,098,580 cases
Oakville	(winery)	1,532,000 gal.	991,994 gal.
Reedley	(winery)	11,770,000 gal.	6,085,259 gal.
	(bottling)	1,000,000 cases	271,064 cases

Location	Annual Capacity	Production (Year ending Aug. 31, 1968)
Rutherford (winery)	302,000 gal.	
(bottling)	180,000 cases	60,062 cases
Total Annual Capacity:	80,893,000 Gal.	
Total 1968 Production:	42,224,423 Gal.	

(CX 55Z) [44]

211. Madera is United's largest winery and has been its main plant since before the acquisition (CX 55Z; Tr. 2388, 10,717). Its capacity was doubled during the 1960's and its new facilities were used in producing table wine (Tr. 2637-38). The glass bottle plant supplying United's bottle requirements is located at this winery site (Tr. 9219). Annie Green Springs and T. J. Swann are produced at Madera, and it is the primary facility for Italian Swiss Colony table wines (Tr. 9901). Mr. Stuart Watson, Chairman of the Board and chief executive officer of Heublein, has attested that the Madera plant is essential to the competitive viability of United (Tr. 9333).

212. Asti is the site of the Italian Swiss Colony visitor facility. This is an important element in the image and advertising of the Italian Swiss Colony brand, which bears the name of the original settlement (CX 443A-B). Jacare is produced at Asti (Tr. 9824). It is one of the wineries used for the bottling of Inglenook wines (Tr. 9793). More than $1.5 million were spent in improving Asti between 1967 and 1972 (Tr. 10002-03). Mr. Watson has testified that Asti is essential to the competitive viability of United (Tr. 9333).

213. Rutherford is the showplace winery of United (Tr. 9333). Rutherford is located in the well-known Napa Valley and thereby provides a prestigious address for Inglenook (Tr. 4087). It is not an operating winery, but does bottle Inglenook wines and is the site of the Inglenook testing room (Tr. 9333, 9793). According to Mr. Watson, Rutherford is significant to the competitive viability of United (Tr. 9333).

214. Oakville is a producing winery for Inglenook (Tr. 9333). The crushing of grapes and wine production for Inglenook wines is done at Oakville and the wines are then sent to Rutherford for bottling and aging (Tr. 10729). Cooperage was increased at Oakville in the mid to late 1960's (Tr. 10729). Mr. Watson agrees that Oakville is essential to the competitive viability of United (Tr. 9333).

215. Escalon is a major winery of United at which "premium"

wines are produced. Wines made at Escalon are shipped to Asti for bottling (Tr. 9885; CX 55Z). Inglenook Navalle is the primary brand produced at Escalon. Wines used in the Italian Swiss Colony varietal table wines are also produced at Escalon (Tr. 9945–47). Escalon was converted in the 1960's from dessert wine to table wine production (Tr. 2619).

216. The Reedley plant produces primarily Italian Swiss Colony wines. It is also used for the production of the Petri brand (Tr. 9947) and has a bottling facility (CX 358H). [45]

217. In 1968, glass supply problems and price increases prompted United to decide to build its own plant for production of glass bottles to be located adjacent to the Madera winery. In a management report presented to United's Board of Directors, the President of United reported on the proposed glass plant, that: "Plant capacity should be 13,000,000 cases to include Chicago bottling, and close to 15,000,000 to also include Newark. The estimated saving on the 13,000,000 case plant would be $1,958,000 per year. With a yearly write-off of $702,000, the cash flow would be $2,660,000 for a five year payoff. It would take four years to recover the cash outlay" (RX 1261B). The total cost to United thus would have been $10,600,000.

218. United was able to secure a $3 million long-term loan commitment from the Small Business Administration to finance construction of the glass plant (Tr. 2423, 2681, 9305), and an additional loan commitment from a bank (Tr. 2681). United planned to build the glass plant adjacent to the Madera Winery (CX 259B). Plans to build the glass plant were suspended because of the acquisition negotiations with Heublein (Tr. 2423, 2681). United would have built the glass plant even if the acquisition had not occurred (Tr. 2425, 2681; CX 259B).

219. The glass plant, the Madera Glass Company, was built in 1969, after the merger, as a joint venture with the Indian Head Glass Company owning 51 percent and United owning 49 percent. United is committed to taking the entire output of the plant (CX 557G). United enjoys a 15 percent cost saving on bottles and has earned a profit from the joint venture (CX 563F, 564F, 565F).

220. United's total initial investment in the Madera Glass Company was $1,960,000 (CX 557G). The commitment for a $3 million loan from the Small Business Administration was also utilized (Tr. 9305). United's total investment in the company reached a high of $4.4 million in 1977 (CX 565D). Heublein's participation in financing the Madera Glass Company was the guarantee of long-term loans of $5 million from Aetna Insurance Company, $3 million from Wells-Fargo, $2 million from the Bank of America, and $1

million from the Crocker-Citizens National Bank (Tr. 9220–23). The Madera Glass Company supplies 90 percent of Heublein's requirements of domestic wine bottles (CX 358D).

221. Subsequent to the acquisition, United purchased the land and winery of the Oakville Vineyards. This is adjacent to United's Oakville Winery (Tr. 9887, 9978–79). [46]

222. United had been able prior to the acquisition to borrow money at reasonable interest rates (Tr. 2426–27, 10,914).[10] As of August 31, 1968, United had long-term debts of only $7,061,908 and members' equity amounted to $25,319,318 (CX 555E). The three long-term loans which comprised over 95 percent of the long-term debt were at interest rates of 5 1/4 percent, 1/2 percent over prime, and interest-free, respectively (CX 555H–I).

C. Allied Grape Growers

223. Allied Grape Growers ("Allied"), is an incorporated agricultural cooperative association, organized, existing and doing business under and by virtue of the law of the State of California, with its principal office and place of business in Fresno, California (Heublein's Answer IV, 10 (p. 8)).

224. Prior to Heublein's acquisition of a controlling interest in United, Allied was in the business of acquiring grapes and supplying them to United for the production of wine (CX 55X; Heublein's Answer IV, 10 (p. 8)).

225. Allied was started in 1951 as a farmers cooperative with 230 members (Tr. 2366–67, 2381). It was formed to supply grapes to be produced into wine and sold by the Petri Wine Company (Tr. 2368). The wines were produced in the Escalon and Madera, California, wineries, which were purchased by Allied in 1951 from Louis Petri (Tr. 2368, 2373). The brands and facilities of United Vintners were purchased by Allied from Petri in 1959 (Tr. 2369).

226. Allied's members entered into three-year contracts for the sale of their grapes to Allied, which agrees to sign up a specified tonnage of its members' grapes during that period. The membership of Allied has changed substantially since the acquisition. Many growers who were members of Allied prior to the merger have withdrawn and a number of growers who were not members in 1968 have joined (RX 1018, 1019, 1020, 1026, 1027; Tr. 2374–75).

227. After it acquired United, Allied entered into agreements with its members for grapes to be delivered to United (Tr. 2369, 2375). The money generated (after expenses) from the sale of wine by

[10] There is record reference (RX 1195) to a particular financial institution refusing financing. The circumstances and nature of the financing, however, were not developed on the record.

United was paid to the members of Allied following the delivery season. The amount of money generated (after expenses) from the sale of wine above the market value of the grapes delivered is called "excess over [47]market" and represents the growers' earnings from United (Tr. 2369; CX 555G). The amount payable to each individual member was based upon the market value of the grapes he delivered (Tr. 2377). Out of the amount payable to the grower a certain percentage was retained by Allied (called a "retain"). The accumulated retains from the growers constituted the capital of Allied. The retains were paid back to the grower over a six-year period (Tr. 2376).

228. The average market price for grapes was based upon reports of the Federal-State Market News Service, a government agency which publishes the prices paid for grapes by wineries according to grape variety and growing area (Tr. 2378).

229. The average market price for grapes was $44.19/ton for the 1960–1968 period (RX 1219).

230. During the period 1959–1968, the weighted average market price for grapes delivered to United was approximately $50 per ton (Tr. 2409). The weighted average return to the grower members over the market value was $10 per ton (Tr. 2408, 2715).

231. Allied's members, in addition to the average market price for grapes, received their pro rata share of the excess over average market price for grapes. The excess over average market price was generated by United from the sale of wine and represented the earnings of United (Tr. 2377, 2379).

232. Money retained in a particular year, after a time lag of about a year, was paid back in quarterly installments over a six-year period (Tr. 2376, 2541–42). The grower built up his retains for six years and thereafter would, in quarterly installments, receive money from the retain fund as well as payment of what was not retained (Tr. 2376).

233. The average retain over the 1959–1968 period was $10.50/ton. The average net proceeds in excess of quoted average market price for grapes was about $10/ton for the 1959–1968 period (Tr. 2374).[11] The $10/ton average for the return above the $44.19/ton average market price is a return of about 23 percent. The $10.50/ton retain is [48]approximately 19 percent of the $54.07/ton ($44.19 + $9.88) average total price per ton of grapes.[12]

[11] There was an average 15-month waiting period for grape payments. The grower would be receiving the proceeds from his previous year's crop during this period. Crop loans were also available to growers from Allied, if needed (Tr. 2560).

[12] Average return over market for the 1960–1968 period calculated from United's financial statements from 1960–1968 (Pages G from CX 547–55; RX 1219).

234. The retain account represented the growers' equity capital in United (Tr. 2385, 10895, 10919; RX 1015B; see, *e.g.*, CX 553F).

235. The earnings of United or return over market and the market price were paid to the grower (less the retain) beginning about one year after the crop was delivered (Tr. 2545, 2557–58; see also, *e.g.*, CX 553M).

236. A change in the tax law in 1966, whereunder the grower would have had to pay taxes on retains kept by United, caused a change in form of United's retain fund. With the change (prior to the 1968 fiscal year) in United's retain fund from a "revolving fund" to a "capital fund", the growers' equity was considered permanent, not revolving capital. The financial consequence to the individual member was essentially the same, but retains were not considered to be paid in by members for the current year and paid out by United for the crop six years before. Instead, the grower was considered to have a permanent investment and share in United which was maintained by payments from or to the member depending upon whether his proportion of the annual crop increased or decreased (RX 1014A–E, 1015Z–6; Tr. 10,943–44).

237. United's retains account had grown to $25,319,318 by 1968 (CX 554E, F, 555E).

238. During the 1959–1968 period, Allied had paid Louis Petri $24 million for United. It did so using money generated from the retains of $10.50/ton. The return over average market price for grapes averaged $10/ton over the same period (Tr. 2374, 2675–76). The payment for United, therefore, reflected the profits of United (Tr. 2374, 2674). While these profits may be said to have been held back from the growers, the growers received the full average market price for their grapes and in addition acquired a share in the increasingly valuable assets of United.

239. The average market price for grapes delivered by Allied's members prior to the acquisition (1960–1968) was $44.19 and the average market price for grapes delivered by Allied's members after the acquisition (1969–1977) was $90.64 (RX 1219). **[49]**

240. Allied recognized that the capital requirements for United would increase and so changed the form of the retain fund from a revolving to a capital fund. The change facilitated an increase in the capital investment in United (Tr. 10,943–44; RX 1014A–E, 1015D, E, Z–9, Z–10). United's capital requirements were determined by its board of directors and funds were retained in or paid out of the capital fund accordingly (RX 1015Z–8, 1020I).

241. By 1968, the membership of Allied had grown to 1,600 from the original 230 in 1951. The grapes signed up by Allied had grown

from 50,000 tons in 1951 to 410,525 in 1968 (Tr. 2381). In 1968, and for some four years prior thereto, there was a waiting list of additional grapes which the growers wanted to deliver through Allied. In 1968 or a year or two before, there were 100,000 tons on the waiting list (Tr. 2387, 2537).

242. After the merger, United continued to crush the grapes delivered by Allied's members and produce wine (Heublein's Answer V, 15 (p. 11)). Grapes were delivered to United by Allied pursuant to a long-term supply contract that had been entered into coincident with the merger (CX 221).

As recited in the Preliminary Statement, *supra*, p. 7, that long-term supply contract was declared invalid in a private suit, *Allied Grape Growers* v. *Heublein, Inc.*, Civ. No. C-75-0456 (D. Cal., filed July 21, 1978), and Allied subsequently sold its entire 18 percent interest in Vintners to Heublein.

D. Heublein Allied Vintners

243. Heublein Allied Vintners, Inc. ("Vintners") was a corporation organized on September 24, 1968, for the purpose of the acquisition of United by Heublein. Vintners' sole asset was 100 percent of the stock of United (Answer of Heublein Allied Vintners to Amended Complaint, VII pp. 2-3). Vintners was a holding company (CX 328D). Heublein had an 82 percent interest in Vintners and Allied had an 18 percent interest in Vintners (CX 211, 328F, H).

As recited in the Preliminary Statement, *supra*, p. 9, after Allied sold its 18 percent interest in Vintners to Heublein in 1978, Vintners on November 9, 1978, was merged into Heublein and ceased to exist.

III. EVENTS LEADING UP TO THE ACQUISITION

244. Mr. Louis Gomberg, a wine industry consultant and merger broker (Tr. 1402, 1410-11), by letter dated September 28, 1967, first called to the attention of Heublein (through its Chairman, John Martin) the possibility that United might be a candidate for acquisition (Tr. 1420, 4009; RX 1130). [50]

245. Mr. Gomberg had approached Mr. Bruno C. Solari, President of United, about a possible acquisition. Mr. Solari expressed a willingness to listen to any offer, but took no initiative in seeking anyone to acquire United (Tr. 1421-26).

246. Mr. Martin met with Mr. Gomberg on the West Coast in the fall of 1967, and they discussed various acquisition candidates (Tr. 4485, 4491-92). Mr. E. W. Kelley, Executive Vice President of Heublein, was then assigned to find out from Mr. Gomberg whether

any of those wineries would be interested in talking to Heublein. Mr. Gomberg said that he would talk to United and see if they were interested (Tr. 4493).

247. Later in the fall of 1967, Mr. Bruno C. Solari went to New York for purposes unrelated to consideration of a merger (Tr. 4718–19). While he was in New York, a representative of Heublein called to set up a meeting with him (Tr. 4716). Mr. Watson and Mr. Martin came to meet with Mr. Solari in New York and they told him they were interested in the possibility of buying United (Tr. 4008–09, 4720).

248. In December 1967 or January or February 1968, key executives of Heublein agreed that they wanted to look into the United matter and decided that Mr. Kelley should pursue it (Tr. 4500–02).

249. In March 1968, a contingent from United including Mr. Solari went to Hartford to discuss the matter with Heublein (Tr. 4566, 4568–69, 4721). There, Heublein presented its general plan of acquisition for the United representatives to report back to their board of directors (Tr. 4867). Heublein proposed a purchase price of about $38 or $38.5 million (Tr. 4868–69).

250. Until Mr. Solari told the Allied and United Boards of Directors (actually the same board) early in 1968 of Heublein's interest in acquiring United, there had been no interest on the part of either board or either company in selling out. Neither board had approached any company with respect to the possibility of selling United and no one had been authorized to explore the sale of United to another company (Tr. 2430–34, 2682–85).[13] [51]

251. Mr. Kelley met with Mr. Solari and Mr. Gomberg in California in April 1968 to discuss a possible Heublein-United merger (Tr. 4496). Shortly after that meeting, Mr. Kelley met in San Francisco with Mr. Solari and his associates to discuss the matter (Tr. 4573).

252. After obtaining information on United, Mr. Kelley returned to Hartford, where Heublein decided to pursue the possible acquisition further. Inasmuch as Heublein also had other opportunities, it was decided to make a study of the alternative means of entering the wine industry. McKinsey and Company was hired to do a study of four or five ways to enter the wine industry and to evaluate the merits of the United approach (Tr. 4512–13).

[13] Mr. Solari, who was President of United at the time of the merger and continued in that position under Heublein, recalled meetings with Welch Grape Juice in the middle 1960's to "explore the acquisition or a merger or how could the two companies do better by working together than working apart" (Tr. 4723). Welch withdrew from the talks (Tr. 4724). Mr. Solari, however, confirmed the testimony of other United and Allied officials that no one on the Allied board asked him to initiate any talks or explorations as to the sale of United (Tr. 4722).

253. Two to four weeks after it was commissioned, the McKinsey study of theoretical alternatives for entering the wine industry (RX 1212A-Z-15) was presented to Heublein (Tr. 4533). It was presented at a meeting on May 13, 1968, which was attended by a group of Heublein executives including Mr. Hart, Chairman of the Board and Mr. Watson (Tr. 4531). The four inside members of Heublein's Executive Committee were presented with the McKinsey report as a group (Tr. 4613).

254. Over the course of the negotiations regarding the acquisition of United, Heublein increased the price it was willing to pay (Tr. 2442).

255. During those negotiations, presentations were made by representatives of Heublein to the Boards of Heublein and Allied. Presentations were made by Stuart Watson, President, Edward Kelley, Executive Vice President, Ralph Hart, Chairman of the Board and John Martin, Chairman of the Executive Committee of Heublein. Other Heublein officials were also present. In addition, there were district meetings with members of Allied to persuade them to vote in favor of the merger. A total of 33 district meetings (three sets of meetings at each of 11 districts) were held at which Heublein representatives were present or at which Allied and United board members made the presentations prepared by Heublein (Tr. 2445-48, 2461-79).

256. Heublein represented to Allied that it was very knowledgeable in the wine business and that it had made a thorough study of the California wine business (Tr. 2468). Mr. Kelley represented to Allied in the fall of 1968 that Heublein had studied the domestic wine business for two or three years (Tr. 2777). Heublein presented itself to Allied as a good marketer (Tr. 2460-62, 2476-78, 2688-89, 2697-2700, 2773, 2776; CX 263, 264, 267). [52]

257. Heublein utilized charts and other visual and verbal presentations to demonstrate Heublein's growth as detailed in Findings 44-74, *supra* (CX 263, 264, 265, 266, 267; Tr. 2473, 2476-77, 2697-2700).

258. Heublein representatives pointed out that Heublein had a wide distribution system and that Heublein's and United's products were compatible so that the distribution of United's wines could be enhanced by using Heublein's distributors; Smirnoff vodka was cited by Heublein as a product which could be used to gain better distribution for United's wines (Tr. 2464-68, 2487). By having Lancers wine and Smirnoff vodka along with United's wine, the two companies could both increase the distribution of their products and both could use each other's warehouses (Tr. 2690-91, 2696).

259. Representations were made that the merger would result in

increased efficiency with the advertising dollar because of the joint effort (Tr. 2508–09, 2692–93).

260. It was also pointed out that the combination of Heublein with United could result in getting greater shelf space at the retail level (Tr. 2695).

261. Prior to the acquisition, there were discussions between Heublein and United with respect to consolidation of distributors and marketing efforts (Tr. 8926–27; CX 422).

262. On the basis of the foregoing findings under this heading as well as the description of United prior to the merger, it is concluded that United and Allied did not enter the merger arrangement because of any inability to continue in business on their own; that they did not initiate any steps seeking to be acquired, but that, when presented with a merger offer which appeared to be to their advantage, they accepted such an offer.

IV. THE ACQUISITION

263. A "Plan and Agreement of Merger" was entered into as of August 31, 1968 among Allied, Vintners, Heublein and Connecticut Vintners, Inc.[14] That agreement was executed on September 26, 1968 (CX 211A, O).

264. The agreement provided that Heublein would acquire a controlling interest in United (CX 55D–F, 211A–C). Prior to the acquisition, United had been a cooperative whose sole member was Allied (CX 211D). United was the production and marketing arm of Allied (CX 55X). [53]

265. The acquisition, effectuated on February 21, 1969, gave Heublein a controlling interest in United (CX 5, 55D–F).

266. Heublein, as consideration for the interest it acquired in United, gave shares of Heublein common stock valued at approximately $7,521,000, Series A Heublein preferred stock valued at approximately $20,319,000, and Heublein Series B preferred stock valued at approximately $5,000,000. The total value of the shares paid by Heublein to members of Allied and former members of Allied in exchange for their interest in United was valued at approximately $33 million (CX 136D).

267. Prior to the acquisition, United had been converted from a cooperative association to a corporation whose sole owner was Allied (CX 211I, 328D–H). As the result of a complex reorganization, United became a wholly-owned subsidiary of Vintners, a company organized

[14] Connecticut Vintners, Inc. was a wholly-owned subsidiary of Heublein which was merged into Vintners as one of the steps in effectuating the acquisition (CX 211).

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for purposes of the acquisition (CX 328D-H, 211A-C). Also as a result of the reorganization, Heublein acquired an 82 percent interest in Vintners and Allied acquired an 18 percent interest in Vintners (CX 328D-H, 211A-C).

268. Since the merger, United has been operated as a subsidiary of Heublein (CX 136E).

269. As a condition precedent to the merger agreement, Allied, Heublein, Vintners and United entered into a supply contract, which also was executed on February 21, 1969, the date of the merger (CX 211M, 321Q). The supply contract provided that Allied would act as the supplier of all of United's grape requirements for 20 years, renewable for six additional ten-year terms at the option of Allied (CX 221D-E). It also provided that Allied was entitled to 20 percent of United's pretax profits and to designate eight members of United's 20 member board of directors (CX 221 O).

270. The supply contract has been declared in a United States District Court proceeding between Heublein and Allied to be null, void and unenforceable and is no longer in effect. Allied no longer has the right to share in United's profits nor does it have the right to representation on United's board of directors. Allied's designees on the United Board of Directors have resigned (Memorandum in Support of Motion to Certify Dismissal of Allied Grape Growers to the Commission dated September 12, 1978, p. 7, Exhibit A; RX 1248Z-26 through Z-28. See *supra* p. 7).

271. Allied has sold its 18 percent interest in Vintners to Heublein, and Vintners has been merged into Heublein leaving Heublein as sole owner of United (See *supra,* pp. 7, 9). [54]

272. Pursuant to an agreement (among Heublein, United, Allied and Vintners), Allied in late 1978 entered into a six-year grape supply contract with United (RX 1248A through Z-4).

V. THE RELEVANT MARKET

Determination of the relevant market is prerequisite to determination of whether a challenged acquisition does, in fact, violate the antitrust laws. An acquisition in violation of the law " . . . must be one which will substantially lessen competition 'within the area of effective competition.' Substantiality can be determined only in terms of the market affected." *United States* v. *duPont & Co.,* 353 U.S. 586, 593 (footnote omitted).

A. Geographic Market

273. The relevant geographic market in which the effects of

Heublein's acquisition of United Vintners are to be measured is the United States as a whole (Amended Complaint, Para. 19; Answers of Heublein and United Vintners to Paragraph 19 of the Amended Complaint).

B. Product Market

Brown Shoe Co. v. *U.S.*, 370 U.S. 294 (1962), set out the standards by which relevant product markets and submarkets are determined:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 593–595. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. Because ¶ 7 of the Clayton Act prohibits any merger which may substantially lessen competition "in *any* line of commerce" (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found [55]to exist, the merger is proscribed, . . . (at 325, footnotes omitted).

With *Brown Shoe* in mind, the following findings require the conclusion that the relevant product market is "all wines" and that "table", "dessert" and "sparkling" wines are "well-defined submarkets. . .which, in themselves, constitute product markets for antitrust purposes."

1. Product Market—Wine

274. "Wine", as defined for purposes of government regulation of wine production, winery construction, winery licensing, wine ingredients, wine taxation and related purposes, is an alcoholic beverage which is the product of the juice or must of grapes or other fruit. It includes products which have been sweetened or to which various flavoring ingredients have been added. Included are all still wines, champagne and other sparkling wines, artificially carbonated wines and special natural wines. Special natural wines are flavored wines such as vermouth made pursuant to a formula approved under government regulations (CX 309J, K, L; 26 U.S.C. 5381–5386).

275. There are literally hundreds of different kinds of wines (CX 308K). However, all wines are produced basically in the same manner, by crushing grapes or other fruit and fermenting their juice. The ensuing procedures then differ somewhat depending upon

the particular kinds of wines desired. For a description of production procedures, see Findings 406–12, *infra.*

276. Industry statistics such as those of the Wine Institute (the leading trade association in the industry) are maintained in three categories—(1) still wines containing up to 14 percent alcohol; (2) still wines containing over 14 percent alcohol; and (3) effervescent wines (Tr. 1579–80). The terms "dry", "table" or "dinner" wines are used for still wines not over 14 percent alcohol (Tr. 1812, 3153; CX 308Z–24, 310 O, P, Q). The terms "sweet", "dessert" or "appetizer" wines are used for still wines over 14 percent alcohol (Tr. 1812, 3153; CX 308L, 310 O, P, Q).[15] The term "dessert wines" also includes "appetizer wines" (CX 308L). Effervescent wines include artificially carbonated wines (CX 309J). The term "sparkling" is used to refer to effervescent wines (Tr. 1812; CX 308R). Examples of table wines are Burgundy, Gamay, Cabernet Sauvignon, Ruby Cabernet, Pinot Noir, Zinfandel, Pinot Chardonnay, Chenin Blanc, Emerald Riesling, Grey Riesling, Chianti, Sauterne. Examples of dessert wines (including appetizer wines) are Sherry, Vermouth, Port, Tokay and Muscatel. Examples of sparkling wines are Champagne and Sparkling Burgundy (CX 308K). [56]

277. Wines are also classified as generic or varietal. Varietal wines are named after the predominant grape variety contained in the wine and by law must contain at least 51 percent of that grape variety (CX 310S; Tr. 749). Examples of varietal wines are Cabernet, Pinot Noir, Zinfandel, Chardonnay, Riesling, Muscatel, Ruby Cabernet, Petit Sirah, French Columbard, Emerald Riesling, Barbera, Sylvaner and Chenin Blanc (CX 308Z–24; Tr. 540A). Generic wines may be made from a mixture of grapes, no one of which need account for any specified percentage of the grapes used (Tr. 757). Examples of generic wines are Burgundy, Rhine Wine, Sherry, Port, Sauterne and Chablis (CX 308Z–23; Tr. 757).

278. Varietal wines contain from 51 percent to 100 percent of the varietal grape for which they are named. There is no requirement that the varietal percentage be disclosed on the label (Tr. 517) and such disclosure is not usually made (Tr. 811). There is no indication with respect to generic wines of the types of grapes used in their production (Tr. 810).

279. All wines vary in quality depending on where, when and how they are made. There are wide ranges of wine quality. There is variation within types of wines and within wineries. There is a continuum of wine quality. A particular wine can vary among

[15] The terms "sweet" and "dry" refer to alcoholic content, not to the taste of the wine (Tr. 1812; CX 308Z–24).

various producers, and for a single producer from year to year. There are thousands of variations in the winemaking process. Time, temperature, and winemaking procedures all affect the gradation in wine quality. The very same variety of grapes differs in quality and this causes variations in the wine produced from them. The wine handling ability of a winery also affects wine quality (Tr. 523, 532–33, 758, 913, 3153).

280. The range of prices for all kinds of wines also varies (Tr. 2873). Cabernet Sauvignon wines, for example, range in price from under $2.00 a bottle for Italian Swiss Colony up to $20 per bottle (Tr. 758). The price range of generic wines overlaps the price range for varietal wines (Tr. 2874–75). The wines of United in January 1974 ranged from $.99 to $6.50 per 1/5 gallon bottle at California retail prices (CX 218Z–291 through Z–304). In 1972, United's product line sold over a retail price range of $.89 or $.95 to $5 or $6 a bottle. There were very few price gaps and United sold products at virtually every pricing point (Tr. 3741).[16] In California, Gallo prices are near the lowest end of the price range and Beaulieu prices are near the upper end (Tr. 1849). About 2 percent of wines sell above Beaulieu's prices and about 10 percent of wines sell [57]below Gallo's prices (Tr. 1853). As of January 1974, the California retail price range of Gallo wines was from $.69 to $2.79 per fifth (CX 218Z–280, 218Z–281), while that of Beaulieu wines was from $2.25 to $7.00 (CX 218Z–263).

Price—Quality Considerations

281. Wines were referred to by numerous witnesses as "standard" or "premium". Some of those witnesses did so on the basis of wine quality (Tr. 673, 674, 774, 1871, 2214, 2215, 2154). Others applied the terms "standard" or "premium" according to price (Tr. 1712, 2035, 3473, 3930, 4249, 7252, 9760–61, 9983, 9984).

HUV contend that the effects of the challenged merger must be analyzed on the basis of separate "standard" and "premium" wine submarkets. Their proposed categorization is based on alleged price differences (Tr. 10329–33; RX 1D, 1E, 7C, 7D, 9D, 15B, 17G, 23E, 25E, 27B).

282. With reference to December 1972 California wine, for example, HUV have classified table wines retailing at under $1.35 per fifth as standard and those selling at $1.35 and above as premium (RX 1D, 1E, 17G), "sweet" wines selling at $1.35 per fifth as standard and those selling at $1.35 and above as premium (RX 7C, 23E),

[16] Another example of price range is Guild Wineries and Distillers whose table wines sell at retail from $1.09 to $4.50 (Tr. 2991).

sparkling wines selling at under $3.49 per fifth as standard and those selling at above $3.49 as premium (RX 9D, 25E), and refreshment wines selling at under $1.35 per fifth as standard and those selling at $1.35 and above as premium (RX 15B, 27B).

283. Witnesses who characterized wines as standard or premium on the basis of price differed in their price divisions. Marvin Sands, President of Canandaigua Wine Company, views Gallo's $1.69 price as the upper end of the standard price range and the $1.79 to $2.50 prices of Almaden, Paul Masson and Christian Brothers as the beginning of the premium price range (Tr. 4249). Louis Gomberg, wine consultant who prepared various tables for HUV, used $1.25 in his industry statistics as the dividing line for table and dessert wines and $3.50 for sparkling wines in 1970. These dividing lines were increased over the years to account for inflation and were $1.45 and $4.00 respectively, in 1971, $1.50 and $4.00, respectively, in 1972, and $1.75 and $4.50, respectively, in 1973. In 1974, Mr. Gomberg's table and dessert wine dividing line was $2. In 1975 and 1976, his dividing lines were $2 for table and dessert wines and $4.50 for sparkling wines (Tr. 1817-22; RX 581, 585, 586). Ralph Hart, former president, chief executive officer and chairman of the board of Heublein defined premium wines as those selling for $3 to $6 as of the time he was chief executive officer of Heublein (Tr. 3930). Mr. Hart was chief executive officer of Heublein until April 1968 (Tr. 3921). [58]

284. Dr. Richard Peterson, winemaster and president of the Monterey Vineyard, is also president of the American Society of Enologists, the scientific and professional society for winemakers (Tr. 320, 325). In Dr. Peterson's opinion, the term "premium" means different things to different people. Henry Rubin, a wine columnist and wine consultant, would not define "premium" because it is a very loosely used term. Any winery can call its wines "premium", and many do as a matter of self-evaluation. This, however, does not mean that they are of any higher quality (Tr. 721, 773-74).

285. Wine price may not be relied upon as an indicator of quality (Tr. 514). Most marketers agree that retail price depends far more on volume than on actual product quality (Tr. 514, RX 1184B). Certain wines such as the second line of Almaden and Sebastiani are marketed in a manner intended to make the consumer believe they are "premium" wines or "sublevel of premium" wines, but are actually "standard" wines (Peterson Tr. 1871). Almaden mountain wines and the Inglenook Navalle wines are both "standard" wines dressed up as "premiums" (Peterson Tr. 1877).

286. There is only a loose relationship between wine quality and price (Tr. 753). There is no absolute line between low-priced and

high-priced wines (Tr. 773). Henry Rubin as a writer on wines assesses the quality of wines against their prices and advises consumers which wines are a good value (Tr. 772). He testified that some wines, such as Lancers and Blue Nun, are overpriced for their quality (Tr. 753), while others are underpriced for their quality (Tr. 754).

287. Robert Balzer, a former wine store owner and restauranter, is a wine writer with a nationally syndicated column in the Los Angeles Times and is the food and wine editor for Holiday magazine (Tr. 2791–95). He circulates a newsletter on food and wine and has written a number of books on wine (Tr. 2795–96). He has taught five courses on wine at UCLA (Tr. 2799). He is acquainted with consumer tastes and purchasing habits in wine through his 27 years as a wine merchant, teacher, his restaurant experience and hundreds of letters each month from his wine consumer readers (Tr. 2791, 2799–2800). He is an experienced wine taster who participates in 75 to 100 wine tastings a year and who conducts monthly wine tastings by panels of competent and experienced tasters for his newsletter (Tr. 2803–08). He was presented to the public by United as a wine expert in an advertisement for Inglenook (RX 331B). The tastings for his newsletter include low-priced and high-priced wines (Tr. 2821). The quality evaluation of wine at the tastings is based upon a generally accepted and recognized 20 point scoring system developed at the Department of Viticulture and Enology at the University of California at Davis (Tr. 2808, 2840, [59]2919–22). The wines so evaluated are ranked on the basis of their quality in his newsletter (Tr. 2821–22; CX 346, 347, 348, 349, 350).

288. The prices of wines which are rated in Balzer's tastings do not follow quality rankings, but vary. The retail price of wine is not a reliable index of wine quality (Tr. 2842, 2860; CX 346, 347, 348, 349, 350). The broad range of wines which are evaluated in Balzer's newsletter irrespective of price are wines from which a consumer would choose and are thus in competition with one another (Tr. 2868, 2869).

289. As an example of the variance in the price-quality relationship, ten brands of the same variety of wine, Cabernet Sauvignon, each selling for $3 would not have the same quality (Tr. 7256, 7258, 7259).

290. In comparative blind tastings by experts and novices of California and European wines, California wines were preferred although the imports frequently cost two to three times as much as their California counterparts (CX 308Z-1 thru Z-8).

291. Imported wines and California wines are similar in charac-

teristics and are made from the same types of grapes grown under similar conditions (CX 308U). California wines are made from the European grape family called *vitis vinifera* (CX 308T, 308Z-14 thru Z-16). John Powers, chairman of the board of United Vintners, confirmed that imported and domestic wines compete with each other within industry segments (Tr. 9825). Wines produced in the eastern and midwestern states are made from grapes of the family *vitis labrusca,* the native American grape. Both HUV and complaint counsel have included wines from all geographic areas within the relevant markets as they have defined them (RX 1D; CX 373A).

292. Heublein's own 1967/68 Marketing Plan (CX 97K, L, M) demonstrates the invalidity of HUV's present contention that "standard" and "premium" wines must be treated as separate markets. There, it was recognized that competition for Heublein's Harveys Bristol Cream (a "premium" wine) came from three sources:

1. The premium quality imported sherry market.
2. The imported liqueur-cordial market.
3. The domestic "fifth" sherry trade-up market. **[60]**

After reciting that Harveys' prime competition comes from other imported sherries, and that, because of its high quality, premium price and position acquired by advertising effort, it was also in competition with quality cordials and liqueurs, it was concluded:

> Also, because of the sizeable volume and potential of the domestic "fifth" sherry market, brands such as Gallo's, Taylor, and Paul Masson cannot be overlooked as competition to Harvey's Bristol Cream. This could be a trade-up market for Harvey's. It is noteworthy that connoisseurs have judged the quality of these domestic sherries to be as good as or equal to the quality of some imported sherries. (See opposite for comparison of prices in these three categories.)

The prices referred to (Retail in California) were $.82 for Gallo (well below HUV's "standard"—"premium" price demarcation); and $1.75 for Taylor and $2.87 for Paul Masson. Also listed was Almaden at $1.48. Yet Heublein considered all such wines to be in competition with its Harveys brand which sold for $6.89.

Physical Characteristics

293. Wine has unique physical characteristics. The federal government has established standards of identity for wine (CX 308Z-7, 310N-Q). Wine is a beverage containing by law from 7 percent to 24 percent alcohol (CX 310J).

294. The sensory evaluation of wine is called organoleptic

evaluation (Tr. 462). Organoleptic evaluation is used to assess the physical characteristics of wine such as clarity, aroma, bouquet, color, flavor, acidity, presence of acetic acid, sweetness and other factors (Tr. 2911–18, 738). There is a generally accepted standard used worldwide for evaluation of the physical characteristics of wine called the Davis 20-point scale (Tr. 2840, 2921).

295. Wine is the only beverage which offers the complete range of the four tastes to which the palate is sensitive—sweetness, acidity, saltiness and bitterness (CX 308D).

Wine Production

296. Wine of all types—table, dessert, and sparkling—are generally produced by the same group of firms. Each of the eight largest firms for wine overall in 1972 (CX 373K) produced table, sparkling and dessert wines. **[61]**

1. Gallo (CX 373U, Z–7, Z–13).
2. Heublein (United Vintners) (CX 373U, Z–7, Z–13).
3. National Distillers (Almaden) (RX 23A; CX 373Z–7, Z–13).
4. Guild (CX 373U, Z–7; RX 10A).
5. Mogen David (CX 373U, Z–7; RX 26C).
6. Taylor (CX 373U, Z–13; RX 18A).
7. Franzia (CX 373Z–7, Z–13; RX 7A).
8. Seagram (Paul Masson) (CX 373Z–7; RX 23A, 25A).

297. Every firm which is among the eight largest firms in the table, dessert or sparkling wine category (but not in the all wine category) is a producer (or importer in the case of Renfield Importers) of all three categories of wine: table, dessert and sparkling.

Canandaigua Industries	(CX 373U; Tr. 4192–93)
Renfield Importers (imports)	(CX 373U; RX 17D, 26A)

The Christian Brothers	(CX 218Z-270, 373U)
Monarch Wine Co.	(CX 373Z-7, 373Z-13; RX 1B)
Gold Seal Vineyards, Inc.	(CX 373Z-13; RX 17A, 233)

298. Vermouth, a still wine over 14 percent in alcohol, was produced by seven of the eight leading firms in the all wine category for 1972 (CX 373K).

1. Gallo	(CX 218Z-280)
2. Heublein (United Vintners)	(CX 218Z-292, Z-285)
3. National Distillers (Almaden)	(CX 218Z-292, Z-262)
4. Guild	(CX 218Z-287)
6. Taylor	(CX 168D (1968))
7. Franzia	(CX 218Z-278)
8. Seagram (Paul Masson)	(CX 218Z thru 266)

299. The fifth ranked firm, Mogen David, is owned by the Coca Cola Bottling Company of New York which also owns Vermouth Industries of America.

300. With certain modifications in physical plant, wineries can shift their production from one type of wine to another in response to changes in demand. This was done by United, which made changes in its wineries in the 1960's to meet the change in demand from dessert wines to table wines (Tr. 2585, 2619, 2620, 2637). The Escalon winery was converted from a dessert wine plant to a table wine plant (Tr. 2619). Gallo converted its wineries to emphasize the production of table wines (Tr. 440). The Monterey Vineyard [62]winery was not designed with sparkling wine capability but could have added equipment to produce champagne. It could also have produced dessert wine simply by adding some tanks (Tr. 531). The industry as a whole shifted its production in the 1960's from dessert to table wine (Tr. 439, 7466-67, 8090).

301. Many firms including the industry leaders, Gallo and United, produce both, what have been termed, "standard" and "premium" wines. The following firms have been described as producing both such wines: Geyser Peak (Tr. 6274); California Wine Association (Tr. 1014); United Vintners (Tr. 3741, 9530-31); Guild (Tr. 3047-48); Weibel (Tr. 673, 716); Gallo (Tr. 9807, 9971); California Growers (Tr. 1954); Canandaigua (Tr. 4198); Angelo Papagni (Tr. 6276-77); Montcalm (Tr. 5162, 5244); Heublein (Tr. 2856); C. Mondavi (Tr. 1720); Almaden (Tr. 1870, 1871, 1877); and Sebastiani (Tr. 1870, 1871).

302. There is a trend toward expansion of the price and quality ranges sold by individual wineries (Tr. 767). Producers of low priced wines have extended their product lines upward in price and quality. In the last five years, Gallo has expanded the price range and quality range of its products (Tr. 1720, 1857–58, 1998–99, 3080–81, 8571–72).

303. New varietals have been added to the Colony brand of United. These include Cabernet Sauvignon, Pinot Noir, Chenin Blanc, Ruby Cabernet and French Columbard (Tr. 8568). They sold at higher prices than other Colony table wines (CX 536F).

304. Producers of high priced wines have extended their product line downward in price and quality. Almaden in the 1960's bottled its mountain wine in half gallon jugs. Other companies followed and the so-called "premium" category was downgraded in price (Tr. 1871–72). Witnesses referred to this middle price range as bridging the gap between "standard" and "premium" or between low priced wines and high priced wines (Tr. 1512, 1513, 1871–72, 8847–88, 8986; CX 192A). This medium price range was sometimes referred to as "subpremium" (Tr. 1513, 8986, 9477) or "midpremium" (Tr. 7259, 7596). Other terms sometimes used for these medium priced wines are "low end premium" or "mountain wine" (Tr. 1512–14). Companies in addition to Almaden producing wines in this price range together with higher priced wines are: Taylor (Tr. 8414); Paul Masson (Tr. 539, 8340); Beringer (Tr. 539, 8339–40); Sebastiani (Tr. 539); C. Mondavi (Charles Krug & C.K. Mondavi brands) (Tr. 1720, 7595–96).

305. United Vintners introduced a lower priced and lower quality wine called Inglenook Navalle to extend downward its Inglenook "premium" line of wines (Tr. 9272–73, 7834–35). **[63]**

306. Firms have shifted their production into this medium price range of wines in response to an increase in consumer demand (Tr. 8576). For example, the Inglenook brand of United had been exclusively in the high-priced range up to approximately 1971. By 1978, its production in table wine had shifted so that 3.4 to 3.5 million cases were the medium-priced Navalle and only 460,000 cases were in the higher priced Vintage and Estate lines. This constituted a shift in the line from 100 percent high-priced wines to 12 percent high-priced wines and 88 percent medium-priced wines (Tr. 8525, 9272–73).

307. The upper end of the Italian Swiss Colony ("standard") table wine price range in 1978 was $1.79. The low end of Almaden's ("premium") table wine price range was $1.89 (CX 536B, F). United's ("standard") Lejon champagne sold at $3.39 while Almaden's ("premium") Le Domaine champagne sold at $3.55 (CX 536B, F).

Production Expertise

308. Enology is the science of winemaking (CX 308Z-8). Viticulture is the science of grape growing (CX 308Z-8). There is a Department of Enology and Viticulture at the University of California at Davis (Tr. 3101).

309. Graduates of the department are employed in wineries both in the north coast area of California and the San Joaquin Valley area of California (Tr. 3101-02). (See Findings 312-27, *infra,* for discussion of significance of these two areas.)

310. Dr. Richard Peterson was responsible for winemaking at Gallo and left to become winemaster at Beaulieu (Tr. 329), Gallo was producing wines which Dr. Peterson characterized as "standard", while he considers Beaulieu to be the top chateau in California producing "premium" wines (Tr. 330, 502, 508). Gallo's wine handling ability is excellent and Gallo could produce high quality wines by using higher quality grapes (Tr. 532).

311. There is a professional society of winemakers called the American Society of Enologists, to which virtually all winemakers belong (Tr. 325).

Grapes and Vineyards

312. The north coast or coastal area and Central Valley or San Joaquin Valley area of California are grape growing and wine producing areas (Tr. 415, 425, 510, 1018-19, 1028, 1286, 3101-02, 3225-27, 4114, 7644-47). The Central Valley area includes the San Joaquin and Sacramento Valleys of California. The north coast includes Humboldt, Marin, Mendocino, Napa, Sonoma, Alameda, Contra Costa, Monterey, [64]San Benito, San Francisco, San Mateo, Santa Clara and Santa Cruz Counties (CX 296G). The geographic boundaries of the northcoast or coastal area have been expanding over recent years (Tr. 1286).

313. In the mid 1940's to mid 1960's the so-called "premium" wineries such as Paul Masson, Christian Brothers and Inglenook used grapes from the coastal area rather than the Central Valley (Tr. 7476). Today, however, firms rely substantially on grapes grown in the Central Valley to produce "midpremium" wines (Tr. 7612).

314. The northcoast wineries are substantial users of Central Valley grapes. The following wineries identified by witnesses as northcoast or "premium" wineries use Central Valley grapes or wine made from Central Valley grapes. Robert Mondavi; Charles Krug (C. Mondavi); Paul Masson; Christian Brothers; Almaden; Sebastiani;

Inglenook (United Vintners); Hans Kornell; and Weibel (Tr. 510, 717, 4114, 7644-46, 7834-35, 7951-52).

315. Almaden, the leading producer of mountain table wine (RX 18A) had 75 percent of its table wine sales in its Mountain Wine line (CX 289C). The grapes for this line came almost exclusively from the San Joaquin Valley (Tr. 956). The Almaden winery is in the north coast area, but the sources of close to 75 percent of its table wines are wineries such as Pirelli-Minetti, Gallo, Sierra Wine Company and Delicato, all located in the San Joaquin Valley (Tr. 928-32; CX 464E). The varietal grapes owned by Almaden comprise only 10 percent of its grape requirements. Sierra Wine Company located in the Southern San Joaquin Valley accounts for 40-50 percent of Almaden's grape or wine requirements (CX 464E). Inglenook competes for the same grapes as Gallo (Tr. 950).

316. Inglenook's Navalle line of wines which comprises about 88 percent of the Inglenook table wines is made in substantial part from Central Valley grapes (Tr. 7951-52). Among United's "premium wine" production facilities is the winery at Escalon in the Central Valley (Tr. 8509-10). Escalon is used primarily for the production of Inglenook Navalle wines (Tr. 9946). The Lodi facility which is a part of the so-called Premium Wine Company of United is also located in the Central Valley (Tr. 8509-10).

317. Some Central Valley wineries do nothing but produce wine for north coast wineries (Tr. 1028). Central Valley wineries which shipped wine to coastal wineries include: Sierra Wine Company; Delicato Winery; California Wine Association; California Growers; Cherokee Vineyard Association; and Gallo (Tr. 928, 932, 1015, 1028, 1959, 7645-46). **[65]**

318. The movement of Central Valley wine and grapes to north coast wineries increased in the late 1960's (Tr. 4109, 4112).

319. In 1968, the southern and central San Joaquin Valley accounted for 52.6 percent of all wine produced in California. In the same year, the Escalon-Modesto area accounted for 21.2 percent and the Lodi-Sacramento area 9.3 percent. The north coast areas of California were responsible for 14.5 percent, while Southern California represented 2.3 percent of total wine production for the state (CX 291H).

320. In 1971, the southern and central San Joaquin Valley accounted for 57.4 percent of all wine produced in California. In the same year, the Escalon-Modesto area accounted for 20.1 percent and the Lodi-Sacramento area 8.0 percent. The north coast areas of California were responsible for 12.6 percent, while Southern California represented 1.9 percent of the state's wine production (CX 296I).

321. From 1968 through 1971, the Central Valley area of California, including the southern and central portions of the San Joaquin Valley as well as the Escalon-Modesto and Lodi-Sacramento districts, accounted for 82.6 percent to 87.3 percent of total California production of all wines. During the same period, the north coast areas produced 11.4 percent to 14.5 percent of total California production of all wines (CX 291H and 296I).

322. It is now common practice for wineries outside the Central Valley to purchase grapes from there (Tr. 931). Without Central Valley grapes such firms could not produce as much wine as they do (Tr. 932). Dr. Richard Peterson estimated that 90 percent of the wine grapes crushed in California came from the San Joaquin Valley (Tr. 510).

323. Central Valley wineries use grapes or wine from the north coast (Tr. 1018–19, 2216, 3225, 4114, 7646–47). Gallo is one of the largest purchasers of grapes and wine in the Napa Valley, one of the areas in which the finest grapes are grown (Tr. 415, 520). Gallo also purchased wines from Sonoma and Mendocino Counties (Tr. 4115). Gallo owns the Frei Brothers winery on the north coast and purchases wines from the Napa Coop in that area (Tr. 7647).

324. Both Gallo and United are large purchasers of grapes on the north coast to the point of affecting the prices others must pay for north coast grapes (Tr. 2216, 2219, 2253–54; CX 438). **[66]**

325. The Monterey Vineyard grape acreage is planted to so-called "premium" or varietal grapes. Gallo purchases about one-third of this supply, while the remainder is purchased by Robert Mondavi, Wente, Mirassou, Sebastiani and others (Tr. 519–20). Dr. Peterson identified Robert Mondavi, Wente and Mirassou as producers of "premium" wine and Sebastiani as a producer of "premium" and "subpremium" wines (Tr. 502, 539).

326. Napa Valley and Central Valley grapes are blended in various percentages and result in wines, including generics, of various quality levels (Tr. 526). The blending of wines is a complicated command decision of the winemaker who may blend wines from different varieties of grapes, from different districts and from different years. Every winemaker blends wines differently (Tr. 3150). Blending in the making of varietal wines varies considerably from winery to winery (Tr. 3150–52).

327. Dessert wines of all qualities are produced primarily from Central Valley grapes (Tr. 525).

Industry Recognition

328. The Wine Institute is a voluntary trade association comprised of wineries from all areas of California.[17] Its members produce wines of all types and at all prices (Tr. 564-65, 2992). Members are not classified according to the prices at which their wines are sold (Tr. 2992). About 90 percent of winery license holders are members of the Wine Institute (Tr. 974). Its purpose is to increase public awareness of wine and to expand the market for it (Tr. 567-68). It is the leading wine industry trade association in the United States (Tr. 582).

329. One of the Wine Institute's functions is to compile statistical data to enable the industry and others to understand the industry's posture, *i.e.*, what is going to market, what is likely to go to market and industry trends in terms of kinds of wines (Tr. 585-86). The statistical surveys were started by Louis Gomberg while he was with the Wine Institute and were intended to inform industry members, grape growers, suppliers to the industry, government agencies and universities of activities occurring in the industry (Tr. 1578-79). **[67]**

330. Members of the wine industry refer to the Wine Institute statistics for industry statistical information. The statistics are considered reliable and are relied upon by members of the wine industry (Tr. 590, 591, 977).

331. As originally prepared in the 1930's and 1940's, the statistical reports were broken down into three basic categories: up to 14 percent alcohol, over 14 percent alcohol, and effervescent. These categories are essentially the same today (Tr. 1578-80). Wine industry statistics are still broken down according to tax categories. Wines under 14 percent are table wines and include the so-called refreshment wines. Wines between 14 percent and 21 percent are aperitif and dessert wines. The third category is sparkling (Tr. 592). The category "all wine", the total of table, dessert and sparkling wines, is reported in the statistical reports and includes both domestic and imported wine (Tr. 979; CX 295 (Table 6)). The Wine Institute statistical reports have never been broken down by price categories nor by "standard" and "premium" classifications (Tr. 980-81; CX 291-92).

332. The Wine Institute has an economic research department to forecast market trends and probable raw material needs for the

[17] California is the largest wine producing area in the United States, followed by New York (CX 293H). California production as a percent of total United States commercially produced wine entering distribution channels in the United States was as follows: 84.6 percent in 1960, 81.5 percent in 1968, 84.9 percent in 1969, and 85.7 percent in 1976 (CX 295N, 366L; Wine Institute Bulletin, March 24, 1978, No. 78-3, Table 2, officially noticed September 27, 1978).

future. The economic research department develops the statistical data published by the Institute (Tr. 585, 972).

333. The Wine Institute has taken public positions on behalf of the California wine industry (Tr. 571). It has a trade barriers program and committee which is concerned with laws, regulations and proposed legislation in local, state and federal jurisdictions which would affect the entire wine industry (Tr. 3026–36).

334. The California Wine Advisory Board was a state board that administered a state marketing order for wine. It was in existence from 1938 to 1975 (Tr. 965). All producing wineries in California were assessed to provide funds for the Board (Tr. 969–70).

335. The programs of the Wine Advisory Board included promotion of California wine and generic advertising of wine, without the use of brand names. There were also programs dealing with trade barriers, economic research and statistics. The Wine Advisory Board for a time prepared the statistical reports that are now prepared by the Wine Institute (Tr. 966, 972).

336. There is a trade magazine for the wine industry called *Wines and Vines.* It reports on the California, United States and world wine industry (Tr. 2992). *Wines and Vines* publishes an annual directory of the United States wine industry listing winery capacities (Tr. 1745). [68]

337. Respondent Heublein has recognized "all wine" as a market. E.W. Kelley, Executive Vice President of Heublein commissioned McKinsey and Company to study United Vintners and the wine industry (Tr. 4533; CX 220). The study was prepared by McKinsey employees and by Andrew Beckstoffer who was on Kelley's staff and was Heublein's Manager of Acquisition Analysis (Tr. 4533, 8945). The McKinsey study was first reviewed by Kelley and then presented to the top management of Heublein (Tr. 4529–30, 4978). The study depicted the growth in the overall wine market (CX 220E). It compared the growth rates of individual companies such as Paul Masson, Almaden, Christian Brothers, Beaulieu, Gallo and Roma on the basis of all wine (CX 220H).

338. In discussing "Competitive Structure" and the relative size of competitors, the McKinsey study states: "Except For United Vintners And Gallo, Industry Is Composed Of Many Small Competitors," and lists as competitors United Vintners, Gallo, Taylor, Almaden, Paul Masson, Christian Brothers, Beaulieu, Beringer Brothers, Korbel, Wente, Martini and imports (CX 220I). This list includes both "standard" and "premium" producers, the distinct categories now contended for by HUV (RX 1, 17). The market shares of these firms and of imports as a whole are then presented as

percentages of the total dollar sales and case sales for all wines sold in the United States (CX 220I). In presenting a picture of wine production, the statistics used are for all wines and are not subdivided by type or price (CX 220K). United's market share in major geographic areas is presented as a share of the total United States wine market (CX 220Q).

339. In a proxy statement to its shareholders in connection with the acquisition of United, Heublein's and United's market shares are listed as percentages of total industry gallonage in the categories of still wines and champagnes. No distinction is drawn between price or quality classifications (CX 55Y).

340. In the section on "Competition and Regulation," the proxy statement states generally that "The wine industry is highly competitive and its productive capacity is substantially greater than the present rate of consumption." No distinction is made among product types or prices (CX 55Z).

341. There are no wine universe statistics prepared for industry use which are broken out between "standard" and "premium" (Tr. 10,044, 10,047, 10,337–38).

342. Heublein made a presentation to the Federal Trade Commission staff during the investigation which preceded this proceeding and voluntarily furnished additional documents supplementing the oral presentation (CX 327A, B). The documents discuss the competitive position of United Vintners [69]in terms of United's market share of the total domestic wine market, the domestic table wine market, the domestic sparkling wine market, and the market for all other domestic wines (CX 327U, Z–35). These same markets were used in discussing United's market share of wines sold in various states (CX 327V, W, Z–36 thru Z–40).

343. United also recognized the "all wine" market. Richard Oster, when he was president of United, justified a budget request by using charts reflecting United's share of market (Tr. 7809–10). The charts he used show United's and Gallo's share of the total United States wine market and is not subdivided into price or product categories (RX 1247B–C). In a talk presented to Heublein's management committee, Oster described United as "a strong number two factor in the United States wine industry" (Tr. 8000).

344. Mr. Oster's monthly reports to Stuart Watson, Chairman of the Board of Heublein, reflect that United's management monitored and reported United's performance in terms of its share in the all wine market (CX 238C, 239C, 240D, 241D, E, 242C, 243D, 244D, 246E).

345. Mr. Oster's successor, John Powers, is Chairman of the Board and Chief Executive Officer of United (Tr. 9420, 9425–26). Mr.

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Powers continues to monitor United's performance in the "all wine" market. In another proceeding, Mr. Powers responded to a question as to United's market share, by giving United's share in the all wine market—at that time 18 percent. Upon further questioning he was unable to state United's market share in product or price categories such as "low", "standard" or "premium" (Tr. 9671-72).

346. Mr. Bruno C. Solari, President of United Vintners prior to the acquisition, was concerned about the entry of distilled spirits suppliers such as Seagram into the "wine business". He described Seagram as controlling 4 to 5 percent of the "wine business", without further categorization (Tr. 4686, 4688).

347. Robert Ivie, President of Guild Wineries and Distillers, was Chairman of the Wine Institute from 1974 to 1977 and a director for the nine previous years (Tr. 2964, 2967-68). He was part of a Wine Institute group which made a presentation to the Cost of Living Council for relief from price controls (Tr. 2987, 2990).

348. The Wine Institute made the presentation for the wine industry. The industry recognized that those of its members permitted under price control regulations to raise prices could not do so because "a significant pricing factor in the wine market," Gallo (whose prices were at the low end of the spectrum), was prevented by regulation from raising its prices. The industry recognized that, as a practical [70]matter, other firms could not raise prices as long as Gallo was precluded by regulation from raising its prices. Other members of the industry were thus deterred from raising their prices to reflect their costs, as permitted under the pricing regulations. This presentation of the industry position was made on behalf of all members of the Wine Institute including those whose wines were high priced, and was supported by the "premium" wineries (Tr. 2987-90). Other presentations requesting relief from price controls for the "wine industry" were made by the Wine Institute (see, *e.g.*, CX 313).

Government Recognition

349. The federal government has a 4-digit standard industrial classification number for all wine (CX 318).

350. The Federal Alcohol Administration Act and regulations thereunder make no distinctions among price categories of wine (Tr. 4104-05; CX 310). Neither do the Internal Revenue Code regulations applicable to wine (CX 309). The federal excise tax rates applicable to wine vary with product type, but not according to wine quality or price (CX 363A-B).

351. The California Board of Equalization uses tax categories of still wine not over 14 percent, still wine over 14 percent and sparkling wine, but makes no distinctions between "standard" and "premium" wines or price categories (Tr. 1727, 9696–97). The California marketing order for wine which was administered by the California Wine Advisory Board applied to all California wineries producing wine (Tr. 581, 582).

Common Channels of Distribution

352. In most instances, "standard" and "premium" wines pass through the same wholesale channels of distribution (Tr. 9738). Most wholesale distributors for Inglenook ("premium") wine were also Italian Swiss Colony ("standard") distributors (Tr. 7952–53). In 13 of the leading 15 metropolitan markets for wine, 24 out of 34 United distributors carried both Inglenook and Italian Swiss Colony wines (CX 533A). Over 70 percent of United's distributors carry both its "standard" and "premium" table wines (Tr. 9881). United's company-owned distributors in the Southern California and New York/New Jersey areas distribute both "standard" and "premium" wines (Tr. 9718–19, 9743).

353. Of the six distributor witnesses who categorized wines as "standard" or "premium", four carry both "standard" and "premium" wines (Tr. 3409, 6159, 6174, 6549, 6575, 7313–14; CX 400A, B). The sales forces of wholesale distributors are [71]responsible for sales of high and low priced wines and all product types (Tr. 3437, 6649–50, 7430; CX 400).

354. All wine companies compete with one another for wholesale distributors (Tr. 1084). Mr. Bruno C. Solari, former president of United, who testified that United's low priced wines and Seagram's high priced wines did not compete, feared Seagram's entry into the wine business (Tr. 4686, 4693–94, 4766–67). He felt that distribution of United's low priced wines would be foreclosed to certain distributors who carried the higher-priced Seagram's wines (Tr. 4686, 4689, 4693–94).

355. In at least eight control states, the state is the only distributor. Thus all wines must pass through the same distribution system all the way to the state retail stores (Tr. 9623–24; CX 379 O).

356. Wines of all types are sold through the same retail channels of distribution. Retail package stores carry both higher priced and lower priced wines (Tr. 3437, 6305, 6306, 7622, 8541, 9737). Grocery stores and supermarkets also carry both "standard" and "premium" wines (Tr. 3437, 8541, 9737).

357. The wine buyer for 130 stores of a California grocery chain testified that the range of wine prices in these stores was $.83 per fifth to $5 per fifth retail. He was allotted a limited shelf space for all wines in general (Tr. 2047, 2050–52, 2060).

358. All wines compete for shelf space and displays in retail stores (Tr. 655, 1084).

359. Both so-called "standard" and "premium" wines are carried by distributors for sales to restaurants (Tr. 1079–80, 6174–75, 6263, 6265–66, 6270, 6273; CX 400A, B).

360. Both fine wines and "jug" wines (sizes larger than one-fifth of a gallon) are sold in restaurants (Tr. 782). Fine wines on the wine list compete with the "jug" wine sold as a house wine. Customers vary their choices from time to time (Tr. 728, 782–83, 788–90, 2862). Inexpensive wines are sold to neighborhood restaurants and pizza parlors as house wines (Tr. 6262–65, 6310, 6574, 7321).

Consumer Understanding, Use and Buying Habits

361. Some consumers buy low-priced wines for all occasions, while others limit their purchases to high-priced wines. More customers, however, buy wines of varying quality and price (Tr. 776–77, 782, 2849–50, 7852). Consumers experiment by trying wines of various prices (Tr. 2974–75). Some join wine appreciation classes or groups (Tr. 728, 735–36, [72]2797–99). Even wine connoisseurs and other knowledgeable wine drinkers drink both high-priced and low-priced wines (Tr. 2851).

362. Consumers, considered collectively, think of wines over a wide range of price as suitable for a particular use, such as for drinking with a meal. This would encompass what might be considered low-priced, medium-priced and high-priced wines (Tr. 2977–78, 2984).

363. As testified by Dr. Barnes, HUV's economic expert witness, products subject to relatively frequent purchase "do tend to be regarded by consumers as sometimes substitutes for one another" (Tr. 10376).

364. Consumers may purchase a lower priced wine for everyday use and drink a higher priced or higher quality wine on special occasions, for example, when entertaining (Tr. 775, 2851, 2976–78, 2197). In restaurants, consumers may choose a lower priced house wine one time and a higher priced wine from the wine list the next (Tr. 783, 2862).

365. Consumers buy wine not on the basis of quality or price alone, but also on the basis of value in relation to price (Tr. 772,

2851). For example, a consumer who has tried both Gallo's Andre champagne at $1.98 and Korbel champagne at $6 might select either, or a different champagne. He would not necessarily choose the most expensive (Tr. 2316–17, 2330, 2332).

366. The determination of wine quality includes an element of subjective preference (Tr. 745, 2332, 2884). A consumer who prefers sweet-tasting wines might choose Gallo's lower-priced Andre champagne over the higher-priced and supposedly higher quality Korbel product because Andre tastes sweeter (Tr. 2332).

367. There is a learning curve for wine consumption. Consumers generally prefer sweeter wines when they first drink wine and move toward drier ones as they gain experience (Tr. 768–69, 2849, 5281).

368. Consumers commonly trade up in price and quality over time, purchasing the next higher grade or price category (Tr. 2975, 6281).

369. Trading up is a phenomenon that is recognized and exploited in the wine industry. Montcalm attempted to offer a full range of products for the consumer's maturing wine preferences (Tr. 5281). The maker of the more expensive Korbel champagne encourages trading up by consumers (Tr. 2335). "Standard" wine companies try to retain consumers who are trading up by offering varietal wines (Tr. 6281). [73]

370. United recognized the phenomenon of trading up. Richard Oster, United's former president, testified that Lejon champagne advertising was designed to trade up some consumers of lower priced wines (Tr. 7851–52). In Oster's judgment, Inglenook Navalle was directed at the person who wanted to trade up from "standard" wine to a "slightly better" product (Tr. 7949–50). Heublein's 1972 Annual Report stated that Inglenook wines were intended to capitalize on consumers' trading up as they gained knowledge of wines (CX 53 O).

371. Heublein realized that Harveys Bristol Cream competes not only with imported sherries, but also with domestic sherries, which a Heublein marketing plan called the "domestic 'fifth' sherry trade-up market" (CX 97K). In the section entitled "Competition", the marketing plan points out that Gallo, Taylor and Paul Masson cannot be overlooked as competition to Harveys Bristol Cream (CX 97L). At that time, the California retail price of Harveys Bristol Cream was $6.89, Taylor's was $1.75 and Gallo's was $.82 (CX 97M).

372. Consumers understand the term "premium" wine as constituting a quality claim (Tr. 774, 2854). "Premium" may be used by almost any winery under many different conditions and has no precise meaning to consumers (Tr. 839). "Premium" has been used in advertising and publications with reference to the wines of Gallo,

Italian Swiss Colony and Beaulieu, wines whose prices are vastly different (Tr. 839).

373. Gallo, whose products are low-priced, has long used the term "premium". In the late 1950's, Gallo undertook an extensive advertising campaign in which its wines were advertised as "premium" (Tr. 1647, 1648). Edward Shaw, a Young and Rubicam advertising agency executive responsible for Gallo's advertising, testified that Gallo used advertisements on nationwide television in 1973 and 1974 which described Gallo as a "premium" wine (Tr. 4887, 4889–90, 4892–95). The term "premium" was used in those commercials to convey a quality image of Gallo, its quality vineyards, grapes, and wines (Tr. 4895–96; Comm. Phys. Exh. Y, Z, Z–1, Z–2).

374. United itself has advertised its comparatively low-priced Italian Swiss Colony brands of wine as "premium". In an advertising brochure entitled "Fine Wines from Italian Swiss Colony," the Private Stock and Napa Sonoma Mendocino table wines were described as "premium table wines" (CX 333C, D). The label on Napa Sonoma Mendocino bottles also used the word "premium" (Tr. 1886). These wines are classified by HUV for purposes of this case as "standard table wines" (CX 1E).

375. United advertises its Italian Swiss Colony wines as coming from "premium wine country" (CX 333B). [74]

376. The original Italian Swiss Colony settlement emphasized in United's advertising was at Asti in Sonoma County, a part of the north coast area (Tr. 4094; CX 333B, 443A, B). The Italian Swiss Colony visitor center and tasting room are at Asti (CX 443A). Italian Swiss Colony wines are labelled as "made and bottled" at "Italian Swiss Colony, California," or use a San Francisco address (Comm. Phys. Exh. A, B, C, F). "Italian Swiss Colony, California," however, is only a post office address for United's winery at Madera, California, which is in the Central Valley (Tr. 4093).

377. Consumers do not use the term "standard" wine (Tr. 774, 2855). Robert Furek, a marketing employee of United for eight years and a former vice president for marketing of United, does not recall the term "standard" ever being used in advertising or promoting Italian Swiss Colony wines (Tr. 8528–29). The term "standard" is not used on wine labels (Tr. 795).

378. Label styles on bottles of widely distributed "standard" and "premium" wines are so similar that a consumer cannot determine which wine is "standard" and which is "premium" from labels (Tr. 795–96, 805–06, Comm. Phys. Exh. G, L). This was demonstrated on the record with respect to five widely distributed champagnes. Champagnes selling in 1974 for $1.99 (Andre), $2.79 (Gallo), $2.99

(Lejon), $5.25 (Almaden) and $5.59 (Korbel) could not be distinguished as "standard" or "premium" on the basis of labeling or type of bottle closure (Tr. 806-08, 822; CX 218Z-262, Z-280, Z-281, Z-294, Z-295; Comm. Phys. Exh. J, D, O, Q).

379. Both high-priced and low-priced wines come in cork-sealed bottles (Tr. 819). Gallo wines selling for less than $2.00, as well as other low-priced wines, are cork-sealed (Tr. 819). Franzia sells cork-sealed wines which are "standard", as does Geyser Peak in its Summit line which is "standard" (Tr. 6279-80). Many low-priced, low-quality imports are sold with cork-sealed bottles (Tr. 820; Comm. Phys. Exh. V, W).

380. Jug wines are those which come in larger than fifth size bottles, *e.g.*, gallon or half-gallon bottles (Tr. 756). The same wines are also sold in fifths (Tr. 879-80, 2867).

381. As of 1974, the following brands of wines which HUV classified in their market share tables as "premium" or "mountain" were sold in both fifth and larger size bottles:

Almaden	(CX 218Z-262, 440Z-259)
Paul Masson	(CX 218Z-266, 440Z-263)
Christian Brothers	(CX 218Z-270, 440Z-268)
Guild (Cresta Blanca)	(CX 218Z-272, 440Z-269)
Beringer (as of 1972)	(CX 218Z-277, 440Z-261) [75]
Harveys Bristol Cream	(CX 218Z-289, 440Z-226)
Lancers	(CX 218Z-290, 440Z-226)
United Vintners (Inglenook Vintage)	(CX 218Z-291, 440Z-279)
United Vintners (Inglenook Navalle)	(CX 218Z-291, 440Z-279)
Korbel	(CX 218Z-294, 440Z-278)
Mogen David	(CX 218Z-299, 440Z-285)
Monarch (Manischewitz)	(CX 218Z-300, 440Z-386)
Robert Mondavi	(CX 218Z-300, 440Z-286)
C. Mondavi (CK)	(CX 218Z-301, 440Z-287)
Sebastiani	(CX 218Z-309, 440Z-292)
Taylor (as of 1978)	(CX 485C, 440Z-127)
Wente	(CX 218Z-313, 440Z-293)
Louis Martini	(CX 218Z-212, 440Z-211)
California Wine Assoc. (Eleven Cellars)	(CX 218Z-265, 440Z-266)

382. As of January 1974, the following brands of wine which

HUV classified in their market share tables as "standard" were sold in both fifth and larger size bottles:

Franzia	(CX 218Z-278, 440Z-270)
Gibson	(CX 218Z-274, 440Z-275)
Gallo	(CX 218Z-280, 440Z-271)
Guild (Cribari and Winemasters)	(CX 218Z-287, 440Z-277)
United Vintners (Italian Swiss Colony)	(CX 218Z-292, 440Z-281)
United Vintners (Petri)	(CX 218Z-304, 440Z-289)
Guild (Roma)	(CX 218Z-305, 440Z-290)
California Growers (Growers)	(CX 218Z-286, 440Z-276)
California Wine Assoc. (L&J)	(CX 218Z-265, 440Z-266)

383. Consumers cannot distinguish between "standard" and "premium" wines on the basis of packaging because of the similarities in labelling, closure and bottle size (Tr. 824).

384. Only a limited number of consumers understand the difference between generic and varietal wines (Tr. 808-09). Neither generic nor varietal wine labels usually disclose the percentage of varietal grapes used in the wine (Tr. 810-11).

385. Vintage dating of wines may be misleading to the consumer attempting to determine the quality of wine (Tr. 813).

386. Wineries use d/b/a (trade) names on their labels. When d/b/a names are used, consumers cannot determine what company has actually produced the wine (Tr. 813). [76]

387. Under current regulations of the Bureau of Alcohol, Tobacco and Firearms, consumers are unable to determine where a wine was produced from the label on the bottle (Tr. 4100). Wine may be shipped from the Central Valley to the north coast area and be labeled as "produced and bottled" at a north coast location if a company owns facilities in both areas. In such a situation, 100 percent Central Valley wine may be designated as "produced and bottled" at the north coast location (Tr. 4143). Wine can be shipped from the Central Valley to the north coast and be labeled as "made and bottled" at a north coast location even if the firm selling the bottled wine has not made any of it (Tr. 4144, 4147).

388. The term "estate bottled" originally meant that a wine so labelled was produced entirely from grapes grown by the producer in vineyards within five miles of the winery. The term is now so loosely

used it has practically no meaning to the consumer (Tr. 811–12, 4051, 4058–60, 4073).

389. There is a spectrum of wine prices from which consumers may choose (Finding 280 *supra*). Wine prices do not fall in distinct groups with large gaps between them but constitute a continuous spectrum (CX 218, 440).

390. Burgundy prices are an example of the continuum. Burgundy is a common generic red table wine named after the Burgundy region of France. Domestic wines with similar characteristics are called burgundies (CX 308K, L). Burgundies are available over a wide and continuous spectrum of prices (CX 218). A consumer selecting a burgundy is faced with a vast array of choices among brands and retail prices (CX 218):

$ .89	Gallo (Carlo Rossi)	(CX 218Z–281)
.99	United (Petri)	(CX 218Z–304)
	Franzia	(CX 218Z–278)
1.09	Guild (Cribari, Tavola)	(CX 218Z–289)
1.29	United (Italian Swiss Colony)	(CX 218Z–292)
1.29	Gallo (Gallo Burgundy)	(CX 218Z–280)
1.39	Gallo (Gallo Hearty Burgundy)	(CX 218Z–280)
1.59	Almaden (Mountain Red Burgundy)	(CX 218Z–262)
	United (Italian Swiss Colony Private Stock)	(CX 218Z–292)
1.69	United (Napa Sonoma Mendocino)	(CX 218Z–292)
	United (Inglenook Navalle)	(CX 218Z–291)
1.89	Almaden (Mountain Burgundy)	(CX 218Z–262)
1.99	Beringer (Beringer)	(CX 218Z–277)
	Paul Masson	(CX 218Z–266)
	Christian Brothers	(CX 218Z–270)
2.15	Sebastiani	(CX 218Z–309)
2.19	United (Inglenook Vintage)	(CX 218Z–291)
2.25	Korbel	(CX 218Z–294)
	Charles Krug	(CX 218Z–269)
2.50	Beaulieu Vineyard	(CX 218Z–263) [77]
2.75	Mirassou	(CX 218Z–299)
2.75 29.15	Heublein (Bouchard imported red Burgundies, 28 different selections)	(CX 218Z–288)

(Prices are per fifth bottle at retail in 1974 in California)

391. For 1974, HUV's proposed price cut-off between "standard"

and "premium" table wines is $2.00 (RX 585). HUV's position that a table wine selling for just under $2.00 would not be in competition with one selling for just over that amount (while at the same time acknowledging that all table wines selling at all prices under $2.00 would be in competition with each other and all table wines selling at all prices over $2.00 would be in competition with each other) is untenable.

392. Not only does the price of burgundy vary from brand to brand but also within any given brand. Burgundy is only one specific type of table wine among many others selling at different prices so that the prices of competing table wines have even smaller gaps than are demonstrated for burgundies alone (CX 218Z-262 thru Z-303, 308K, 440Z-258 thru Z-294). Each of the other types also varies in price between brands and from brand to brand (CX 218Z-262 thru Z-303, 440Z-258 thru Z-294).

393. United's own table wine prices illustrate the variety of prices at which table wines are available (CX 536E, F, I):

Petri

$1.19 Burgundy, Chianti, Chablis Blanc, Pink Chablis, Vin Rose, Rhine, Sauterne

Colony

$1.39 Alfresco Rose, Alfresco Blanc
$1.49 Rose, Rhineskeller, Moselle, Chianti
$1.59 Sauterne Blanc, Rhine, Burgundy, Emerald Chablis, Pink Chablis, Gold Chablis, Ruby Chablis
$1.69 Ruby Cabernet, Zinfandel, Barbera, Rhine Riesling, Chenin Blanc, French Columbard, Pinot Noir
$1.79 Cabernet Sauvignon
$2.49 Tipo Chianti [78]

Inglenook Navalle

$2.09 Burgundy, Chablis, Vin Rose, Rhine, Riesling
$2.19 French Columbard, Chenin Blanc, Zinfandel, Ruby Cabernet

Inglenook Vintage

$2.70 Burgundy, Chablis, Rhine, Cabernet Rose

Inglenook Estate

$3.75 Gamay Rose, Gamay Beaujolais, Zinfandel, Petite Sirah, Sauvignon Blanc
$4.00 Chenin Blanc, Grey Riesling
$5.00 Pinot Noir
$5.50 Gewuztraminer, Johannisberg Riesling, Charbono
$6.50 Cabernet Sauvignon, Pinot Chardonnay
$7.50 Red Pinot/Pinot St. George, Pinot Noir (Cask)
$8.50 Cabernet Sauvignon (Cask)

All prices are for fifth gallon bottles at retail in California in August 1978 (CX 536E, F, I).

394. Sherry is a common dessert wine (CX 308C). It is available over a wide and continuous spectrum of prices. A consumer purchasing a sherry faces many choices among brands and retail prices (CX 218). This range of choice was recognized by Heublein in its marketing plan for Harveys Bristol Cream where Gallo's $.82 sherry and Harveys at $6.89 are shown as competitors (CX 97K, L).

395. Champagne, a sparkling wine (CX 308C), is another example of a type of wine sold over a broad spectrum of prices (CX 218):

$ 1.95	Gallo (Andre)
	Franzia
	United Vintners (Jacques Bonet)
$ 2.49	United Vintners (Italian Swiss Colony Private Stock)
$ 2.79	Gallo (Gallo)
$ 2.99	United Vintners (Lejon)
$ 3.10	Almaden (Le Domaine)
$ 3.49	United (Lejon Blanc de Blancs)
$ 4.55	Christian Brothers
$ 4.99	Paul Masson
	Taylor (Great Western) [79]
$ 5.25	Almaden
$ 6.00	Beaulieu
$ 6.50	United Vintners (Inglenook)

$ 7.00	Beaulieu (Private Reserve)
$11.25	Mumms (Extra Dry) (Imported)
$14.65	Mumms (Cordon Rouge) (Imported)

(Prices are per fifth bottle at retail in 1974 in California)

396. Dr. Richard Courtney, an economist, is Vice President and Senior Economist at the Bank of America (Tr. 5435). He is an expert on consumer demand theory, the rationale behind consumer purchasing decisions and the way in which consumer purchasing decisions are translated into market demand functions (Tr. 6024, 6025).

397. As testified to by Dr. Courtney, a most significant factor in determining whether products are in competition with one another is substitutability as viewed by buyers (Tr. 5992–99). If a wine purchaser can buy wine over a range of prices, products within that range are viewed as substitutes for one another. And the products in that price range are in competition with one another (Tr. 5995).

398. The likelihood of individual consumers substituting wines of differing prices is greater if wines are sold over a range or spectrum of prices rather than at distinctly separate price points. The difference in price of a few cents is not likely to inhibit the consumer from substituting one wine for another (Tr. 5994, 5995). This is particularly true of frequently purchased, relatively low priced products such as wines, as opposed to high priced products such as automobiles, houses or television sets (Tr. 10,376). As found above, table wines, dessert wines and sparkling wines are each offered in a spectrum of a multitude of prices with closely spaced intervals.

399. Individual consumers and groups of consumers are more likely to substitute products from various producers as the number of alternatively priced products are increased and the price difference among products decreases (Tr. 5996–97). Many of the major low priced wine producers have expanded their product lines into a higher price range. Other major producers of high priced wines have extended their product lines into a lower price range (Findings 301–06, *supra*).

400. As wine prices do not invariably reflect their quality, there is a range of prices for wines of comparable quality. Wines of differing prices are thus substitutes for one another in terms of quality (Tr. 5997–98). [80]

401. To the extent consumers trade up over time to higher priced or higher quality wines, they are considering a wider range of alternatives (Tr. 5998–99). Trading up indicates that consumers view a broader range of alternative products as substitutes (Tr. 5998–99).

This is particularly true when substitution is viewed over a period of time (Tr. 5998-99).

402. The very considerations involved when a purchaser is determining whether to trade up from the so-called "standard" category to the "premium" category places all of the wines being judged in direct competition (Tr. 5998-99).

403. As consumers buy wines at different prices, they increase their knowledge about wines and broaden the range of wines which they consider acceptable substitutes. Consumers generally learn to appreciate drier and more complex wines as they gain experience and knowledge of wines (Tr. 768, 2849).

404. The availability of wines of various types and prices in a store or restaurant has an effect on the consumer's ability and inclination to substitute among them. A store or restaurant offering a wide selection of wine will allow a customer more substitutes among a broader range of wines (Tr. 5997).

405. Consumers have a range of choices in wine price and quality and the various wines from which they choose are in competition with one another (Tr. 788-89, 2868).

2. Submarkets—Table, Dessert, and Sparkling Wine

Production

406. In table wine production, grapes are delivered to the winery and crushed by mechanical crusher. The crushed grapes and their juice (called "must") are pumped into fermenting vats or tanks where fermentation takes place (CX 308V). In the process of fermentation, the grape sugar is converted to alcohol and the finished product is wine (Tr. 3130). Complete natural fermentation of grapes generally results in an alcohol content of 10 to 14 percent. Rarely does natural fermentation result in wines over 14 percent in alcohol (CX 308V). The use of 14 percent as a breaking point between tax categories for wine is because of this natural alcoholic level of wine (Tr. 1580-81). Fermentation takes from a few days to several weeks (CX 308V). Clarification of the liquid is done either before or after fermentation for white wines, and after fermentation for red wines. After fermentation, wines are aged (Tr. 3133-34, 3142-43). There are variations in length of aging, types of containers in which wines are aged and size of aging containers (Tr. 3133-34, 3139-40, 3142, 3143). Most wines are then blended to attain desired characteristics (CX 308Y). The wine is then bottled [81]and some wines are aged further in the bottle before shipment (CX 308Z-1).

407. The production of dessert wines (including appetizer wines

and vermouth) is essentially the same as for table wines through the fermentation process. Additional steps are required after fermentation, however. Dessert wines must be fortified to reach the desired over 14 percent level of alcohol. Fortification is accomplished by the addition of distilled alcohol from another source (Tr. 3154–55). Dessert wines are generally made with at least 17 percent alcohol to prevent spoilage (Tr. 3153–54). Fortification stops the fermentation process. The wine is then clarified and may be aged before being bottled. In the case of most sherries, the wine is generally baked (aged at high temperature) and clarified. It may then be aged or immediately bottled (Tr. 3158–59). Vermouths are flavored with herbs after fortification, following which they are clarified, aged for a short time and then bottled.

408. Sparkling wines are basically table wines with additional production steps to add the sparkle (Tr. 919). Sparkling wines are made from still (nonsparkling) white table wines. Sugar and yeast are added to the still wine in a closed container. The wine then undergoes a second fermentation, creating carbon dioxide which is not allowed to escape (Tr. 3170–71). This second fermentation can be done in a large (1,000–24,000 gallon) tank or in fifth gallon containers. If done in a tank the wine after fermentation is filtered in the tank to remove the yeast, bottled under pressure and then sold. If the second fermentation is done in bottles the wine may be transferred under pressure to a tank for filtering of the yeast. It is then rebottled and sold. This is called the "transfer process". Another method of removing yeast from the bottle involves keeping the bottles turned on end to allow yeast to settle in the neck of the bottle. The yeast is removed by freezing the bottle neck, removing the cap and allowing the frozen yeast to pop out. The bottle is then topped off, resealed and sold (Tr. 3171–74). This is called the "bottle process". Carbon dioxide can also be added to wine by artificial carbonation. There are not many carbonated wines on the market (Tr. 3170).

409. In the production of all wines there are many decisions made by the winemaker and many variations in the production process which cause variations in the resulting wines. As explained by Dr. Amerine, one of the leading authorities in viticulture and enology, "There are thousands of variations, almost as many as there are winemakers, time, temperature, procedures, when the procedures are applied, all of which to a smaller or larger extent will affect the gradation and quality of the wine" (Tr. 3153). [82]

410. The production of dessert wines requires equipment in

addition to that needed for table wines, including fortification tanks and a still to make alcohol for fortification (Tr. 529).

411. Production of sparkling wines requires specialized equipment not needed for table wines. Sparkling wines require pressure-resistant tanks to withstand the high pressure generated in the tank process or in the transfer process (Tr. 926, 3171–72). Pressurized bottling equipment and special corking equipment is needed. More expensive pressure resistant bottles, more expensive thicker corks and wire to hold the corks on are also required (Tr. 530, 923–24; CX 308Z–3).

412. Special handling is required for sparkling wines because of the hazards from pressurized bottles. Workers use gloves, face shields and protective aprons in handling sparkling wines (CX 308Z–4; Tr. 531).

Physical Differences

413. There are many differences in chemical composition (besides alcohol content) between table and dessert wines (Tr. 3168).

414. Table wines deteriorate soon after they are opened, while dessert wines, because of their higher alcoholic content, do not (Tr. 2846).

415. Sparkling wines lose their quality soon after opening (Tr. 2846).

416. Sparkling and carbonated wines contain a minimum level of carbon dioxide specified by government regulation (Tr. 3113, 3170; 26 U.S.C. 5041(a)). Thus, by legal requirement, they are different.

Differences in Use

417. As testified to by wine expert and columnist, Robert Balzer, "Even in relatively unsophisticated consumers there is the recognition that there are differences in wine and they fall into categories of table wine, appetizer and dessert wines, sparkling wines. Each one nominates itself for a different kind of use" (Tr. 2843–44).

418. Table wine, historically, is a fundamental and basic commodity and is the most important category (Tr. 2844). Table wines are generally served with a meal (Tr. 2844; CX 308D). Red, white and rose wines are each generally thought to go best with certain foods (CX 308N thru P).

419. Dessert wines (including appetizer wines) are generally used before or after a meal. The term "dessert wines" refers to wines over 14 percent in alcohol whether drunk as an appetizer or with dessert (Tr. 3153; CX 308L). [83]The main appetizer wines are sherry (except

cream sherries) and vermouth (CX 308M). Wines served with dessert include port, muscatel and tokay (CX 308 O). Cream sherries are sweet and are therefore generally drunk after dinner with dessert (CX 308M).

420. Sparkling wines are generally associated with festive uses or special occasions (Tr. 2845, 4884, 6290).

Consumer Recognition

421. Consumers generally recognize and understand the differences among table, dessert and sparkling wines. They are generally familiar with the names of common table wines as distinguished from the names of common dessert wines (Tr. 814, 2846–47).

422. Consumers are able to determine from the appearance of the bottle whether a wine is a sparkling wine as distinguished from either table or dessert wine. Sparkling wines are packaged in relatively thick bottles which have a different shape from bottles used for table and dessert wines. The appearance of the closure is also distinctive for sparkling wines (Tr. 814–16).

423. Dessert wines are frequently labeled "dessert wine." It is not unusual for table wines to be labeled "table wine" (Tr. 814).

Government and Industry Recognition

424. The wine industry recognizes three basic categories of wine which are commonly called table, dessert and sparkling wines (Tr. 1579–80, 1811–A). Still wines not over 14 percent alcohol are called "table wines". Still wines over 14 percent alcohol are called "dessert wines". Effervescent wines are called "sparkling wines" (Tr. 1579–80, 1811–A, 4107–08). Flavored wines are called "special natural" wines (26 U.S.C. 5386(a); CX 309K).

425. Table wines: All still wines not over 14 percent alcohol are taxed at $.17 per gallon (26 U.S.C. 5041(b)(i): CX 363; Tr. 4106). This category includes those flavored ("special natural") still wines not over 14 percent in alcohol such as Sangria and "refreshment wines" (26 U.S.C. 5041(o)(1); CX 363).

426. Dessert wines: All still wines over 14 percent alcohol, with one exception, are taxed at $.67 per gallon (26 U.S.C. 5041(b)(2); CX 363; Tr. 4107). This category includes those flavored ("special natural") still wines over 14 percent in alcohol, such as vermouth (26 U.S.C. 5041(b)(2); CX 309K, 363). The one exception is wines between 21 percent [84]and 24 percent alcohol which are used for blending only and are not commonly sold to the public (Tr. 4107–08).

427. Sparkling wines: Effervescent wines include "sparkling

wines" taxed at $3.40 per gallon and "artificially carbonated wines" taxed at $2.40 per gallon (CX 309J, 363). Artifically carbonated wines are a small part of the market (Tr. 3170). They include flavored ("special natural") effervescent wines (CX 309J, 363). Although artificially carbonated wines are taxed at a different rate, they are generally considered to be "sparkling wines" (Tr. 3170). The Wine Institute statistical tables have no separate category for carbonated wines, but include them with sparkling wines (CX 297A).

428. State taxes on wines also use the same three basic categories (CX 379R; Tr. 1578-80). In all but two states, the tax rates on carbonated and sparkling wines are the same. In all but one state, the tax rate on vermouth and other dessert wines are the same (CX 379R; Tr. 1579-80).

429. Table, sparkling and dessert wines are the three basic categories recognized by the wine industry. Industry witnesses categorized wine products in these three general categories (Tr. 617, 620, 919, 4192-93, 7422, 7424, 7592-93).

430. Table, sparkling and dessert wines are the basic categories utilized in reports on the wine industry's activities and trends. The *Wine Marketing Handbook,* described as the "industry bible" by a former vice president of marketing of United, reported wine sales for all wines and the three basic categories plus vermouth (Tr. 3669, 3733; CX 379U). The Bank of America, in a report on the wine industry, reported wine shipments in these three basic categories together with "all wine" (CX 288I-K).

431. United's former president, Bruno C. Solari, testified to the shift in the wine industry from dessert wines to table wines (Tr. 4756). Another former president of United, Richard Oster, testified to the growth of the "table wine market" in contrast to the decline in the "dessert wine market" (Tr. 7778, 7886, 8005). Bruce Johnson, former marketing vice president of United and former Heublein group product manager, testified to United's share of the "dessert wine market" (Tr. 3669, 3754-55).

432. Heublein's marketing strategy for its Vinya wine was intended to "capitalize on the expanding still table wine market" (CX 352N).

433. The McKinsey study of United and the wine industry, in addition to analyzing the wine industry as a whole, reviewed the consumption of wines in the three basic categories, table, dessert and sparkling wines (CX 220K). [85]

434. Louis Gomberg, Heublein's wine industry consultant, reported to Heublein in 1968 United's market shares in the three basic categories of table, dessert and sparkling wines (CX 206A; Tr. 1407).

435. John Powers, Chairman of the Board of United, continually monitors the shipments of United's competitors by using the gallonage figures reported by the California Board of Equalization. "They are an important part of our marketing intelligence" (Tr. 9485). Those gallonage figures are reported in the categories: wines not over 14 percent alcohol, wines over 14 percent alcohol and sparkling wines (Tr. 9696-97). The categories are not subdivided into "standard" or "premium" (Tr. 9695-97). Mr. Powers recognized that Jacare, which now is not carbonated, is a table wine, but when carbonated, was sold in the "sparkling wine market" (Tr. 9977-78).

436. Heublein has recognized the existence of the table, dessert and sparkling wine markets. In a voluntary submission to the Federal Trade Commission staff, Heublein recited the market shares of United in the table, dessert and sparkling wine markets (CX 327A, P, U, V).

437. The differential between the tax rates for table wines ($.17 per gallon) and sparkling wines ($3.40 per gallon) requires that the pricing structure for sparkling wines be higher than for table wines, with a resultant trend toward usage of sparkling wines for special occasions (CX 367T).

3. Exclusion of Refreshment Wines from Table Wine Submarket

438. While, because of their alcoholic content, they are taxed as still wines not over 14 percent, refreshment wines belong in a category separate and apart from other still wines not over 14 percent. This is due to differences in production, in the consumers to whom they appeal, in the uses to which they are put, in the manner in which they are marketed, and in their growth rates and life cycles. They are recognized within and without the industry as constituting a distinct category of wines (CX 53 O, 241E, 247D; RX 345-48).

439. Refreshment wines, also referred to as "pop" wines, are beverages generally much lower in alcoholic content (6-8 percent) than table wines (normally 10-14 percent; CX 308V). They are derived from fermentation of the cheapest available fruit concentrate, either apples, pears, grapes or other citrus fruits. Regardless of the fruit used to produce the alcohol, the resulting wine is "neutralized" or stripped of color and taste. Thereafter, the flavor, sweetener and character of the wine are added (Tr. 429-31, 566-67, 5144, 6179, 9534-36). As the former assistant production manager of Gallo explained: **[86]**

Well, the idea is that you strip the wine clean, more or less free from all flavor, by doing it in a carbon column or ionic machine or some other method, and then you have what amounts to alcohol and water, but it is legally wine, and then you simply add flavor and sugars so that it is palatable and sell it as, with a proprietary name, and that is pop wine (Tr. 430).

440. The bulk of refreshment wine has been produced by Gallo under brands such as Boone's Farm, Ripple and Spanada; by United under brands such as Bali Hai, Annie Green Springs and T.J. Swann; and by Mogen David under the Cold Bear, Black Bear and JUG brands (CX 359L; RX 933K; Tr. 5155, 6181, 7353, 7797–98, 7822–24, 7911–13, 8308–09, 8319–21, 9535).

441. High-speed bottling lines used in the production of refreshment wines cannot be converted to the making of table wine (Tr. 9902). The former executive vice president of Pop Wines, Inc., a company created to specialize in pop wines, testified that Gallo's refreshment wines were competitive with his products but that the wines of other named producers of table wines were not (Tr. 5213–15). The marketing strategies applicable to refreshment wines are completely different from those applicable to dry table wines, even though both are still wines not over 14 percent (Tr. 7353–55, 8006–07, 8305–08, 8319–21, 9536).

442. Refreshment wines are consumed primarily by two segments of the population: young, college-age whites and urban blacks. United's T.J. Swann line, originally marketed to the college-age white consumer, was later repositioned and targeted towards urban blacks when market research showed they were responding to its taste and other characteristics. Many of the young consumers of refreshment wines desire their "soda pop" taste (RX 345B; Tr. 3768–69, 5214–15, 5239–41, 6182, 7796–98, 8319–21, 8362–66, 8555–56, 9535–36, 9978). Refreshment wines are frequently the first type of wine experienced by those who previously had been drinking beer and other non-wine, party-type beverages (Tr. 3768–69, 6182, 7353–55, 8319–20, 9534–36).

443. Consumers generally use refreshment wines for purposes distinct from those applicable to dry table wines. Whereas dry table wines are used primarily as an accompaniment to food at meals, refreshment wines are not so intended and are rarely consumed with meals. Refreshment wines are consumed as social beverages. Consumers who buy refreshment wines are interested in their flavor, palatability and refreshing qualities. Refreshment wines are generally served cold and over ice. They are not normally even promoted as being consumed in wine glasses (RX 345–48; Tr. 8319–20, 9535–36). [87]

444. Due to their refreshing nature and their appeal to youth,

refreshment wine sales have a distinctive seasonal pattern. Monthly shipments of dry table wines to wholesalers are generally even during most of the year, peaking at holidays; refreshment wines have peaks in the warm weather season beginning in April or May and have a major upsurge during the summer period (Tr. 9950).

445. Because refreshment wines are largely consumed at social gatherings of young adults, the major competitive products are soda pop and beer. A former Olympia Brewing Company executive said that his company regarded refreshment wines as competing with beer for the young adult trade. The former executive vice president of Pop Wines, Inc., explained: "The pop wines . . . are seen really as a mid-point, say, between the soda pop business and the beer business. It was essentially a soda pop with an alcoholic content" (Tr. 5214, 6179–81, 8319–21).

446. Refreshment wines are also distinguished from dry table wines by their placement in retail stores. Refreshment wines are shelved together with soft drinks and beer, in a refrigerated area apart from the retail space devoted to dry table wines (RX 347; Tr. 6181, 6607).

447. Sales of refreshment wines are characterized by extreme volatility. In contrast to dry table wines, the life cycles of these wine brands tend to be short, with accelerating sales increases and often with equally rapid declines (CX 53 O).

448. There has been a boom and bust cycle in the sales of refreshment wines. Refreshment wines happened very suddenly (Tr. 566–67). A peak year for refreshment wine sales was 1972 (Tr. 5209–11). From 1967–1972, refreshment wine shipments grew 2,185 percent from a relatively insignificant 2.8 million gallons to more than 64 million gallons. In the same period, shipments of table wines (exclusive of refreshment wines) grew from 85 million gallons to almost 156 million gallons or 83.5 percent.[18] [88]

4. Inclusion of Refreshment Wines in All Wine Market

HUV (RR 125–30; RRPF 148–50) contend that refreshment wines should be eliminated from the All Wine universe as well as from the share of each company in that category. To the contrary, the very evidence above relied upon to exclude refreshment wines from the

[18] The figures for refreshment wine shipments come from RX 15 and 27. The figures for table wines are derived by subtracting the refreshment wine gallonage as shown on RX 15 and 27 from CX 373V thru Z–7 (which include refreshment wine gallonage).

HUV's witness John Powers, Chairman of United, provided United sales figures for refreshment wine (Tr. 9539–40) which are inconsistent with those shown on RX 15. Since RX 15 was prepared as a statistical document for introduction into evidence, was introduced at the very beginning of HUV's defense (Tr. 6058) and the accuracy of the exhibit has never been challenged by any party, I am accepting RX 15 over the testimony of Mr. Powers.

table wine submarket demonstrates that they are properly considered in the broader all wine category.

449. Refreshment wines are fermented and made like other wines up to the point the different processes are followed. They are wines to which flavor has been added (CX 309Z-15). Gallo and United, the dominant companies in the production of all wines are also the dominant producers of refreshment wines and United produces its refreshment wines at the same facilities at which it produces table wines (CX 373; RX 15, 27; Tr. 9901). The winery in which Pop Wines, a company which entered to make only refreshment wines, operated was a bulk winery that had been in existence for 30 to 40 years (Tr. 5134, 5136).

450. Wine, in general, not merely refreshment wine, is recognized by the Wine Institute (the wine industry trade association) as appropriate for use in mixed wine coolers for summer, hot drinks in winter and punches for parties all year around (CX 308G). Table wine use is not limited to meals, and white wines in particular are increasingly being utilized as cocktails (Tr. 7685; CX 367Z-10 thru Z-13).

451. Refreshment wines are viewed as an introductory wine to accustom young consumers to wine drinking with the expectation that they will then develop a taste for better quality table wines (Tr. 5281; CX 53 O). Heublein and United direct promotions of Lejon, Inglenook, Faisca and Lancers wines to young consumers and to ages just older than college level (CX 116N, 129C, 256Z-57, 65).

452. Refreshment wines are sold through the same channels of distribution as all other wines (Tr. 3310-11; CX 218Z-280, Z-281, Z-292, Z-293, Z-295, 256Z-34, Z-38, 371). An effort is made to have white and rose wines placed in the cold box of retailers (Tr. 6609).

453. In summary, while there are differences sufficient to require the exclusion of refreshment wines from the table wine submarket, refreshment wines clearly are properly included in the overall all wine market. [89]

Discussion of Applicable Law and Conclusion

"All Wines" constitute the relevant product market. The following summarizes the application of the criteria enunciated in *Brown Shoe Co.* v. *U.S.,* 370 U.S. 294 (1962):

1) All wines share certain physical characteristics unique to wine and are used for the same general purposes. All wines are products of the fermented juice of grapes or other fruits; and, as alcoholic

beverages distinct from others, their principle use is as articles of food.

2) All wines are produced from similar raw materials, by similar production processes, using similar production expertise. While different varieties of grapes or other fruits may be used to produce different varieties of wine, and while additional steps may be added to the basic production process to produce dessert or sparkling wine, all wines are produced by the basic process of crushing, fermenting, clarification and bottling. Individual wineries are capable of using different varieties of raw materials and of changing their product line and quality.

3) Federal and state governments, as well as the wine industry itself, view the wine industry as a single group. Federal and state regulations (except for different tax rates on table, dessert and sparkling wines) on entry, tax bonding, distribution and retail pricing procedures are common for all wines. Industry trade associations, such as the Wine Institute (the primary trade group), and professional associations such as the American Society of Enologists, include representatives of producers of all wines.

4) All wines are distributed through the same wholesale and retail distribution channels, and are thus in competition with one another for wholesale distribution and retail shelf space.

5) Consumer purchasing patterns indicate public recognition of all wines as being in competition with one another, although consumers may choose particular wines for particular occasions. [90]

While complaint counsel have not shown that price sensitivity[19] exists throughout the all wines market, price sensitivity alone is not determinative of the existence or non-existence of a product market. In *U.S.* v. *Continental Can Co.,* 378 U.S. 441 (1964), the Court held:

> . . . price is only one factor in a user's choice between one [product] or another. That there are price differentials between the two products or that the demand for one is not particularly or immediately responsive to changes in the price of the other are relevant matters but not determinative of the product market issue (at 455).

HUV argue that, since there was a great disparity in retail prices between the products sold in 1969 by Heublein (primarily Lancers at $3.98 and Harveys Bristol Cream at $7.79) and United (the majority of whose products sold for less than $1.50), there was no actual competition between Heublein and United. They contend that " . . . the alleged markets aggregate competitively distinct products and

[19] An additional *Brown Shoe* criterion.

thereby ignore the very competitive realities relevant market determinations are intended and required to honor" (RPF 178).

This position is without merit. ". . . [I]t is improper 'to require that products be fungible to be considered in the relevant market,' *United States* v. *duPont,* 351 U.S. 377, 394," *U.S.* v. *Continental Can Co., supra,* at 449. And, in *Telex Corp.* v. *International Business Machine Corp.,* 510 F.2d 894 (10th Cir. 1975), the court found:

> One evidence of cross-elasticity is the responsiveness of sales of one product to price changes of another. But a finding of actual fungibility is not necessary to a conclusion that products have potential substitutability (at 917-18).

As complaint counsel's economic expert witness, Dr. Richard Courtney, testified (Tr. 5992-93, 5995-96, 6027), interchangeability in use is an accepted measure of substitutability, and products capable of being utilized for the same purpose are substitutes, and thus in competition. All wines, regardless of price, variety, or production method, are capable of consumption as alcoholic beverage food products, and are thus in competition with one another.

HUV rely on *United States* v. *The Federal Company,* 403 F. Supp. 161 (W.D. Tenn. 1975), for the proposition that "when manufacturers of apparently similar products consistently fail to react to each other's price changes, this shows that [91]they do not perceive the products as competitive and that the products do not, in fact, compete" (RPF 224). In that case, the court found that all wheat flours, including family flour, bakery flour, ingredient flour, industrial flour, durham flour and mill feed are not one line of commerce. The court determined that the various products derived from the wheat milling process have different physical compositions and are not substitutes for one another. They are sold at different prices to different customers for different uses and there is not a fixed relationship in price among them; that there are different pricing systems for family flour and bakery flour; and, that each product is usually sold by different personnel. The case, therefore, does not support HUV's position.

Complaint counsel's proposed submarkets, table, dessert and sparkling wines, are also appropriate. The same criteria enunciated in *Brown Shoe,* 370 U.S. 294, support these submarkets. As discussed in the factual findings above, table wines (still wines not over 14 percent alcohol by volume), dessert wines (still wines over 14 percent alcohol by volume) and sparkling wines have distinct physical characteristics (*e.g.,* alcohol content), distinct additional production processes (*e.g.,* fortification or addition of carbonation), distinct uses (*e.g.,* consumption with meal or as aperitif or after-dinner drink), and distinct consumer recognition (*i.e.,* table wine is often referred to as "dinner" wine, champagne is for "special occasions", Tr. 2845, 6290; Heublein's advertising campaign for Harveys Bristol Cream as an after-dinner drink: "Never serve the coffee without the Cream" (CX 97Z-6)).

HUV argue that the proper submarkets should be "standard" and "premium" wines, asserting that there is no competition between these categories, and the industry and public recognizes such a distinction. This position is not supported by the evidence of record in this proceeding and is legally untenable. Despite extensive pleadings, HUV have not shown where clear demarcations in price, packaging, advertising, production, distribution or consumer purchasing patterns are found to support their proposed submarkets. Indeed, the facts of record show just the opposite of what HUV contend. A broad spectrum of prices is apparent among wines, all of which are clearly substitutable in end use. The Court in *Brown Shoe, supra,* reached the same conclusion as that reached here in refusing to hold that " . . . medium-priced shoes do not compete with low-priced shoes . . . It would be unrealistic to accept Brown's contention that, for example, men's shoes selling below $8.99 are in a different product market from those selling above $9.00" (at 326). In *U.S.* v. *Joseph Schlitz Brewing Co.,* 253 F. Supp. 129 (N.D. Cal., 1966), the court found, "There are no distinguishable price levels [92]of beer which constitute relevant product submarkets within the line of commerce found by the court" (at 143). Also, in *Mogul* v. *General Motors Corporation,* 391 F. Supp. 1305 (E.D. Pa., 1975), the court took judicial notice of the fact that:

> . . . the relevant product market cannot be limited to Cadillac. The Cadillac . . . competes with even the less expensive models of automobiles in serving the consuming public's transportation needs and desires (at 1313).

Respondents' own economist witness, Dr. Irstin Barnes, testified that for products subject to frequent purchase, such as foods and beverages, products with different prices do tend to be regarded by consumers as substitutes for one another (Tr. 10,376). He agreed with the proposition that: "To the extent you increase the difference in price between two products, the price overcomes the difference in quality" (Tr. 10,402), thus enhancing competition between the differently priced products.

The Commission has held, with respect to dog food, that "to be sure, the differing price and quality grades demonstrated by respondents do support finding separate submarkets here, but the submarkets are closely associated in one market," *Liggett & Myers,* *Inc.,* Docket 8938, 87 F.T.C. 1074, at 1158 (1976). Although there may be some recognition of grades of qualities of wine usually referred to a "standard" and "premium", precise demarcation is not possible. A Wine Institute publication, *The Story of Wines,* explains that:

> Wine, because it continually changes in quality even after bottling, and because its desirable characteristics defy measurement, has never had an industry-wide quality grading system such as many other products have. Individual vintners have their own grading systems, but these are not uniform between companies. Some vintners have low-priced and higher-priced brands; others use vintage dates or such words as "special", "deluxe", "select", "reserve", or "private stock" to denote quality differences (CX 308Z-6).

As the Commission recently stated in *Coca-Cola Bottling Company of New York, Inc.* (Docket 8992, January 23, 1979):

> The principles governing antitrust market definition are designed to satisfy the necessity to make difficult judgments in an area of unavoidably imperfect knowledge, and markets so designated cannot always (nor need they, as a matter of law) satisfy the purist's **[93]**desire that every product within them possess a high degree of cross-elasticity of demand with every other (at 10).

Brown Shoe and the cases following it recognize that any reasonably proved submarket may support a finding of illegality. In *U.S.* v. *Mrs. Smith's Pie Co.,* 440 F. Supp. 220 (E.D. Pa., 1976), the court held that "Since the Clayton Act is concerned with *any* [*sic*] line of commerce, the government need not base its case on the narrowest possible market . . . However, nothing . . . precludes use of a narrower product market if that is the 'line of commerce' where competition is affected" (at 229).

Accordingly, even if narrower product markets such as "standard" and "premium" could have been established, this would not have precluded the appraisal of the effects of the acquisition on the broader "all wines" market and the "table", "dessert" and "sparkling" wine submarkets.

454. Based upon the foregoing findings of fact and in consideration of the applicable law, the relevant product market within which to appraise the effects of the acquisition is found to be all wines (domestic and imported); and the appropriate submarkets are table wines (excluding refreshment wines), dessert wines and sparkling wines.

VI. STRUCTURE OF WINE INDUSTRY AND RELEVANT ACTIVITIES

455. Both domestic and foreign wines are marketed in the United States (CX 218A thru Z-316, 366A thru Z-22).

456. Shipments into distribution channels refer to tax-paid

withdrawals of wine together with imports of wine for consumption. Tax-paid withdrawals of wine are withdrawals from bonded status at which time state and federal taxes are assessed. Normally, wines remain in bonded status until they are ready for market (CX 295L; Tr. 4039-42).

A. Shipments

1. All Wines

457. In 1960, shipments of all commercially produced wine entering distribution channels in the United States totaled 163,352,000 gallons. In 1968, all wine shipments had increased to 213,658,000 gallons. In 1976, all wine shipments had grown to 376,389,000 gallons (CX 273, 295J, 366I, 373E; Wine Institute Bulletin, March 24, 1978, No. 78-3, Table 2, officially noticed September 27, 1978). [94]

458. From 1957 through 1966 shipments of all wines grew from 151,881,000 gallons of commercially produced wine entering distribution channels in the United States to 191,176,000 gallons, for an average annual growth rate of about 4.4 million gallons. Between 1966 and 1967, all wine shipments grew 12.2 million gallons. Thereafter, shipments of all wines grew substantially from year to year. Total shipments of all wine increased approximately:

Gallons (millions)	*Year*
10.3	1967 to 1968
22	1968 to 1969
31.7	1969 to 1970
37.9	1970 to 1971
32	1971 to 1972
10	1972 to 1973
2	1973 to 1974
18.6	1974 to 1975
8.4	1975 to 1976

Between 1966 and 1976, the all wine market grew at an average annual rate of approximately 18.5 million gallons (CX 295J, 366I, 373C, E, F, H, J, K; Wine Institute Bulletin, March 24, 1978, No. 78-3, Table 2, officially noticed September 27, 1978).

2. Table Wines[20]

459. From 1968 through 1972, table wine shipments including all still wines not over 14 percent alcohol by volume (excluding refreshment wines) entering distribution channels in the United States grew substantially from year to year. Table wine shipments grew by approximately:

Gallons (millions)	*Year*
12.2	1968 to 1969
14.7	1969 to 1970
13.5	1970 to 1971
22.0	1971 to 1972

(CX 295J, 373Z, Z-2, Z-4, Z-6, Z-7; RX 15A-B, 27A-B).

In 1968, table wine shipments entering distribution channels in the United States, amounted to 93,445,400 gallons and constituted 43.7 percent of all commercially produced wines entering distribution channels in the United States (CX 295J; RX 15A-B, 27A-B). [95]

3. Refreshment Wines

460. In 1968, refreshment wines entering distribution channels in the United States amounted to 5,321,000 gallons and constituted 2.5 percent of all commercially produced wines entering distribution channels in the United States (RX 15A-B, 27A-B). In 1972, their share had increased to 19 percent (CX 373K).

461. Between 1968 and 1972, refreshment wines entering distribution channels in the United States grew dramatically. Shipments were approximately:

Year	*Gallons (millions)*
1968	5.3
1969	14.3
1970	29.9
1971	51.7
1972	64.3

(RX 15A-B, 27A-B)

[20] In view of the exclusion of refreshment wines from the table wine market, and there being no record evidence of refreshment wine shipments subsequent to 1972, findings on the table wine market do not go beyond 1972.