
IN THE MATTER OF

HOOSIER PIANO AND ORGAN CO., INC., ET AL.

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

Docket C-2423. Complaint, July 12, 1973—Decision, July 12, 1973.

Consent order requiring a Shelbyville, Indiana, piano retailer, among other things to cease misrepresenting the manner in which merchandise has been reacquired from former purchasers or the terms and conditions under which such merchandise is being offered for sale for the unpaid balance of the original purchase price; making sale offers which are not bona fide offers; representing retail prices as usual and customary unless such is the case; misrepresenting prices as reduced from respondents' former price; and using false, misleading or deceptive sales plans or programs.

Appearances

For the Commission: *R. A. Palewicz.*

For the respondents: *Robert Adams, Adams & Cramer,* Shelbyville, Indiana.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Hoosier Piano and Organ Co., Inc., a corporation, and William A. Donica, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Hoosier Piano and Organ Co., Inc.,

is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana with its principal office and place of business located at 1221 Jefferson Avenue, Shelbyville, Indiana.

Respondent William A. Donica is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address in the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, and distribution of new pianos to the public at retail.

PAR. 3. In the course and conduct of their business as aforesaid, pianos, when sold, to be shipped from their place of business in the State of Indiana to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of said pianos respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general circulation and in oral sales presentations made by their salesmen to prospective purchasers and to purchasers with respect to the quality, condition, characteristics, and price of said pianos, the terms and conditions of sale, and of the status and position of their salesmen.

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

SPINET PIANO BARGAIN WANTED—Responsible party to take over low monthly payments on a spinet piano. Can be seen locally. Write Credit Manager, P. O. Box 276, Shelbyville, Indiana 46176.

SPINET-CONSOLE PIANO BARGAIN Can be seen locally. Will transfer to responsible party. Cash or liberal terms. Write Credit Manager, P. O. Box 276, Shelbyville, Indiana 46176.

SPINET-CONSOLE PIANO Wanted responsible party to take over spinet piano. Easy terms. Can be seen locally. Write Credit Manager, P. O. Box 276, Shelbyville, Indiana 46176.

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning,

but not expressly set out herein, and in connection with oral statements and representations of respondents and their salesmen, respondents have represented, and are now representing directly or by implication:

1. That pianos, partially paid for by previous purchasers, have been repossessed and may be purchased for the unpaid balance of the original purchase price.

2. That they are making bona fide offers to sell the pianos described in said advertisements.

3. That the advertised pianos are being offered for sale at special or reduced prices and that purchasers will thereby be afforded savings from respondents' regular selling prices.

4. That persons responding to said advertisements will deal with credit department or other personnel not compensated by sales commissions.

PAR. 6. In truth and in fact:

1. Few, if any, repossessed pianos are shown or made available for the unpaid balance of the original purchase price to persons responding to said advertisements. To the contrary, most, if not all, of the pianos shown or made available to such persons are new.

2. Respondents' offers are not bona fide offers. To the contrary, they are made for the purpose of obtaining leads to prospective purchasers. Respondents' salesmen, thereafter, call upon such persons and attempts to, and do, sell new pianos to them.

3. The advertised pianos are not being offered for sale at special or reduced prices, nor are purchasers thereby afforded savings from respondents' regular selling prices for new pianos. To the contrary, the prices at which respondents sell said pianos are their regular selling prices.

4. Persons responding to said advertisements do not ordinarily deal with the credit department or other personnel. To the contrary, they are induced to purchase pianos by sales personnel compensated by sales commissions.

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

PAR. 7. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, firms, and individuals in the sale of pianos of the same general kind and nature as those sold by respondents.

PAR. 8. The use by respondents of aforesaid false, misleading and deceptive statements, representations, and practices, has had,

and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of said pianos by reason of said erroneous and mistaken belief.

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

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Hoosier Piano and Organ Co., Inc., is a corporation organized, existing and doing business under and by virtue

of the laws of the State of Indiana, with its office and principal place of business located at 1221 Jefferson Avenue, Shelbyville, Indiana.

Respondent William A. Donica is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation and his principal office and place of business is located at the above-stated address.

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

ORDER

It is ordered, That respondents Hoosier Piano and Organ Co., Inc., a corporation, its successors and assigns, and William A. Donica, individually, and as an officer of said corporation (hereinafter sometimes referred to as "respondents"), and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of pianos or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, orally, visually, in writing, or in any other manner, directly or indirectly that:

1. Pianos or other merchandise have been repossessed or in any manner reacquired from a former purchaser, or are being offered for sale for the unpaid balance, or any portion thereof, of the original purchase price, or for the amount or any portion of the amount owed by a former purchaser; however, it shall be a defense hereunder for respondents to show that said advertised products actually are of the character stated and are offered for sale and sold on the terms and conditions represented.

2. Any pianos or other merchandise are being offered for sale when such offer is not a bona fide offer to sell the advertised merchandise on the terms and conditions stated.

3. Any amount is respondents' usual and customary retail price for merchandise unless such amount is the price at which the merchandise has been usually and customarily sold at retail by respondents in the recent regular course of business.

4. Any price is reduced from respondents' former price if respondents' business records fail to establish and show

that such price constitutes a significant reduction from the price at which such merchandise has been sold in substantial quantities or offered for sale in good faith for a reasonably substantial period of time, by respondents in the recent, regular course of their business.

5. Any savings is afforded in the purchase of merchandise from the respondents' retail price unless the price at which the merchandise is offered constitutes a reduction from the price at which said merchandise is usually and customarily sold at retail by the respondents in the recent regular course of business.

6. Persons responding to advertisements will be dealing with credit department personnel, or will be dealing with any other person than sales personnel.

It is further ordered, That respondents shall cease and desist from using any sales plan or procedure involving the use of false, misleading, or deceptive statements to induce the sale of pianos or other merchandise offered by respondents or to obtain leads or prespects for the sale of pianos or other merchandise.

It is further ordered, That respondents, for a period of one year from the effective date of this order, shall furnish each newspaper or other advertising medium which is utilized by the respondents to obtain leads for the sale of pianos or other merchandise, or to advertise, promote, or sell pianos or other merchandise, with a copy of the Commission's news release setting forth the terms of this order.

It is further ordered, That respondents serve a copy of this order upon each present and every future agent, representative, salesman, and employee engaged in the sale of pianos or other merchandise; that respondents obtain from each such person so served a written acknowledgement of the receipt thereof and an agreement in writing to abide by the terms of this order; and that respondents discharge any such person so served for failure to abide by the terms of this order.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions and employees.

It is further ordered, That the respondents shall notify the Commission, at least thirty (30) days prior to any proposed change in their business organization such as dissolution, assignment, incorporation, or sale resulting in the emergence of a successor firm, partnership, or corporation, or any other change

which may affect compliance obligations arising out of this order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

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

IN THE MATTER OF

RJR FOODS, INC., ET AL.

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

Docket C-2424. Complaint, July 13, 1973—Decision, July 13, 1973.

Consent order requiring a New York City manufacturer, seller and distributor of beverages designated "Hawaiian Punch," and its New York City advertising agency, among other things to cease misrepresenting the natural fruit juice content of fruit-flavored beverages, and depicting fruit or juice in labeling. In addition, the firm must make certain affirmative disclosures for a period of one (1) year and thereafter until a consumer survey is taken which gauges the need for continuing the disclosures.

Appearances

For the Commission: *C. O. Cook.*

For the Respondents: *David Grossberg, Cohen & Grossberg,* New York, New York, *Eugene L. Lambert, Covington & Burling,* Washington, D. C., and *G. A. Avram,* secretary and general counsel, RJR Foods, Inc., Winston Salem, North Carolina.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commision Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that RJR

Foods, Inc., a corporation, and William Esty Company, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent RJR Foods, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 750 Third Avenue, New York, New York.

PAR. 2. Respondent William Esty Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 100 East 42nd Street, New York, New York.

PAR. 3. Respondent RJR Foods, Inc., is now, and for some time last past has been, engaged in the manufacture, sale and distribution of beverages designated "Hawaiian Punch" which come within the classification of a "food," as said term is defined in the Federal Trade Commission Act.

PAR. 4. Respondent William Esty Company, Inc., is now, and for some time last past has been, an advertising agency of RJR Foods, Inc., and now for some time last past, has prepared and placed for publication and has caused the dissemination of advertising material, including but not limited to the advertising referred to herein, to promote the sale of "Hawaiian Punch" beverages, which come within the classification of "food," as said term is defined in the Federal Trade Commission Act.

PAR. 5. Respondent RJR Foods, Inc., causes the said product, when sold, to be transported from its places of business in various States of the United States to purchasers located in various other States of the United States and in the District of Columbia. Respondent RJR Foods, Inc., maintains, and at all times mentioned herein has maintained, a course of trade in said product in commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 6. In the course and conduct of their said businesses, respondents have disseminated, and caused the dissemination of certain advertisements concerning the said beverages by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including

but not limited to, advertisements inserted in magazines and other advertising media, and by means of television broadcasts transmitted by television stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product; and have disseminated, and caused the dissemination of, advertisements concerning said product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said beverages in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. Typical of the statements and representations in said advertisements, disseminated as aforesaid, but not all inclusive thereof, are the following:

A) The featuring of fresh fruits and fruit trees prominently and repeatedly in television commercials, sometimes continually throughout the television commercial, and often in conjunction with the audio message "Those seven natural fruit juices in Hawaiian Punch" and the video message "7 natural fruit juices." Sometimes but not always, the aforesaid messages are given in answer to questions, including but not limited to, the following:

1. What makes this [flavor] punch so great?
2. What makes Hawaiian Punch a natural with peanut butter?
3. What gives Hawaiian Punch its Punch?

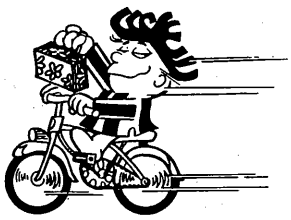
B) The following print advertisements:

PAR. 8. Through the use of said advertisements and others similar thereto not specifically set out herein, disseminated as aforesaid, respondents have represented and are now representing, directly and by implication, that Hawaiian Punch beverages consist predominantly of natural fruit juices.

PAR. 9. In truth and in fact, the predominant ingredients in Hawaiian Punch beverages are water and sweetening agents which are added to fruit juices and other ingredients to produce the final products.

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

Hawaiian Punch® Sunshine Orange is much *more* than o
bination with Valencia orange juice plus six other natural
sult is a uniquely sweet orange that kids love. And it's loa
Sunshine Orange has as much Vitamin C as an equivalen
without the pulp, without any bitter taste. Serve Hawaiian Pu
your kids and you'll all be happy.



"Pack their lunch with a fruit juicy surprise"

Now **HAWAIIAN PUNCH®** comes in 8 ounce single serving cans.

Now your kids don't have to be home to enjoy their favorite Hawaiian Punch flavor treats. Hawaiian Punch true fruit punches now come in handy, go-anywhere eight ounce easy-open cans.

Just pop them into the freezer overnight. Next morning put one into their lunch box. By the time noon rolls around, it's thawed and ready to drink; a cold, delicious lunch-time surprise.

Remember, Hawaiian Punch is made with seven natural fruit juices. You'll find your favorite flavor in our new eight ounce cans: Apple-Red, Great Grape, Sunshine Orange, and, of course, Fruit Juicy-Red.

Visit the Hawaiian Punch Pavilions at Sea World/San Diego and Sea World/Ohio... see Shamu, the killer whale.

STORE COUPON

Save 10¢

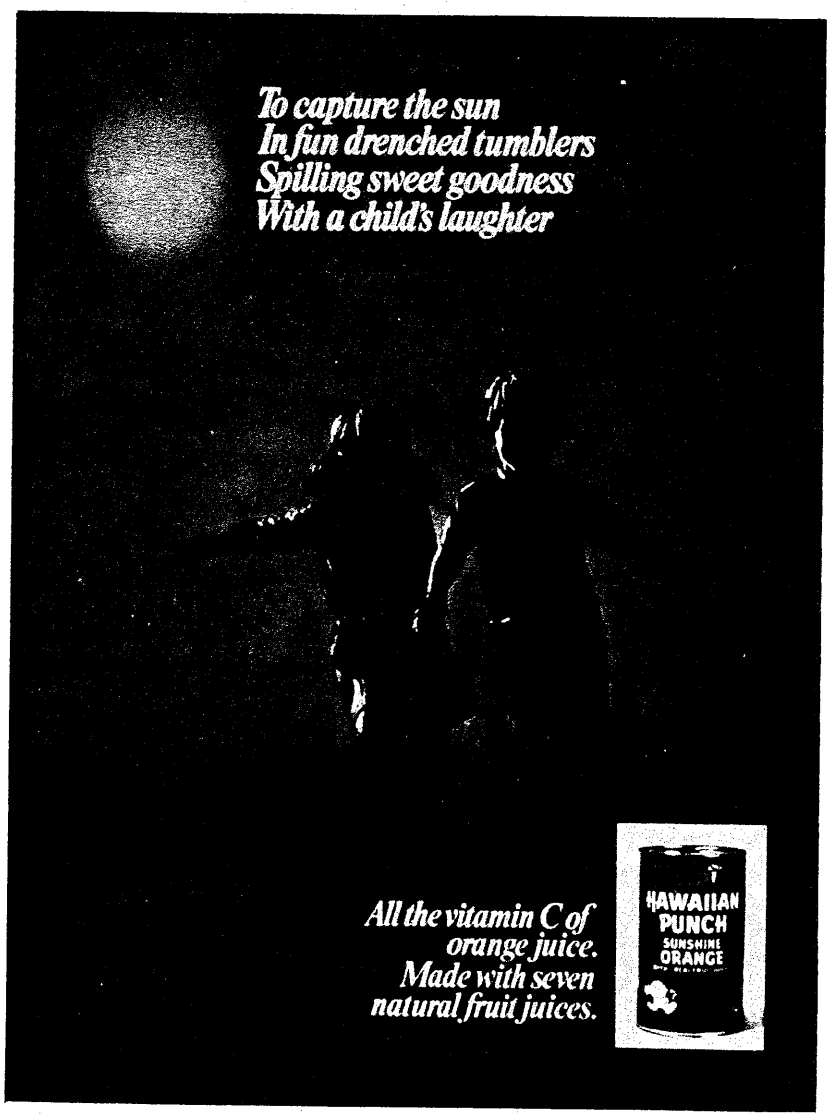
TO GROCER: Upon compliance with terms of this offer, you will be refunded 10¢ toward the purchase of one pack of six 8-oz. cans of Hawaiian Punch, any flavor, plus 3¢ handling cost if you mail this coupon to address below. Coupon not to be assigned or transferred by you. Any other application constitutes fraud. Invoice proving purchase of stock within 90 days, to cover coupons accepted, must be shown on request. Void when presented by outside agency or where prohibited, taxed or otherwise restricted. Consumer must pay applicable sales tax. Good only in U.S.A. Cash value 1/20 of one cent. RJR Foods, Inc., Box 1003, Clinton, Iowa 52732. Redeem this coupon today.

HP-59

RJR Foods, Inc.

This advertisement prepared by
WILLIAM ESTY COMPANY
INCORPORATED


SAVE
on Hawaiian Punch® Grape
Hawaiian Punch Grape is the great grape punch—a blend of seven natural fruit juices for breakfast, lunch-time, anytime.
7¢
SAVE 7¢ ON A 46 OZ. CAN OF HAWAIIAN PUNCH GRAPE
7¢
STORE COUPON
HAWAIIAN PUNCH GRAPE
Mr. Grocer: You will be refunded 7¢ on one 46 oz. can of Hawaiian Punch Grape plus 3¢ for handling if you receive and handle it strictly in accordance with the terms of this offer and if, upon request, you submit evidence thereof satisfactory to R. J. Reynolds Foods. Void when presented by outside agency or where prohibited, taxed or otherwise restricted. Good only in U.S.A. Cash value 1/20 of 1¢. R. J. Reynolds Foods, Inc. Box 1003, Clinton, Iowa 52732.
R.J. REYNOLDS FOODS, INC.
HP-3
STORE COUPON
7¢
7¢



This advertisement prepared by:
WILLIAM ESTY COMPANY, INC.

Ad No. P55-176A
This advertisement appears in:
Family Circle, October, Digest Page Bleed


PERFECT FOR BREAKFAST
NEW!
HAWAIIAN PUNCH
SUNSHINE ORANGE
WITH 7 REAL FRUIT JUICES
WITH 7 NATURAL FRUIT JUICES

PAR. 10. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent RJR Foods, Inc., has been, and now is, in substantial competition, in commerce, with corporations, firms and individuals in the sale of food products of the same general kind and nature as that sold by respondents.

PAR. 11. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent William Esty Company, Inc., has been, and now is, in substantial competition in commerce with other advertising agencies.

PAR. 12. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices and the dissemination of the aforesaid "false advertisements" has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of "Hawaiian Punch" by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondents including the dissemination of "false advertisements," as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices in commerce and unfair methods of competition in commerce in violation of Section 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

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

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been

violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed agreement, placed such agreement on the public record for a period of thirty (30) days, and received and considered comments, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission thereby issues its complaint, makes the following jurisdictional findings, and enters the following order.

1. Respondent RJR Foods, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and principal place of business located at 750 Third Avenue, New York, New York.

Respondent William Esty Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 100 East 42nd Street, New York, New York.

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

ORDER

I. *It is ordered,* That respondent, RJR Foods, Inc., a corporation, and William Esty Company, Inc., a corporation, their successors and assigns, and their officers, agents, representatives and employees, directly, or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any fruit-flavored, non-carbonated beverage under the "Hawaiian Punch" trademark, as a frozen concentrate, liquid, liquid concentrate, powder, or in any other physical state, whether or not containing natural fruit juice, forthwith cease and desist for a period of one year after service of the order upon RJR Foods, Inc. and William Esty Company, Inc., and thereafter until respondents submit to the Commission the results of a survey conforming in protocol, procedure and results to Appendix A to this order, from:

1. Disseminating or causing the dissemination of, any

advertisement by means of the United States mails or by any other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which depicts fruit or juice unless (a) the total percentage of single strength fruit juice contained in a concentration at which the product is intended to be served is clearly and conspicuously disclosed; or (b) the said product contains 100 percent single-strength fruit juice in a concentration at which the product is intended to be served.

It is provided, however, That the use of the word "fruit" or the use of the name of a fruit(s) to describe the taste or flavor of said product shall not, solely on the basis of such use, be deemed a violation of this order.

It is further provided, That for purposes of compliance with this order, the disclosure required above will be deemed clear and conspicuous in television advertising if (a) it appears at least once in each television commercial; (b) it is presented simultaneously in both the video and audio portions of the commercial; (c) the video portion (i) is of a sufficient size so that it can be easily read on all commercially available tube sizes, and (ii) it appears on the screen for a sufficient period to permit it to be read by the viewer, but not for less time than the audio portion; and (d) any other video or audio material accompanying the disclosure is not inconsistent with normal artistic and technical standards.

2. Disseminating, or causing the dissemination of, any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, which contains any of the representations, acts or practices prohibited in subparagraph 1 above.

For the purposes of compliance with this order, respondent William Esty Company, Inc., may rely in good faith upon information concerning the composition of any such product supplied by the manufacturer or processor of said product, *Provided,* That respondent neither knows nor has reason to know that any claim covered by this part is false or deceptive.

II. *It is further ordered,* That respondent, RJR Foods, Inc., a corporation, and William Esty Company, Inc., a corporation, their successors and assigns, and their officers, agents, representa-

tives and employees, directly, or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any fruit-flavored beverage, as a frozen concentrate, liquid concentrate, powder or in any other physical state, whether or not containing natural fruit juice, forthwith cease and desist from:

1. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents, through the manner of the use of words or depictions, photographs, or other representations of fruit, that the natural fruit content of any product is greater than its actual fruit juice content.

2. Disseminating, or causing the dissemination of, any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, which contains the representations prohibited in subparagraph 1 above.

It is provided, however, That the use of the word "fruit" or the use of the name of a fruit(s) to describe the taste or flavor of said product shall not, solely on the basis of such use, be deemed a violation of this order.

It is further provided, That respondents shall not be deemed in violation of Part II of this order with respect to any such fruit-flavored beverage so long as (a) they are in compliance with Part I above as to such fruit-flavored beverage, or (b) they have available a survey conforming in protocol, procedure (other than the independence of the survey supervisor) and results to Appendix A to this order as to such fruit-flavored beverage.

For the purposes of compliance with this order, respondent William Esty Company, Inc., may rely in good faith upon information concerning the composition of any such product supplied by the manufacturer or processor of said product, *Provided,* That respondent neither knows nor has reason to know that any claim covered by this part is false or deceptive.

III. *It is further ordered,* That respondent, RJR Foods, Inc., its successors and assigns, and its officers, agents, representatives and employees directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, distribution or labeling of the products

described in Part I above in commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist for a period of one year, and thereafter until respondents submit to the Commission the results of a survey conforming in protocol, procedure and results to Appendix A to this order, from depicting fruit or juice in labeling, as "labeling" is defined in the Federal Food, Drug, and Cosmetic Act, unless (a) the total percentage of single strength fruit juice contained in a concentration at which the product is intended to be served is clearly and conspicuously disclosed in any labeling containing such use; or (b) the said product contain 100 percent single-strength fruit juice in a concentration at which the product is intended to be served.

It is provided, however, That conformity to any affirmative regulation or standard issued under the Federal Food, Drug, and Cosmetic Act providing for the disclosure of fruit juice content on the label or labeling of said product will be deemed compliance with the requirements of this Paragraph III; and that the use of the word "fruit" or the use of the name of a fruit(s) to describe the taste or flavor of said product shall not, solely on the basis of such use, be deemed a violation of this order.

For purposes of compliance with this order, the disclosure required above shall be deemed clear and conspicuous in labeling if (a) it appears on any appropriate information panel as that term is used in 21 C.F.R. 1.10(h); (b) it appears in numbers of a color or shade that readily contrast with the background; (c) it appears in a type face of not less than 6 points on a 46-fluid ounce container, 4 point on a 12-fluid ounce container, and in proportional type sizes for other container sizes; and (d) it appears as part of any tabular, charted or graphic presentation if the label bears a compositional comparison between said product and any other product.

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions engaged in the advertising, offering for sale, sale, distribution or labeling of any aforementioned product.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order, including but not limited to the sale or acquisition of the

business of advertising, offering for sale, sale, distribution, or labeling of fruit flavored beverages by affiliated corporations of respondent, RJR Foods, Inc.

It is further ordered, That respondents shall, within sixty (60) days after service of the order upon them, each file with the Commission a report in writing, signed by such respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.

It is provided, however, That RJR Foods, Inc., will be deemed in compliance with Part III of this order if the required disclosure appears on labels placed into production within sixty (60) days after service of the order upon RJR Foods, Inc., or September 1, 1972, whichever is later.

APPENDIX A

A. *Survey Results:*

If a survey conducted in accordance with Section B shows that (a) 67 percent of current purchasers of fruit-flavored beverages (see Para. B.2.a. below); or (b) 80 percent of current or prospective purchasers of Hawaiian Punch products (see Para. B.2.b.); or (c) 95 percent of current purchasers of Hawaiian Punch products (see Para. B.2.c.) think that Hawaiian Punch products contain no more than 20 percent natural fruit juice, then the disclosure described in Sections I and III of the order will no longer be required after one year from the date of serving of this order upon RJR Foods, Inc. and William Esty Company, Inc.

B. *Survey Protocol & Procedure:*

1. This survey, including the processes of sampling, data, generation analysis, and interpretation of results, shall be conducted by independent experienced interviewers and supervisors.

2. Using telephone directories representing the entire United States, a national probability sample will be drawn; within the limitations of this method of sample selection, the sample will be projectable to the total population. Interviewers will call the numbers to locate 500 individuals who have (a) purchased fruit-flavored noncarbonated beverages in the last month; or (b) purchased Hawaiian Punch brand fruit-flavored beverages in the last month, or express an intent to do so within the succeeding month or so; or (c) purchased Hawaiian Punch brand fruit-flavored beverages in the last month. If there is no answer when a selected telephone number is called, the number will be tried again, up to two additional times, at different times of day and on different days of the week. Approximately 20 percent of each interviewer's work will be validated by telephone.

3. Only the following questions will be asked in these interviews:

A. "Hello, my name is _____, and I am calling for a national research company that is conducting a survey about beverages. Do you ever buy fruit drinks?"

B. If answer to "A" is "no," or if the respondent is a child, ask, "May I please speak to the main food purchaser in your home?" Then start again at question "A" with the main food purchaser.

C. "In the past month, have you bought any canned fruit drinks?"

D. "What brand or brands do you usually buy?"

E. How likely would you say that you are to buy one or more cans of (name of brands named in "D") in the next month or so? Would you say you are . . . 1. "Sure that you won't," ____
2. "Not likely", ____
3. "Fairly likely", ____
or 4. "Quite likely" ____
to buy (name of brand)

In the event that a respondent has not named Hawaiian Punch in response to "D", insert this brand as follows: If one, two, or three other brands are mentioned, insert Hawaiian Punch as the second brand; if four or more brands are mentioned, insert Hawaiian Punch as the *third* from last brand.

Responses 1 and 2 to question "E" will not be counted in population option B.2.b.; responses 3 and 4 will be counted in that option.

F. In the case of population options B.2.b. and B.2.c., ask only respondents who name Hawaiian Punch in "D" or "E", and in the case of population option B.2.a., ask *all* respondents: "Now I would like to ask you to rate the fruit *juice* content of some canned fruit drinks. If you think the brand is composed entirely of fruit juice, rate it 100 percent. If you think it has no fruit juice, rate it as 0 percent. Please pick a figure from 0 to 100 that expresses the brand's fruit juice content. How would you evaluate (brand name)?"

Repeat last sentence for each brand mentioned in response to "D" and "E", in order used by respondent. In the event that a respondent in population option B.2.a. has not mentioned Hawaiian Punch, insert this brand as follows: If one, two, or three other brands are mentioned, insert Hawaiian Punch as the second brand, if four or more brands are mentioned, insert Hawaiian Punch as the *third* from last brand.

G. "Thank you very much for your help."

4. The completed questionaires will be edited and coded, with the punching verified for approximately 20 percent of the punched columns.

IN THE MATTER OF

BOISE TIRE COMPANY, ET AL.

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

Docket C-2425. Complaint, July 16, 1973—Decision, July 16, 1973.

Consent order requiring a Boise, Idaho, seller and distributor of automotive tires and other automotive accessories, principally Uniroyal products, among other things to cease misrepresenting the quality, design, or

service of its products; and misrepresenting scientific tests and their results.

Appearances

For the Commission: *R. H. Brook.*
For the respondents: *pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Boise Tire Company, a corporation, and Richard E. Larson, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Boise Tire Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Idaho, with its office and principal place of business located at 1601 Front Street, Boise, Idaho.

Respondent Richard E. Larson is an officer of Boise Tire Company. He formulates, directs and controls the policies, acts and practices of Boise Tire Company, including those hereinafter set forth. His address is the same as that of Boise Tire Company.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the business of selling and distributing tires and other automotive accessories, principally Uniroyal products.

PAR. 3. In the course and conduct of their business, respondents advertise extensively in media of interstate circulation and broadcast. Respondents have maintained, and do now maintain, a course and conduct of business in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of Uniroyal Zeta Steel Radial Tires ("Zeta Tires"), respondents have made certain statements and representations concerning such tires in media of interstate circulation. Said statements include the following:

[Zeta Tires are] Rated #1
[Zeta Tires are] #1 in quality
#1 in design
#1 in service
it's just plain * * * #1

PAR. 5. Through the use of the above statements, respondents have represented, directly or by implication, that Zeta tires had been compared with all other tires, in an objective manner, using an industrywide, government or other accepted system of quality standards or grading, by independent scientific testing of contemporary applicability, and that Zeta tires had been found therein to be superior in a general category ("Rated #1") and in specific rating categories for "quality," "design" and "service." Respondents further represented, by implication, that they had evidence, in their possession or immediately available to them, adequate to support these claims.

PAR. 6. In truth and in fact, Zeta tires had not been rated or compared with all other tires, and there exists no industrywide, government or other accepted system of quality standards or grading of tires; and Zeta tires had not been rated by any independent scientific testing against all other tires in any general or specific categories. Moreover, respondents have never had evidence, in their possession or immediately available to them, to support these claims.

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

PAR. 7. The use by respondents of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the tendency and capacity to mislead and deceive members of the public into the purchase of substantial quantities of Zeta tires under the erroneous and mistaken belief that these statements and representations are true.

PAR. 8. In the course and conduct of their business, and at all times mentioned herein, respondents have been and are now in substantial competition in commerce with corporations, firms and individuals engaged in the sale and distribution of tires and other automotive accessories of the same kind and nature as those sold by respondents.

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

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Boise Tire Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Idaho, with its office and principal place of business located at 1601 Front Street, Boise, Idaho.

Respondent Richard E. Larson is an officer of Boise Tire Company. He formulates, directs and controls the policies, acts and practices of Boise Tire Company, and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Boise Tire Company, a corporation, its successors and assigns, and its officers, and Richard E.

Larson, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of tires or any other automotive accessories, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing in writing, orally, visually or in any other manner, directly or by implication:

A. That Zeta tires have been rated "#1" as to quality, design or service;

B. That any tires or other automotive accessories have been rated or compared as to quality, grade, line, level, design, performance or other characteristics (except in conformance with a government approved or industrywide standard, if and when such is developed) unless:

1. The representation is fully substantiated by controlled scientific tests, the results and methodology of which are available for public inspection; and

2. The representation is accompanied by a clear and conspicuous statement that there are no industrywide or other accepted standards of quality or grading, that representation relates only to the private standard of the seller or manufacturer, and that the test results and methodology on which the representation is based are available for public inspection.

It is further ordered, That respondents cause the publication in the sports section of the Idaho Statesman, in large bold face type, of a retractive advertisement one quarter page in size. It shall be devoted exclusively to a clear and conspicuous statement that, contrary to previous advertisements of Boise Tire Company, neither Uniroyal Zeta Steel Radial Tires nor those of any other manufacturer have been rated by any government or accepted industrywide system, and that in fact no such system for rating or grading tires exists. This advertisement shall also include the following sentence, in 14-point block capital letters:

THIS ADVERTISEMENT IS PUBLISHED PURSUANT
TO ORDER OF THE FEDERAL TRADE COMMISSION

Said advertisement shall be published within sixty (60) days after service upon them of this order.

It is further ordered, That the respondent corporation shall

forthwith distribute a copy of this order to each of its operating divisions.

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

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment, and of his affiliation with a new business or employment, in the event of such discontinuance or affiliation. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

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

IN THE MATTER OF

PEPSICO, INC.

Docket 8903. Interlocutory Order, July 17, 1973.

Order denying respondent's motion to dismiss the complaint.

Appearances

For the Commission: *A. R. Richter, S. G. Stoker, Ira Nordlicht* and *J. E. Egan.*

For the respondent: *Edward Howrey of Howrey, Simon, Baker & Murchison,* Washington, D. C., and *James G. Frangos, John Kirby* of *Mudge, Rose, Guthrie & Alexander,* New York, New York.

ORDER DENYING MOTION TO DISMISS

On June 22, 1973, respondent ("PepsiCo") filed a motion with the administrative law judge seeking dismissal of the complaint herein essentially on two grounds: (1) the Commission's action,

through its general counsel, in seeking an injunction under the All Writs Act against certain acts of PepsiCo, evidenced prejudgment and disqualified the Commission in this case; and (2) respondent believes there may have been *ex parte* communications by the Bureau of Competition to the Commission contrary to Commission Rules and the Administrative Procedure Act.

Complaint counsel filed on July 2, 1973, a reply in opposition to the motion to dismiss. On July 5, 1973, the administrative law judge certified the motion to the Commission on the ground he lacked authority to rule on it. See Section 3.22(a) of the Rules of Practice.

Although the administrative law judges have authority to rule on nearly all issues during the time the proceedings are before them, including most questions of due process that may be raised, we agree that the issues presented here should probably be ruled on in the first instance by the Commission since they arose as the result of actions taken by the Commission itself after the complaint was issued.

However, upon review of the motion and supporting documents, we find no basis in law or fact to grant the motion.

I. ALLEGED DISQUALIFYING PREJUDGEMENT BY THE COMMISSION.

The undisputed facts are as follows: On October 25, 1972, respondent PepsiCo published an offer to purchase common stock of Rheingold Corporation with an announced view to gain control of that company. On November 15, 1972, the Commission issued the complaint in this matter, challenging PepsiCo's tender offer and the acquisition of any shares pursuant thereto as violating Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The following day, PepsiCo and the Commission entered into an agreement under which the parties agreed to discuss a hold-separate agreement, and pending such discussion PepsiCo agreed that if the tender offer were successful it would take no steps to assume or exercise actual control of Rheingold nor take any steps to make any change in the corporate structure, board of directors, or management of Rheingold, before December 4, 1972, and thereafter without giving the Commission ten (10) days' notice.

In return, the Commission agreed that it would not file any action seeking to have a court order PepsiCo to hold the Rheingold

assets separate until on or after December 4, 1972. (Subsequently, respondent promised that it would take no action to abrogate the November 16, 1972, agreement until February 7, 1973, and thereafter only upon giving ten (10) days' notice to the Commission.)

On March 2, 1973, PepsiCo notified the Commission that it was terminating the hold-separate agreement. In order to prevent respondent from exercising control over Rheingold the Commission directed its general counsel to seek an injunction from the Second Circuit Court of Appeals under the All Writs Act, 28 U.S.C. § 1651(a).

On March 13, 1973, upon application of the Commission, through its general counsel, the Court of Appeals issued a temporary restraining order against PepsiCo prohibiting it from exercising any control over Rheingold pending its determination of the Commission's petition filed the same day for a preliminary injunction to preserve the *status quo pendente lite* of Rheingold in aid of the court's potential jurisdiction under Section 11(c) of the Clayton Act and Section 5(c) of the Federal Trade Commission Act.

On April 3, 1973, the Court issued its opinion on that petition, *Federal Trade Commission* v. *PepsiCo, Inc.*, 1973 Trade Cases ¶ 74,450. Although the Court denied the injunction sought, it did so on the condition that PepsiCo enter into a new hold-separate agreement of Rheingold's soft drink operation (one that would not be terminable upon notice by PepsiCo) and that the new management of Rheingold agree not to divest any of its beer business or assets pending the Commission's administrative proceeding. The Court continued its temporary restraining order until the time such hold-separate agreement was entered into and retained jurisdiction to enforce the agreement. Subsequently, on April 16, 1973, such an agreement was entered into by PepsiCo and the Commission.

Respondent argues that in seeking the injunction, the Commission prejudged this case so as to prejudice the fairness and appearance of fairness of future hearings. This contention is based primarily on the fact that the general counsel advised the Second Circuit there was a "reasonable probability" that a violation of law occurred and made assertions about Rheingold and the soft drink industry which are contested issues in the case.

There is no merit in the argument that such assertions were in excess of the Commission's authority to make, either directly or through its general counsel, to the Court of Appeals or that

the Commission will not be able to render a fair and impartial judgment in any future appeal in this matter.

Prior to seeking the injunction, the Commission had already issued its complaint stating that it had reason to believe that the tender offer and acquisition of Rheingold stock violated antitrust laws. Respondent does not (and indeed could not) claim that such assertion constituted "prejudgment" or otherwise denied it due process of law. Yet it was basically on the same information that led it to issue its complaint, that the Commission directed the General Counsel to seek an injunction *pendente lite* from the court. Such an application for a court order to protect the court's potential appellate jurisdiction is a procedure specifically sanctioned by the Supreme Court in *Federal Trade Commission* v. *Dean Foods,* 384 U.S. 597 (1966).

The Commission's general counsel in applying to the Court of Appeals did not argue that the acquisition violated the law, nor did it ask the Court to make such a ruling. The general counsel's argument was that the Commission had commenced administrative proceedings to determine that question and that on the basis of the information then available there was a "reasonable probability" of violation of law.[1] A showing of "reasonable probability" is often required before a preliminary injunction will be granted.[2] Indeed, the Second Circuit, on the basis of the affidavits submitted, held that such a showing was necessary and had been made in that case. For other reasons it denied the injunction.

The general counsel's representation to the Court that there was a "reasonable probability" of violation was not to be taken as a conclusive or final judgment by the Commission on the ultimate merits of its administrative complaint or any factual issues therein. That statement as well as other representations were based only on information then available. It was fully understood that all such assertions were tentative and yet to be tested in a full adversary proceeding. That this was the context in which the statements were made is evident from the Second Circuit's opinion which, while agreeing there was a showing of "reasonable

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[1] Additionally, of course, the general counsel set forth arguments as to why the Commission felt that a take-over of Rheingold by PepsiCo might make it difficult to assure that any later divestiture order would be adequate.

[2] See *Federal Trade Commission* v. *PepsiCo, Inc.,* 1973 Trade Cases ¶ 74,450 at 94.024 and authorities cited there. But *cf. Hamilton Watch Co.* v. *Benrus Watch Co.,* 206 F.2d 738, 740 (2d Cir. 1953); *Semmes Motors, Inc.* v. *Ford Motor Co.,* 1970 Trade Cases ¶ 73,263 (2d Cir. 1970).

probability" of law violation, noted that "at this stage of the proceeding" important questions of fact were still in dispute and could be finally determined only on a full record. *Id.* at 94,024 m.4.

To say that the Commission action seeking the aid of the Court of Appeals to preserve its ability to affirm and enforce an effective order should a violation of law be later determined, had the effect of disqualifying the Commission from proceeding further in the matter would be to nullify the *Dean Foods* holding. It would be equivalent to saying that a judge disqualifies himself from presiding at a trial on the merits if earlier he had issued a preliminary injunction against a party. Yet this clearly is not the law. *NLRB* v. *Kaase,* 346 F.2d 24, 28 (6th Cir. 1965). Heads of administrative agencies are similarly entitled to draw conclusions on the basis of preliminary data presented to them and institute appropriate actions within the framework of the law to carry out their enforcement responsibilities without being charged with prejudging the case.[3]

We also reject respondent's argument that the Commission in assuring the Court of Appeals that it would endeavor to conclude administrative proceedings by September 10, 1973, if the injunction were issued, demonstrated prejudgment. As respondent itself recognizes, these assurances were made to assure the Court that the injunctive relief sought would not impose undue injury upon PepsiCo's ownership rights in the stock it had acquired. In prior cases where All Writ injunctions have been issued at the request of the Commission, such assurances have been given for similar reasons. *Dean Foods,* 70 F.T.C. 1761

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[3] In the leading case on disqualification of administrative officials, *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, 702–03 (1948), the Supreme Court assumed that the Commission, prior to filing its complaint, had formed an opinion on the legality of the basing point system challenged in the complaint. Indeed, the Commission had made reports to Congress and the President to that effect. The Court held that:

"[T]he fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of respondents' basing point practices.

* * * * * * *

"* * * [No] decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court."

See also *Dean Foods Co.,* 70 F.T.C. 1146, 1226–1237 (1966).

(1966), and *OKC Corp.* [77 F.T.C. 1635], 3 CCH Trade Reg. Rep. ¶ 19,293 (1970) at 21, 460.

Notwithstanding these considerations, respondent argues that the expedited hearing schedule established by the Commission by order of April 12, 1973, for completion of Commission proceedings by September 10, was without justification and no longer necessary in view of the Court's decision denying the injunction. But this overlooks the fact that as of April 12, 1973, a new hold-separate agreement had not yet been reached, a condition imposed by the Court on PepsiCo before the injunction would be denied and the restraining order lifted. Furthermore, the Court's opinion seemed to anticipate that some sort of expedited schedule would be ordered by the Commission. Once the agreement had been reached, on April 16, the Commission, on motion of PepsiCo, rescinded its April 12 order, noting that "PepsiCo has now entered into a hold-separate agreement that is unrestricted in duration and in its motion clearly waives any insistence that these proceedings be completed by September 10 of this year" (Order of April 18, 1973) [82 F.T.C. 1233]. The Commission directed a new, expedited hearing schedule in accordance with the time frame suggested by PepsiCo.[4]

In the circumstances, we think it is obvious that respondent's argument is without merit.

II. ALLEGED EX PARTE CONTRACTS WITH PROSECUTORIAL STAFF.

Finally, respondent seeks dismissal of the complaint on the ground that *ex parte* oral arguments "may have been" made to the Commission at the time it met to consider the staff's request that an All Writs injunction be issued.[5] It also states that representatives of the Bureau of Competition "may have communicated" with the Commission with respect to its April 12, 1973, order.

Assuming for purposes of this motion that any such alleged communications would have been improper, the allegation that the staff was present at meetings during which these matters were discussed and decided by the Commission has been fully denied

[4] Respondent seems to argue that even this later modification of the time schedule constituted an unwarranted interference with functions of the administrative law judge. Nothing in our order, however, prevents the administrative law judge from certifying to the Commission, with his recommendation, a motion by any of the parties for a change in the schedule because of supervening circumstances.

[5] PepsiCo was provided, on March 7, 1973, with a copy of the staff's memorandum of March 5, 1973, urging the Commission to seek an All Writs injunction.

in affidavits filed by the Director of the Bureau of Competition, assistant directors, and Commission counsel in charge of the case. As to memoranda by the staff submitted to the general counsel concerning possible trial schedules, these have been turned over to respondent and contained no improper or prejudicial *ex parte* matters.

Accordingly, the Commission, having found no merit to respondent's motion,

It is ordered, That respondent's motion to dismiss the complaint herein be, and it hereby is, denied.

Commissioner Thompson not participating.

IN THE MATTER OF

ADOLPH COORS COMPANY

ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8845. Complaint, June 7, 1971—Decision, July 24, 1973.*

Order requiring a Golden, Colorado, brewery, among other things to cease illegally restraining competition by fixing prices, imposing territorial and customer restrictions upon its distributors, and using unfair short-term termination provisions in its contracts with distributors.

Appearances

For the Commission: *A. J. Joseph, T. Vakerics.*

For the respondent: *Leo N. Bradley, Earl K. Madsen, Bradley, Campbell & Carney,* Golden, Colorado.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (Title 15, U.S.C. Section 41 *et seq.*) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the party identified in the caption hereof and more particularly described and referred to hereinafter as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the interest of the public, hereby issues its complaint stating its charges as follows:

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* Petition for Review was filed by respondent on August 15. 1973 in the Court of Appeals, 10th Circuit.

PARAGRAPH 1. Respondent Adolph Coors Company (hereafter sometimes referred to as "Coors") is a corporation organized under the laws of the State of Colorado, with is executive office, brewery and principal place of business at Golden, Colorado. Coors' sales in 1968 were in excess of $200,000,000.

PAR. 2. For purposes of this complaint the following definitions shall apply:

A. The term "Coors marketing area" means the eleven state geographical area in which respondent sells its beer to distributors.

B. The term "distributor" means any person engaged in the wholesale distribution of respondent's beer products, primarily to other retailers.

C. The term "retailer" means any person engaged in the sale of respondent's beer products, primarily to other persons who consume said products.

D. The term "wholesale price" means the price at which the distributor sells to the retailer.

E. The term "retail price" means the price at which the retailer sells to the consumer.

F. The term "philosophy" means the respondent's business policies, which have been formulated by the respondent for the brewing, distribution and sale of respondent's beer.

G. The term "central warehouse account" means a business organization, generally owned and operated by a retailer which operates a storage facility which is capable of accepting delivery of beer from a beer distributor and which later generally redelivers the beer in combined truckloads with other products to various retail outlets from which the beer will be sold to the consumer.

PAR. 3. Respondent is engaged in the brewing, distribution and sale of beer bearing the trade name Coors, through a distributor organization located in Texas, Oklahoma, Kansas, Wyoming, Colorado, New Mexico, Arizona, Utah, Idaho, Nevada and California. In 1968, based upon unofficial figures, Coors ranked fifth in volume of beer sold in the United States.

Respondent sells Coors beer, f.o.b. Golden, Colorado, in various sizes and types of containers, including kegs, cans and bottles. When sold in kegs, the kegs are sold to distributors for resale primarily to bars, where the bartender operates a mechanism in conjunction with the keg to serve a consumer a glass, mug or stein of beer. This last type of beer service is "draught" beer.

PAR. 4. In the course and conduct of its business of distributing

Coors beer, respondent ships or causes to be shipped said Coors products from Golden, Colorado, to distributors located in the Coors marketing area. There is now and has been for several years last past a constant, substantial, and increasing flow of Coors beer in "commerce," as that term is defined in the Federal Trade Commission Act.

PAR. 5. Except to the extent that competition has been restrained by reason of the practices hereinafter alleged, respondent's distributors in the course and conduct of their business of offering for sale Coors beer purchased from respondent are in substantial competition in commerce with one another and with other firms or persons engaged in the distribution and sale of other brands of beer; retailer customers of the Coors' distributors are likewise in substantial competition with each other and with retail sellers of other brands of beer; and respondent is likewise in substantial competition with other firms engaged in the brewing, distribution and sale of beer.

PAR. 6. In the course and conduct of its business, respondent Coors has engaged and is continuing to engage in the unfair methods of competition and unfair acts and practices in commerce, among others, enumerated in this paragraph:

1. For several years, respondent has pursued a plan, policy or philosophy throughout the Coors' marketing area, the purpose of which is to fix, control, establish and maintain the wholesale prices at which distributors and the retail prices at which retailers advertise, offer for sale and sell Coors beer.

2. In furtherance of this price-fixing policy, respondent has and continues to the present time to engage in one or more of the following acts or practices, but not necessarily limited thereto, in the Coors' marketing area:

(a) It suggests wholesale prices to its distributors for the various containers in which Coors beer is sold;

(b) It enters into agreements, understandings or combinations with its distributors as to the wholesale prices which the distributors will charge for Coors beer;

(c) It advises its distributors that it is contrary to the Coors' policy or philosophy for the distributors to sell Coors beer at less than the agreed upon wholesale prices;

(d) It attempts, from time to time, to verify the prices at which its distributors sell Coors beer;

(e) It provides suggested retail prices to its distributors for the various containers in which Coors beer is sold;

(f) It joins with its distributors in attempting to coerce retailers to sell Coors beer at the suggested prices or at least not below a certain price;

(g) It encourages its distributors to eliminate price cutting retailers by persuading the price cutter not to cut the Coors' price or, if that is not successful, by ceasing further deliveries to the retailer;

(h) It threatens retailers that if they do not sell Coors beer at the suggested retail price, they will not be able to obtain sufficient Coors beer in the future;

(i) It enters into agreements, understandings, or combinations with retailers as to the retail prices or price ranges which the retailers will sell Coors beer; and

(j) It acts, and has its distributors take other action, to cause retailers to sell Coors beer at prices or in price ranges suggested by respondent.

3. In addition to the foregoing, respondent Coors has established a policy of prohibiting its distributors from selling Coors beer outside of their assigned territories.

4. In furtherance of this territorial restraint, respondent has and continues to the present time to engage in one or more of the following acts and practices, but not necessarily limited thereto, in the Coors marketing area:

(a) It enters into contracts with its distributors which read, in part, as follows:

> While this agreement is in effect, the Distributor will conduct the business of the wholesale distribution of Coors beer in the above territory only * * *;

(b) It informs its distributors that this is part of the Coors philosophy;

(c) When it learns that Coors beer is being sold to retailers whose premises are located outside of the territory assigned to a distributor, it seeks to determine which of its distributors made the sale;

(d) It threatens Coors' distributors that if they don't cease sales to accounts outside their territories, Coors will obtain new distributors to replace them;

(e) When particular accounts or geographical locations are in dispute between two distributors, respondent seeks to settle this dispute by itself deciding which distributor will serve the account or area, or by having the two distributors agree between themselves which distributor will serve the account or area.

5. In addition to the foregoing, respondent Coors has established a policy of requiring its distribtuors to require their retailers who serve Coors beer on draught to be exclusive Coors draught beer accounts and not to split their service of draught beer between Coors and another brand of light-colored draught beer, if the retailer wants to serve Coors draught beer.

6. In addition to the foregoing, respondent Coors has established a policy of prohibiting its distributors from selling beer to central warehouse accounts or from selling Coors beer to a subdistributor for delivery to a central warehouse account.

7. In addition to the foregoing, respondent has included in contracts between itself and its distributors a clause permitting cancellation of the agreement for breach of the agreement by the distributor on five days notice to the distributor. The agreement also provides for cancellation by either party, without cause, upon giving thirty days notice. The contract is non-assignable and does not provide the distributor with any right to sell his business. In some cases respondent has approved for sale of the distributorship to a third party, but failed to permit the parties to freely agree on the terms of the sale.

PAR. 7. The above acts and practices have the capacity and tendency of hindering, suppressing or eliminating competition with the following effects, among others:

1. Distributors have sold Coors beer at prices fixed by respondent Coors;

2. Retailers have sold Coors beer at prices fixed by respondent Coors;

3. Distributors have refrained from selling Coors beer outside of their assigned territories;

4. Competition between Coors distributors and between Coors retailers, with respect to the sale of Coors beer, has been eliminated;

5. Retailers have given Coors more favorable sales space and have acted discriminatorily in other ways in promoting the sale of Coors beer, to the detriment of other brands of beers;

6. Draught beers brewed by other companies have been forced out of retail outlets;

7. Distributors have been deprived of their freedom to act as independent businessmen; and

8. Distributors have been unfairly deprived of the true value of their businesses when selling them to their successors as Coors' distributors.

PAR. 8. The aforesaid acts and practices of respondent have the tendency to unduly restrict and restrain competition and have injured, hindered, suppressed, lessened or eliminated actual and potential competition, are to the prejudice and injury of the public, and constitute unfair methods of competition in commerce and unfair acts or practices in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY WALTER R. JOHNSON, ADMINISTRATIVE LAW JUDGE

SEPTEMBER 15, 1972

SUMMARY OF PROCEEDINGS

The Commission in a complaint issued on June 7, 1971 (mailed on June 28, 1971), charges that the respondent, Adolph Coors Company (hereinafter referred to as "Coors"), violated Section 5 of the Federal Trade Commission Act by various acts and practices which have had the effect of restraining competition between distributors and retailers selling Coors beer and other beers in the market area in which Coors distributes its beer. The unlawful practices alleged, as summarized, are that respondent has

(1) fixed, controlled, established and maintained the prices at which its distributors and its retailers sell Coors beer;

(2) restricted the territories in which, and the customers to whom, its distributors may sell Coors beer;

(3) required its distributors to force retailers to serve Coors draft beer exclusively, or not at all;

(4) prohibited its distributors from selling and delivering beer to central warehouse accounts;

(5) included thirty and five-day cancellation periods in all of its distributor contracts; and restrained its distributors from freely selling their distributorships to purchasers of their own choosing and at prices freely determined by the seller and the buyer.

The respondent's answer filed on August 30, 1971, is in the nature of a general denial, however, it admits that it enters into contracts with distributors which do contain clauses setting forth the sales territories of the distributors and a clause permitting cancellation for breach of the agreement on five days' notice and on thirty days' notice without cause. As affirmative defenses the respondent challenges the authority of the Commission to issue the complaint contending that it fails to state a claim for relief;

that it is not engaged in commerce; that its pricing activities are limited to suggestions; that its vertically imposed territorial limitations are lawful; that it is exempt from any proceeding by operation of the Twenty-first Amendment to the Constitution of the United States; that it is entitled to protect its trademarked products; that its conduct provided intrabrand competition; that the Commission is guilty of laches since the alleged practices have been in widespread, open and notorious use in the brewing industry for well over forty years; that the order sought by the Commission violates the respondent's property rights; and that no distributor has ever been terminated because of an act complained of by the Commission.

Prehearing conferences were held on September 4, 1971 and January 14, 1972, at which time matters relating to the conduct of the processing and the time and place of hearings were discussed and resolved. Hearings were commenced on February 14, 1972 at Denver, Colorado, and proceeded continuously in said city through March 14, 1972, during which time complaint counsel put in their case, calling 28 witnesses, and respondent its defense, calling 42 witnesses. Their were 2971 pages of testimony taken, and approximately 3000 documents, totaling over 5000 pages, were received in evidence. On the last day of the hearings, it was ordered that complaint counsel file their proposed findings on May 12, 1972; respondent its proposed findings on May 26, 1972; and complaint counsel their reply on June 5, 1972. On May 12, 1972, the Small Business Administration filed a motion to intervene which, by order dated June 15, 1972, was allowed by the Hearing Examiner* to the extent of permitting the Administration to file a brief as *amicus curiae*.

GENERAL BACKGROUND STATEMENT

Respondent Adolph Coors Company is a corporation organized under the laws of the State of Colorado, with its executive office, brewery and principal place of business at Golden, Colorado (complaint and answer). The respondent is, as referred to in the industry, a regional brewer, and its beer is marketed through

* At the time this case was tried, the presiding officer was known as a Hearing Examiner, whose title was changed to Administrative Law Judge on August 19, 1972. [See amendment of Subpart B, Part 930, Title 5 of Federal Regulations (37 F.R. 16787). In conformity with this amendment, the Commission changed the title "Hearing Examiner" as used in Sections 9 and 14 of the Statement of Organization, published June 30, 1970 (35 F.R. 10627), to "Administrative Law Judge". See 37 F.R. 22658.]

distributors in the eleven States of Oklahoma, Kansas, Wyoming, Colorado, New Mexico, Arizona, Utah, Idaho, Nevada, California, and a portion of Texas (complaint and answer). Population trends of the United States show a gravitation to this southwestern portion of America (RX 1081–1093). These are basically the same marketing areas that it has been marketing in since the end of prohibition (Tr. 2859). Adolph Coors Company will probably expand its marketing area by 1980 into the rest of Texas and then possibly into Washington, Oregon and Nebraska, but these facts aren't announced yet because, if they were, it would just create more applications for distributorships (Tr. 2915). The beer is marketed through 166 independent distributors (Tr. 2860). There is one exception to that and that is the metropolitan Denver area wherein Coors Distributing Company is the distributor, this company being a wholly-owned subsidiary of the Adolph Coors Company, and the reason for this is that it serves as a model and a research laboratory, plus giving the brewery distributorship experience (T. 2862; RX 170, pp. 7–8). The contracts with the distributors are written (Tr. 2862; CX 2 A–C; CX 3 A–C).

William K. Coors, called as a witness by respondent, is the present chief executive officer of the respondent (Tr. 2840). He has worked for the respondent since graduating from Princeton as a chemical engineer in 1939 (Tr. 2841). He testified that the respondent is a privately held company and can be traced back to 1873 when Adolph Coors (grandfather of William K. Coors), a 20 year old native of Germany, together with a partner named Schuler, purchased a plot of land in Golden, Colorado, with a stone building thereon where they established a brewery. In 1880, Adolph Coors bought out his partner, and respondent's brewery has remained on the same site throughout the years of its existence (Tr. 2842–2843).

Mr. Coors stated that during prohibition the Adolph Coors Company manufactured near beer and malted milk (Tr. 2843). In addition, much effort was directed toward Coors Porcelain Company during the prohibition era, which was originally started in 1887 as a glass plant to manufacture beer bottles for the brewery (Tr. 2844; RX 1155 B). Coors Porcelain Company is a totally-owned subsidiary of the Adolph Coors Company and is operated by Joseph Coors, brother of William K. Coors (Tr. 2844). When prohibition finally shut the brewery industry down, there had been just prior to that time approximately 1,400 breweries operating in

the United States. When prohibition ended, 1935 saw approximately 750 breweries in America that had survived and were able to get back into beer production, and this number has steadily declined to the point where there are now operating in America only about 70 breweries of any consequence (Tr. 2845). The decrease in the number of breweries has been due to the competition in the brewing industry (Tr. 2845). The failure to continually produce a high quality beer at a realistic price has caused 95 percent of the brewery failures since 1935.

Mr. Coors further stated that size doesn't necessarily have anything to do with the economic condition of a brewery in that some of the more successful breweries are small ones (Tr. 2900). Production of beer by the Adolph Coors Company in 1935 amounted to 140,000 barrels (Tr. 2860). In 1948, the Adolph Coors Company was the 49th largest brewer in America with production amounting to 470,000 barrels (RX 1057 A). The Adolph Coors Company now ranks as the fourth largest brewer in America following its three major competitors, Anheuser-Busch, Schlitz and Pabst (Tr. 2852; RX 1057 S). Production of the Adolph Coors Company in 1971 amounted to 8,500,000 barrels. Sales of the Adolph Coors Company during the year 1971 were approximately $350,000,000 (Tr. 2899). Mr. Coors serves as the chairman of the board of directors of the United States Brewers Association, whose 41 members comprise about 90 percent of the brewing capacity in America today (Tr. 2845).

He explained that the major ingredients of beer are approximately 92 percent water, barley, a source of neutral starch, corn, rice and in some cases a converted sugar syrup and hops for flavoring (Tr. 2846); that Coors has a natural supply of remarkably pure water that underlies the land at the brewery (Tr. 2847); that 80 percent of the hops comes from Germany, and the other 20 percent comes from Idaho (Tr. 2847); that the German hop "* * * that we use has a very bland, a very fragrant flavor to it that gives our beer a characteristic that we are unable to get with domestic hops" (Tr. 2847). He further testified (Tr. 2847-2848): "The German hops do not have the bittering power that the American hop has so in addition to paying about twice as much for them, you have to use about twice as much, too. * * * We have our own recognized variety of brewing barley. It is called Moravian. It is grown for us by about 1,600 farmers located in specific areas in Colorado, Idaho, and this year for the first time in Wyoming. * * * We have our own staff of agronomists. We have

been working on this barley for 25 years now, at least. * * * The seed is grown for us by certain certified seed growers. We receive the seed, we process the seed and we sell the seed to a grower, the farmer himself. We will not accept barley that is not grown from our seed. * * * We have an experimental farm in the San Luis Valley of Colorado. * * * We develop various barley strains [there]. We experiment with various agronomic techniques, always trying to improve the barley, improve the growing methods, be as much help as we can be to our growers primarily to get a feel for what it costs to grow barley so that we are fair with our growers in what we pay. * * * American brewers use a source of neutral starch and this would be corn or rice or in some cases a manufactured sugar syrup. * * * We use rice. * * * In our opinion, rice makes a superior beer. * * * We use what is referred to as short-grain rice as opposed to a long-grain rice. It comes from Sacramento and San Joaquin Valleys of California.

Mr. Coors stated that what a good distributor should do in distributing Coors beer is covered in the policy manual of the company (Tr. 2862; RX 1047 E, F and G). Summarized, a good distributor should obey all laws, be active in community affairs, know governmental agency personnel applicable to the beer industry, be active in state and local beer organizations, encourage ecology and recycling efforts, be a responsible businessman, maintain a satisfactory merchandising department, solicit the business of every retailer in his territory, fairly allocate beer during shortages, control inventory, promote all packages, have adequate refrigeration, attempt to sell refrigerated marketing concept, work against boycotting, service his territory even during strikes, have complete care and control of the product, and cooperate with manuals and bulletins published from time to time by the company.

To determine whether or not a distributor is distributing within the general framework of the policy manual, Mr. Coors stated (Tr. 2863): "The company maintains a staff of area representatives. I believe there are 35 people in this group. * * * Each area representative is assigned a certain number of distributors and it is his responsibility to work with these distributors to see that the conditions of the policy manual are adhered to."

In speaking on competition, Mr. Coors said that the Coors Company competes with "every brand of beer that is sold" (Tr.

2851); and that its major competitors are Anheuser-Busch, Schlitz and Pabst. Mr. Coors does not expect that there will be more than 20 brewers in America by 1980 (Tr. 2881). If the top three brewers in America continue their present rate of growth, they will fulfill all the total beer requirements of the United States by 1985 (Tr. 2581). The competition in the beer business is "rough and ruthless" (Tr. 2853). In connection with this competition, he testified (Tr. 2853): "We [Coors Company] have one substantial disadvantage and that is our single plant location. We are today the only shipping brewery left in America. In 1971 the average barrel of our beer traveled 961 miles to its market place. This puts a freight consideration on us that our major competitors do not have with their multi-plant operations. Somehow we have to overcome this freight disadvantage."

"There are two things we attempt to do. We attempt to minimize our marketing costs by achieving better market penetration than our competitors and to minimize our advertising costs to offset our freight disadvantage." This is evident in that Coors now markets in the same basic area that it marketed in in 1935 (Tr. 2876). Coors' advertising costs during 1971 were less than $1 per barrel, while the advertising costs of Anheuser-Busch or Schlitz have been "$4 and up" (Tr. 2853).

The witness explained in detail the process employed in the manufacture and packaging of the Coors beer, which he stated was an extremely technical science and took a period of 80 days, while the breweries which are competitors take only 20 days (Tr. 2855). The plant is classified as a food manufacturing plant with absolute standards of cleanliness controlled by what is called an aseptic process (Tr. 2855). The aseptic process is merely the art of deactivating micro-organisms so that the beer can be microbiologically stabilized before it leaves the premises in the various packages (Tr. 2856). This is done with hermetically sealing all areas where all air is filtered and sterilized and used in conjunction with equipment designed and fabricated by the Adolph Coors Company (Tr. 2856). The Adolph Coors Company is unique in that it fabricates most of its own equipment (Tr. 2873). Coors beer is not pasteurized any more. The elimination of pasteurization and the conversion to the aseptic process started in 1959, and took about eight years to complete (Tr. 2856). The elimination of pasteurization is an absolute necessity for a refrigerated marketing concept. This concept must use the aseptic fill process which necessitates keeping the beer cold from the

beginning (Tr. 2857). In aid to this, the entire brewery is air conditioned (Tr. 2858). No other brewer in America uses the refrigerated marketing concept (Tr. 2858). Coors beer is not stored at the brewery except for a few odds and ends with 98 percent of the beer coming right off the packaging lines and going in either insulated railroad cars or refrigerated trailers for transportation to the distributors (Tr. 2858). Mr. Coors stated that "our beer is the most expensive beer made in America by a substantial margin."

The marketing department establishes the prices for Coors beer which is all sold at the same price to all distributors f.o.b. Golden, Colorado, and prices are communicated directly to the distributors at the time they are established (Tr. 267). The distributor selects the mode of transportation from the brewery, arranges for the same, and pays all freight bills direct to the carrier (Tr. 262-263).

Seventy-five percent of the beer is shipped by rail and 25 percent of the beer is shipped by truck (Tr. 2866). The rail cars that the company uses are specially insulated, cushioned cars built to the Adolph Coors Company's specifications and no other brewery in the country ships in this manner (Tr. 2866). All rail cars and transportation vehicles are either insulated or refrigerated and that is a part of the Coors refrigerated marketing concept (Tr. 2866).

As to why they ship in refrigerated or insulated transportation, he said (Tr. 2866-2867): "Our beer is a very expensive beer. It is a very delicate beer. It is a very sensitive beer. If we are going to get our beer to the consumer with a maximum appeal to him in terms of flavor and drinkability, we must minimize both the time and the temperature that the beer is subjected to from the time it leaves our packaging lines until it gets to the consumer. Refrigerated marketing achieves the minimizing of the temperature * * *."

"Through extremely tight quality control," Coors guarantees the continued production of high quality beer (Tr. 2873). Mr. Coors continued (Tr. 2873-2874): "There have been over 800 brewers go out of business since 1935. Some of them have gone out more than once. I would suspect that in 95 percent of the cases or more that poor product is the basic reason. They could not produce a beer of satisfactory quality at a price * * *."

Mr. Coors states that there has been a chronic beer shortage at the Adolph Coors Company for many years (Tr. 2876). The

brewery produced at over capacity during 1971 (Tr. 2912). It is impossible to supply the demand (Tr. 2884). It puts practically all of its resources into plant expansion (Tr. 2884). These shortages are dealt with by computerized calculations based upon withdrawals from the individual distributors' warehouses (Tr. 2864). This fact is further complicated in that specific beer must go to specific places in specific packages (Tr. 2865).

The Adolph Coors Company requires that both the shipper and the distributor move the beer to the consumer as fast as possible. The amount of inventory with the distributor is controlled by the Adolph Coors Company and the distributors have nothing to say about that because the Coors Company works in and out of the distributors' inventory. The responsibility of controlling the retail stock level of both the distributor and retail outlet is the responsibility of the distributor so that the time spent in each place is an absolute minimum (Tr. 2874).

Mr. Coors stated that fifty percent of the employees of the Adolph Coors Company are involved in construction work as far as expanding the brewery is concerned, and there is no construction company in the State of Colorado that is larger or any company in the State of Colorado that has a larger engineering force, both of which are dealing solely with brewery expansion (Tr. 2880). By 1980, the present forecasts indicate that brewery production will have reached 20,000,000 barrels (Tr. 2914; RX 189 B), with this figure climbing to 25,000,000 barrels by 1982 (Tr. 2916; RX 189 B). By this time, Coors will be producing all of its own aluminum cans and this long range planning also involves barley growth expansion, as well as the expansion of all phases of the malting, brewing and packaging facilities (Tr. 2917).

He testified that survival is the only factor that entered into the decision to keep the company on a constantly expanding basis (Tr. 2918). The availability of resources is the only thing that limits the ability of the Coors Company to grow, and all of these resources are internally generated. Although the founder of the company borrowed money, the second generation never borrowed any money and the present generation, the third, has never borrowed any money (Tr. 2918). Only 2 percent of the total cash flow is paid to the stockholders of the company (Tr. 2919).

The Adolph Coors Company started the development of the aluminum can back in 1954 through its wholly-owned subsidiary, the Coors Porcelain Company (Tr. 2871). The Adolph Coors

Company is now totally converted to aluminum cans (Tr. 2871; RX 169, p. 10). The aluminum cans are superior because they are only a two-piece can rather than a three-piece can and, in addition thereto, there is no weld on the main body. Joints and seams cause unsanitary conditions and interaction between the beer and the metal as beer eats through the lining at these points (Tr. 2869). The aluminum recycling program as initiated by the Adolph Coors Company has created a favorable image from an environmental standpoint (Tr. 2894).

The Adolph Coors Company has evolved a new can packaging innovation which will result in easy opening devices which remain with the can (Tr. 2929; RX 169, p. 10). The aluminum can permits a complete ecology effort (RX 169, p. 10). Further, these cans will be stuck together in six-pack packages by glue, rather than using paper carton carriers (Tr. 2929). The Adolph Coors Company has a policy to pay its distributors 10 cents a pound for aluminum cans returned for recycling purposes (RX 180 A). The Adolph Coors Company also has a bottle recycling program, the success of which depends on good retailer relations between the distributor and the retailer (RX 175 H). Adolph Coors Company distributors have received grateful recognition in their marketing areas for these ecology efforts which center on these distributors (RX 172, p. 19). The public acceptance of the recycling program is obvious in the nature of the increases which have been experienced in the can return program (RX 170, p. 3).

The respondent admitted in its answer that it unilaterally imposed vertical territorial limitations upon its distributors. Mr. Coors stated that the care and control of the beer required territorial limitations so that minimum stocks could be maintained at the retail level (Tr. 2879). The only way the respondent can monitor its distributors' performance is with these limitations. Mr. Coors further stated that the elimination of territorial restrictions would wipe out 75 percent of the small retail accounts (Tr. 2891). Mr. Coors stated that shortages of beer prevented the beer from being marketed in places like Houston, San Antonio and Portland or any areas outside the existing distributors' territories (Tr. 2878). Furthermore, he testified that Coors restricts territories in which distributors are permitted to market because that is the only way Coors knows to provide the market coverage that Coors has to have (Tr. 2878).

Much of the hearing and briefs have dealt with pricing and to completely evaluate it the judge starts with the Coors philosophy as stated by Mr. Coors that the brewer, distributor and retailer must get a fair take of return on their investment (Tr. 2885). Discounting at either the brewer or wholesale level severely damages the quality of the beer because it results in over-age beer in the market place (Tr. 2895). This one factor, alone, according to Mr. Coors, has put more breweries out of business than any other single practice (Tr. 2895).

Mr. Coors stated that he has never threatened a distributor with termination as alleged in the Commission complaint (Tr. 2885).

As far as central warehousing is concerned, Mr. Coors stated that CX 2030 was completely irresponsible and unreliable simply because of impossibility and the fact that you would be dealing with a different product (Tr. 2882–2885).

TESTIMONY

Proceeding now to individual witnesses called by complaint counsel, relevant portions of their testimony are hereafter set forth in some detail. No attempt is made to be all inclusive with the witnesses as to their total testimony. Such would be time consuming and unduly cumulative.

1. *Everett L. Barnhardt.*

Everett L. Barnhardt testified that he is a vice president of the Adolph Coors Company and has held that office since 1959 (Tr. 234). Mr. Barnhardt identified CX 349 A-Z 150 to be a policy manual covering policies for representatives and distributors of the company which was probably prepared in the Coors sales and marketing departments (Tr. 242). Mr. Barnhardt does not recall ever making any recommendations for changes in the manual (Tr. 243). The manual is for the time period June 1970, and is updated as of that time (Tr. 243). Mr. Sewell is in charge of the M.I.A.C. and Mr. Barnhardt does not know what the initials stand for, but Mr. Sewell's principal responsibilities are the accumulation and compiling of statistical data (Tr. 252). Mr. Barnhardt does not know whether Mr. Sewell keeps track of prices by users in the territories, but he does know that Mr. Sewell keeps track of the market sales in Coors' territories (Tr. 252–253).

Mr. Barnhardt approves f.o.b. prices before they are announced (Tr. 265). He approves of applicants before they are given a

Coors distributorship (Tr. 266). The marketing department decides which distributors are terminated from Coors and Mr. Barnhardt always approves the decision before it is announced (Tr. 266–267). CX 351–B states that a distributor is to distribute aggressively in a manner satisfactory to Coors, which Mr. Barnhardt stated means following of various company policies outlined in brochures, and understandings both written and verbal (Tr. 274). CX 348 is a part of those brochures. Distributors must operate in compliance with all laws (Tr. 275–276). One of the reasons for a distributor termination would be his failure to show cooperation with company policy and suggestions (Tr. 278). Mr. Barnhardt does not participate in interviewing applicants for Coors' distributorships, but he does generally have a conversation with them before they are given a distributorship (Tr. 283). In these conversations, Mr. Barnhardt stresses the Coors philosophy, but he does not bring up the matter of Coors' pricing policies in these conversations (Tr. 284).

Mr. Barnhardt testified he doesn't know whether Coors' distributors have given deals to get a franchise account, but he thinks that would not be a wise or desirable thing to do (Tr. 292). He has recommended to distributors that they do not make deals or discounts to franchise accounts (Tr. 292). Mr. Barnhardt's understanding of central warehousing is someone who buys in great quantities at a central spot to redistribute to numerous outlets (Tr. 293). Mr. Barnhardt is not aware of any franchise accounts that have an agreement with Coors (Tr. 295).

2. *Jerald B. Sewell.*

Jerald B. Sewell is currently manager of Marketing Information Analysis Center (M.I.A.C.) of Coors (Tr. 331). His main responsibility is to maintain records (Tr. 332). M.I.A.C. is also responsible for preparing marketing studies. He regularly makes studies of the percentage of the market that each distributor has in his own area and these are up-dated on a monthly basis as information is fed in from the various states from state agencies (Tr. 334).

3. *Eldon D. Danenhauer*

Eldon D. Danenhauer, of Topeka, Kansas, doing business under the name of Lapeka, Inc., has been a Coors distributor since March 1, 1968 when he acquired the distributorship through a purchase from a Mr. Steinhoff, pursuant to an agreement Mr. Danenhauer himself negotiated with Mr. Steinhoff at a price of $291,000 (Tr.

375, 429) and markets in eight Kansas counties. On direct examination, he testified (Tr. 364–447) that his current Coors sales representative is Jack Pearson who was preceded by Mel Linn. He would see them approximately once every six weeks or oftener. He stated (Tr. 378): "Well, they come in and suggest things, they offer suggestions and guidelines to help my organization and to upgrade it, try to see that I follow the policies and philosophies of the brewery."

These men have been a substantial help to him and are reliable. "The original pricing was basically what the former owner had been selling for, and my idea of what I felt I should charge for the wholesale price" (Tr. 379; CX 2292). Whenever he adopted new prices, he advised the brewery of these charges when he put them into effect (Tr. 404). After commenting on a number of price suggestions and changes, the witness was asked (Tr. 400–401):

Q. Did you discuss the prices you adopted in July 1970 before you adopted them?

A. All I can recall, and this is in June of 1969 when I received a new price suggestion from the brewery, they were given to me, and they said, at that time, I believe Mr. Pearson said to the fact that these were our suggested prices to you, and do whatever you want. Let me have a copy of what you do, and you've got it. And that's what I recall.

Since he has been in business, Coors' representatives recommend to him retail prices for customers and from time to time he accompanies representatives on visits to retailers to discuss with them the recommended retail selling prices (Tr. 417). "There are steady accounts in our area that fall below our recommended prices all the time. * * * I just informed him [Pearson] that it was happening and we were still delivering to them all the beer we could afford to give them" (Tr. 409). He could not say that the brewery had encouraged him to have exclusive Coors draft beer accounts: "It's my understanding that it is best for the retail account, the consumer, and us" (Tr. 413). In the years 1968, 1969, 1970, and 1971, there were in his territory a total of 160, 168, 179 and 182 draft accounts, respectively (CX 2281), out of which 35, 47, 54 and 76 draft accounts, respectively, were using Coors exclusively. There were two Coors split accounts in 1968, and one in each of the other three years. Most of the draft accounts, which do not serve Coors, handle another brand of draft beer exclusively (Tr. 415).

On cross-examination, Mr. Danenhauer testified that the nego-

tiations for the acquisition of the Steinoff organization were between the Steinhoff people and him and his attorney; that Coors did not in any way dictate to him any terms of that agreement; that the figure paid included a blue sky (Good Will) figure of approximately one-twelfth of the Steinhoff sales of the previous year which he understood to be used in the beer industry (Tr. 428–429); that CX 2280 shows the prices he has charged the retail accounts ever since he became a distributor; that he sets all of these prices; that he discusses those prices with representatives of the brewery, but he makes the final determination; that the eight counties in Kansas in his territory are his responsibility; that he has no desire to distribute elsewhere; that he now has an investment of around $800,000 in his distributorship and he would not make that investment if Coors were to put another distributor in the same territory (Tr. 443–446). All exhibits introduced by complaint counsel, which showed Mr. Danenhauer's prices, were prices set by Mr. Danenhauer himself (Tr. 444), the determination of prices was Mr. Danenhauer's alone, and he was never threatened in any manner by the brewery (Tr. 444).

4. *Jay Wagnon.*

Jay Wagnon, of Wichita, Kansas, testified (Tr. 449–521) that he has been a Coors distributor under the name of W. W. Sales Company at Clinton, Oklahoma, since 1952, where he has twelve counties; that he has been a Coors distributor under the name of Wagnon, Sales, Inc., at Wichita, Kansas, since 1954, where he has four counties; and that in Wichita he distributes other brands of beer, Pabst, Carling, Colt 45, Hannigans and Metz, and in Oklahoma, he has Falstaff (Tr. 449–451). On direct examination, there is considerable testimony relating to discussions with reference to prices charged the retailers by Mr. Wagnon and the suggested prices made by Coors' representatives and officials, some of which he followed and others that he refused to put into effect. In view of the admissions made by the witness on cross-examination, it would not serve any purpose to go into the details of the direct examination. Mr. Wagnon testified on cross-examination that, in arriving at prices he charged his retailers, he discussed the matter with his son, who is his sales manager, and other distributors (Tr. 493–495); that the brewery never did anything other than suggest prices (Tr. 498); that he was told by Coors' officers that the final determination on prices was his, and his alone (Tr. 506); that his sales representative, Mr. Linn, never

once asked to approve any of his prices (Tr. 512); that he discussed with his retailers the matter of making a reasonable profit; that his distributorship had been short of beer for many years (Tr. 514); that discounting by retailers in their prices of beer, including Coors, has been going on for many years (Tr. 518); but that he on his own decision does not tolerate deals and discounts (Tr. 514–515); and that the supermarket people in general had specials which were below the suggested prices, and they set their own prices at the prices they choose (Tr. 518).

5. *John P. Ward.*

John P. Ward testified (Tr. 521–565) that he has been a distributor for Coors under the name of John P. Ward, Incorporated for fifteen years. His territory consists of Wyandotte, Johnson, and Miami Counties and the eastern part of the State of Kansas. His sales for 1968 totaled $1,261,785.52 and rose to $3,164,445 in 1971 (CX 2306). Coors' representative for the last three or four years has been Jack Pearson, and his predecessor was Mel Linn; he sees Mr. Pearson about six or seven times a year; both Mr. Pearson and Mr. Linn are "definitely" reliable persons (Tr. 526–527). He is generally familiar with the Coors policies and, as to pricing policy, he answered (Tr. 527):

> Well, I put my own prices into effect, and I may listen to their suggestions when a new package is coming out or when there is a tax rise or when there is a railroad freight increase I listen very diligently but I know my business and they know theirs. So, if I see fit to put a price on the product more generally it is much higher than what they and we were talking about.

He has a contract with Coors and, when asked, "Does that contract permit them to terminate you?" he answered, "If I do something wrong, certainly" (Tr. 529). He has never offered to sell beer to any of his accounts at a discount, and has never given a case free with a number of cases. He stated: "That is a policy of my own through years of experience, that you just cannot buy your business" (Tr. 540–541). He understands that is also a Coors policy and he thinks that he would no longer be a distributor if he violated that policy. He believes he has heard that Coors wants all of the retail accounts to make a profit on Coors beer and not to sell at a loss (Tr. 541); "Some of them try to run your brand as the leader and we just don't like to have that to happen" (Tr. 542); he understands that Coors doesn't like that to happen either (Tr. 542). He agrees with that policy "100 per cent"; he "definitely" talks to his retail customers about fair profits on Coors beer. He testified (Tr. 542–543):

Well, if they do try to sell it at a very cheap price I try to advise them not to do it because they are just messing up the market when they do. And the beer, for them to sell it at a cheap price, just isn't available.

On cross-examination, Mr. Ward testified that he determines his prices to the retailers set forth in all of the pricing documents introduced by complaint counsel and received in evidence (Tr. 559–560); he would not have invested the considerable amount he has in his distributorship if he did not have a territorial right in which he distributes Coors beer (Tr. 560); he does not have enough beer "to take really good care of the terrtory that I have;" and this beer shortage has existed for fifteen years (Tr. 560); he has both exclusive and split draft accounts in his territory, and does not have a policy against split accounts; as to "Coors' philosophies," as alluded to by complaint counsel, he has never "been coerced or threatened in any manner, way, shape or form" (Tr. 562).

On redirect examination, the following exchange took place (Tr. 562–563):

Q. You stated you had a considerable investment in your distributorship, Mr. Ward. Would you state for the record what it is today?

A. The first of the month it will be almost $800,000.

Q. Thank you. You said you would not have invested this amount of money in your distributorship without a territorial right. Would you tell us why?

A. I would be foolish.

Q. Why?

A. Why would you throw money down a hole, so to speak?

Q. Can you explain a little more completely why it would be throwing money down a hole?

A. When I invest money I feel that I am capable of taking good care of it. By taking care of it, in this particular line of business, is production, penetration of the market, quality merchandise served every day, day in day out.

Q. You couldn't have achieved these things without a protected territory?

A. No, I could not have, couldn't even have dreamed.

Q. Why?

A. Say, for instance, you are a distributor in the state and you have purchased a lot of beer and you didn't sell it and it got old and you came in my market and dumped it at a price 50 cents off a case, like some of them are doing, what do you think that would do to my territory and my investment?

Q. What would it do?

A. It would knock the hell out of it.

Q. Someone coming in and selling at a lower price?

A. Why certainly, and stale old beer.

On recross-examination, the following took place (Tr. 563–564):

Q. Let's assume, and you used the word market penetration, Mr. Ward, what do you mean when you use the word market penetration?

A. I try to sell every account every one of our packages.

Q. How many accounts do you have in your counties?

A. All but 38.

Q. Let's assume for a minute that there was another Coors distributor in the same counties in which you distribute, and let's assume further that the Adolph Coors Company, on the penetration theory, requires each of your distributors to call on all 660 accounts, now, what is going to happen to the price of beer in that territory?

* * * * * * *

A. Well, I don't think either one of us would make any money. We couldn't stay in business fighting that way, lowering the price.

6. *Cecil Chance Scott.*

Cecil Chance Scott testified (Tr. 567–644) that he is now and has been since 1966 a Coors distributor doing business as 4–C Distributing Company, San Angelo, Texas, having an assigned territory of nine Texas counties (Tr. 577). He first applied to be a Coors distributor in 1945, and reapplied in 1963 or 1964 (Tr. 568). Before becoming a distributor, he was first interviewed in August 1965 at Wichita Falls, Texas, by two Coors representatives who inquired what his philosophy was pertaining to discount pricing, etc., and he responded (Tr. 570): "I had come from a real competitive line of business in the rock bit business. I had always been and am now violently against dealing, cutting prices, kick backs because I have been a victim of a lot of that." He went to the brewery at Golden, Colorado, for his second interview and he does not remember anything said on discounting or price, stating (Tr. 574): "They were wanting to know more about me than I was wanting to know about them. We talked more about my background and so forth than we talked about how Coors operated."

In fact, the witness was questioned at such length by complaint counsel about his wholesale prices since 1966, that the examiner was provoked to inject himself (Tr. 601):

HEARING EXAMINER JOHNSON: And as I take it, you used your own judgment after discussing the matter, whether you should raise your price or shouldn't?

THE WITNESS: Yes sir, I sure do.

HEARING EXAMINER JOHNSON: Did you think you were being intimidated in any way?

THE WITNESS: I have never been intimidated by Coors or any of their people in any way to any of my knowledge or I didn't take it that way. I have never been intimidated about anything.

The witness prepared a current list by name of every draft ac-

count in his marketing area and the brand of beer sold by each account which complaint counsel used as a Commission Exhibit (CX 2308 A-B). Of the total of 69 draft accounts, Coors had 23 customers, 12 exclusive and 11 splits; 23 accounts served other brands of draft beer exclusively. The Commission's own exhibit closely shows no exclusive draft discount policy here. And in those accounts where he does not have Coors draft beer, he has other packages of Coors beer (Tr. 636).

When asked as to the Coors Company policy with regard to split draft accounts, the witness said (Tr. 612–613):

> Only that split accounts, that we try to get them exclusively if we possibly can, and in the interest of serving good beer and so forth, I was told when I started why split draft accounts, how they could cause me trouble and why I should try and persuade the retailer to go one brand of beer, and we even persuade them to go one brand of beer if it's not our beer. I did that just this week.

To the question, "Why would you do that?," he said (Tr. 613):

> Well, sir, when a waitress takes an order and two kids order a Coke and three others order a beer and somebody orders something else and one type of beer and she gets it all on this tray and turns it a half around nobody knows what they got. We just like to have our beer served in our glass, in a good clean glass. We like to have a good clean beer. That is the only reason for it all. I have had split accounts since I opened my doors and we have accounts that take great pains with their employees and say, "You put Coors in the Coors and Brand X in that glass and you can give them exactly," and they have been doing it, and they serve a good beer, and I have no objections to that at all. I only have objections when they start serving somebody's else's beer in my glass or serving my beer in their glass telling them it is their beer.

He suggested retail prices to his accounts. He recalled a problem he had with Harry's Food Store; he asked them not to use Coors beer as a leader and football the prices, up and down (Tr. 602–603). Deliveries were stopped. He was sure that he discussed the problem with the Coors representative (Tr. 604). When asked what Coors suggested, he stated (Tr. 605):

> I don't remember the Coors people as much as I do other distributors. When this thing happened I remember asking other distributors. I was asking them for advice, this, that and the other, about how to handle situations, I am new in the business. I remember definitely other distributors discussing over a beer or lunch that footballing beer would hurt the sale of it. They probably advised me of it. I certainly couldn't advise them, I didn't know.

He knew Mr. Harold Letcher and has had several discussions

with him over a number of years (Tr. 615). Mr. Scott stated that he could have said to Mr. Letcher, "If you advertise my beer at a low price other companies will think I am giving you a discount" (Tr. 615–616). He further testified (Tr. 616–617): "Well, sir, he [Letcher] is a very controversial man, and no one gets along with him, the liquor dealers, any of the other beer. We are not the only one. Mr. Letcher is just that type of man. * * * As I said before, I could have said to Mr. Letcher I think that discounting in the paper would hurt me with other retailers. I'm sure that I have said that or probably have."

He stated that Mr. Letcher sells whiskey and beer in two stores in his territory; that he sells Coors beer to Mr. Letcher in those two stores; that he has never cut Mr. Letcher off; and that he has been delivering to him for six years (Tr. 622).

On cross-examination, Mr. Scott testified that he did not pay anything as a consideration for obtaining his distributorship (Tr. 629). He has been short of beer regularly since he became a Coors distributor (Tr. 635–636). In all of the years that he has been a distributor, he has fixed the prices that he has charged the retailers for beer, and the retailers, themselves, fix the prices that they sell Coors beer for (Tr. 631). With reference to Harry's Food Stores' (Polunskys) transaction referred to on direct examination, the witness said (Tr. 633–634):

> Things that would be unbelievable that we were faced with. When this came out in the paper retailers called me and said, "How come you didn't give me a discount?" I said, "I don't give anybody a discount." They said, "Now, don't tell us that you are not discount because I know the Polunskys, they have been in business here for 40 years or more, and they won't discount unless they get a deal." I said, "Well, they sure have this time." Then they called me a liar, they called me everything, and I am new in the business, and it concerned me. I was accused and I just went through this thing not long ago, again, in another. So, that is what led up to the argument with the Polunskys. Whenever we got together on the telephone I am sure that I related this to him, and he probably said, "Well, you can tell them to ask me. It is a hot item, a new item, and I am going to do this." You know how a conversation would probably go. Right now I don't really remember whether I cut him off or he kicked me out. It was just a disagreement, it was an argument.

Cecil Scott testified that the book value of his company is $120,000 and he would not have invested that amount to be the Coors distributor if he thought there was going to be another distributor in the same territory working the same accounts (Tr. 637-638).

7. *Raymond Willie, Jr.*

Raymond Willie, Jr., of Dallas, Texas, testified that he has been president of Willowbrook, Inc., since May 17, 1966. Sometime in August of 1965, he made application for the Coors distributorship in Dallas (Tr. 647). He was interviewed the first time in Dallas on March 17, 1966 (CX 2212 A-D). His three partners were present at the interview and gave general information about their backgrounds; they were informed that, if they were to be the Coors distributor, they would be expected to obey the taxes and the federal laws to the letter, and that they would have to be good citizens and participate in civic affairs (Tr. 646-650). He stated that the Coors representatives passed on to them some of their philosophy; he does not remember their going into any pricing and pricing was not discussed at a subsequent meeting (Tr. 650-651).

Sales were increased from $6,476,622.47 in 1968 to $13,365,-107.73 in 1971 (CX 2324 A-B).

They received from Coors a document (CX 2309) on May 17, 1966, when they became a distributor, containing a list of suggested selling prices to retailers (Tr. 657–658). They did not follow the suggestions; the partners discussed it among themselves and they determined what to sell the beer for (Tr. 657–659, and see CX 2309).

When there was a price change by the brewery in the summer of 1968, he had discussions with Coors personnel and they suggested several new prices to him (Tr. 662); Mr. Willie and his organization followed one of the price suggestions by Coors but changed three out of the four (Tr. 663).

Mr. Willie testified that his company suggested the retail prices that their customers use. When he became aware of discount prices of their retail accounts, he would talk to them; he just took it upon himself to go out without Coors' encouragement. He testified (Tr. 668): "We suggest a lot of prices in our market. We are not always able to get the retailer to go along with our suggestion, but we do suggest."

He was aware that one of his retailers had been cutting prices from time to time at the retail level in the Dallas area, but their price cutting had been ignored by him (Tr. 653–654; CX 2212 C).

He talked to Coors' representative in regard to the special selling prices of Wards Cut-Rate Drug Company and, in describing the conversation, he said (Tr. 671–672):

Just the general gist of the thing, as I had felt that I should continue to see Wards just as I would any other retailer that would continue to sell our brand at less than retail price, and I have had many visits with Wards drug chain as well as Skillerns drug chain that does the same, and I've talked to their buyers, pointing out their cost and so forth, and both buyers have both been nice and polite and very good customers of ours, but have told us in no uncertain terms that this merchandise was theirs, and they would sell it at the price they wanted to. They have continued up until this date to sell it for the price they wanted.

* * * * * * *

I can't remember talking to Mel [Mel Linn, Coors' representative] about it. I can remember talking to the buyer at Wards from time to time, and I think this has been two or three times where we have had—not had enough beer, and I pointed out to them in advance by saying, "Look, we're not going to have cans, or we're not going to have bottles, or whatever package it's going to be. We're going to have to put you along with everybody else on allocation," and I have mentioned that to him, and I don't mind telling you why because for me, it would be tremendously embarrassing for him being on allocation and trying to advertise something he wouldn't have enough of, would be misleading to the public. So I have always gone to them, pointing out to them when we had shortages.

The witness said there was a time when Coors expressed dissatisfaction with the way his distributorship was performing (Tr. 673). The situation is well expressed in a letter from Coors (signed by Robert Eke) to Willowbrook, Inc., dated February 11, 1969 (CX 2327 A-B).

In a letter to Coors, dated February 18, 1969, and signed by all of the partners of the distributorship (CX 2329 A-B), it was said in part by Willowbrook, Inc.:

We wish to advise you that all management disagreements have been resolved.

* * * * * * *

As a result of these meetings, we have resolved the problems that were facing the management of our company and we have emerged as a stronger four-man team that is fully capable and enthusiastic to do the job assigned to us of building a strong and successful distributorship in the Dallas market for the sale of Coors Beer.

We feel that the management problems encountered and the assistance of the Adolph Coors Company through meeting with us has been most beneficial and we want to express our thanks for the consideration shown us and hereby pledge and rededicate ourselves to making Willowbrook, Inc., a distributorship of which Adolph Coors Company can be justly proud.

On cross-examination, he testified that he did not pay anything for his distributorship rights (Tr. 689). The partnership has about three-quarters of a million dollars invested in their Dallas

distributorship; they wouldn't invest that kind of money were it not for the fact that they would be the only Coors distributor in this territory (Tr. 689–690). The witness produced a document which had been marked as CX 2325 but had not been offered in evidence by complaint counsel which gave information of the draft accounts in their market and showing numerous split draft accounts. With complaint counsel's consent, it was received into evidence at the request of counsel for respondent as originally marked (Tr. 693–694). The document reads:

ANALYSIS OF DRAFT ACCOUNTS IN DALLAS MARKETING AREA

	TOTAL DRAFT ACCTS.	TOTAL COORS ACCTS.	EXCLUSIVE COORS ACCTS.	COORS SPLIT ACCTS.
DEC. 31, 1968	521	80	62	18
DEC. 31, 1969	549	104	79	25
DEC. 31, 1970	544	119	92	27
DEC. 31, 1971	622	142	121	21

Coors beer is widely advertised in their market at less than their suggested retail prices; the sales prices to the retailers are set by the partnership; they have never been coerced, intimidated, or threatened by any member of the Coors organization for any reason whatsoever (Tr. 695).

On redirect examination between the witness and complaint counsel the following exchange took place (Tr. 700):

Q. Mr. Willie, you said you wouldn't have invested your three-quarters of a million dollars, whatever amount you're going to invest in the next few months in this distributorship, if you felt that there would be more than one distributorship in this area. Would you tell us why?

A. Well, if were awarded Dallas, Rockwall Kaufman, whatever we were given, if other Coors distributors are going to come into that market and are going to sell Coors beer in that market, then, it is certainly going to raise our price, and it is certainly going to raise the price to the consumer; but forgetting about the consumer a minute, if some other Coors distributor comes into our area, then, we are not going to make the profit, and the price of the beer is going to be increased because we are going to all have to perform the full Coors service which is rotation in merchandising and watching the quality of the product.

8. *Wayne Campbell.*

Wayne Campbell, of Oklahoma City, Oklahoma, testified as follows: He is now employed by Ford Distributing Company, Oklahoma City, a Coors distributor; that he had been employed by

Coors from 1956 to 1958, first as a tour guide and later as a sales representative; that he joined Ford Distributing Company in 1958 as executive vice president and general manager (Tr. 723–724); that Ford's territory consists of central, northeast and east Oklahoma and the distributorship is one of the largest in the Coors family (Tr. 724). The situation with reference to draft accounts in the area served by Ford for the years 1968, 1969, 1970, and 1971 is as follows as shown by complaint counsel's exhibits:

	1968	*1969*	*1970*	*1971*
Total in the Area	743	764	876	951
Coors exclusive	496	548	653	734
Coors split	28	22	23	32

(CX 2336, 2337, 2338 and 2339; Tr. 728–729)

In 1970 Ford's profits were dropping and they attempted to get some answers to their problem (Tr. 739–740). On their own initiative, they prepared a written analysis of their operation for a five year period ending September 30, 1970 (CX 2355 A-J), which was presented to Coors. Mr. Campbell testified as follows in this regard (Tr. 740–741):

> We asked for their suggestions because we realized that they had experience on methods of operating more efficiently.
>
> * * * * * * *
>
> This [CX 2355 A–J] is an outline of our company, a comparative statement of our income for given periods and some of our profit and loss statements, some examples of that, and also a little payroll information. We presented this for the purpose of seeing if the brewery could give us any suggestions on what's wrong with our operation in relation to profits; and as it turns out, and as I said, this was the article here that gave us the idea to put in three or four programs and cut dead wood and operate it more efficiently in 1971.

A meeting was held in Golden, Colorado, about January 30, 1971, at which Coors people were present, together with Mr. Ford and the witness. He stated (Tr. 744):

> We didn't raise our price because we came up with a more realistic solution. Do you want me to explain the whole thing?
>
> * * * * * * *
>
> Q. Just tell us what happened at the meeting.
>
> A. We decided to come up with a cost of operations index figure and incentive plan to operate more efficiently. We discontinued, we laid off or let go two or three people that we felt were dead wood, and we also got rid of a connection that we had with another company that we felt was pulling

us down, and we operated more efficiently in 1971, and we made more money in '71. It was more realistic than raising prices and that was our decision to make.

On cross-examination, Mr. Campbell emphasized his concern about the hazards involved in draft beer accounts which he had gone into on direct examination (Tr. 745–746):

The biggest thing we worry about at Ford Distributing Company is quality. That's what has made us what we are, that and a lot of hard work, and we have split accounts that jeopardize that quality in some cases. By this, I mean that we have even had examples of retailers that split with another beer, and they couldn't sell the other beer, and they'd put Coors tap knobs on that beer and sell it. We've had CO_2 restriction problems which our beer draws at a certain pressure; and if that pressure is not maintained, the quality of Coors again is diminished. We've got refrigeration problems in Oklahoma City, for example, coming out of our ears, and we just cannot deliver adequate amounts of beers to retailers that don't have adequate refrigeration facilities. We also have problems with misrepresentation of the product where a customer asks for a Coors and he gets another brand, and there are multiples of problems.

* * * * * * *

Equipment is another problem, gas gauges, et cetera, and refrigeration. We find that equipment problems are probably as bad in our market, for instance, as I've ever seen them, and in a split situation it isn't conducive.

Ford suggests retail prices to its retail accounts, but the retailer, himself, makes the final determination on what he will sell for. The retailers are not penalized for failure to follow the suggested retail price. He stated (Tr. 747): "As a matter of fact, many of them are not following our suggestions right now." They still have Coors beer available to them.

He testified that they discuss with the retailers the selling prices of different brands including their own and discuss suggested profits so the retailers can make a reasonable profit; and they talk to Coors' sales representatives concerning the wholesale prices. Mr. Campbell testified (Tr. 736):

We set our wholesale prices depending upon the situation of our company at a given time and we try to work it on a profit margin. We take a lot of advice from our accounting firm as to our prospects on profit.

* * * * * * *

We discuss it [with Coors' sales representatives], but we set our own prices.

9. *William Louis Barrows.*

William Louis Barrows, of Stockton, California, an insurance salesman, testified (Tr. 758–773) as follows: He was a Coors dis-

tributor from March 16, 1964 to January 4, 1971; his territory consisted of San Joaquin County (California) south of the Eight-Mile Road (Tr. 759). He stated (Tr. 760): "We were supposed to sell within our territory because it wasn't economically feasible to go out of our territory anyway." On two occasions he sold from his warehouse to accounts from outside his territory (Tr. 760). He described Coors' position on these sales (Tr. 760): "Take care of your own territory, which basically they were right and I agreed with them." When he took over his territory in 1964, he arrived at his price to retailers by countinuing the existing price of the former distributor. Whenever there was a price change, he posted the brewery recommended price on all occasions. He discussed with Coors that he wanted to initiate a price increase (Tr. 763). He attended several distributor meetings in Golden, Colorado, and he recalled Mr. Barnhardt and Mr. Bill Coors speaking; they "felt" that the price structures were such that everybody could make money and it wasn't necessary to chisel and it was in violation of the California price posting law anyway (Tr. 767). By "chisel" he meant "Selling prices below posted prices or giving free merchandise, things in that area" (Tr. 768).

On cross-examination, he said that he, personally, in any discussions he had with the brewery personnel, regardless of what the subject matter was, was never threatened or intimidated in any way (Tr. 769). Only once did he have a serious disagreement with the people at the brewery, when Coors wanted him to put non-union trucks on the road during the time of a strike; the brewery wanted Coors beer delivered during the strike. The subject that caused him to sell was his "refusal to put non-union trucks on the road" (Tr. 769). He testified further on this point (Tr. 769):

Q. Was the selling out your choice or was it suggested to you by the brewery?

A. That is kind of a hard question to answer, sir.

On redirect examination, he testified (Tr. 772): "If we could have agreed on labor, I probably would still be there." He decided to sell when it became evident what their wishes were; the sale was made to Rink Babka, and all negotiations in connection therewith were handled by the witness and his attorneys; the deal he finally made with Mr. Babka was the one he approved himself (Tr. 770–771).

10. *Harold John Letcher.*

Harold John Letcher, of Rowena, Texas, testified as follows:

He is in the alcohol beverage package business with stores in Manard and Rowena, Texas, where he handles Coors beer. In January 1966, he opened a store in Brownwood, Texas, doing business as the Handy Liquor Store. On June 3, 1966, Mr. Stewart Coleman, the distributor for Coors in the Brownwood area, refused to sell him any more Coors beer; at the time he was also handling Pearl, Lone Star and Schlitz beers (Tr. 776–777). He had advertised weekend specials selling certain beers below his regular prices. He had a number of discussions with Mr. Coleman after he (Coleman) stopped delivering Coors beer to him, and Mr. Coleman agreed to sell him beer if he would not advertise and sell at special prices, but this the witness refused to do (Tr. 777). On July 5, 1966, the witness wrote and sent a letter to Coors Brewery, stating that Mr. Coleman had passed him up after June 3, 1966, and that Mr. Coleman said he had orders from Coors' representative that his franchise would be cancelled if he delivered beer to Mr. Letcher's Brownwood store (CX 2005). On September 12, 1966, the witness again wrote a letter to Coors Brewery, stating that he had not received a reply to the July 5th letter. On February 6, 1967, he wrote a letter to Mr. Robert Eke at Coors Brewery, referring to the previous letters he had written without receiving a response, which stated his problem since no beer had been delivered since June 3, 1966 (CX 2014). In a reply, dated February 9, 1967, to the latter letter, Mr. Eke advised him that he was asking Mr. Campbell and Mr. Coleman to contact him. On February 10, 1967, before Mr. Letcher had received the foregoing letter, he telephoned Mr. Eke at Golden, Colorado, making a tape recording thereof. Over the objection of respondent, the judge permitted the playing of the tape and the conversation between the two was set forth as a part of the transcript by the reporter (Tr. 804–805). He (Eke) said further in part (Tr. 817):

> * * * we feel that we are obligated to all of our customers to hold up their margin of profit and we sincerely feel that you should appreciate this. Now, there is a lot of breweries and I can say without exception other than ours, that would encourage you to cut the price. Here, again, we feel that our product is going to represent a good deal of your profit and for this reason we feel that you should maintain a decent margin on it.
>
> * * * * * * *
>
> We feel also that we are under obligation to the other retailers in the area to see that they maintain a decent profit.

As to buying from another distributor, Mr. Eke said (Tr. 820–821):

Here is the situation on this. All of our beer is pretty much allotted and the amount of beer going into the area is the amount that is going to take care of the needs for that immediate area. So if they start shipping it off, some of their own customers are going to suffer.

On February 8, 1967, Mr. Letcher taped a conversation that he had with Mr. Wayne Campbell, which took place in the former's office in Rowena, Texas, at which time Mr. Campbell said in part:

Well, we look at it this way, Mr. Letcher. We feel like we have a right to protect our product no matter what the circumstances are and we feel we have a quality image. It is a real fine product and we want to maintain it. We are doing this for one reason, to let the retailer make a profit. What hurts us is to see somebody not make a profit. [Tr. 837.]

* * * * * * *

Oh, well, yes, Mr. Letcher, we couldn't care less about competitors. As far as we are concerned, we think they are all fine, they are fine people, we don't have any arguments with them at all, but we do have certain beliefs just like yourself and certain policies on our product that we like to follow and this isn't only true here, it is true everywhere. We know for a fact that we have the prerogative to not sell to price cutters. We can't come in here and tell you what to do because this is your prerogative what you do, but it is our prerogative also not to sell to people who degrade the image of our product. All we want to do is sell to the people that will make a fair profit and we will get along fine. [Tr. 837–838.]

* * * * * * *

Well, I understand your situation, but quite frankly, as I said before, we have the same policy throughout all of our marketing areas, no matter if it is the biggest retailer or the smallest one, we have the same belief. As a matter of fact, the biggest retailer in the United States, probably we have had an understanding with them on that and they hold our prices up all the time. Now, they felt maybe the same way that you did first, but now they look at it this way. No other brewery but Coors, that we know of, has this kind of belief, this strong belief about pricing. So they go ahead and do whatever they want to with them, but with Coors, in order to keep Coors, this is the only way we will stand. We don't want it to seem like we are being overbearing about it. It is a policy we have had before we came in to Brownwood. It is a policy we will have when we go into any other market. We have had it for years and years and this is the way we have built our reputation, our quality image. We know for a fact once we sell the beer to you we cannot tell you. [Tr. 839–840.]

* * * * * * *

We are real proud of our record wherever we are and we feel it has been built not only on a quality product, which we feel we have, but also on an image that is created of being quality. The only way we are able to maintain that image is to not let our product be price cut, cut down and chopped down and degraded in image by prices. If a product is worth a certain amount, we think it should sell for that. We definitely are firm believers in our retailers making a profit. Once a retailer cuts our product, he is

not making the profit he should and he is also degrading our image that we are so concerned with. We not only spend a lot of money on the product in making a quality product, but we want to let the people know and realize that it is quality. So this is the reason I certainly wanted to come by here today. [Tr. 841–842.]

* * * * * * *

Well, here again we are not only referring to advertising in the paper, we are referring to the actual retail prices you are selling it for, in other words, what you price that for. It isn't only the advertisements in the paper that we are concerned about. It is the product, what it actually sells for. We will not tolerate price cutting. [Tr. 843.]

* * * * * * *

Of course here again we are talking about what we believe. We are not trying to dictate anything. All we have is a belief and once a person gets the beer, it is your prerogative to do whatever you want to do with it, but that doesn't mean we have to reservice you. [Tr. 845.]

* * * * * * *

If you sell the product for what it should be sold for, make a profit on it. We are asking one other thing, this is between you and our distributor, I would suggest this, if you decide that you want—we would like to have your business over there just like we have got it here, the same condition where you keep our product up, no specials, no cutting prices on it, keep it there, we could not care less what you do with the rest of the beer, that is your business and their business. If you keep our beer at the same price, don't cut it, we would like to have the same relationship that we have here. [Tr. 846–847.]

* * * * * * *

Well, actually as far as we are concerned, approach it the same way, they are not putting our beer on specials, they are not putting it in the paper, they are not cutting it, you are not having any unfair competition by this. We will be treated the same way by you as we will by them. That is fine with us. Where we don't have any price cutting or any advertising, that is all we ask and that is the reason I came by to have a man to man business talk with you. We want to show our appreciation, our respect, and let you know that we would respect your business and we would like to have it under these conditions, but this happens to be a basic brewery policy and we have had it for years. We had it before we came into Brownwood and we will have it forever as far as we are concerned because we find that it is the best policy we can have. [Tr. 848–849.]

Mr. Letcher sold a half interest in the Brownwood store in 1966 to Ralph Williams who was working for him as manager, and his other half interest he sold to Mr. Williams in August of 1971 (Tr. 866–867).

11. *Ralph E. Williams.*

Ralph E. Williams, of Brownwood, Texas, in the retail liquor, beer and wine business under the name of Handy Liquor Store,

testified (Tr. 892–905) that he was manager of that store when it was owned by Harold Letcher. In 1966 he bought a half interest in the establishment from Mr. Letcher, and in August of 1971 he bought the other half. He sells all of the brands of beers that are available in their area. They had Coors beer in 1966 at the time he was manager of the store, when Mr. Letcher advertised and sold Coors and other brands of beer at special prices. He testified (Tr. 894):

> Well, Mr. Coleman [Coors' distributor in that area] told us that we couldn't advertise, if we did he would have to discontinue selling to us, cut us off. So Mr. Letcher told him that he didn't want to have to get in the paper but if he advertised one major brand he needed to advertise the others, all of them, you know, and so he advertised Coors again and that was it.

Mr. Coleman refused to sell any more Coors beer to the store untill August 1971 when the witness became complete owner of the store.

On cross-examination, the following exchange took place (Tr. 899–902):

> Q. Actually, Mr. Letcher had problems with more distributors than Mr. Coleman, did he not, from time to time?
>
> A. Not to my knowledge. He lived someplace else and I lived in Brownwood.
>
> * * * * * * *
>
> Q. You don't know if he ever had any problems with any other distributors?
>
> A. Not there in my store, I'm pretty sure.
>
> * * * * * * *
>
> Q. As a matter of fact, you knew that the reason your store didn't have Coors was because Coleman couldn't get along with Letcher.
>
> A. No, just because Coleman told Mr. Coors we couldn't have beer.
>
> * * * * * * *
>
> Q. * * * And you had a pretty good idea that when you bought Letcher out you could have Coors in that store, isn't that correct?
>
> A. I had a pretty good idea.
>
> Q. Where did you get that idea?
>
> A. Because Stewart Coleman was our friend and we figured he would let us have it if the brewery would let him do that.
>
> * * * * * * *
>
> Q. Did Mr. Coleman make any conditions upon you in any way, shape or form when he brought that beer back in there?
>
> A. None whatever. He was the first truck out there to bring the beer when I opened up.

12. *Henrietta Williams.*

Henrietta Williams, of Brownwood, Texas, the wife of the previous witness, testified (Tr. 905–914) that she first became associated with Mr. Harold Letcher on May 3, 1965 as a clerk in the Handy Liquor Store; that they had Coors beer in early 1966, and that, after they were running weekend specials in the paper, Mr. Coleman came to the store telling them "it was a brewery regulation that they didn't allow Coors to be run on special and advertised in the paper" (Tr. 908) ; that Mr. Coleman stopped delivering Coors beer to them and on June 10, 1966, the witness accompanied Mr. Letcher to Mr. Coleman's place of business and placed an order for certain packages of Coors beer tendering a cashier's check for $510 to cover the cost; that Mr. Coleman informed them "that as soon as the boys returned from their route he would send it out to us. The subject came up of advertising in the paper and running it on special and he told Harold no that he couldn't send him the beer if he was going to advertise it on special * * *" (Tr. 908–909). She testified further (Tr. 909) :

> Mr. Coleman. He said, "I would like to sell you beer but have a hundred thousand dollar investment and I don't want to take a chance on it" and Mr. Letcher said, "Well, I certainly understand that." Then Mr. Coleman told Mr. Letcher that there would be a brewery representative down in a few days and he might talk with him and see what they could do.

At the time of the conversation, Mr. Coleman was selling them Jack's beer and he delivered them that brand for several months (Tr. 910).

On cross-examination, when respondent's counsel referred to the testimony on direct "that Mr. Coleman told you that he might lose his franchise or something to that effect," she said (Tr. 911) :

> He said that he was sorry that he would like to sell us the beer but he had about a one hundred thousand dollar investment and he couldn't take the chance on it because it was a brewery policy not to advertise the beer on special in the paper.

She further testified that she and her husband determine the prices at which they sell; that to a certain extent it is a fairly common way in the liquor business to watch your competition and see what they do; that she really wouldn't know if Mr. Coleman got along with Mr. Letcher; that Mr. Letcher seems to think Mr. Coleman is all right as far as she knows; and that they have not run any specials on Coors beer since August 1971 (Tr. 911–913).

13. *Sylvan Polunsky.*

Sylvan Polunsky, of San Angelo, Texas, testified (Tr. 914–945) that he is vice president of Harry's Food Stores, Incorporated and vice president of Quick Stop Food Stores, Incorporated, both located in San Angelo. Harry's Food Stores is a superstore type of operation and in 1966 its volume of business was somewhat over a million dollars. They started selling Coors beer around the year 1966 when it first came into their market. The store stocked all beers and Coors had a good reputation so they wanted to handle it. They bought beer from 4–C Distributing Company, a Coors distributor, owned by Cecil Scott. On April 9 and May 14, 1967, in newspaper advertisements, Harry's Food Stores ran ads on Coors beer, six glass cans at a special discount price of $1.09 (CX 2019–2021). After that they ran out of Coors beer and were unable to get any further delivery. In a subsequent talk, Mr. Scott told the witness, "We do not sell to price cutters" (Tr. 924). On May 26, 1967, the following was contained in Harry's Food Stores' one-page advertisement (CX 2023):

CUT-PRICES!

COORS SAID IT—"WE DON'T SELL TO PRICE CUTTERS"—THAT'S HARRY'S WHERE YOU GET GROCERY BARGAINS BY THE BAG FULL! ALWAYS LOW PRICES PLUS YOUR CHOICE OF STAMPS. COORS WON'T SELL US BUT ALL THE OTHER FINE LIGHT BEER COMPANIES DO—CHECK OUR SPECIALS!

The witness said they got Coors beer back at both stores in 1968, but they have not advertised nor discounted the product since then (Tr. 927).

On cross-examination, he said that he was upset with Coors because the brewery doesn't cut the price of their beer to him like the rest of the breweries; that every time he ran a special on beer, he had been given a big discount by that brewery some way or the other; and that the discounts take the form of, say, 50 cents a case rebate or 10 free with 100 or something along that line (Tr. 933). He testified (Tr. 934):

Q. * * * Are there other supermarkets now in San Angelo?
A. Yes.
Q. And do they run specials on beer?
A. Yes.
Q. And isn't it true, when they run specials on beer you know that the brewery has been in there giving somebody a discount, don't you?
A. I wouldn't actually know what they are doing with other stores.
Q. You've got a good idea.

A. I would assume they were, yes.
Q. Sure. So whenever there is a special, some brewery, then they are given a deal, aren't they?
A. I think so, yes.
Q. As a matter of fact, you know that's the case.
A. I wouldn't know it.
Q. That's the way it's been with you every time.
A. That's the way it's been with us.

It is very possible that Mr. Scott told him at the time he pulled the beer out of his store in 1967 that a lot of other retailers were accusing him of making deals (Tr. 943). Mr. Scott has told him that he is free to sell the beer at whatever price he wants, which Mr. Scott told him sometime after he got Coors beer back (Tr. 944).

14. *Robert I. Polunsky.*

Robert I. Polunsky, of San Angelo, Texas, doing business with his brother under the name of Harry's Food Stores, testified (Tr. 946–956) that the store sold Coors beer; that in the summer of 1967 they advertised and sold the beer at special discount prices and, as a result, Coors' distributor refused to sell them any more beer; that they opened the Quick Stop Food Store on June 17, 1968 and all of the distributors, except Coors, called on them to stock their beer; that they did not call Coors immediately but they had several calls for their product so he called Mr. Scott and told him he wanted to handle Coors at Quick Stop; that they met at a coffee shop and it was agreed to put Coors in both of the stores; that, although in the conversation Mr. Scott never made any definite statement nor any specific request, nor any deal (Tr. 952), it was the witness' understanding that Coors would not be discounted or he would pull it from them again (Tr. 950) ; that, since getting Coors beer back in the stores, they have not advertised nor run it on a special nor had any problem of getting Coors beer (Tr. 950).

On cross-examination, the witness said that in recent years Mr. Scott has taken the position and stated to him that he could sell their beer for any price he wanted to (Tr. 953).

15. *John H. Pierson.*

John H. Pierson, of Lawrence, Kansas, testified (Tr. 960–1049) that he is market sales representative of eastern Kansas for Adolph Coors Company and has been for three and a half years; that there are six Coors distributors in his territory; that he has been employed by Coors for twenty years, mostly in the capacity

of a sales representative; that he has never recommended that a distributor in his territory be placed on probation, and none of the distributors has ever been placed on probation in Kansas (Tr. 975). Complaint counsel offered a document (CX 2412), dated November 1971, which was received in evidence, and which showed that the retail prices charged by supermarkets in Topeka, Kansas, were lower than those charged by the liquor stores and that higher prices were charged by the so-called convenience store for Coors beer as well as competitive brands. The document also states that the prices of Seven-Eleven were higher than those of other retailers, with the exception of one item. At one of the regular meetings of the Coors people, the Seven-Eleven situation was brought up and discussed, but nothing was done about it (Tr. 1000–1001). The witness was examined at length by complaint counsel with reference to discussions had with distributors as to their wholesale prices, but there is no indication that any distributor was coerced or intimidated in this respect and the prices fixed were those as determined by the distributors.

16. *Kenneth Hayes.*

Kenneth Hayes, of Arlington, Texas, testified (Tr. 1051–1063) that he has been with Coors for ten years, starting as a laborer and construction man, then went into the sheet metal shop, the public relations department, and into the marketing and sales deparments. He has been a marketing representative since April 1967, and his duties include sales and marketing reports. He reports back to the brewery on the progress or regress of distributors and the care and control of the product. He testified that he prepared marketing data information sheets showing retail prices of Coors and competitive brands (Tr. 1053–1059) based on averages (Tr. 1069), but he didn't know what use is made of them at the brewery (Tr. 1059–1060). CX 2405 (Tr. 1063) is a report by the witness, dated March 13, 1971, regarding his visit to Del Rio Distributing Co., Del Rio, Texas, which points out certain shortcomings of the distributorship.

17. *Harvey V. Gorman.*

Harvey V. Gorman testified (Tr. 1071–1116) that he is marketing director of the Adolph Coors Company since 1969 and has been employed by the Adolph Coors Company for over 20 years in a variety of jobs (Tr. 1071–1073). He stated that Coors' distribution contracts specify a territory which the distributor is to service and that he couldn't recall any distributor wanting to sell

outside of his territory (Tr. 1081–1082). He did suggest to any distributor that he not sell outside his territory because it is not desirable for him to try to sell outside when he doesn't have enough beer to sell within the area that he has (Tr. 1081–1082).

He testified that while he was sales director for Coors all matters pertaining to terminations or deletions for business practices not in agreement with Coors' policies were discussed at the main office in Golden, Colorado (Tr. 1076). He stated that sales representatives' reports were used and supplied the reasons for the eventual termination of the Orth and Hemphill distribution in Oakland, California (Tr. 1080). Mr. Gorman stated that distribution contracts contained 5 and 30 day termination provisions, and stated that the Coors philosophy on central warehouses is to deal through its distributors instead of going through central warehousing to protect the control of the product (Tr. 1089).

On pricing Mr. Gorman testified that, if he felt that retailer prices were too low in some areas, he would contact the Coors divisional manager to contact the area representative to speak to the distributor concerning fair profits (Tr. 1084–1085) ; that the area representative would talk to the distributor to see if he had talked to the retailer about fair pricing (Tr. 1085). He testified that the company has a policy that distributors are to report price changes to Coors before a price change becomes effective, which some distributors do and some do not do. (Tr. 1085) ; that he is familiar with area marketing price data sheets which divisional managers review to determine what is going on in the market place and to review with area representatives (Tr. 1086–1087) ; that, if these price data sheets indicated unusual situations, they would be noted by the territorial manager (Tr. 1087) ; that he participates in interviewing applicants before they are accepted as Coors distributors and that applicants are questioned as to their attitude about pricing—fair pricing but there is no single answer desired in response to the questioning and that the applicants answer the question in different ways (Tr. 1090) ; that most Coors distributors recognize the company philosophy on fair pricing so that the consumer receives Coors beer at a fair price (Tr. 1090) ; that he is aware of a number of areas in California since 1965 where distributors deviate from posted prices, and there must be 10 or 12 of such areas that he can recall (Tr. 1091–1092) ; that divisional managers and sales representatives of Coors suggest prices to distributors and they have been told that the distributor makes the final decision on the selling price (Tr. 1096) ; that he at-

tended a meeting at the brewery in Golden with Mr. Wagnon, at which Mr. Wagnon's prices were discussed, but nothing was decided at the meeting and no decisions were made (Tr. 1101–1102); that Mr. Campbell and Mr. Ford of the Ford Distributing Company requested a meeting with Coors in Golden in late 1970 or early 1971 and they would come to Golden for such a meeting and pricing was discussed at that time as part of the total picture of the distributorship's problems at that time (Tr. 1104); that this meeting with Mr. Campbell and Mr. Ford and Coors was to discuss problems in the distributorship because their margins were decreasing and that the Ford Distributing Company submitted a report to him for this meeting (CX 2355); that Mr. Campbell and Mr. Ford decided at the meeting to take a good look at their operation and see what they could do (Tr. 1108); and that there were no price agreements reached and that Coors does not make price agreements (Tr. 1108).

On cross-examination, Mr. Gorman testified that, if a distributor raised prices abnormally high, his sales would decrease which could wreck the distributorship (Tr.1114); and that Coors for the last 20 years in its own operations has fought any increases in f.o.b. pricing and the only price increases during that period have resulted from things Coors could not control such as packaging costs, container costs, and the like (Tr. 1115).

18. *Robert Eke.*

Robert Eke testified that he is currently sales department administrative assistant at Coors reporting to Mr. Harvey Gorman, and that he has been employed by Coors over 40 years (Tr. 1127–1128); that he has been administrative assistant the last four years, and before that a divisional manager (Tr. 1128); that Coors' distributors are restricted to sales in certain areas required in their contracts (Tr. 1128–1129); that, if a distributor sold outside his territory, he would have been called upon to discuss the matter with his sales representative and that, if he still desired to sell outside his territory, Coors would request the distributor to come to Golden to have a conference with his sales representatives, Mr. Gorman and Mr. Eke (Tr. 1130); that the purpose of this meeting in Golden would be to discuss the reasons that Coors felt it was wrong for the distributor to take beer away from his current customers and sell in some other area; that, if the distributor still sold outside his territory, Mr. Eke did not know what would happen, and Mr. Gorman would have to an-

swer that (Tr. 1131) ; that Mr. Eke requests his sales representatives to report retail prices of the competition and Coors' prices to him at the retail and the wholesale level (Tr. 1136) ; that CX 2272 is a form used by the Coors sales department to know what the product is selling for at the retail and wholesale level for Coors and competitors (Tr. 1138–1139) ; that in reviewing any such document report, if prices seemed to him to be out of line for Coors, he would ask the appropriate divisional manager to check with the area representative involved to find out why the change took place (Tr. 1140) ; that the representative would be instructed to talk to the distributor on Coors' basic philosophy in such a situation (Tr. 1141) ; and, if retail prices were involved, that Coors would ask the area representative to ask the distributor to discuss this with the retailer (Tr. 1141) ; that these pricing reports are for information only, and to his knowledge no Coors executives have used them in any way except for information purposes to see what was going on in the field (Tr. 1144) ; that the extent of any discussions with retailers by Coors' distributors would be to use powers of discussion to seek to have the retailer uphold a suggested price if at all possible (Tr. 1142) ; that the Coors pricing philosophy and pricing policy are pretty much interchangeable in wording, meaning that Coors' products are sold at a price including a profit for Coors, that the distributor then sells the product allowing him a reasonable markup for profit, and that the retailer then sells the beer at a reasonable markup to the consumer, so that the consumer can buy it at a reasonable price (Tr. 1146) ; that insofar as training and instructions for sales representatives are concerned, they are told that pricing should be at a level where the retailers are all going to make a reasonable profit, and this is as far as Coors goes on instructions with its representatives (Tr. 1148) ; that Coors suggests minimum retail pricing and has reserved the right to cut off a retailer who does not support the suggested price, but this has never been enforced and he has never heard of a retailer being cut off by Coors for not following suggested minimum prices (Tr. 1148–1149) ; that the reservation of the right to cut off a retailer for not following suggested prices has never been put into effect but that Coors reserves the right to do so if it so chooses (Tr. 1151) ; that it is not the policy of Coors to achieve a uniform price at the retail level (Tr. 1151) ; that Coors requires distributors to notify it of proposed price changes before they go into effect so that, whether the prices are changed upwards or downwards, Coors consults

with him so that he can make a decent profit to carry out his distributor responsibilities and maintain a strength position (Tr. 1153–1154); that Coors believes in pricing integrity as an essential part of its business and this is another way of saying that no discounting should occur on its beer (Tr. 1157).

Mr. Eke testified that he was familiar with certain problems that Harold Letcher had with a Coors distributor named Stewart Coleman (Tr. 1162); that he heard of the problem from Mr. Coleman, and that Mr. Coleman told him he was going to stop delivering beer to Mr. Letcher (Tr. 1162–1163); that to this day Mr. Eke does not know whether Mr. Coleman actually did or did not stop beer delivery to Mr. Letcher (Tr. 1163); that Mr. Letcher called him on the telephone and sent him letters concerning his problem with Mr. Coleman (Tr. 1163–1166); and that Mr. Eke, in response to Mr. Letcher's questioning, possibly told him that he didn't think there was a distributor from outside that territory who had beer available to sell to Mr. Letcher (Tr. 1167).

On cross-examination, Mr. Eke testified that wholesalers set their own prices and that the retail prices are set by retailers (Tr. 1170–1171); that concerning market price reports, they indicate a wide range of retail prices and are prepared on the basis of an average of retail price figures (Tr. 1172); when on direct examination he stated that representatives and distributors come to an agreement on pricing, he referred to the fact that both parties felt that that was the way it should go, but he didn't mean that they would enter into an agreement (Tr. 1174); and that in any such discussion the final decision on pricing is made by the distributor and the only thing the Coors representative can do is hope that he comes to a desirable conclusion (Tr. 1175).

19. *Willard S. Johnston.*

Willard S. Johnston, a lawyer who has been engaged in the practice of law since 1935 in the State of California, with offices in San Francisco, testified (Tr. 1178–1260) that he is now and has been for many years the attorney for Beverage Distributors, Inc. ("B.D.I."); that in 1955, B.D.I. was a wholly-owned subsidiary of Safeway Stores engaged in the distribution of beer, wine and soft drinks in the State of California; that in 1958, due to the fact that there were almost continual legal problems resulting from proceedings and related matters instituted by beer wholesalers in California, Safeway divested itself of the ownership of B.D.I. rather than continue in a defense of seemingly endless proceedings, selling all of its stock to four individuals

who were then officers of B.D.I.; that B.D.I. when it was a part of Safeway, did accept beer in a central warehouse and then shipped it to the Safeway Stores at its central warehouse; that B.D.I. then had two warehouses in California, one in the Bay area and one in Los Angeles; that, upon becoming an independent corporation from Safeway, a Mr. Morton became president of B.D.I., and continued in that position until he died in 1966; that, upon the death of Mr. Morton, it appears that the witness became the majority stockholder of B.D.I. and the chairman of its board of directors. He recalled that there did come a time in California when B.D.I. no longer purchased beer from the Coors Company or its distributors and in this respect he testified (Tr. 1183):

Q. Can you recall what happened at that time at all? Do you have any recollection how that happened?

A. Well, I do recall that purchases were made of Coors beer from time to time during the '50's, and I do recall that in the late '50's or early '60's, efforts were made to purchase Coors beer by B.D.I. in California and B.D.I. was turned down.

He stated that, in addition to California, B.D.I. does do business in Nevada and Arizona; that they did regular business in Coors beer in Nevada until 1963; that by letter (CX 2053), dated October 14, 1963, B.D.I. was informed by O.K. Distributors, Inc., a Coors distributor in Reno, Nevada, that they were in violation of their contract with their parent company in selling at prices below what they were charging other retail accounts in the area, and as of November 1, 1963, their prices to B.D.I. would be the same as to other retail accounts in their area; that, in the opinion of the witness, the offer of the distributor to sell to B.D.I. at the regular retail prices was "tantamount to a refusal to sell" (Tr. 1189). The witness discussed the matter with Mr. Morton and told him "I thought initially he ought to bring the matter to the attention of the Coors Brewing Company and see if it could be resolved, and that he should, also, of course, advise Safeway of the problem and apparent inability to continue to supply them with Coors beer in Nevada" (Tr. 1189); that a memo (CX 2054 A-B) from the files of Mr. Morton indicates that he talked to O.K. Distributors, Inc., which included this statement (CX 2054 A):

I asked him if Coors dictated the prices at which he could sell and he said not in so many words, but "more or less the parent company tells him what price to sell at." He said he could have only one price and that so far as he knew, he was the only wholesaler in Nevada selling to us as a sub-

wholesaler, that we bought some brands direct from the breweries, and that in Las Vegas the Coors distributors sold direct to Safeway Stores.

Mr. Johnston testified that B.D.I. was never able to get Coors beer back in Nevada after 1963. He stated that B.D.I. also had some operations in Arizona in which they had Coors beer for a period of years up until 1963 or 1964; that the situation in Arizona was brought to the attention of the Coors officials who "expressed the view that they didn't like the central warehouse method of distribution" (Tr. 1197).

On cross-examination, Mr. Johnston testified that he was very much in hopes that the Coors Company loses on this issue of central warehousing in the present proceeding brought by the Federal Trade Commission; that he has had continual problems with the A.B.C. Board in California as to the legalities of B.D.I.'s operations; that B.D.I. has never been in the draft beer business; that he agreed that the brewery should have something to say about which package its distributors should handle; that the reason the Coors officials don't like the method of central warehousing is "Because they prefer the territorial type of distribution and are under pressure from the territorial distributors, have been over the years, to permit the territorial distributors to handle all accounts within these territorial boundaries" (Tr. 1233); that in California, Coors, Budweiser, Schlitz, Pabst, Miller's, National, Carling and Hamms are fair traded with the retail minimum price fixed by the brewer; and that B.D.I. has litigated with Anheuser-Busch, Falstaff, Hamm's and Olympia, but has never sued the Adolph Coors Company.

20. *Robert Edward Laverty.*

Robert Edward Laverty testified (Tr. 1262–1313) that he is president and chairman of the board of Thriftimart, Inc., which position he has held since 1968; that he has been associated actively with Thriftimart, Inc. since 1944; that Thriftimart, Inc. operates 79 retail stores, 86 cash-and-carry wholesale stores, and has 5 warehouses; that all of the retail stores have liquor licenses; that the stores buy Coors beer through the many Coors distributors who deliver its products to his stores; that Thriftimart has a central warehouse; that no delivery of Coors beer is made to the warehouse, and Thriftimart has never picked up Coors beer at any of the distributors' warehouses; that he does not know the current cost of Coors, but thinks that a six-pack sells for $1.29; that, to the best of his knowledge, no Coors distributor

has posted a delivered price at its warehouse (a "dock-delivered price") (Tr. 1264); that he recently found a "subdistributor," who was buying from distributors and selling at a dock-delivered price to customers picking up their own supplies; that in early 1972, when the breweries found out that they were buying from this subdistributor, they cut off or threatened to cut off delivery to the distributor, so "the distributor refused to sell to the subdistributor who was selling us the product" (Tr. 1265); that Thriftimart was continuing to buy from the distributor in February 1972, but that the subdistributor could no longer get Budweiser; that dock prices have always been lower than the store-delivered prices; that Thriftimart does warehouse some beer, including Lucky Lager, Burgermeister, Spring, Brew 102, Regal, and several imported beers; that occasionally they obtained from subdistributors some Olympia, Budweiser, Michelob, Busch, Colt 45, and other malt liquors; that subsequently (on cross-examination) he listed Pabst in this group; that the beer is delivered from the Thriftimart warehouse by Thriftimart truck, together with delicatessen products and produce, and that the beer is rotated both in the warehouse and in the stores; that Thriftimart runs promotions on the beers that it handles through its own warehouse, a recent promotion of Burgermeister selling six for 99 cents; that a quality control program for better beer is handled through Thriftimart warehouse and supplies are dated as received and cans are code dated; that the beer is rotated as new stock comes in and the same procedure is followed in the retail stores; that Thriftimart's recommended shelf life for beer is 60 days; that in recent months Thriftimart has put restrictions on the activities of all delivery men from distributors; that in the case of beer, this independent activity led to overstocking of some beers and a shortage of others; that previously Thriftimart had trouble with beer that was getting stale and now the drivers are no longer allowed to rearrange the beer in the cooler; that, whether or not the beer is warehoused by Thriftimart, it buys no more than a week to two weeks' supply at a time in order to insure inventory turnover and quality control; that the consumer would benefit from central warehousing and handling would be more economical even if Thriftimart paid the same price; that he estimated his company would save 10 cents to 12 cents a case if beer was delivered to the Thriftimart warehouse and then redelivered to the stores, assuming that Thriftimart would still pay the same price; that savings might not be reflected in beer

prices "because all the national brand beer prices in the State of California are set by the wholesaler and not by the retailer," except private label beers (Tr. 1273–1274); that the savings realized through present warehousing arrangements can be passed to the consumer on other items. He testified that, with reference to Certified Grocers, a cooperative wholesaler, its central warehouses private label beer for distribution to its customers but it was unsuccessful in obtaining other beers for this kind of distribution; that license difficulties were faced by Certified Grocers and also by Thriftimart; that he directed a cost study (CX 2030 A–E; Tr. 1275–1286); that the number of beer distributors has been declining in the last few years, a lot of beers going out of business, a lot of mergers, and some distributors have taken on multi-beer accounts; that, in his experience, "the brewery in every respect controls the distributor as to what price he wants to set and what he wants is eventually what the retailer has to sell it for" (Tr. 1284–1285); and that central warehousing of beer probably would have an adverse effect on private labels.

On cross-examination, Mr. Laverty testified that Thriftimart has a retail license but not a wholesale license in California. He stated that by central warehousing, he meant delivery of products by supplier to a central location that services individual stores; that there are advantages of having beer handled by a wholesaler who also handles other grocery products; that Thriftimart is now doing a better job in controlling its beer inventory and handling all beers at its retail location; that Thriftimart had a tighter control on shelf life and he stated that he "insists that it all be turned in 30 days and we have no more than two weeks' supply of beer on hand at any one time" (Tr. 1295); that he understood that Coors considered 60 days a reasonable shelf life for beer; that he did not think that his stores had any beer 60 days old, although he thinks that beer will hold for 60 days; that Thriftimart tries to do a better job than that but considers that the shelf life of beer is at least 60 days; that he doubted there was any appreciable difference between beer that was 30 days old and beer that was 60 days old; that, when beer is packaged, that's as good as it is ever going to be, and with each passing day it probably deteriorates in quality; that he doubted that any person can tell the difference between beer on the shelf for 30 days and beer on the shelf for 60 days except by checking the dates on the bottles; that Coors formerly did not get the space it was entitled to in the Thriftimart coolers but, since

Thriftimart changed its system, Coors gets most of the box; that Thriftimart now tries to correlate the percentage of shelf space with the volume of sales of a particular beer; that all the beer drivers, including Coors, overstocked at the Thriftimart stores; and that, since the Thriftimart system has been changed, the shelf space for Coors in the sales area has been tripled.

21. *Royal B. Irving.*

Royal B. Irving, of Tucson, Arizona, testified (Tr. 1316–1372) that he is president of Coors Beer Distributors, Inc. There was received in evidence a document (CX 2446 A-B) containing remarks made by the witness at the United States Brewers Association convention in San Francisco, California, on February 9, 1965, which reads in part:

It is a good situation when a wholesaler can have a healthy and profitable business with handling just one brand of beer. I do point out, however, that a wholesaler cannot always survive on one brand alone. It is often necessary for him to take on an additional brand, or brands, or even merchandise unrelated to beer. His first consideration is to maintain a profitable operation. Lacking this he is of no use to his supplier, or suppliers. It should be mentioned here that in past years I have handled three brands of beer at one time.

I will now discuss with you the matter of a wholesaler's franchised territory. This is a matter that can be handled by the brewer itself. Each wholesaler has, or should have, a territory of definite boundaries, within which the wholesaler sells all of his product that is sold.

One of the greatest threats to the independent beer wholesaler, is that of the rapidly expanding chain stores, that handle food and beer, and that establish a central warehouse from which they deliver beer to their various stores regardless of territorial franchises. This has the effect of drying up the market of a small wholesaler and giving this business to the wholesaler who is fortunate enough to be situated in the central buying area.

This is a matter of slow strangulation for those wholesalers affected. These chain stores with their modern and up-to-date marketing techniques are gaining an increasingly large share of the package beer volume.

This problem can be solved, because it has been solved by the brewer that my company represents, The Adolph Coors Company. When the majority of the Coors wholesalers in Arizona asked Coors to control and enforce their franchise agreements, Coors did so. This was not an easy thing to do. It required a lot of courage and intestinal fortitude on their part to get this done. The chain store principals were notified that wholesalers' franchises had to be respected and that Coors was not to be shipped from the central warehouse to stores in other wholesalers' franchised areas.

You can imagine the uproar. The attitude of the chains was that when they bought the beer they should be allowed to send it to their stores within the state. The attitude of Coors was that this could not be allowed inasmuch as their policy was to enforce franchise agreements. At any rate the problem

was solved and the statewide chain stores now handle Coors and each store purchases from the local wholesaler. Granted that it took a year or two to get this matter settled, to the point that the chain stores would handle Coors; the point is that the policy was decided upon by the brewery and was carried out.

In California one large grocery chain does not handle Coors in any of its stores for the reason that Coors will not allow them to distribute from a central warehouse. It is a deadlock, but the fact remains that Adolph Coors Company stand firm by their policy of protecting franchised territories. I have understood that some breweries go so far as to sell direct to the central warehouse, or buying agency, and cut out all wholesalers.

It is my experience that central warehouse distribution, in the case of chain store set-ups, is very detrimental to the product itself. Beer is delivered in their own trucks, often by personnel inexperienced in handling beer and, as the saying goes "who could not care less." In many instances the beer being delivered is stacked on top of, or against, the beer already in the warehouse.

Improper rotation is the result and the end-result of improper rotation is old and off-taste beer. You may well ask the question "If this is the case why don't you have your salesmen check the stockrooms for old beer?". The answer is that where the beer comes from a central point the local wholesaler's salesmen are usually not allowed in the stockroom. Further, the salesman is not too interested inasmuch as he does not make a penny of commission on that account.

Coors strictly enforced in Arizona the policy set forth in the speech. Complaint counsel offered and there were received in evidence a number of documents produced by the witness which reflect the pricing structure of the company from 1968 through 1971 (CX 2447–2459, CX 2462–2472). The witness related the circumstances with reference thereto and the discussions and correspondence had with Coors' representatives. Although the Coors people made suggestions as to prices, there is no indication of coercion or undue influence on their part and the prices put into effect were the result of the distributor's own judgment.

On cross-examination, it was revealed that the witness had produced a document pursuant to subpoena of complaint counsel which had not been shown to the witness on direct examination, which set forth the total number of draft accounts in his marketing area, the total Coors exclusive draft accounts and the total Coors split accounts. The document was then offered by respondent and received in evidence (RX 1108 B) and showed that, as of January 1, 1972, Coors Beer Distributors, Inc. had 69 exclusive draft accounts and 119 split draft accounts. The witness testified that he had been a distributor for Coors for over 35 years; that Coors offered him the distributorship and he did not pay anything

for the account; that the company is a family concern including daughters and sons-in-law. Mr. Irving testified that he is familiar with the termination provisions in his distributorship contract and that no member of the Coors Company has ever used them as a threat to him in any way in the operation of his company (Tr. 1363); that he has in the neighborhood of three quarters of a million dollars invested, and that he certainly would not have made that investment if he were not assured that he would have a territory in which he would be the sole distributor of Coors beer (Tr. 1365); that he has a completely refrigerated warehouse, which he thinks is necessary to properly keep beer and his beer is delivered in insulated trucks (Tr. 1364). He testified (Tr. 1365–1366): "We discuss the pricing with Coors, we discuss it among ourselves, we decide what price we should eventually come up with and we set that price." On the retail level, he testified (Tr. 1366): "Well, we believe that the retailer is entitled to a proper markup. As a matter of fact, the retailer group themselves comes up pretty well with the prices, although we will suggest that they get a markup of about a third."

When asked what he meant when he said that the chain stores pose some kind of threat, referred to in his San Francisco speech, he explained (Tr. 1367):

> Well, what I mean is that central buying by chain stores and in the state of Arizona the central purchasing has been done in Phoenix, and the chain stores, chain store systems would send their trucks out to their stores in various parts of the state, and what I actually mean by that is that we lose the sale of beer in our market through the chain stores when they do that. It can be quite a quantity, as a matter of fact, the larger buyers would buy from that way and we would have a lot of smaller buyers left. It would be a real rough situation on a wholesaler and he would be left with many small accounts to handle and very few larger ones.
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> * * * * * * *
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> It would very likely increase the prices as far as we are concerned.

As to what happens to the product when it finds its way into a central warehouse, he said (Tr. 1368):

> Well, when it is distributed from a central warehouse, it is put on trucks, sent to various stores throughout the state, unloaded without, I believe, proper regard to rotation. Beer that is already there is probably covered up, this has happened many times. I don't say it always happens, but I say this is one of the things about central warehousing that is very detrimental to beer. Rotation is not handled and beer gets old and off-taste. We have gotten, and I am not saying right now, in the past when it was being done, complaints about old beer, off-taste beer, and many times when we

trace it down it would come right out of a chain store, because its rotation and freshness is terribly important in the beer business.

He described his responsibility under the contract with Coors concerning the rotation of beer (Tr. 1368–1369):

It is my responsibility to make sure that that beer does not get old, to make sure that it is rotated properly. When our delivery salesmen, our route salesmen go in, they pull the beer out that is already there, put in the beer they are delivering, then put the other beer back. We try very, very hard to keep our beer not over 60 days old.

* * * * * * *

We pick the beer up and destroy it if it is too old, if it is over 90 days old. If it is around 60 days old, we will pick it up and exchange it and maybe a place that is moving beer real fast, we will get rid of that package, but we think that beer that is 60 to 90 days old should be taken off the market.

Mr. Irving testified that if the beer is destroyed, he bears the full expense (Tr. 1369).

22. *John Hemphill.*

John Hemphill, who is a former Coors beer distributor located in Oakland, California, testified (Tr. 1373–1413) that he got the Coors distributorship in 1958 but prior to that had been selling other beers (Tr. 1377); that Coors assigned him a specific territory and he was told not to distribute Coors outside his boundary (Tr. 1379); that from time to time during his distributorship he and the Coors people discussed his Coors pricing starting in 1964 when Mr. Eke requested that he lower the price of the 24 eleven-ounce bottle (bar package) $.05 per case which Mr. Hemphill testified that he went along with because Mr. Eke was very diplomatic about it (Tr. 1380); the next discussion on pricing that he recalled was over quarter barrels in 1965 in which Coors stated that no such barrels would be shipped until the price for the product was established, and that the price should be with the rest of the California distributors which was at $8.50, and the price Coors recommended to him was $8.50, but the price he wanted was $9.00 (Tr. 1381–1382); the next price incident he testified to occurred in 1966 concerning seven-ounce can pricing (Tr. 1382). Mr. Hemphill testified that Coors gave the distributor a deadline of January 31, 1966, to reduce the price to $2.77 from $2.83 and to have the price posted (Tr. 1382). Hemphill testified he objected because he was always asking for a little bit more for the packages and consequently did not post the recommended price right away; that Coors representative Weaver came to the office and said he

was tired of talking about prices and territorial restrictions with them and that if they didn't want to abide by the philosophy policies and recommendations of Coors the best thing for them is to not be a Coors distributor (Tr. 1382) ; that they did eventually post down to $2.77 prices (Tr. 1383). Mr. Hemphill testified that sometime in 1967 Coors representative Mr. Corder recommended that sales of beer from the distributor to the military base should be at the full posted price minus the state tax, but that which the distributorship had presented to the military base was lower (Tr. 1388) ; that Coors representative Corder in 1967 told him that he would have to choose between selling Pabst or Coors beer; that Coors gave him an opportunity to sell his business on the basis of 1/12 of the gross of the previous year as the good will value for the selling price of the business (Tr. 1389–1390).

On cross-examination Mr. Hemphill testified that his Coors territory was the same one that another brewer had previously given to his partnership when they took on that brand in 1956 (Tr. 1391). He admitted that he operated outside the Coors territory continuously while he was a Coors distributor (Tr. 1392) ; that he knew when he signed his Coors contract that it contained a 30-day termination provision (Tr. 1393–1394) ; that Mr. Hemphill's primary function in the distributorship was the record-keeping function (Tr. 1396) ; that when he obtained the Coors distributorship he used the same territory for Coors that he had been using in the past for his Regal Distributorship (Tr. 1397) ; that the distributorship bought a warehouse site for speculation (Tr. 1404) ; that it was the policy of the distributorship that any of is employees that didn't want to comply with the policies and philosophies of it should look for another job (Tr. 1405) ; that he did not discuss the sale of his Coors distributorship on his own with any prospective purchaser until the day before he was terminated (Tr. 1408) ; that Coors had previously said that it had proposed buyers for it (Tr. 1408).

It should be noted that in the four instances concerning price discussions with Coors that Mr. Hemphill testified to, that in only one of those instances was there sufficient information in the record to determine what pricing decision was made, and in that instance he testified that Coors representative Eke was so diplomatic that he acquiesced in his recommendation.

The credibility of witness Hemphill is in question in light of pending legal proceedings he initiated in San Francisco against

Coors (Tr. 1404), and in view of his demeanor and the general nature of the answers given during his testimony. Accordingly, the undersigned has determined that he can place little weight on the testimony of Mr. Hemphill in this matter.

23. *Jay Thurman.*

Jay Thurman testified (Tr. 1415–1477) that he is currently employed in an insurance consulting firm but that he was a former distributor of Coors Beer for the period 1968–1971 and that the name of his distributorship was Grand Mesa Distributing (Tr. 1417) ; that the principle officers in Grand Mesa Distributing Corp. were himself, his wife, and his mother (Tr. 1417) ; that he held the position of president of the company; that his contract contained provisions concerning territorial restrictions (Tr. 1420) ; that he was requested by a retailer outside his territory to sell Coors beer to him in 1969 (Tr. 1421) ; that he discussed this with a representative of Coors (Tr. 1423) named Richard Whipple and that Mr. Whipple told him not to sell the beer to that retailer under any circumstances (Tr. 1423) ; that his contract contained termination provisions of 5 and 30 days notice (Tr. 1424) ; that Coors representatives used the termination provisions to bring pressure on the distributorship (Tr. 1424) ; that his wholesale prices were determined on the basis of figures that his sales representative would furnish him (Tr. 1424, CX 2047) ; that the Coors representative would make out such a price sheet in his presence from a master sheet which included his pricing for other marketing areas in Colorado (Tr. 1428) ; that pricing sheets were given to him by his representative with a statement that this is your pricing (Tr. 1428) ; that he disagreed with these prices and told his representative that he wanted to change prices but that his representative said that any price changes would have to be approved by Mr. Straight at the brewery and he was a tough man to get an increase by (Tr. 1429) ; and that he was not free to set his own wholesale price (Tr. 1430) ; that sales representative Maurer of Coors told him that retailers must be kept in line on pricing and that Coors would not want price disparity to creep in and to notify him of price cutting if he found any going on (Tr. 1430-1431) ; that Coors would not allow him to discount to retailers (Tr. 1432) ; that he improved the condition of his distributorship while it was under his control and invested one-quarter of a million dollars in it, and by building a new facility (Tr. 1433) ;that Coors forced him to sell his distributorship (Tr.

1434–1435) ; that he sold his distributorship at a very substantial loss (Tr. 1435) ; that Coors would not permit him to take part in negotiations of his distributorship (Tr. 1435) ; that in computing the sales price for the distributorship, Mr. Gorman stated that he would not allow any good will over 1/12 of some sales figure that he had not heard of (Tr. 1442). On cross-examination, Mr. Thurman stated that initially his father put up all the money when he bought the Coors distributorship (Tr. 1446) ; that he desired a written contract as a Coors distributor and that the territory provision and the territory used by the seller to him was satisfactory (Tr. 1455) ; that he was not aware that his contract contained 5 and 30 day termination provisions until six months after he was appointed a distributor (Tr. 1459–1460) ; that within his marketing area retailers pretty much followed his suggested retail pricing (Tr. 1466) ; that he attempted to borrow money from his retailers but that he did not know at that time that this was a violation of the Colorado liquor code (Tr. 1471).

The undersigned finds that in light of the general nature of testimony given by Mr. Thurman and his demeanor in testifying, that there is a question of the credibility of the witness and accordingly finds that the testimony of the witness can be given little weight.

24. *Glen Carskaddon.*

Glen Carskaddon, of Fresno, California, testified (Tr. 1488–1509) that he is presently a wholesale beer distributor handling Olympia and Country Club Malt Liquor; that he has been actively engaged in the beer distributing business since 1947, and indirectly since 1934; that his father became a Coors franchiser in 1940, and he joined him in 1945; that they had a Coors territory that was limited to portions of Fresno, Madera County, California; that they never delivered outside of their area, and that he was not aware of any distributor ever coming into their territory to sell Coors beer. He stated that they sold Coors beer to approximately 90 draft accounts, of which 5 or 6 were split accounts; that he would sell split accounts to draft retailers for about 30 days and then, at the end of that period, if they didn't go exclusive, they would pull the Coors beer out (Tr. 1492) ; that this was in keeping with the instructions that they received from the Coors representatives. He stated that in April of 1968 at a general distributors meeting in Sacramento, he met with Mr. Gorman and Mr. Straight and they thought on account of his age, that he

should think of retiring and getting out of the business. As to his reaction to this suggestion, he said (Tr. 1495):

> * * * I was just flabbergasted. I just couldn't understand why because of the increases. I thought we were doing a very fine, outstanding job in comparison to some of the other places. We were building our equipment. We were putting on new trucks, et cetera.
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> Yes, I said, "I don't care about selling."

Subsequently he had a meeting with Coors' executives, stating (Tr. 1498–1499): "They pointed out, 'Sometimes, Glen, you can't straddle the fence because you might wind up with having nothing.'" He took the comment to mean (Tr. 1499): "Well, we don't have to sell you beer, and you might just as well be out in the cold and not receive anything for your business." He testified that he finally sold out to Ed Donaghy, but he could not recall the selling price; his attorney, who was on the board of directors, negotiated the price and settlement. On cross-examination, he explained that in draft beer accounts there is a problem with refrigeration that creeps up from time to time, that draft beer is much more of a difficult package to handle than the other packages; cleanliness is important, pressure at which the beer is drawn is a problem, and the substitution for brands in split accounts becomes a problem on occasion. He testified that he knew that Coors could terminate him for no cause whatsoever; that Coors did not choose to terminate him, but requested that he find a buyer; that he had known Mr. Donaghy, to whom he sold the distributorship, for ten years, was very fond of him, and referred to him as his nephew; and that he went to Coors, suggested his name as the purchaser, and Coors said "Fine" (Tr. 1509). Mr. Donaghy is the present Coors distributor in Fresno.

25. *Donald A. Jackson.*

Donald A. Jackson, an attorney from Fresno, California, testified (Tr. 1509–1517) that his firm represented the Coors distributorship of Mr. and Mrs. Carskaddon for a number of years, and thereafter in 1961 he served on the board of directors; that he was trustee for a trust established by the Carskaddon's for their daughter which owned 20 percent of the stock in Carskaddon Distributing Company; that he represented all of the parties to the distributorship and handled the negotiations in making the sale; that his first involvement with the sale related to getting the approval of a buyer; that Coors had initially indicated they

had some buyers, but they did not come forward with any; that the Carskaddon's and he had proposed Mr. Donaghy as a buyer as early as May 1968. He stated that Mr. Donaghy submitted to the Coors people a letter relating to his financial ability to make the purchase and, after a number of meetings, around October 15, 1968 he was approved; the sale price was $319,000 for everything, exclusive of inventory; the equipment was $140,000 and goodwill $179,000. He stated that the price differed slightly from the figures suggested by Coors for goodwill (Tr. 1515).

26. *Peter Tinetti, Sr.*

Peter Tinetti, Sr., of Merced, California, now retired, testified (Tr. 1518–1556) that he was a Coors distributor, doing business as Midstate Distributing Company, from 1952 to April of 1970, handling Global, Pabst, Eastside, Hamm's, Coors and Olympia beers; that in 1954 he took on Olympia beer after Coors beer; that on April 1, 1970, the time he sold out, he was distributing only Coors and Olympia beers; that his contract with Coors restricted his territory to all of Merced and Mariposa Counties, and he had Madera County south on Highway 9 to Fairmeade, California; that he discussed these territorial restrictions with the Coors people and was told that "the lines were clearly set up" (Tr. 1520); that he never sold Coors outside this territory and was not aware of any other Coors distributor selling in this territory; that the wholesale prices for Coors beer were sent him by the brewery, and he just carried through with the prices they suggested; that, according to state laws, he was free to set his own wholesale prices, but Coors did not allow this; that after attending a meeting of area distributors in 1968, he asked for a ten cent price increase for the mountain areas but was told that the brewery wanted one price throughout the state. In this connection, CX 684 A-B, a report by Ken Hayes, a Coors representative, dated August 17, 1968, states in part:

> A meeting was held by the area distributors and they have talked Pete, Sr. into charging 10 cents a case more in Mariposa County because of the distance and the mountainous area. It was explained that this would have to be okayed by the Adolph Coors Company; but that I could not see that it was feasible and that the other distributors were just trying to help themselves. It amounts to one route a week with round trip amounting to about 100 miles. Roads are good and total case sales throughout the year vary from 200 cases in winter to 325 cases during the summer plus keg business.

He stated that this report reflects what Mr. Hayes told him about

the price increase in the mountains (Tr. 1523); that he made sales to military accounts in California at a price somewhat less than the civilian market, and was told by the Coors people that he had to go up to the civilian market less the state tax (Tr. 1523); that Mr. Corder told him originally and, when Mr. Hayes came in, he was told again, and thereafter he raised the price (Tr. 1523); that he had roughly 60 draft accounts in his area; that at one time he had about 45 split accounts; that the largest number of split accounts he had in the last few years was five; that in the last two or three years, they were all exclusive accounts; that in 1967 Mr. Hayes told him "to either get them [the split-draft accounts] exclusive Coors or get rid of them" (Tr. 1524); that he placed the Coors draft beer in taverns for a limited period of time, usually 30 days; that his Coors sales for the first three months in 1969 were 30,600 cases, and for the same period in 1970 were 45,600 cases, and that, compared to the statewide sales in California of Coors beer, this was above the statewide average; that on March 13, 1969 he attended a meeting with Mr. Corder, Mr. Hayes and Mr. Gorman in Denver, which was the first time the subject of selling his distributorship came up; that they told him he "didn't have the Coors image" in his area, and that Mr. Corder had said that he "could not serve two masters" meaning that the witness also had Olympia beer along with Coors beer (Tr. 1527–28). With regard to dual distributorships, he testified (Tr. 1528):

> At that time, they had a blackboard up in the meeting room, and there was a chart on it, but I believe either Mr. Gorman or Mr. Kerr made it. It showed one brewery to a distributor to a retailer as being a perfect Coors distributorship, a strong Coors distributorship. The second chart showed a distributor having two beers subsequently selling to the retailers as a poor distributorship.

He stated that thereafter he did offer to split them as an alternative to sale. He testified (Tr. 1529–1530):

> I offered to split the two brands and put up a warehouse to suit whatever they wanted. I said that I would put on as many men and as many trucks as they saw fit. I added, "within reason," that I didn't want to lose money, and that I would either put my son in charge of the Coors or keep it myself and give whoever was left the Olympia distributorship.
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> * * * * * * *
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> They said that would not change the situation, that they still wanted one owner, a new owner.

He stated that at a meeting in 1969 with Mr. Hayes and Mr.

Arnold of Coors, "they were dissatisfied with what I came up with and told me that I would have to find a buyer or they would find a buyer, and I offered to sell out to two of the men who worked for me, but they did not have enough money to come up with the purchase price, so I felt I should have controlling interest in it until they paid it off, and they wouldn't go for that" (Tr. 1530); that he was free to select a buyer, but he sold the distributorship to Robert Scarpitto, one of the two men sent by Coors (Tr. 1531); that at a meeting with Mr. Scarpitto and his attorney and Mr. Hayes, the selling price for goodwill was discussed and "They said the one-twelfth agreement that had gone on throughout the state on sales of this nature was one-twelfth of the gross and that would be satisfactory" (Tr. 1531); that he did not feel this was a fair figure but was afraid to raise the price because of a fear of termination, stating (Tr. 1532):

> Well, I saw what happened to some of the distributors, maybe Orth & Hemphill. They just took the brand away from them without giving them a chance to sell, and I didn't want that to happen to me. It is better to have a little bit than nothing.

He testified that he attended a general meeting of all the distributors from 11 states in Golden or in Denver where pricing was discussed, at which time it was stated that "they didn't want any chiseling, any underhanded deals" which he understood to mean varying from the price that was set, the posted price; when asked that, if he had reposted at a price other than Coors' price, it would be chiseling, he testified (Tr. 1533): "It might be, to their way of thinking. Legally, it would not be chiseling."

On cross-examination, he testified that, when he acquired Coors in 1952, he also had Pabst, Global and Eastside draft; that he took on Olympia in 1954, and that no Coors' representative told him not to take on Olympia; that, when he signed the contract with the Coors Company, he knew that it had a five- and thirty-day termination provision in it; that, at Coors' request, he called on all, roughly 450, retailers in his area, and that, of that number, he had "Upwards of 400," some accounts being exclusive (Tr. 1536); that his responsibilities as a Coors distributor in his territory were "To see that I got all possible coverage, all possible placement, that the beer was treated properly, and to sell as much as I possibly could" (Tr. 1536); that he had full responsibility for rotation in his territory and for the condition of the product; that the report of Mr. Hayes (CX 684 A-B) was in error when it

said they "have talked Pete, Sr. into charging 10 cents a case more" because they didn't talk him into charging, but only into *trying* to charge 10 cents a case more (Tr. 1540) ; that, with regard to the military pricing situation, although Mr. Corder and then Mr. Hayes had told him to change his price, he did not do so immediately, but "shortly after, I think, when Mr. Hayes insisted" (Tr. 1540–1541) ; that he then put into effect Mr. Hayes' suggestion that "military prices should be the same as everyone else's less tax" (Tr. 1541) ; that he had problems in his distributorship with draft beer; that draft beer is a "teasy item" to handle, meaning that it is not pasteurized and must be kept under refrigeration, since otherwise secondary fermentation takes place sometimes and spoils the product; that draft beer has the problem of age so rotation is critical; that draft beer has to be kept under constant pressure and that Coors beer draws at a higher pressure than most other beers; that sanitary conditions are a problem with draft beer and he had to send his own men around to clean all the outlets, the hoses, the taps and faucets about every ten days, every week would be better. In this regard, he testified (Tr. 1544) :

A. They felt that every week would be better suited.

* * * * * * *

Q. Did you disregard their suggestions in this area?

A. We checked a lot of these accounts and found that there was nothing wrong with taking care of them every ten days to two weeks.

Q. In your opinion?

A. Yes, sir, the beer tasted proper, the hoses were not all gummed up, nor were the faucets.

Q. And in this manner, you disregarded the Coors representative's suggestions?

A. To that extent, I might have. Yes, sir.

He stated the same draft-cleaning man would make a route and clean both the Olympia and Coors facilities; that the cleanliness of the serving glasses in the retailers' places was a constant problem and had to be checked; that the Coors representatives checked glasses in retail accounts on many occasions and, when they found dirty accounts, they would report that to him and he "would follow right through" (Tr. 1546) ; that the Coors Company did give him a chance to sell; that he paid nothing for the Coors franchise and, at the time he took it on, it wasn't worth handling, but he thought it had possibilities, it gave him another product, and "Saleswise, they had a very good beer, but saleswise they just didn't have the public acceptance at the time" (Tr.

1547). He admitted that the prime purpose of the meeting on March 13, 1969 was marketing and did not have anything to do with dual distribution (Tr. 1547); that his son, whom he proposed to head up the Coors operation if Coors had permitted him to split it, was just a general handy man prior to the time he sold his Coors operation; that he "didn't intend to divest myself of Olympia" (Tr. 1549), but he would have run whichever one (Olympia or Coors) the Coors people wanted him to; that the night before the sale was terminated with Mr. Scarpitto, he called Mr. Corder up, and in this connection the following exchange took place (Tr. 1550–1551):

Q. Stating that you would do what?

A. Stating that I would go with the Coors and divest myself of the Olympia. I know it was too late to do anything, but I wanted to get his reaction, and he stated, "You know this is what we wanted you to do, but it's too late now. Why have you made up your mind to do it at this point?" I told him that the Coors sales were going up, and the Olympia sales were leveling off, and that for this reason, but my main reason for the call was to get his reaction which I did and got just the answer I wanted, that had I thrown out the Ole, I could have been a Coors distributor.

Q. As a matter of fact, you told Mr. Corder you made a mistake, didn't you?

A. Yes, sir, I did.

Q. And as it turned out, in fact, you did make a mistake, didn't you?

A. Well, sales-wise, money-wise, yes, sir.

Q. You made a wrong decision?

A. Yes sir.

He testified further concerning Orth & Hemphill (Tr. 1551–1553):

Q. Now, I think, you stated when you discussed good will you saw what had happend to Orth & Hemphill. Do you recall that statement on direct examination?

A. Yes, sir.

Q. What happened to Orth & Hemphill?

A. The beer was yanked from him. He wasn't even allowed to sell anything, the brand, or whatever.

Q. Yo don't have any idea what he turned down, do you?

A. No, sir.

And as a matter of fact, he could have turned down a very, very fair price, couldn't he?

A. It could be.

Q. And if such were the case, then your testimony, as for it being yanked away, would be an erroneous statement, wouldn't that be correct?

A. Well, he felt like I did, that he could hold off and that the Coors people would not make a move, and he was proven wrong subsequently.

Q. Is there an attitude that prevails among distributors, that they can wait and wait and delay, and that the Coors Company won't do anything about it?

A. All this is dependent upon activities and sales, sir, if the sales are satisfactory and the box positions are satisfactory, I don't see why the change should be made.

Q. You will agree that there is a lot to a distributorship besides sales, wouldn't you?

A. Oh, yes, sir.

Q. Let's get back to Mr. Orth, and I don't think you answered my previous question. Let me ask it for you again. Is there a feeling that it is fairly wide spread among the Coors distributors that Coors moves very, very slowly, and they really don't get in a hurry about doing anything as far as the distributors are concerned in the way of enforcing certain standards that they have and that type of thing?

A. They don't chop you off immediately.

Q. As a matter of fact, sometimes they will go to the end of the world with you, won't they?

A. To get their desires, yes, to get what they wish.

Q. As a matter of fact, don't you really know, Mr. Tinetti, of Coors distributors who the Coors Company should have done something about years and years and years prior to the time that they did?

A. There are some, yes, sir.

He stated that he thought Mr. Barnhardt had made the speech on "chiseling" and "underhanded deals" at the Denver meeting; that these words have a particular meaning in the brewing industry and that this practice is fairly common among some distributors; that he has known of some instances among the Coors distributors, but he has never known any instance where, if the Coors representatives found out about it, they didn't take some kind of action (Tr. 1553–1554); that Coors has a fanatical attitude on law enforcement, demanding strict obedience to every state, federal law and local state regulation; that the breweries post the retail prices of beer in California pursuant to the fair-trade laws of California; that he posted his own wholesale prices in the counties which he markets; that from time to time Coors Company had made suggestions as to what his wholesale prices should be, Coors also having the right to fair trade at the wholesale level in California; that when he first took on both Coors and Olympia, Olympia was by far the stronger brand and continued to be for years, stating (Tr. 1555): "It was the Olympia Beer that was paying the tab on running the business." He added that Olympia beer is not pasteurized and requires the same treatment as Coors (Tr. 1556).

27. *Robert Glen Dixon.*

Robert Glen Dixon, of Del Rio, Texas, a former Coors distributor, doing business as Del Rio Distributors, Incorporated, and marketing in ten counties (selling beer in only eight since two

counties are dry), testified (Tr. 1558–1607) that he became a Coors distributor officially in 1969 when John Reynolds and he bought out Mr. Gonzales; that he was associated financially with the Del Rio distributorship before 1969 when he financed Mr. Reynolds in his part of the distributorship with Mr. Gonzales; that Mr. Reynolds and he then owned the business fifty-fifty when they bought out Mr. Gonzales and Mr. Reynolds was president of the company; that he thereafter bought out Mr. Reynolds because "the business was in bad financial status, and, too, there wasn't enough for both of us to stay there and operate it, and the indebtedness was so great I had to take it over and furnish the money, so I just bought Mr. Reynolds out" (Tr. 1561); that, when he became sole owner and president in May 1969, he was selling approximately seven or eight thousand cases of beer a month, and thirty to thirty-five half barrels a month; that, when his distributorship ended on November 30, 1971, his sales of Coors beer in the month of November were over 19,000 cases and 160 barrels, and he had 82 per cent of the draft beer business in his territory at that time; that he sold his business in November 1971 to Mr. Ware and Mr. Foster, who had been approved by Coors, for $193,000 but has only been paid $100,000, although he thought it was worth $300,000 (Tr. 1563); that, when they bought out Mr. Gonzales, the beer business was bad, but in September of 1969 the distributorship first became profitable "and gradually got better all along" (Tr. 1564). He testified as follows regarding a situation which arose early in 1969 involving the Piggly Wiggly Company (Tr. 1564–1565):

> Well, Piggly Wiggly was the best dealer I had and they ran specials and they ran specials on everything in the store and they ran specials on Coors beer. However, they paid the regular price that everybody else paid to me, but I had talked with them several different times about their specials and they said it was a drawing card for their business and they were willing to lose money on the beer so they could get customers into the store. So, then I was approached by Mr. Linn [Mr. Mel Linn, a Coors representative] about this situation of specials, and Mel told me that he would come down and talk to Piggly Wiggly, which I made an appointment with Mr. Don Summar. We had an appointment in my store, in my office, and we visited a little while and Mr. Linn mentioned to him about the specials and he told him that he run everything special in the store and that he paid for the bill. He felt like it was his beer, he could do anything he wanted to do with it. He could either sell it, pour it out or do anything he wanted to do with it. And he got real upset about it and said some very nasty things, and got upset.
>
> * * * * * * *
>
> Yes, Mr. Summar left, and then I asked Mr. Linn what we would do in

that situation. He said, well, of course, he was kind of upset, too, he said, "Well, we just won't sell them any beer." And I said, "Well, he is a good customer of mine. What position would that put me in if I didn't sell him beer?" He said, "We can just keep cutting down on beer. You won't get that much beer to sell, because we don't have the beer to sell on a special like that." And they evidently did because I didn't get any beer.

In spite of what Mr. Linn had told him, the witness stated that he continued selling to Piggly Wiggly after this because "they were my good customers and I just didn't want to cut them off" (Tr. 1566). He testified that at this time his business had begun to pick up and he wasn't losing money right at that point, although the business had lost $82,000 up to that point. He testified as follows regarding another situation with Piggly Wiggly in April 1971 (Tr. 1566–1567):

A. Mr. Hayes was the new man in the territory. He came into the territory and I don't know exactly the date, I believe it was sometime in April in '71, I believe it was, and they were still selling the beer. They didn't sell beer every week; they would have weeks they didn't and they would run it on special.

Q. This is Piggly Wiggly?

A. Piggly Wiggly we are talking about, and, also, Food Way run it on special, so Mr. Hayes and I went up to talk to, they have a new manager now at Piggly Wiggly and his name is Fred Van Winkle. Mr. Hayes and I went up and met Mr. Fred Van Winkle in the store and we visited a little while, and Mr. Hayes mentioned something about the specials they had been running, and he told them he made some more expensive things than beer in the store and he was going to run this special as long as he bought beer from Dixon, our Coors, and he got rather upset and just walked off and left us standing there.

Then we went across the street to Food Way and Mr. James Porter is the manager over there, and we visited a while, I made an appointment with Mr. Porter and we visited for a little while, and then Mr. Porter, he mentioned about the specials, and Porter told him he had gotten a lot business by having the Coors beer and running it as a special. Mr. Hayes then mentioned that Coors preferred not to run their beer on special, so for them to sell it at a profitable price.

When he asked Mr. Hayes what he could do about the situation, Mr. Hayes told him, "If you just don't sell them any beer he would not continue running it * * * we could just not deliver them any beer, we don't have enough for them running specials like this" (Tr. 1568); he stated that he told Mr. Hayes, "He is going to continue running it as long as I sell him beer" (Tr. 1568); with regard to a possible lawsuit, the witness testified (Tr. 1569):

I mentioned to Mr. Hayes if I didn't deliver beer, it was my understanding that Piggly Wiggly or Food Way could sue me for not delivering beer and if I have beer in my warehouse it is my understanding that I have to deliver beer to my customers who had a license to buy beer.

The witness also stated that he had a discussion with Mr. Hayes concerning a tax change and testified (Tr. 1569) :

A. Yes. We had a tax change and everybody in Texas was having to change prices. He came by with the suggested prices and in the discussion we come up with the draft beer situation, and at that time I was getting, before that time I had been getting eighteen fifty and I had gone up just for a check to see what it would be if I went to nineteen fifty. I went up a dollar a barrel.

Q. You actually put into effect the price of $19.50?

A. Yes, sir. So I went to $19.50, and Mr. Hayes wanted to know if I read my contract. He said, "You can't go up on your beer without advising Coors of the situation." I said, well, I have gone back down, anyway. So I said, "I went back down to $18.50." But he felt like I should have discussed it with Coors before I did go up on the price. It only lasted about a week.

He testified that his contract "reads that before you change your prices, I believe that is the way it reads, that you go over it with Coors, talk with Coors about it" (Tr. 1570) ; that he had never before priced his beer differently from Coors' suggestions before that date; that Coors' representative, Mr. Linn, had told him that Coors' policy is not to give deals and discounts, that he would only sell in the territory to which he was assigned, and, if he sold outside his territory, Mr. Linn told him "we would be on the next plane to Golden to take it up with the authorities" and "I would lose my distributorship" (Tr. 1571) ; that there was one illegal sale of 50 cases of Coors beer outside his territory when an employee, Ike Townsend, arranged to have it delivered to a warehouse in Crystal City, which is his territory, but the buyer had then taken the beer to Austin where his son had a barbecue stand and sold it; that Austin was in his territory, but it wasn't in the place where his license was and that was where he was cited by the Liquor Control Board for selling beer since under Texas laws it is necessary to deliver to the place where the license is (Tr. 1572) ; that he has sold some beer to retailers who took the beer outside his territory by giving them a manifest which permits them, under Texas law, to take the beer from the warehouse outside of his territory (Tr. 1573) ; that he did not discuss with the Coors people these sales to retailers at his warehouse when he gave them manifests until the situation arose about selling his business; that, on May 1, 1971, he had a meeting in Dallas with Messrs. Linn, Hayes and Kersen, at which time Mr.

Linn told him that "they felt like I wasn't doing the job that they would like for me to do down there and he was going to get me a letter out within 30 days giving me 90 days to straighten it up" because "some old beer was in the territory and that I wasn't giving them the service and had some turnover in my employment" (Tr. 1575); that thereafter he received a letter (CX 2477 A-B), dated May 5, 1971, from the Adolph Coors Company, signed by Melvin C. Linn, placing him on a three-month probationary period "within which you must bring your operations up to the standards satisfactory to Adolph Coors Company;" that in August 1971 he had a meeting in Golden with Harvey Gorman, Mel Linn, Ken Hayes and Leo Bradley, in order "to discuss with him the lack of improvement in his operation during the three month probation period which ended August 5th" (CX 924); at that time Mr. Gorman said that his distributorship had not been improved in accordance with their letter of May 5, 1971, and he was asked to sell his distributorship (Tr. 1577); also, at that meeting, Mr. Hayes mentioned a sale by the witness in Johnson City outside his territory; that thereafter he received a letter (CX 2478 A-B), dated August 17, 1971, from the Adolph Coors Company, signed by Harvey V. Gorman, giving him notice of termination, which states in part:

> The Agreement is being terminated for many causes, among them being the following:
>
> 1. Unsatisfactory draught service and maintenance.
> 2. Poor rotation in your area.
> 3. No efforts to build a good organization.
> 4. Poor service.
>
> It has nothing to do with our decision; however, we note with interest you will shortly receive from the Texas Alcoholic Beverage Commission a three-day suspension for violation of Texas laws.
>
> In our probationary letter to you dated May 5, 1971, you were advised you would be given a reasonable time to sell the distributorship if your performance remained unsatisfactory. This commitment on our part shall expire on November 1, 1971.

With regard to the above, the witness testified that he "was giving the best draft and the best sales there were;" that there was not poor rotation in his area; that he had made every "effort I could possibly to build a good organization, and I thought I had a good organization according to the increase to what we had been selling;" that he was giving good service (Tr. 1580–1582); that he thought he was terminated "For selling beer out of my, this

beer that went into other, some other territories and because they [Piggly Wiggly] were running beer on special" and it was beyond his control if he kept them as a customer (Tr. 1582).

On cross-examination, he testified that Coors beer came for the first time to Del Rio, Texas, in December 1966 and also to San Angelo, Dallas, Fort Worth and Wichita Falls about the same time; that the Coors Company did not have production enough for those areas of Texas until 1966; that, when Mr. Gonzales and Mr. Reynolds owned the Del Rio, he had a financial interest in it through Mr. Reynolds, who owned 49 percent of the stock and he had financed Mr. Reynolds in his partnership with Mr. Gonzales; that Mr. Reynolds and he bought out Mr. Gonzales but he furnished the money; that the Coors Company knew that they were buying out Mr. Gonzales and did not object; that he was in the drilling business and pump business when he first started to back Mr. Reynolds and his first experience with the beer business was when he furnished some money to Mr. Reynolds (Tr. 1587); that he had other people running his drilling business, pump business and shopping center business, but he moved to Del Rio and took over the distributorship and operated the trucks (Tr. 1588); that he devoted his full time to the distributorship after May 1969 (Tr. 1588); that he did not pay Mr. Reynolds any money for his part of the business because he had signed the notes of indebtedness for the distributorship and furnished the money (Tr. 1589); that, when he bought out Mr. Reynolds, he assumed the building and the trucks and the indebtedness (Tr. 1589); that in 1971 the distributorship was worth $300,000; that the record is not clear as to how he arrived at this figure; that, during the meeting with Mr. Hayes and the Piggly Wiggly manager, Mr. Hayes stated that the Coors Company wanted retailers to make a fair rate of return on their investment (Tr. 1593); that Mr. Hayes talked with him after he raised the price for half barrels from $18.50 to $19.50 because his competitors did it; that he paid $13.50 for the half barrels; that the Coors representatives complained to him about his rotation policies, the conditions of some of his draft accounts, that he was not devoting full time to the business, some of the service he was giving his retailers, the condition of his warehouse, and some of his violations of the Texas liquor laws; that he was suspended three days on one occasion and eight days on another occasion when he was late in paying for his license; that, during the eight-

day period, Mr. Richard Mirlow of Fort Stockton, a Coors distributor, delivered beer to his customers; that these suspensions were not the fault of the Coors Company; that in the letter to him from the Adolph Coors Company, dated May 5, 1971 (CX 2477 A–B), he was told that the sales price, or the contract or the agreement between him and the buyer, if in fact he didn't get by his probationary period, would be entirely up to him (Tr. 1600); that he negotiated the sale on his business and subsequently entered into a contract and that the Coors Company did not take any part in that contract; that he contracted to sell the business for $193,000 and the Coors Company stayed away and let him handle the whole thing himself; that he accepted $100,000 from the buyers, Mr. Foster and Mr. Ware, because of his creditors, and the Coors Company had nothing to do with that transaction (Tr. 1603); that, although he knew there were shortages from time to time for Coors beer going into his area, he told the Coors Company he would like to have another county closer to him in his territory, but Coors said they were not opening up any new territory on account of the shortage of beer (Tr. 1606); that he never checked on the age of the beer he sold outside his territory and had no regular calling program for doing so (Tr. 1607).

28. *John A. Fletcher.*

Mr. Fletcher testified (Tr. 1613–1636) that he is a buyer for Lucky Stores (supermarket business) in San Leandro, California (Tr. 1614); that he is buyer of beverages, tobaccos, deli, and liquids (Tr. 1614); that he is a purchaser of beer from Beverage Distributing Inc. (Tr. 1617); that there are definite advantages in central warehouse delivery to Lucky Stores in lower consumer prices, better product control, control of pilferage problems, delivery control and quality control of beer (Tr. 1617–1620); that Lucky Stores under central warehousing can delivery cheaper due to the fact of volume merchandise (Tr. 1622).

Under cross-examination he admitted that he obtained central warehoused products that cost less than he can buy from regular distributors and that if he couldn't get them at a reduced cost he wouldn't centrally warehouse them (Tr. 1627); that to a degree he had to obtain a price break on purchases in order to pay for the distribution out of the central warehouse (Tr. 1627); that his only purpose in central warehousing is to service his own stores (Tr. 1630); that central warehousing has no effect whatso-

ever on the price of beer in California because that is set by the manufacturer (Tr. 1632); that he believes he has better control over stock rotation under central warehousing but he does not know of the success or failure of the stock rotation in his stores of Coors products (Tr. 1633–1634); that he could not make a comparison of distribution costs of Coors distributors compared to his central warehouse (Tr. 1635–1636).

Proceeding now to respondent's witnesses (42 in number) short summations of portions of their testimony is similarly set forth.

1. *Harvey Gorman.*

Mr. Harvey Gorman was called for the limited purpose of identifying respondent's RX 1047, the policy brochure (Tr. 1738). He stated that even though the policy was dated November 1971, it was in fact the policy of long-standing and was merely printed in this form so as to be an aid to younger distributors (Tr. 1738).

2. *Raymond Willie, Jr.*

Raymond Willie, Jr., testified (Tr. 1741–1767) that he is president of Willowbrook, Inc., of Dallas, Texas, a Coors distributor; that his territory is Dallas, Kaufman, Ellis and Hunt Counties, Texas; that they were appointed the Coors distributor some time the latter part of May 1966 after making application in August 1965 by writing a letter to Mr. L. R. Straight, at that time general sales manager of Coors Company; that their first date of operation was August 29, 1966; that he did not pay anything for the Coors distributorship; that in 1971 they sold around 235,000 barrels of Coors beer; that, besides the policy manual, draft manual and advertising or merchandising manual, they receive update sheets from time to time from the local sales representative, letters and bulletins concerning the operation of their distributorship; that their contract with the Adolph Coors Company is in writing and specifies his territory; that sometimes they had a shortage of beer; that he would not have contracted with the Adolph Coors Company had he known it was their general policy to have only one distributor in a given area; that they would not have invested the kind of money that they had to invest had they thought that there would be another Coors distributor in the territory; that they set their sales prices; that the retailers set their prices; that it's a very common situation in their territory for Coors beer at the retail level to be sold at discount prices; that prices of Coors beer

at reduced prices are advertised by retailers in publications in Dallas in the newspapers at below his suggested retail prices; that his policy concerning exclusive draft accounts in his distributorship is that he will split with foreign beer or dark beer, "We will split with those two" (Tr. 1747); that they stopped splitting with the domestic beers in their market after a very short time when they saw it was unfair to the consumer and to them (Tr. 1747); that they have never threatened to cut off any retailer that didn't adhere to their suggested prices, nor have they threatened them with no deliveries if they didn't maintain the prices that they suggested; that they have never been threatened as a distributor with termination of their distributorship if they didn't observe territorial boundaries; that they never have been threatened with termination of their distributorship because of their split draft account policy; that they have never been threatened with termination of their distributorship if they did not sell to a central warehouse; that they have never been threatened or coerced or intimidated in any way by the Adolph Coors Company or any of its agents (Tr. 1748); that he recalled his earlier testimony concerning a 10 cents a case promotion that he was reported to have had with a certain sector of the Dallas community, the Negro sector, and that it did not take place; he stated, however, "We did fulfill the part where we advertised Coors beer, their ads, in the paper Sepia" (Tr. 1750). On cross-examination, the witness testified that they are now starting on a program to change their delivery operation so far as delivery truck equipment is concerned, and have ordered the first of a series of completely refrigerated package delivery trucks in order to complete the Coors refrigerated marketing program and "because it is going to improve the taste of Coors beer" (Tr. 1750); that Mr. Bradley or the local sales representative contacted him regarding a file kept by him from the beginning of his distributorship containing Thursday and Friday newspapers in which the retailers advertise beer at discount, and he furnished the file to him (Tr. 1751); that they had a serious organization problem in their company about which he testified (Tr. 1754):

> I don't feel that we were intimidated. I don't think we were threatened. I think they sat down with us. It was very serious to them and it was serious to us and they wanted to get this problem in our organization, which was an organizational problem—a conflict of personalities—and they wanted to help us get this problem straightened out. They laid out a time schedule. They laid out some things they wanted us to do.

He stated that thereafter they were on probation, with the local sales representative making a report to the Coors sales committee, which "would be a full year of complete evaluation as to how we were progressing" Tr. 1755); however, they did show the expected progress and worked out their problems; that poor rotation was called to their attention and old keg beer was brought to their attention and they corrected it immediately (Tr. 1757); that they had a retailer complaint from a Mr. Smith because the route salesman had refused to give him the number of cases he requested (records would indicate that he would sell this in about two months) and at that particular time they wanted their retailers to carry about a five to seven day working inventory; that their supervisor, Jerry Davis, went out to see Mr. Smith but "he threatened Mr. Davis with his life, said he was going to kill him, to get out of his store" and then called someone at the brewery and said they would not sell him enough beer and he demanded some action (Tr. 1760); that thereafter Mr. Linn and he went to see Mr. Smith and explained their policy and "it was all right" and it was decided that in the future "our sales manager would go out, and personally go out and see the account rather than leaving our supervisor to take care of it" (Tr. 1762).

On redirect examination, he testified with regard to RX 659 through 689, advertisements of sales of Miller's, Budweiser, Schlitz and Coors beer which appeared in the Dallas Times Herald. When asked by complaint counsel, he identified the size cans not stated in the advertisements as follows: RX 659, 660 and 676 all advertise six-pack cans of the four different brands and they are 12-ounce cans; RX 677 advertises only Coors 6 Tab Open Cans which are 12-ounce cans. He stated that the 12-ounce can is the only can you can sell in the State of Texas, a 15-ounce or 16-ounce or 7-ounce can not being permissible.

3. *Mrs. Myrtle Bard.*

Mrs. Myrtle Bard, of San Bernardino, California, testified (Tr. 1769–1782) that she is president and treasurer of the Bard Distributing Company, a Coors distributor; they had their first shipment in 1933; that her operation sold six million dollars of beer in 1971; that her contract with Adolph Coors Company is written and her territory is specified herein; that, during the past four or five years, she has not been short of Coors beer until this last year and that's the first time she ever had a problem; that she sets the prices; that she has never been threatened or

coerced or intimidated in any way by any member of the Adolph Coors Company; that her territory was Indio and Yucca Valley and San Bernardino, her main headquarters; that she recently sold Indio and Yucca Valley because she wanted to get out of such a large territory; that she asked Coors to find her a buyer and they did, two gentlemen, to whom she sold the Indio and Yucca Valley territory; that Coors Company dictated absolutely nothing on the sale and the entire transaction was her desire and on her terms (Tr. 1773). On cross-examination, she testified that her investment today is a little over two million dollars and her business is profitable; that her total sales in dollars in 1971 were six million, and in 1970 were "five million something" (Tr. 1774) ; that her net profit before taxes in 1971 was approximately $365,000, and in 1970 was about $268,000 before taxes; that she has been increasing her investment every year in her distributorship in the last ten years; that she sold the Indio and Yucca Valley areas on November 15, 1971, and this sale was included in the six million dollar sales referred to above and also in the profits; that her husband handled several beers, Pabst, Schlitz and 102; that she handled Falstaff but stopped in 1960; that in 1960 Falstaff was about 12 percent of the sales of Coors; that she had been approached within the last five years to distribute other brands of beer but wasn't interested; that Coors is a quality beer which contributes to its sales; that she didn't believe that a decrease in sales would occur if she increased her wholesale price by a nickel a case for 12-ounce cans in California; that Budweiser, Schlitz and Olympia beers are her principal competitors in California, but she did not know about their pricing or their advertised sales; that California is a Fair-Trade State and all of her prices are posted with the Secretary; that she is a member of the California Beer Wholesalers Association to which most all the distributors belong; that she sells Coors beer to anyone who wants Coors beer as long as the account wishes; that she would say that Coors beer has the largest share of the market in the San Bernardino area but she did not know the percentage. On redirect examination, she testified that, although Coors is the only beer she sells now, the physical plant is such that she could distribute out of there another type of beer if she so desired (Tr. 1781) ; that she has about eight hundred retail customers in her area in San Bernardino at the present time, of which a hundred eight or nine are draft accounts and she was sure she had split accounts but did not

know how many since she doesn't call on the trade (Tr. 1782).

4. *Kenneth Adamson.*

Kenneth Adamson, whose business address is Sacramento, California, testified (Tr. 1783–1825) that he is part owner, vice president and general manager of the L&M Foster Company, Incorporated, doing business as the Foster Company, a Coors distributor, since November 23, 1970; that from March 15, 1963, he was sales manager for Mr. Vincent J. Domenico, a Coors distributor in Lakewood, Colorado; that, to his knowledge, the Foster Company did not pay for its distributorship; that he is familiar with the Coors policy manual, RX 1047–A, and they have a draft beer manual "that helps us in the distribution and quality control of our draft beer and we have a merchandising manual that assists us in our market area, placement and servicing of legal types of advertising in California" and are periodically brought up to date on new packaging through correspondence with the brewery and with the brewery representatives (Tr. 1784–1785) ; that they have meetings from time to time with the sales representatives when they call on his territory and also group meetings that usually include generally the introduction of a new package, new type of advertising, recycle programs, labor difficulties, etc. (Tr. 1785) ; that he knows all the executive officers with the Adolph Coors Company and they have a draft service man that calls on their operation and assists their draft people in bringing things up to date, pressure changes, types of installations, new ideas to try to assist the accounts in building volume, regarding cleanliness, etc., and they also have the merchandising representative who works with their merchandiser, assists them in the placement and ideas concerning their advertising point of sale material (Tr. 1785) ; that they have a written contract with Adolph Coors Company which specifies their territory; that their territory is Sacramento and Yolo Counties; that, since he has been with the distributorship startng in November 1971, they started having very serious beer shortages and had to ration beer throughout their market area; that, back as far as 1963, when he was with the distributor in Denver, from time to time there were beer shortages with separate packages and it was a problem, but he stated, "I think the thing that helped a little bit was the fact that we were so closely located to the brewery" ((Tr. 1789) ; that the Foster Company posts its prices with the Alcoholic Control Board in the areas that it operates pursuant to the law and sets the posted price; that Coors

Company sets the posted retail price, which is a minimum price, pursuant to the California law; he testified concerning exclusive draft accounts (Tr. 1790):

> Well, we don't really have any policy that we're aware of with regards to exclusive draft accounts. We have in our distribution area about 130 draft accounts at this particular time and I would say that between 35 and 40 of them are split accounts. We, as the distributor, don't really care to have split accounts because it increases our problems of service and quality control. We have had brand substitution. Some beers are cheaper than ours and when somebody requests beer, they hit the knob of their choice and sometimes we don't feel that the consumer is given a fair shake in split draft accounts.

He stated that there is always the possibility that someone might order Coors beer and be given some other beer, and he thinks it does happen because some of the people involved in the industry don't really care about that part of their business and are trying to make money by substituting a brand that is less price and less quality than Coors (Tr. 1791); that draft beer must be kept cold all the time from the brewery until it is served to the customer or it will deteriorate rapidly. He testified that he has never joined with any representatives of Adolph Coors Company in threatening retailers in any way concerning prices, his prices being posted by law and being minimums; that he has not, in conjunction with the Coors Company, threatened any retailer with no deliveries to him; that the Coors Company has never threatened him as far as his territorial limitations are concerned; that he has never been threatened by any agent of the Coors Company in relation to his split draft account situation; that he has never been threatened by the Adolph Coors Company in conjunction with any central warehousing policy, stating, "We deliver to every account every week, and that's our control" (Tr. 1794); that his understanding of central warehousing "is where we would make a large drop of large quantities of beer into a centrally located warehouse, which in turn would be delivered by somebody other than ourselves * * * by ourselves to a central location, which in turn would do our job for us, if they could keep—if they could operate under the same conditions and same standards that we as Coors distributors do" (Tr. 1794); that he would not be willing in his distributorship to trust his responsibility to anybody else along those lines (Tr. 1795); that he has never been threatened or coerced or intimidated by any member of the Coors Company or any of its agents; when asked what importance he placed upon the five-and-

thirty day termination provision in his contract, he replied (Tr. 1795):

> In all honesty, they don't mean a thing to me. I have a personal pride that I would think that it would be a personal reflection on me if I weren't conducting myself in a businesslike manner.

On cross-examination, the witness stated that Mrs. Foster, the owner of the Foster Company, had told him that nothing had been paid for the Coors distributorship; that, for the fiscal year ending August 31, 1971, they sold 100,800 barrels or $4,785,000; that in 1971 the distributorship's total investment, the retained earnings of the corporation, were approximately $150,000 which includes the equipment but not the warehouse which is owned by Mrs. Foster and leased to the corporation; in August 1971, the net profits after taxes were about $86,000; that he owns ten percent of the distributorship; that he had submitted his application to the Adolph Coors Company in February 1970, was interviewed for the distributorship, and was recommended to Mrs. Foster as a potential investor; that she made the decision to bring him into the distributorship because she wanted to "start her retirement process and still remain active in the business;" that he paid Mrs. Foster $65,000 in cash for his ten percent interest in the company, which he borrowed from the Aurora National Bank in Colorado; that he believes the business today is probably worth "two hundred and seventy-eight thousand" dollars although he hasn't looked at a financial statement for some time; when asked about his agreements with Mrs. Foster as to acquiring further ownership in the business, he replied (Tr. 1813):

> I can acquire up to forty-nine percent of the outstanding shares in the corporation through November 23, 1975. At that time I may purchase controling interest in 1977. I will be allowed to purchase another—I will be allowed a seventy percent holder or—or a seventy-one percent holder, and then in 1980 I will be permitted to buy one hundred percent of the corporate stock.

He testified that, at the meeting when he purchased his ten percent interest in the stock from Mrs. Foster, there were present Mrs. Foster, her accountant, Mr. Gorman, Mr. Chet Korter and himself in order to help in establishing their agreement and "we wanted to make sure that Mrs. Foster was able to get everything out of the operation that she was entitled to" since she is a widow (Tr. 1814); that, concerning her reason for taking a partner, he stated (Tr. 1814): "I was aware that they did a market survey

in her distribution area and gave her several alternatives to follow, as suggestions to help her out." He learned this through Mrs. Foster. He stated that he is familiar with the Coors Company policy (RX 1047–A) which puts in writing the oral policies that have always been in effect ever since he has been active in the beer business; that, at the suggestion of the Coors Company, they are in the process of putting together their own company's policy brochure and more carefully defined job descriptions to increase efficiency where their employees are represented by the Teamsters Union; that, when Budweiser had a "post-off" or dropped its prices at the retail level, "we had a fifty-four and a half percent increase in our distribution area this last year, and to be quite honest, we didn't notice any effect on their overall sales;" that his company has never had post-offs; that their draft beer is not profitable to them at the present time but they don't increase their price because they would like to use their draft beer as exposure to the on-premise drinkers so they will be able to sell beer to them in the package stores; that Olympia has had the biggest part of the market penetration at this particular time and is priced identical to Coors; that Coors has about twenty-five percent of his marketing area, and his distributorship also has Rainier ale; that, if for some reason they lost the Coors distributorship, they could probably use their facilities for distributing another kind of beer; that draft beer is just one of many packages that they service; that they have 1536 licensed retailers in his distribution area and they serve all except 120; that they have approximately 130 draft accounts, a number of them being split accounts but he didn't know the exact number; that they are split with everybody except Olympia and "they won't split with us."

5. *Cecil Scott.*

Cecil Scott, having previously been duly sworn, testified (Tr. 1825–1843) that he is the same Cecil Scott who testified before; that he is in business in San Angelo, Texas, and became a Coors distributor in 1966; that he sold approximately 16,000 barrels of Coors beer in 1971; that he did not pay anything for his Coors distributorship; that he is familiar with RX 1047–A, the policy manual of the Coors Company, gets periodical bulletins on recycling and various information about draft equipment, etc.; that Coors' representatives call on him very regularly and they discuss his operations and his market; that he has a written contract in which his territory is specified; that since 1966 he has been short

of Coors beer every year; that he would not have contracted with the Adolph Coors Company had he not known it was their policy to have only one distributor in a given area; that he sets the prices for his beer; that the retailers set their own prices for their beer; that there is a normal markup of about twenty-five percent and at times some retailers sell Coors beer for less than that and have advertised these sales prices a few times; that RX 636 is an advertisement running Coors beer at ninety-nine cents on Thursday, Friday and Saturday, November 4th, 5th and 6th, by a grocery store new in 1971 in the San Angelo Standard Times; he has a policy to try to get them all exclusive draft accounts if he can; when asked, "Now why do you try to do that?," he replied (Tr. 1829):

> Well, storage space and service problems and this sort of thing. Most of my accounts are real small and will only hold a couple of kegs and if you split it with another—they never have run out while they're closed. They run out when they are the busiest and then if they call, you just can't get there in time, and they are mad, and it's just a built-in problem.

He testified that he has never been joined with any agent of Adolph Coors Company in threatening retailers who did not adhere to certain prices; that he has never threatened or been joined by any agent of Adolph Coors Company in threatening any retailers by curtailing their deliveries of beer; that Adolph Coors Company has never threatened him so far as his territorial boundaries are concerned "in any way, shape, form or fashion" (Tr. 1830), nor by any Coors agents; that his contract has a 30-day termination clause in it but that he never placed any importance on it because "I sold my home in Midland, Texas and invested my life savings and borrowed $200,000 before I ever knew we was going to have one, and so I never placed any importance to it whatsoever" (Tr.1831); that he went into business on April 25, 1966 and within a couple of days, around the 27th or 28th of April, he delivered the first beer to a Mr. Letcher in a store at Minnard; that they go to the retailer once a week and, when his route man went back to that Minnard store the second week, he reported that they didn't take any beer; that this went on for about three weeks and Mr. Letcher didn't take any beer, so they checked and he still had the beer in a back room so he went down and bought it at retail price; that the following exchange took place (Tr. 1832):

> Q. Why did you buy it?
> A. Well, it had been in there three weeks and I thought he was going to keep it and let it get old and then put it on the market and hurt me, and