IN THE MATTER OF

SUCCESS MOTIVATION INSTITUTE, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-1768. Consent Order, July 14, 1970—Modifying Order, March 22, 1983

The Federal Trade Commission, having received no objections to a show cause order, has reopened this proceeding and modified its order issued on July 14, 1970 (77 F.T.C. 943), so as to provide prospective franchisees and distributors with more information on sales data, as well as success and failure rates, so that they may better evaluate their chances for success.

ORDER REOPENING THE PROCEEDING AND MODIFYING THE DECISION AND ORDER

On July 14, 1970, in this matter the Commission issued against respondents Success Motivation Institute, Inc. and Paul J. Meyer, in connection with the sale of franchises or distributorships, in commerce (as "commerce" is defined in the Federal Trade Commission Act), a Decision and Order to Cease and Desist.

On December 8, 1982, the Commission issued an order for respondents to show cause why the proceeding should not be reopened and the Decision and Order to Cease and Desist issued on July 14, 1970, should not be modified in a certain respect.

Respondents Success Motivation Institute, Inc. and Paul J. Meyer raised no objection to the proposed modification.

Therefore, the Commission being of the opinion that the proposed modification will increase the ability of prospective purchasers to evaluate their chances for success as distributors or franchisees of respondents and, therefore, that the public interest will be served by modifying the Decision and Order in this matter as requested,

It is ordered, That the proceeding be, and hereby is, reopened.

It is further ordered, That the Decision and Order issued on July 14, 1970, be, and hereby is, modified by deleting paragraph (3) of the order and by substituting for paragraph (4) of the order the following (with paragraphs to be renumbered appropriately):

(4) Failing to furnish to prospective franchisees or distributors a written tabulation or statistical summary showing, on an accumlative and comparative basis, for each fiscal year, for each of the corporate respondent's operating divisions the following information as it per-

tains to the division of which the prospective franchisee or distributor is considering acquisition of a franchise or distributorship:

(a) The median and mean gross sales to respondents' franchisees or distributors exclusive of initial inventories sold to new franchisees or distributors during the fiscal year.

(b) The number of franchisees or distributors at the beginning of the fiscal year, the number appointed during the year, the number terminated during the year, the number retained at the end of the year, and the length of time that those retained at the end of the year have been respondents' franchisees or distributors.

(c) The foregoing information shall be tabulated as a running 4-year analysis so that prospective franchisees or distributors will be furnished such information for the 4 fiscal years immediately preceeding the year in which the information is to be furnished, *provided* that, the information for the fiscal year most recently completed prior to the year in which the information is to be furnished will be made available within 45 days of the close of the fiscal year.

(d) The tabulation will include all franchisees or distributors, whether full or part time, whether or not purchases were made during the fiscal year(s) on which the tabulation is based.

(e) The information required to be furnished under this paragraph will be given to prospective franchisees or distributors at the first face-to-face meeting or 10 days before the execution of any franchise or distributor agreement, whichever comes first, on a separate document which the prospective franchisee or distributor may keep.

IN THE MATTER OF

DAMON CORPORATION

Docket C-2916. Show Cause Order, March 29, 1983

ORDER TO SHOW CAUSE WHY ORDER REQUIRING COMMISSION APPROVAL FOR CERTAIN ACQUISITIONS SHOULD NOT BE MODIFIED

On June 2, 1982, respondent Damon Corporation ("Damon") filed a petition requesting that the Commission reopen the proceeding in Docket No. C-2916 and eliminate that portion of the Order requiring Damon to obtain prior Commission approval for acquisitions of independent laboratories in twelve geographic markets and to notify the Commission of any other acquisitions of independent laboratories. The petition was placed on the public record pursuant to Section 2.51 of the Commission's Rules of Practice, 16 C.F.R. 2.51. Although Rule 2.51 and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), require that the Commission decide petitions to reopen within 120 days, Damon voluntarily waived that deadline in this case. On January 31, 1983, the Commission denied Damon's petition, concluding that the petition failed to demonstrate that either changed conditions or the public interest required elimination of the prior approval requirement. However, the Commission believes that it may be in the public interest to exempt small laboratories from the requirement, and is therefore issuing this order to show cause why a partial modification should not be ordered.

A. *Complete Elimination Of The Prior Approval Requirement Is Not Warranted*

As described in more detail in the letter denying Damon's petition, the Commission found that Damon had not demonstrated any harm to competition such that the public interest would require complete elimination of the prior approval requirement. In considering petitions to reopen under Rule 2.51, the Commission balances the reasons for modifying an order against the reasons for its retention. Damon's principal argument was that the order, as a practical matter, prevented acquisitions that were necessary to permit Damon to compete effectively. However, Damon's petition did not provide any evidence that its allegations in this regard extended beyond smaller acquisitions only.

Damon also alleged that the order served no valid purpose because no acquisition of medical laboratories could possibly injure competition. Were this true, then even limited evidence of injury to Damon might justify eliminating the prior approval requirement. However, Damon's petition did not adequately address possible differences between large, automated laboratories (and the mix of tests they perform) and other types of laboratory facilities. Thus, not only did Damon fail to prove that acquisitions of large laboratories were necessary to its ability to compete or were in any way hampered by the prior approval requirement, it also failed to prove that acquisitions of large laboratories would no longer raise any antitrust concern. Damon's showing on both sides of the balancing test was limited primarily to small acquisitions.

The Commission also found that Damon's petition had not demonstrated changed conditions of fact that would require elimination of the prior approval requirement. Much of the petition attempted to show that the complaint had misstated Damon's market shares, and that it was based on an erroneous market definition. However, Damon had the opportunity to contest the allegations of the complaint but chose not to do so, and is not now entitled to an order modification on this theory alone. In any event, for the reasons just discussed, the market conditions that were alleged in the petition would not support a total elimination of the prior approval requirement for all acquisitions, large and small. Finally, the Commission found that its failure to challenge acquisitions of other medical laboratories or its recent statement on horizontal mergers did not constitute a "change of law" sufficient to justify the requested modification.

B. *Grounds For Modification Of The Prior Approval Requirement*

However, the Commission does find that the public interest may require some modification of the order. The prior approval provision appears to impede acquisitions of small laboratories, an activity which seems to be an important competitive tool for large laboratory companies. At the same time, acquisitions of small pathologist-owned laboratory businesses appear to present little probability of harm to competition since these laboratories are numerous and entry at this small scale of manual operation is frequent.

First, because of the character of acquisitions in the medical laboratory industry, the prior approval provision may place Damon at a critical disadvantage in persuading individual owners of small target laboratories to sell their businesses to Damon. Thus, despite the technical availability of the prior approval procedure, the order may effectively bar some acquisitions. Damon has shown that the publicity, delay, uncertainty, and expense of seeking prior approval can often impede its efforts to reach an agreement. This is because the industry is characterized by frequent and quickly consummated sales to larger laboratory companies of small pathologist-owned laboratory businesses, the primary value of which lies in the good will existing between the pathologist owners and their physician clients. By interfering with the practical transferability of this good will, the prior approval procedure may destroy the value of an acquisition.

Second, Damon has demonstrated that acquisitions are a particularly important competitive tool in the laboratory industry. Thus, to the extent the order prevents acquisitions, it may hinder effective competition by Damon. Damon has shown that sales volume is subject to continual erosion in the laboratory business due in part to the formation of new pathologist-owned laboratories whose owners have professional relationships with the physician clients of larger firms, and in part to decisions by physicians and hospitals to do some testing "in-house." At the same time, such professional relationships make it difficult to rely on ordinary sales efforts to win new customers. Damon has presented facts demonstrating that other large national competitors rely heavily on numerous acquisitions of small pathologist-owned laboratories, often hiring the former owners as sales representatives, and that Damon has not been able to compete as effectively in this manner.

Therefore the public interest appears to require the exemption of small laboratories from the order's acquisition approval provision. An exemption for laboratories with less than approximately $1 million in annual revenues seems appropriate for consideration for several reasons.[1] No laboratory acquired by Damon since the order was issued (in markets not covered by the order) exceeded $1 million in total annual revenues. Moreover, the Commission understands that over 90% of the laboratories in the country do fewer than 250,000 tests per year. The average price for all types of medical laboratory tests is somewhere between $2 and $3 per test, depending in part on the size of the laboratory and the sophistication of its equipment. Assuming that most of these smaller firms perform tests to a great extent manually and therefore applying the greater average price figure, it is reasonable to conclude that over 90% of the laboratories do less than $.75 million in business annually. Thus, a $1 million exemption would allow Damon to acquire, without prior approval, well over 90% of the laboratories in any given area.[2] This should substantially eliminate any harm to competition possibly resulting from the order.

Balancing the need for this modification against the reasons not to make it, the Commission believes that acquisitions of laboratories

[1] The proposed order modification specifies a limit of $250,000 per quarter in each of the four quarters preceeding the acquisition. This will assure that the acquired laboratory was not undergoing recent substantial expansion.

[2] Damon's petition is in accord with these figures. Of 286 non-hospital laboratories in the Chicago market, the petition estimates only 16 generated over $1 million in revenues in 1981. The corresponding figures for Philadelphia are 110 of which 11 exceeded $1 million. Petition at 10. Indeed, it appears that as many as half the non-hospital laboratories test fewer than 50,000 specimens annually. Affidavit of Thomas Hansen (attached to petition) at Tables 5 and 6.

with less than $1 million in annual revenues would be very unlikely to raise significant antitrust concerns for several reasons. First, there exist numerous small laboratories in every major metropolitan area throughout the country. Second, smaller laboratories are less frequent providers of highly sophisticated or "esoteric" test services. Third, there appears to be actual frequent entry of laboratories on a small scale by pathologists.

In sum, the Commission believes that it may be in the public interest to exempt laboratories with less than $1 million in annual revenues from the acquisition approval provision in order to relieve any impediment to effective competition that may result from the order. Moreover, because acquisitions of such laboratories are so unlikely to raise antitrust concerns, there appears to be little reason not to order such relief.

Finally, it should be noted that any modification of the consent order by the Commission would operate only prospectively. The substantial interest in preserving the enforceability of Commission orders dictates that Damon remain liable for civil penalties or other equitable relief if any previous violation of the original order should be discovered. This is so regardless of whether the violation involves an acquisition that would have subsequently qualified for the exemption proposed by this order to show cause, if the exemption had not been granted at the time the acquisition was made.

For the foregoing reasons, the Commission hereby issues this order to show cause why the order should not be modified by adding, to Part II thereof, the following paragraph E:

E. Acquisitions consummated after [the date at which this modification becomes effective], of any Independent Laboratory which, during each of its four most recent fiscal quarters preceding the acquisition, has had less than two hundred and fifty thousand dollars ($250,000) in Net Sales of Medical Laboratory Tests and Test Services performed on all specimens (from wherever originating) are exempt from the provisions of Paragraphs A through C of this Part II.

In accordance with Commission Rule 3.72, Respondent has 30 days from the date of service of this Show Cause Order to file an answer hereto. The Commission further directs that the Bureau of Competition shall file its reply to any answer filed by Respondent within 30 days from the date such answer is filed.

Commissioner Pertschuk dissented.

DISSENTING STATEMENT OF COMMISSIONER MICHAEL PERTSCHUK

I dissent from the Commission's decision to issue this Order to Show

Cause. The petition to modify Damon's 1978 order should simply be denied.

At issue here is the order's "prior approval" provision, requiring Damon to get Commission approval of any future acquisitions in twelve narrow geographic markets for a period of ten years.

Prior approval provisions, of course, have been a common fencing-in feature in decades of Commission orders. By requiring firms who have engaged in illegal mergers to get Commission approval before making future acquisitions, a prior approval provision serves both as a prophylactic measure designed to prevent future law violations by the same firm and as a deterrent to other firms which might violate the antitrust laws. As such, a prior approval provision is a modest and sensible restraint on firms that have demonstrated a propensity to violate the law.

Nevertheless, Damon contends that the prior approval provision prevents it from aggressively competing with its competitors. Apparently, by "aggressive competition," Damon means buying up smaller independent laboratories. Damon does not argue that competition would be harmed because of the possibility that the Commission would deny approval of procompetitive mergers. Instead, it argues that the publicity and delay involved in the prior approval process scares off potential acquisition candidates and makes Damon a less attractive suitor than its competitors. On this slender reed, it wants the prior approval requirement dropped entirely.

In justifying an order modification, a petitioner has the burden to demonstrate that "changed conditions of law or fact," or the "public interest," "requires;; such a modification. I agree with the other Commissioners that Damon has not shown any changed conditions of law or fact to justify lifting the prior approval provision. But I disagree that the more nebulous alternative "public interest" standard, which is rapidly becoming the main standard for relief cited by the Commission in our recent spate of order modifications, provides any other ground for the requested relief.

While the Commission is not willing (correctly, in my view) to lift the prior approval provision altogether, it is willing to waive the requirement for acquisitions of independent medical laboratories with under $1 million in sales. It's estimated that this change would exempt over 90% of the laboratories in the covered markets from the prior approval requirement.

The Commission's rationale for this partial exemption rests on the assumption that the public interest is better served by permitting Damon to gobble up smaller companies faster and more cheaply than it can under the existing order. In turn, that assumption can only be justified by a finding that the modest burdens of brief delay and the risk of some publicity, which are inherent in *any* prior approval clause, so frustrate Damon's ability to compete that, on balance, the existing order is anticompetitive. I fail to see how one could draw this conclusion, particularly given the very weak evidence of injury presented by Damon. In my view, Damon has failed to show how this relief is required by the public interest, and accordingly I would deny the petition in its entirety.

SEPARATE STATEMENT OF COMMISSIONER GEORGE W. DOUGLAS

By issuing this order to show cause, the Commission wisely corrects an order whose provisions may well be anticompetitive. Trends in entry and expansion in the market for medical testing services since the Commission entered its order in 1978 indicate that the contemplated modification is far more likely than not to stimulate competition and benefit consumers. The proposed adjustment will afford Damon more freedom to pursue acquisitions which, the historical record strongly suggests, promise to yield valuable cost- and price-reducing scale economies without a corresponding growth in market power.

For the longer term, our experience in this matter suggests the pitfalls of intervening too swiftly to prevent acquisitions in industries marked by rapid innovation and growth. The Commission entered its original order as Damon had just begun to reap the fruits of a pioneering effort to consolidate small, higher-cost testing facilities into more efficient central operations. The Commission's initial concern with Damon's early, seemingly large market shares in Philadelphia and Chicago now seems seriously misplaced in light of the speed with which large-scale, subsequent entry by several major firms dramatically reshuffled market shares and changed Damon's relative standing in the industry. In short, sudden, dynamic change soon rendered the Commission's intervention virtually irrelevant and possibly counterproductive.

For these reasons, it is hard to take seriously Commissioner Pertschuk's suggestion that the proposed modification serves only to enable Damon "to gobble up smaller companies faster and more cheaply than it can under the existing order." If anything, this case reveals how an indiscriminately "aggressive" enforcement posture can deprive consumers of the superior performance that the antitrust laws are designed to promote. There is little to say for a merger policy that fails completely to account for the procompetitive role acquisitions can play in achieving efficiencies and encouraging desirable entreprenurial enterprise. The troubling question is not whether the Commission should modify this order, but rather why it accepted it in the first place.

IN THE MATTER OF

ETHYL CORPORATION, ET AL.

Docket 9128. Interlocutory Order, April 1, 1983

ORDER EXTENDING IN CAMERA TREATMENT

On March 16, 1983 the Commission provided notice to respondents that it intended to issue an opinion in this matter containing certain information contained in the *in camera* record. Respondents have filed various objections to the release of some of this information. In addition to information contained in the opinion, the record, including the initial decision by the administrative law judge, contains information which has been kept *in camera.*

Upon consideration of the objections filed by respondents to release of this information and the public interest in having access to a public record, *it is hereby ordered* that the opinion in this matter will be released with certain portions excised. To the extent that previously *in camera* information is released in the opinion as to which release one or more respondents have objected, the Commission has determined that release will not result in a "clearly defined serious injury." *H.P. Hood & Sons, Inc.,* 58 F.T.C. 1184, 1188 (1961); *Bristol-Myers Co.,* 90 F.T.C. 455, 456–457 (1977). As to information excised from the opinion and the remaining *in camera* information, the Commission plans to release some or all of this information no earlier than 30 days from the date of this order subject to any additional particularized showing by respondents of the need for confidentiality, such showing to be made within 30 days.

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION, ET AL.

Docket 8918. Interlocutory Order, April 8, 1983

ORDER STAYING MODIFIED ORDER TO CEASE AND DESIST

It is hereby ordered, That the "Modified Order to Cease and Desist" issued in this matter this day, be stayed as to respondent American Home Products Corporation until the later of (1) September 30, 1983 or (2) 90 days following the disposition of a petition to reopen, if such petition is filed by American Home Products Corporation no later than April 15, 1983.

Commissioner Pertschuk dissented.

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8918. Final Order, Sept. 9, 1981—Modifying Order, April 8, 1983

The Federal Trade Commission has modified its Final Order In the Matter of American Home Products Corporation, et al., issued on Sept. 9, 1981 (98 F.T.C. 136), in accordance with a decision rendered by the Court of Appeals for the Third Circuit on Dec. 3, 1982. The modification deletes the provision that had prohibited the maker of Anacin and Arthritis Pain Formula from making any non-comparative effectiveness or side effects claims for any over-the-counter drug product unless the company possessed a reasonable basis when making such claims.

MODIFIED ORDER TO CEASE AND DESIST

Respondent American Home Products Corporation having filed in the United States Court of Appeals for the Third Circuit a petition for review of the Commission's order issued herein on September 9, 1981; and the Court having on December 3, 1982, rendered its decision modifying the Commission's order and, as so modified, affirming the order; and the time for filing a petition for certiorari having expired and no petition having been filed:

Now, therefore, it is hereby ordered, That, pursuant to 15 U.S.C. 45(i), the aforesaid order to cease and desist be, and it hereby is, modified in accordance with the decision and judgment of the Court of Appeals to read:

ORDER

I

It is ordered, That respondent American Home Products Corporation, its successors and assigns and respondent's 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 "Anacin," "Arthritis Pain Formula," or any other non-prescription internal analgesic product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, that a claim concerning the superior effectiveness or superior freedom from side effects of such product has been established or proven unless such representation has been established by two or more adequate and well-controlled clinical investigations, conducted by independent experts qualified by training and experience to evaluate the comparative effectiveness or comparative freedom from side effects of the drugs involved, on the basis of which it could fairly and responsibly be concluded by such experts (1) that the drug will have the comparative effectiveness or freedom from side effects that it is represented to have, and (2) that such comparative effectiveness or freedom from side effects is demonstrated by methods of statistical analysis, and with levels of confidence, that are generally recognized by such experts. The investigations shall be conducted in accordance with the procedures set forth below:

At least one of the adequate and well-controlled clinical investigations to evaluate the comparative effectiveness of the drug shall be conducted on any disease or condition referred to, directly or by implication; or, if no specific disease or condition is referred to, then the adequate and well-controlled clinical investigations shall be conducted on at least two conditions or diseases for which the drug is effective. The clinical investigations shall be conducted as follows:

1. The subjects must be selected by a method that:

a. Provides adequate assurance that they are suitable for the purposes of the investigation, and diagnostic criteria of the condition to be treated (if any);

b. Assigns the subjects to the test groups in such a way as to minimize bias; and

c. Assures comparability in test and control groups of pertinent variables, such as age, sex, severity or duration of disease or condition (if any), and use of drugs other than the test drugs.

2. The investigations must be conducted double-blind, and methods of double-blinding must be documented. In addition, the investigations shall contain a placebo control to permit comparison of the results of use of the test drugs with an inactive preparation designed to resemble the test drugs as far as possible.

3. The plan or protocol for the investigations and the report of the results shall include the following:

a. A clear statement of the objective of the investigation;

b. An explanation of the methods of observation and recording of results, including the variables measured, quantitation, assessment of any subject's response and steps taken to minimize bias on the part of subject and observer;

c. A comparison of the results of treatments or diagnosis with a control in such a fashion as to permit quantitative evaluation. The precise nature of the control must be stated and an explanation given of the methods used to minimize bias on the part of the observers and the analysts of the data.

d. A summary of the methods of analysis and an evaluation of data derived from the study, including any appropriate statistical methods.

B. Making any representation, directly or by implication, of superior effectiveness or freedom from side effects of such product unless:

1. The superior effectiveness or superior freedom from side effects so represented has been established according to the terms set forth in paragraph I.A. of this Order, *or*

2. Each advertisement containing such representation contains a clear and conspicuous disclosure that there is a substantial question about the validity of the comparative efficacy or side effects claim, or that the claim has not been proven. Such a disclosure may consist of a clear and conspicuous statement that the claim is "open to substantial question," or that the claim "has not been proven." If other language is used by respondent to convey the required message, respondent shall maintain, for a period of three (3) years after the dissemination of any advertisement containing such disclosure, records sufficient to demonstrate that the required message is effectively conveyed to the advertisement's intended audience.

II

It is further ordered, That respondent American Home Products Corporation, its successors and assigns and respondent's 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 "Anacin," "Arthritis Pain Formula," or any other non-prescription drug product, in or affecting commerce, as "commerce" and "drug" are defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, that such product contains any unusual or special ingredient when such ingredient is commonly used in other non-prescription drug products intended for the same use or uses as the product advertised by respondent.

B. Making any false representation that such product has more of an active ingredient than any class of competing products.

C. Misrepresenting in any manner any test, study or survey or any of the results thereof, concerning the comparative effectiveness or freedom from side effects of such product.

III

It is further ordered, That respondent American Home Products Corporation, its successors and assigns and respondent's 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 "Anacin," "Arthritis Pain Formula," or any products in which "Anacin" or "Arthritis Pain Formula" is used in the name, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to disclose clearly and conspicuously that the analgesic ingredient in such product is aspirin, when such is the case and when the advertisement makes any performance claim for the product.

IV

It is further ordered, That respondent American Home Products Corporation, a corporation, its successors and assigns and respondent's 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 "Anacin," in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, that Anacin relieves nervousness, tension, anxiety or depression or will enable persons to cope with the ordinary stresses of everyday life.

V

It is further ordered, That respondent the C.T. Clyne Company, Inc., a corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising of "Arthritis Pain Formula" or any other non-prescription internal analgesic product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, that such product contains any unusual or special ingredient when respondent knows or has reason to know that such ingredient is commonly used in other nonprescription internal analgesic products intended for the same use or uses as the product advertised by respondent.

B. Making any representation, directly or by implication, of superior freedom from side effects of such product, unless:

1. Respondent knows or has reason to believe that the superior freedom from side effects so represented has been established according to the terms set forth in paragraph I.A. of this Order, *or*

2. Each advertisement containing such representation contains a clear and conspicuous disclosure that there is a substantial question about the validity of the claim, or that the claim has not been proven. Such a disclosure may consist of a clear and conspicuous statement that the claim is "open to substantial question," or that the claim "has not been proven." If other language is used by respondent to convey the required message, respondent shall maintain, for a period of three (3) years after the dissemination of any advertisement containing such disclosure, records sufficient to demonstrate that the required message is effectively conveyed to the advertisement's intended audience.

VI

It is further ordered, That respondents American Home Products Corporation and the C.T. Clyne Company, Inc., shall notify the Commission at least thirty (30) days prior to any proposed change in their respective 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 their respective corporation which may affect compliance obligations under this Order.

It is further ordered, That the respondents herein shall within sixty (60) days after service of this Order upon them, and at such other times as the Commission may require, file with the Commission a written report setting forth in detail the manner and form in which they have complied or intend to comply with this Order.

IN THE MATTER OF

DAHLBERG ELECTRONICS, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8929. Final Order, Aug. 6, 1974—Modifying Order, April 11, 1983

The Federal Trade Commission has reopened this matter and modified its order issued on Aug. 6, 1974 (84 F.T.C. 222), to permit the company to suggest resale prices to its dealers. The modified order leaves intact the prohibition against resale price maintenance.

ORDER MODIFYING DECISION AND ORDER

On November 24, 1982, respondent Dahlberg, Inc., formerly known as Dahlberg Electronics, Inc, filed a Request to Reopen Proceeding and to Set Aside Consent Order. The request was filed pursuant to Section 2.51 of the Commission's Rules of Practice. It was placed on the public record for comments. No comments were received.

Respondent asks the Commission to reopen this proceeding and to set aside the order to cease and desist entered on August 6, 1974. The order generally prohibits respondent in the sale of its own brand name hearing aids from, among other things, employing exclusive dealerships and dealer territorial and customer restrictions and from engaging in resale price maintenance and requires respondent to deal with all persons competing with its dealers.

Respondent relies on changed conditions of fact and law and the public interest in seeking to have the proceeding reopened and the order set aside. It relies principally on the Commission's recent opinion and decision in *Beltone Electronics Corp.,* Docket No. 8928 (July 6, 1982) [100 F.T.C. 68]. In that matter, the Commission dismissed a complaint against another manufacturer of hearing aids that the Commission had issued on May 8, 1973, simultaneously with the complaint issued in this matter.

The Commission has considered respondent's request and other relevant information and determined that respondent has demonstrated that it would be in the public interest to reopen the proceeding to set aside Subparagraph Nos. 1, 2, 3, 4, 6, 7, 8, and 9 of Paragraph I of the order. However, the Commission will not be precluded from taking enforcement action concerning such practices when the Commission has reason to believe that they violate the law.

The Commission has further considered whether to modify as requested by respondent Subparagraph No. 5 of Paragraph I, the prohibition against resale price maintenance. In this regard, the Commission has determined it would be in the public interest to modify the paragraph to terminate the prohibition against suggested resale prices.

Accordingly,

It is ordered, That this matter be, and it hereby is, reopened and that Subparagraph Nos. 1, 2, 3, 4, 6, 7, 8, and 9 of Paragraph I shall be set aside as of the effective date of this order.

It is further ordered, That Subparagraph No. 5 of Paragraph I be modified as of the effective date of this order by striking "5" and "or suggesting" and inserting "or" after "stabilizing,".

IN THE MATTER OF

AMREP CORPORATION

Docket 9018. Interlocutory Order, April 11, 1983

ORDER DENYING RESPONDENT'S MOTION TO DISMISS THE COMPLAINT FOR MOOTNESS AND LACK OF PUBLIC INTEREST

By motion dated January 17, 1983, as supplemented by an affidavit in support of the motion filed February 3, 1983, respondent has moved for an order dismissing the complaint for mootness and lack of public interest. Further, the respondent requests that the Commission reopen the record to consider the developments set out in the motion which, in its view, require the Commission to dismiss this complaint.

Respondent argues that five events have occurred since the close of the record in this proceeding which render further proceedings moot. Respondent notes the settlement of certain class actions by buyers of land at Rio Rancho Estates, the sale of all remaining unsold vacant land at Silver Spring Shores to General Development Corporation [100 F.T.C. 488], the transfer of "substantially all" of the land at El Dorado, the reconveyance of land at Oakmont Shores to the trustee in bankruptcy of the former owner, and the enactment of amendments to the Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1701, *et seq,* and the regulations thereunder. As a result of all of these changed circumstances, respondent argues that it is no longer selling much of the land involved in the complaint, and that future sales will be governed by the stronger protections now present in the amended Interstate Land Sales Full Disclosure Act. Accordingly, respondent argues, any possible Commission order is unnecessary.

On January 31, 1983, complaint counsel filed an answer in opposition to the respondent's motion.

The Commission sees no reason to reopen the record to evaluate the impact of these developments on any potential order which it may adopt in this matter. The reconveyance of lots at Oakmont Shores to the Trustee in Bankruptcy occurred in 1975, and is reflected in the record. (*See, e.g.,* Initial Decision at pp. 73–74.) Similarly, information and arguments concerning the effect of class action settlements, and the amendments to the Interstate Land Sales Full Disclosure Act and the regulations thereunder, are reflected in the record and the briefs. (*See, e.g.,* Denial of Respondent's Motion for an Order Pursuant to 5 U.S.C. 557(d)(1), (12/12/78); Ruling on "Respondent's Motion to Take Official Notice and for a Hearing on Form and Content of Relief" (6/11/79); Respondent's Reply to Complaint Counsel's Answer to Respondent's Appeal, pp. 20–22, 72; Respondent's Answer to Complaint Counsel's Proposed Findings of Fact, Conclusions of Law, and Order, at p. 298.) In addition, the Commission is free to take judicial notice of the changes in the law in this area. Finally, the Commission is fully aware of the terms of the purchase agreement by which General Development Corporation bought the remaining unsold land at Silver Spring Shores from respondent, since it entered an order approving certain terms of that purchase on September 30, 1982 [100 F.T.C. 488]. As a result, the record adequately reflects the "developments" which respondent would have the Commission reopen the record to recognize.

Such developments do not, however, necessarily render further proceedings moot. The Order sought by complaint counsel and largely approved by the Administrative Law Judge applies prospectively to all future sales of undeveloped land, not just the four subdivisions involved in the instant matter. It is well-established that the Commission may enter an Order to prevent future wrong-doing by a respondent that has engaged, but is no longer engaged, in the deceptive or unfair acts or practices alleged in the complaint. *Fedders Corp.* v. *FTC,* 529 F.2d 1398, 1403 (2d Cir. 1976), *cert. denied,* 429 U.S. 815 (1977). Further, complaint counsel have clearly stated their intention to recommend consumer redress for past deceptive acts or practices pursuant to Section 19 of the FTC Act. Whether the respondent has ceased such acts or practices is not relevant to such an action. At best the developments cited by the respondent affect the terms of the Commission's Order, not whether such an Order should issue at all. To that extent, the record adequately reflects those concerns and the Commission will, of course, consider the entire record in determining what, if any, relief may be appropriate in this case.

Accordingly, having considered respondent's motion,

It is hereby ordered, That Respondent's Motion to Dismiss the Complaint for Mootness and Lack of Public Interest be, and hereby is, *denied.*

IN THE MATTER OF

GULF & WESTERN INDUSTRIES, INC.

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

Docket 9153. Complaint, March 25, 1981—Decision, April 14, 1983

This consent order requires a New York City corporation engaged in the burial casket industry, among other things, to timely divest to a Commission-approved buyer, Alabama-Indiana Metal Products, Inc., located in Anniston, Alabama. The order also requires the corporation to permit prospective purchasers to inspect the Anniston facility and supply them with information concerning the facility's operation. Further, the corporation is barred from acquiring any stock or interest in any concern engaged in the manufacture or sale of burial caskets or their components, without prior Commission approval for a period of ten years.

Appearances

For the Commission: *Robert W. Doyle, Jr., Michael E. Antalics, Debra A. Simmons* and *Randall D. Marks.*

For the respondent: *Robert L. Jones,* in-house counsel, New York City and *Charles E. Koob, Simpson, Thacher & Bartlett,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent, subject to the jurisdiction of the Commission, has acquired the stock or assets, as hereinafter described, of corporations subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint pursuant to Section 11 of the Clayton Act (15 U.S.C. 21), and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITIONS

(1) For the purposes of this Complaint, the following definitions shall apply:

(a) A *burial casket* is a container used to display, transport and bury the deceased.

(b) A *burial casket metal knockdown* (*KD*) is an unassembled metal casket side, end, bottom, top or lid, and bridge, which, when assembled, is referred to as a burial casket shell.

II. GULF & WESTERN INDUSTRIES, INC.

(2) Respondent, Gulf & Western Industries, Inc. ("G&W"), is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at 1 Gulf & Western Plaza, New York, New York.

(3) G&W achieved entry into the burial casket industry in 1978 through its acquisition of Simmons Company and its subsidiary, Simmons Casket Company ("Simmons").

(4) Prior to its acquisition by G&W, Simmons Company was a Delaware corporation with its principal place of business located at Jones Bridge Road, Box 49000, Atlanta, Georgia.

(5) In 1979 G&W, ranking 52nd on Fortune magazine's list of the 500 largest industrial corporations, had sales in excess of $5.2 billion, assets in excess of $5.1 billion, and net income in excess of $227 million.

(6) In 1979 G&W was the second largest manufacturer of burial caskets in the United States, with sales of approximately $57 million, and was also a substantial manufacturer of KDs.

(7) At all times relevant herein, G&W sold or shipped its products and services throughout the United States, was engaged in or affected commerce within the meaning of the Clayton Act, as amended, and was engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

COUNT I

III. NATIONAL CASKET CO.

(8) Prior to its acquisition by G&W, National Casket Co. ("National Casket") was a wholly-owned subsidiary of Walco National Corporation ("Walco"). Walco is a corporation organized and existing under the laws of the State of New York, with its principal place of business located at 743 Fifth Avenue, New York, New York. The principal place of business of National Casket is located at 355 Commonwealth Avenue, Boston, Massachusetts.

(9) Prior to its acquisition by G&W, National Casket was engaged in the manufacture of KDs and in the manufacture and sale of burial

caskets. In 1979 National Casket was the third largest manufacturer of burial caskets with sales of approximately $25.5 million and was a substantial manufacturer of KDs.

(10) At all times relevant herein, National Casket sold or shipped its products and services throughout the United States, was engaged in or affected commerce within the meaning of the Clayton Act, as amended, and was engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

IV. THE ACQUISITION

(11) On or about April 17, 1980, G&W acquired the burial casket business of Walco for approximately $12.5 million. Under the terms of the agreement, G&W purchased all of the principal assets of National Casket, including inventory, manufacturing equipment and accounts receivable. The sale also included the transfer of leasehold rights to National Casket's manufacturing facility located in Lancaster, Kentucky and its various warehouses and sales outlets.

V. TRADE AND COMMERCE

(12) For purposes of Count I of this Complaint, the relevant lines of commerce are the following:

(a) The manufacture and sale of burial caskets in the United States ("the burial casket market"); and

(b) The production of KDs in the United States by KD manufacturers, including burial casket manufacturers ("the KD production market").

(13) In 1979 approximately 1.8 million burial caskets were sold to funeral directors in the United States. Total 1979 dollar sales of burial caskets to funeral directors were approximately $543 million.

(14) Prior to the National Casket acquisition, G&W and National Casket were substantial actual competitors in the burial casket market.

(15) In 1979 G&W was the second largest manufacturer and seller of burial caskets, with a market share of approximately 10%.

(16) In 1979 National Casket was the third largest manufacturer and seller of burial caskets, with a market share of approximately 5%.

(17) Concentration in the burial casket market is high.

(18) There is a trend toward increasing concentration in the burial casket market and the acquisition of National Casket by G&W has increased the level of concentration in the market.

(19) Barriers to entry into the burial casket market are substantial.

(20) Within the KD production market, the value of all KDs produced in 1979 was in excess of approximately $70 million.

(21) Within the KD production market, G&W and National Casket were substantial actual competitors prior to the acquisition, with approximately 22.4 and 5.6 percent of 1979 KD production, respectively.

(22) Within the KD production market, concentration is high.

(23) Within the KD production market, there is a trend toward increasing concentration and the acquisition of National Casket by G&W has increased the level of concentration.

(24) Barriers to entry into the KD production market are substantial.

VI. EFFECTS OF THE ACQUISITION

(25) The effect of the aforesaid acquisition may be substantially to lessen competition or to tend to create a monopoly in the burial casket market and in the KD production market in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), in the following ways, among others:

(a) The ability of G&W's competitors to compete in the burial casket market and in the KD production market has been or may be substantially diminished;

(b) Substantial actual and potential competition in the burial casket market and in the KD production market between G&W and National Casket has been or may be eliminated;

(c) G&W's position in the burial casket market and in the KD production market has been or may be further strengthened and entrenched at the expense of G&W's actual and potential competitors;

(d) Barriers to entry into the burial casket market and into the KD production market have been or may be significantly raised; and

(e) The levels of concentration in the burial casket market and in the KD production market have been or may be increased, and the trends toward increased concentration in these markets have been or may be accelerated.

VII. THE VIOLATION CHARGED

(26) The aforesaid acquisition constitutes a violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

COUNT II

VIII. WALLACE METAL PRODUCTS, INC.

(27) Prior to its acquisition by G&W, Wallace Metal Products, Inc. ("Wallace"), a corporation organized under the laws of the State of Indiana, was engaged in the manufacture and sale of KDs. Wallace's principal place of business is South Eighth & O Street, Box 70, Richmond, Indiana.

(28) Prior to its acquisition by G&W, Wallace was engaged in the manufacture and sale of KDs. In 1979 Wallace had KD sales of approximately $10.1 million.

(29) At all times relevant hereto, Wallace sold or shipped its products throughout the United States and was engaged in or affected commerce within the meaning of the Clayton Act, as amended, and was engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

IX. THE ACQUISITION

(30) On or about October 2, 1979 G&W acquired substantially all of the assets of Wallace, for approximately $4.0 million, including inventory, machinery and equipment, accounts receivable and real property located at its two KD manufacturing plants in Richmond, Indiana and Anniston, Alabama. G&W assumed certain of Wallace's liabilities amounting to approximately $5.0 million.

X. TRADE AND COMMERCE

(31) For the purposes of Count II of this Complaint, the relevant line of commerce is the production of KDs in the United States by KD manufacturers, including burial casket manufacturers ("the KD production market").

(32) Within the KD production market, the value of all KDs produced in 1979 was in excess of approximately $70 million.

(33) Within the KD production market, G&W and Wallace were substantial actual competitors prior to the acquisition, accounting for approximately 9.3 and 13.1 percent of the 1979 KD production market, respectively.

(34) Within the KD production market, concentration is high.

(35) Within the KD production market, there is a trend toward increasing concentration and the acquisition of Wallace by G&W has increased the level of concentration.

(36) Barriers to entry into the KD production market are substantial.

XI. EFFECTS OF THE ACQUISITION

(37) The effect of the aforesaid acquisition may be substantially to lessen competition or to tend to create a monopoly in the KD production market and the finished burial casket market in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), in the following ways, among others:

(a) The ability of G&W's competitors to compete in the KD production market has been or may be substantially diminished;

(b) Substantial actual and potential competition in the KD production market between G&W and Wallace has been or may be eliminated;

(c) G&W's position in the KD production market and in the burial casket market has been or may be further strengthened and entrenched at the expense of G&W's actual and potential competitors;

(d) Barriers to entry into the KD production market have been or may be significantly raised; and

(e) The level of concentration in the KD production market has been or may be increased, and the trend toward increased concentration in this market has been or may be accelerated.

XII. THE VIOLATION CHARGED

(38) The aforesaid acquisition constitutes a violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing or said agreement is for settlement purposes only and does not constitute an admission by respondent 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Gulf & Western Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1 Gulf & Western Plaza, in the City of New York, State of New York.

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

ORDER

I.

It is ordered, That for the purposes of this Order the following definitions shall apply:

1. *G&W* or *Respondent* means Gulf & Western Industries, Inc., a corporation organized, existing, and doing business under the laws of the State of Delaware, with its principal offices at 1 Gulf & Western Plaza, New York, New York, as well as its officers, employees, agents, its parents, divisions, subsidiaries, affiliates[1] successors, assigns, and the officers, employees or agents of G&W's parents, divisions, subsidiaries, affiliates, successors, or assigns.

2. Gulf & Western Casket Corporation, a subsidiary of G&W, is engaged in the burial casket industry through various subsidiaries and divisions.

3. *Anniston* means the Anniston, Alabama facility of Alabama-

[1] For purposes of this Order, the term *affiliates* shall mean any entity over which Gulf & Western Industries, Inc. exercises control. The term *control* shall mean the direction or causing the direction of the management and policies of an entity, in any way.

Indiana Metal Products, Inc., a subsidiary of G&W. Anniston, at the time of divestiture, shall include the assets listed in Appendix A.

4. The term *burial casket* means a container used to display, transport and bury the deceased.

5. The term *KD* means an unassembled metal burial casket side, end, bottom, top or lid, and bridge which when assembled is referred to as a burial casket shell.

6. The term *burial casket shell* means a metal burial casket which has not been finished or trimmed with the requisite cloth interiors, decorative exterior hardware, and other finishings.

7. *Eligible person* means any individual, corporation (including subsidiaries thereof), partnership, joint venture, trust, unincorporated association, other business or legal entity, or any combination thereof, approved in advance by the Commission.

II.

It is further ordered, That G&W shall divest absolutely and unqualifiedly the Anniston facility to an eligible person within one hundred and eighty (180) days from the date of the issuance of this Order.

III.

It is further ordered, That divestiture under Paragraph II shall be in a manner which preserves the assets and business divested as a viable, ongoing, competitor in the KD market.

IV.

It is further ordered, That, pending the divestiture required by Paragraph II of this Order, G&W will continue to operate Anniston and shall not take any action, other than in the ordinary course of business, without the consent of the Federal Trade Commission, to inhibit the ability of Anniston to operate as a viable competitor in the KD market.

V.

It is further ordered, That G&W provide prospective purchasers with all information concerning the operations of Anniston requested by such purchasers and permit any inspections that may be required.

VI.

It is further ordered, That, for a period of ten (10) years from the date of issuance of this Order, G&W shall not, directly or indirectly, acquire any stock or share capital of, interest in, or assets used in the manufacture of burial caskets or KDs in the United States by any concern, corporate or non-corporate, engaged in the manufacture or sale of burial caskets or KDs in the United States without the prior approval of the Federal Trade Commission.

VII.

It is further ordered, That G&W shall, within sixty (60) days from the date of issuance of this Order, and every sixty (60) days thereafter until the divestiture is completed, submit in writing to the Commission a report setting forth in detail the manner and form in which G&W intends to comply, is complying, and has complied with the terms of this Order and such additional information relating thereto as may from time to time reasonably be required. All such reports shall include a summary of contacts or negotiations with anyone for the specified assets, the identity of all such persons, and copies of all written communications to and from such persons.

VIII.

It is further ordered, That for a period of ten (10) years from the date of issuance of this Order, G&W shall notify the Commission at least thirty (30) days prior to any change in G&W which affects compliance with the obligations arising out of this Order, 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.

APPENDIX A

This Appendix A is annexed to and made a part of this Order in Docket No. 9153. For purposes of this Order, Anniston shall mean: all assets, properties, titles for properties, interests, rights and privileges of whatever nature, tangible and intangible, located at the Anniston facility on the date of this Order, including, but not limited to, all real property, buildings, machinery, equipment, raw materials, inventory, dies and fixtures as described below, presses, as well as all G&W customer lists relating to the sale of KDs, copies of all G&W KD sales invoices describing KD sales processed through Anniston and every other G&W KD facility since January 1, 1982, trade names, trademarks, patents, patent applications, orders for purchase, and all other property owned or operated at the Anniston facility on said date, except that after the date of this Order, G&W may enter into transactions in the ordinary course of business.

On the date of the Order, the assets described above shall include, but shall not be limited to:

One Cincinnati 500-ton Press, serial number 38743
One Dallas Feeder for use in connection with the Cincinnati 500-ton Press, serial number 38743
One Rowe Reel for use in connection with the Cincinnati 500-ton Press, serial number 38743
One Cincinnati 500-ton Press, serial number 39051
One Verson 1,000-ton Press, serial number 25172
One Niagara Shear, serial number 61373
One Tannwitz Saw, serial number 15883
One Foley Saw Filer, Model 387
One Rockwell Drill Press
One Thorbob Bench Grinder
One Peer Spot Welder, serial number 13435
One Lincoln Arc Welder, serial number 246886
One Lincoln Arc Welder, serial number 246794
One Quincy Air Compressor, serial number 954830–L
One Catch Hole Punch Press
One Baron Blakelslee Degreaser
One Chicago D&K 150-ton Flange Brake, serial number P9687
One Chicago D&K Power Brake, serial number L17540
Three Semi-automatic Body Saws
One Round Corner "A" Punch, serial number 40720
One Square Corner "A" Punch, serial number 50968
One Welty-Weigh Uncoiler, serial number UC7792
One Welty-Weigh Slitter, serial number 67707
One Welty-Weigh Stacker, serial number SC7703
One Body Side Panel Punch Unit
One Ingersoll Rand Air Compressor, serial number 23408
One steel coil crane system
One basket and rack system
One scrap conveyor system
Five forklifts
Dies and fixtures sufficient to make the following part numbers, or such other dies and fixtures agreed to by an eligible person:

Tops	Bodies	Bridges
10	140	28 A Steel
20	427	Copper, Bronze
28	499	50 A Steel
50	700 Embossed	Copper, Bronze
70	750	27 A Steel
70 Embossed	427 A	Copper, Bronze
200	427 A Embossed	200 A Steel, Copper
32 A	490 A	# 1 Oversize
35 A	750 A	32 A
37 A	770 A	35 A
37 A Embossed	790 A	37 A
38 A	809 A Steel	38 A
37 A Stainless	Copper, Bronze	10
Steel	990 Steel	20

Tops	Bodies	Bridges
Full Couch Cap	Copper, Bronze	50
Steel, Copper	427 A Stainless Steel	28
Bronze	110	200
Half Couch Cap	120	70
# 1 Oversize	150	Cap ovals
28–AR	180	
	200	
	700	
	809–AR and bottom filler plates	

Bottom
Universal

IN THE MATTER OF

INDIANA FEDERATION OF DENTISTS

Docket 9118. Interlocutory Order, April 28, 1983

ORDER DENYING PETITION FOR RECONSIDERATION

On February 21, 1983, the Commission issued its decision and final order in this matter. On March 11, 1983, respondent filed a petition for reconsideration under Rule 3.55 of the Commission's Rules of Practice. Respondent argues that a regulation promulgated by the Indiana State Board of Dental Examiners on May 8, 1982, "conflicts with the mandates of the Commission's recent Order . . . [and] compels reconsideration of the Commission's rejection of the state action exemption." (Petition at pp. 6–7)

Any petition filed under Rule 3.55 "must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission." Since respondent made no effort to apprise the Commission of the state regulation before the Commission issued its decision and order, respondent is now hard pressed to argue that the order raises questions upon which it had no earlier opportunity to argue before the Commission. Nevertheless, the Commission has considered respondent's petition on the merits and found it unpersuasive.

The regulation provides in relevant part: "Any person using dental diagnostic materials for the purpose of recommending changes in the treatment plan upon which [reimbursements by a third party] are based is practicing dentistry and must be a dentist. Indiana dentists shall not knowingly submit dental diagnostic materials to any party involved in the Unauthorized Practice of Dentistry." 828 IAC 1–4 (Indiana Register, Vol. 5 Number 5, pp. 992–3, May 1, 1982). Clearly this regulation has no relevance to respondent's state action defense in this case, which concerns conduct engaged in by respondent only up to the time the record was closed in 1979. A regulation promulgated in 1982 cannot, as complaint counsel note, retroactively immunize prior unlawful conduct. Furthermore, even if the regulation had been in effect during the relevant time period, it would not have compelled the concerted action in which respondent engaged. Respondent asserts that the use of the plural word "dentists" in the regulation must mean that Indiana dentists are required to comply *as a group* and, consequently, must conspire together to enforce the regulation among their fellows. This creative analysis exceeds the bounds of reasonableness.

Contrary to respondent's assertion, the opinion in *Gambrel* v. *Kentucky Board of Dentistry,* 689 F.2d 612 (6th Cir. 1982), is not instructive in this matter. *Gambrel* concerned a state board of dentistry's interpretation of a state statute as forbidding dentists from providing prescriptions for dentures directly to consumers. The court upheld the decision in this private suit that the state board's enforcement activity and the *individual* conduct of dentists subject to the statute were protected by the state action doctrine. In *Gambrel* there was no evidence of collective behavior by dentists. 689 F.2d at 20.

Respondent asserts that the Commission's order "would place Indiana dentists in a position of choosing between compliance with the new dental regulation, and compliance with the Order." (Petition at p. 17) However, the Commission's order plainly pertains only to activity engaged in by the Indiana Federation of Dentists or a successor organization, acting as an organization, or by its officers or representatives, acting on behalf of the organization. The individual conduct of IFD members is expressly excluded from the order. The order does not even govern the collective conduct of some IFD members, so long as that conduct is not performed by or on behalf of the federation or a successor organization. (However, such concerted conduct might constitute an unfair method of competition subject to challenge under the Federal Trade Commission Act.) Respondent is correct in interpreting the order to prohibit IFD from adopting a policy against the submission of x-rays or other materials to third-party payers or from "coercing any third-party payer to operate or deal in any particular way." (Petition at p. 21) But since the order deals only with collective conduct, and the state regulation concerns only individual conduct, there is no conflict between the two.

Furthermore, the evidence in the record of the Commission's proceeding indicates that none of the targets of respondent's boycott were involved in the unauthorized practice of dentistry as now prohibited by the state regulation. The regulation provides: "Any person using dental diagnostic materials for the purpose of recommending changes in the treatment plan upon which [third party] benefits are based is practicing dentistry and must be a dentist." 828 IAC 1-4-2. Contrary to respondent's assertion, the record does not demonstrate that changes in treatment are recommended by non-dentist employees of dental insurers in Indiana. Rather, all the evidence indicates that lay employees of insurers can only approve claims for reimbursement or refer them to a dental consultant for evaluation.

Respondent has also argued that the order is unclear and overbroad. Since the language to which respondent refers was contained in the draft order accompanying complaint counsel's answering brief, it is not a matter upon which respondent can claim to have had no previous opportunity to argue. Nevertheless, the Commission has considered respondent's concerns and concluded that its fears are unfounded.

Respondent states that it is unclear whether officers and representatives of IFD are prohibited from engaging on an individual basis in conduct forbidden to IFD. Officers and representatives of IFD are members of that organization. Since the conduct of IFD members acting individually is expressly excluded from the order's effect, it follows *a fortiori* that the prohibition on conduct by "respondent . . . and its officers and representatives" refers only to conduct by or *on behalf* of IFD.

Respondent's other concern is that the order may preclude IFD from lobbying or encouraging the Indiana Board of Dental Examiners to take action that "may result in the effect proscribed by the Commission's Order." (Petition, p. 24) However, any effort by the Commission to preclude a respondent from exercising its First Amendment rights would be constitutionally impermissible. Therefore, the only reasonable interpretation of the order is that the Commission did not intend, in prohibiting conduct that might have the "effect" of requiring that dentists not submit requested materials to third-party payers, to prohibit IFD from engaging in activities that are protected by the Noerr-Pennington doctrine.

Respondent may at some future time identify certain conduct in which it may wish to engage as an organization and which it believes is or may be prohibited by the Commission's order. The appropriate course for respondent at that time would be to seek informal advice from compliance staff, to seek an advisory opinion, or to file a request to reopen and modify the order under Rule 2.51. A request for modification must show that a change in the Commission's order is compelled by changed conditions of law or fact or by the public interest.

Accordingly, respondent's petition is hereby denied.

IN THE MATTER OF

ALLIED CORPORATION

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3109. Complaint, May 17, 1983—Decision, May 17, 1983

This consent order requires a Morristown, N.J. producer and seller of three high-purity acids, among other things, to divest Hi-Pure Chemicals, Inc. (Hi-Pure) within 15 months from the effective date of the order. Hi-Pure, acquired from Fisher Scientific Company (Fisher), must be divested absolutely and in good faith as a viable business concern to a Commission-approved buyer. Further, respondent is required to grant Hi-Pure's acquirer a ten-year royalty-free nonexclusive license to patents owned or applied for by Fisher which are used by Hi-Pure in the manufacturing or packaging of any of the three high-purity acids. Additionally, the company is barred for a period of ten years from acquiring any business entity engaged in the manufacturing or packaging of high-purity acids, without prior Commission approval.

Appearances

For the Commission: *Rendell A. Davis, Jr.*

For the respondent: *Bertram M. Kantor, Wachtel, Lipton, et al.,* New York City and *Brian C. Mohr, Skadden, Arps, Slate, Meager & Flom,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that Allied Corporation ("Allied"), a corporation subject to the jurisdiction of the Commission, intends to acquire the Fisher Scientific Company ("Fisher") and Fisher's wholly-owned subsidiary, Hi-Pure Chemicals, Inc. ("Hi-Pure"), both corporations subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint, pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, as amended, 15 U.S.C. 45(b), stating its charges as follows:

I. Definition

1. For the purposes of this complaint the following definition shall apply: *high-purity acid* means any nitric acid, hydrochloric acid, or hydrofluoric acid which is suitable for use in laboratories or in semiconductor manufacturing facilities.

II. Allied

2. Allied is a corporation organized and existing under the laws of the State of New York with its principal office at Columbia Road and Park Ave., Morristown, N.J.
3. Allied is a diversified company engaged in the production and sale of chemicals, plastics, oil, gas, electrical products, refractories, seat belts and other products.
4. Allied is one of the leading manufacturers in the production and sale of high-purity acid in the United States.
5. In 1980, Allied had total sales of approximately $5.5 billion and total assets of approximately $4.5 billion.

III. Fisher

6. Fisher is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal office at 711 Forbes Avenue, Pittsburgh, Pennsylvania.
7. Fisher produces and sells laboratory equipment and laboratory chemicals.
8. In 1980, Fisher had net sales of approximately $424 million and total assets of approximately $190 million.

IV. Hi-Pure

9. Hi-Pure is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal office at R.D. No. 3 (Edelman), Nazareth, Pennsylvania.
10. Hi-Pure is a wholly-owned subsidiary of Fisher.
11. Hi-Pure manufactures and sells substantial quantities of high-purity acid.
12. In 1980, Hi-Pure had net sales of approximately $4.5 million (including sales to Fisher) and total assets of approximately $1.9 million.

V. Jurisdiction

13. At all times relevant herein Allied, Fisher, and Hi-Pure have been engaged in the production and sale of high-purity acid in interstate commerce and Allied, Fisher, and Hi-Pure are engaged in commerce as "commerce" is defined in the Clayton Act, as amended, 15

U.S.C. 12 *et seq.,* and each is a corporation whose business is in or affects commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*

VI. The Acquisition

14. On or about July 30, 1981, Allied announced a tender offer for 47% of the outstanding common stock and all of the 8–1/2% convertible subordinated debentures of Fisher. On or about July 30, 1981, Allied and Fisher entered into an agreement which provides, *inter alia,* for the acquisition of Fisher by Allied.

VII. Trade and Commerce

15. The relevant lines of commerce are the manufacture and sale of high-purity nitric acid, the manufacture and sale of high-purity hydrochloric acid, and the manufacture and sale of high-purity hydrofluoric acid.

16. The relevant section of the country is the entire United States.

VIII. Actual Competition

17. Allied and Hi-Pure are now and have been for many years actual competitors in the manufacture and sale of high-purity acid.

IX. Effects

18. The effects of the proposed acquisition may be substantially to lessen competition or to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and the acquisition constitutes an unfair method of competition and unfair act or practice within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) substantial actual competition between Allied and Hi-Pure in the relevant markets may be eliminated;

(b) substantial actual competition among competitors generally in the relevant markets may be lessened;

(c) concentration in the relevant markets may be increased and the possibilities for eventual deconcentration may be diminished;

(d) mergers or acquisitions between other high-purity acid producers in the relevant markets may be fostered, thus causing a further substantial lessening of competition or tendency toward monopoly in such markets; and

(e) barriers to entry into the relevant markets may be increased.

X. Violations Charged

19. By reason of the foregoing, the proposed acquisition by Allied of Fisher constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Decision and Order

The Federal Trade Commission having initiated an investigation of the acquisition of Fisher Scientific Company by Allied Corporation, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Clayton Act and the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent 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 respondent 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 respondent has violated the said Acts 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 sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Allied Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its offices and principal place of business located at Columbia Road & Park Ave., Morristown, N.J.

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

ORDER

For purposes of this Order,

(a) *respondent* means Allied Corporation, its subsidiaries, affiliates, divisions, successors, and assigns;

(b) *Hi-Pure* means Hi-Pure Chemicals, Inc. and also means all assets of Fisher Scientific Company, and its subsidiaries, affiliates, and divisions, which are located at Nazareth, Pennsylvania and which are used in the manufacture or sale of high-purity acid;

(c) *Fisher Scientific Company* means Fisher Scientific Company and its subsidiaries, affiliates and divisions; and

(d) *high-purity acid* means any nitric acid, hydrochloric acid, or hydrofluoric acid which is suitable for use in laboratories or in semiconductor manufacturing facilities.

I

It is ordered, That, within 15 months from the date on which this Order becomes final and subject to the prior approval of the Federal Trade Commission, respondent shall divest absolutely and in good faith all of Hi-Pure as a viable business concern to a third party that represents that it intends to use the assets of Hi-Pure in the manufacture, distribution or sale of high-purity acid in the United States. Pending divestiture, respondent shall neither make nor permit any deterioration of Hi-Pure, except for normal wear and tear, that may impair its operating abilities, competitive viability or market value.

II

It is further ordered, That in connection with any divestiture made pursuant to Paragraph I of this Order, respondent will grant to the acquirer of Hi-Pure a royalty-free nonexclusive license for a term of ten years to all patents owned or applied for by Fisher Scientific Company on the date that this Order becomes final and which on said date are used by Hi-Pure in the manufacture or packaging of high-purity acid.

III

It is further ordered, That respondent, for a period of ten (10) years from the date this Order shall become final, shall not acquire, directly or indirectly, without the prior approval of the Federal Trade Commission, any assets of or any stock interest in any company engaged in the manufacture of high-purity acid in the United States (other than products, machinery, and equipment sold by any such company in the normal course of business and nonexclusive patent and know-how licenses); *provided, however,* nothing in this Paragraph III prohibits respondent from acquiring stock for investment purposes only which does not exceed one (1) percent of the outstanding shares of equity securities in any such corporation. As used in the preceding sentence, the phrase *assets* shall refer to assets relating to the manufacture or sale of high-purity acid in or to the United States.

IV

It is further ordered, That within sixty (60) days after the date this Order becomes final, and every sixty (60) days thereafter until respondent has fully complied with the provisions of Paragraph I of this Order, respondent shall submit to the Federal Trade Commission a verified written report setting forth in detail the manner and form in which it intends to comply with, is complying with, or has complied with that provision. All such reports shall include, among other things that are required from time to time, a full description of contacts or negotiations with any party for the sale of properties specified in Paragraph I of this Order, and the identity of all such parties. Respondent shall furnish to the Commission copies of all written communications to and from such parties, and all internal memoranda, reports, and recommendations concerning divestiture.

On the first anniversary of the date this Order becomes final and on every anniversary date thereafter for the following nine (9) years, respondent shall submit to the Commission a verified written report setting forth the manner and form in which it has complied or is complying with this Order.

V

It is further ordered, That respondent 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, or any other proposed change in the corporation, which may affect compliance obligations arising out of this Order.

Commissioner Douglas did not participate. Chairman Miller voted in the negative.

IN THE MATTER OF

E. & J. GALLO WINERY

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

Docket C-2836. Consent Order, Aug. 26, 1976—Modifying Order, May 18, 1983

This order reopens the proceeding and vacates in its entirety the order issued on Aug. 26, 1976 (88 F.T.C. 256). The order, which was due to expire by its terms on Aug. 26, 1986, prohibited respondent from engaging in exclusionary marketing practices.

ORDER REOPENING AND SETTING ASIDE ORDER ISSUED ON AUGUST 26, 1976

On September 23, 1982, respondent E. & J. Gallo Winery ("Gallo") filed a Petition requesting that the Commission reopen the proceeding in Docket No. C-2836 and set aside the Order. Absent Commission action, the Order would expire by its terms on August 26, 1986. The Petition was placed on the public record pursuant to Section 2.51 of the Commission's Rules of Practice, 16 C.F.R. 2.51. Four timely comments were received requesting that the Commission deny Gallo's Petition. Thereafter, in response to requests of various parties, the Commission allowed further opportunity for comment upon all matters, including information released only after the first comment period had closed. Five comments have been received in the latest comment period which expired on April 29, 1983. Although Rule 2.51 and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), require that the Commission decide petitions to reopen within 120 days of filing Gallo has voluntarily waived this deadline.

The complaint and Consent Order in this matter were issued in 1976. They were based on the belief that Gallo had a dominant position in the sale and distribution of wine in the United States and had used its market power to lessen or restrain competition in violation of Section 5 of the Federal Trade Commission Act. After the complaint and Consent Order in this matter were issued, the Commission issued decisions in *Coca-Cola Bottling Co.*, 93 F.T.C. 110 (1979), and *Heublein, Inc.*, 96 F.T.C. 385 (1980), concerning the domestic wine market. The records in these cases predated the factual information which gave rise to the complaint in Gallo.

The complaint and resulting Consent Order against Gallo reflected the Commission's concern that the domestic wine market in the mid-1970's was sufficiently concentrated to warrant close scrutiny, particularly since Gallo was then, as now, the market leader. Moreover, the Commission was concerned that Gallo may have used its dominant market position to establish and maintain exclusive dealing practices with its distributors. The Commission also believed, as evidenced by the allegations in the complaint, that: wine sales were either declining or at least stabilizing; there were no new entrants at the manufacturing level; Gallo's market share was increasing while concentration of domestic wine supply was rising; and entry barriers were substantial, in part, because of the perceived difficulty of obtaining access to distribution at the wholesale level.

In its Petition, Gallo argues that the structure of the wine market has changed, with concentration declining, demand increasing, significant new entry and low entry barriers. (Petition at 9–17). Gallo also asserts that the Commission's decision in *Coca-Cola* undercuts the rationale of the consent, especially with respect to whether distribution barriers are high at the wholesale level. (Petition at 17–19). In addition, Gallo claims that the consensual vertical practices prohibited by the Order are now analyzed under a rule of reason by the courts and the Commission and are almost always found to be procompetitive or neutral. *See, e.g., Continental T.V. Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *In re Beltone Electronic Corp.*, 100 F.T.C. 68 (1982). Gallo contends that the Order hinders it from developing effective distribution programs that will promote interbrand competition. (Petition at 20–21).

The principal thrust of the comments filed in opposition to the Petition is that Gallo will engage in exclusive dealing to the detriment of competition if the Order is vacated in its entirety. (*See, e.g.,* November 5, 1982 Comment of Albert Kramer, Esquire, Cohn and Marks, on behalf of anonymous distributor; November 5, 1982 and January 6, 1983 Comment of Howrey & Simon on behalf of Heublein; November 5, 1982 Comment of Michael J. Keady, Esquire, on behalf of an unnamed winery. *See also, e.g.,* April 28, 1983 Comments of Wine and Spirits Wholesalers of America, Inc.; April 29, 1983 Additional Comments of the Wine Spectrum.) These commenters contend that Gallo has the market power to impose exclusive dealing on distributors and that such action would raise entry barriers by restricting supplier access to wholesale distributors.

The Commission's decisions in *Coca-Cola* and *Heublein* paint a somewhat different picture of the wine market than is implicit in the Gallo complaint and Consent Order. Rather than describing a market with stable or declining demand and increasing concentration, these decisions reveal that the market was experiencing rapid growth during the periods in question. In addition, concentration was at moderate levels and increasing only slightly, if at all. Of even greater import, the Commission in *Heublein* noted that considerable entry had occurred and a large number of potential entrants existed who were capable of entering or expanding into the wine business. 96 F.T.C. at 590–91. While not specifically addressing the extent of entry barriers, the Commission's analysis indicates that potential entrants, particularly those in the spirits and beverage business, face no major obstacles to entering the wine market. In discussing the issue of supplier leverage vis-a-vis distributors, the Commission concluded that no significant potential for leverage existed—distributors appeared capable of resisting supplier pressure aimed at forcing dealers to carry a particular brand or line of products. 96 F.T.C. at 599. To be sure, the decision in *Heublein* did not specifically address the issue of exclusive dealing, nor did it suggest that all non-price vertical restraints in the wine market are legal, but it clearly casts doubt on the continued validity of the market assumptions that underlie the Gallo Order.

Apart from evidence presented concerning the competitive state of the wine market, the Petition also makes a strong case for eliminating many of the Order's prohibitions. The Order strictly limits the financial information Gallo can obtain from its distributors as well as any financial assistance that it may seek to provide to wholesalers. In addition, the Order places undefined limits on the extent to which Gallo may restrict the extra-territorial sales of its distributors. Finally, the Order prohibits any kind to tying or requirements arrangement and limits Gallo's ability to influence distributor inventory practices. These restrictions go far beyond concerns about exclusive dealing and the financial limitations, in particular, are highly regulatory in nature. (September 16, 1982 letter from Professor Lawrence A. Sullivan to Jack Owens, Vice President and General Counsel for Gallo). The information submitted indicates that other wine suppliers use a variety of devices, including brand dedication requirements, to induce distributors to provide more effective promotional services. Although Gallo is permitted under Section II(2)(3) of the Order to terminate dealers for cause, the broad scope of the Order's prohibitions appears to hinder unnecessarily Gallo's ability to utilize many of the marketing devices that are freely employed by its competitors. The fact that some competitors utilize a practice does not, of course, make that practice lawful for all firms, irrespective of their market power. But the conditions in the wine market make it unlikely that competitive injury would result if Gallo were allowed greater flexibility in devising effective distribution programs. Thus, the Commission finds no reason to continue these provisions of the Order.

A closer question is raised by Paragraph I(3)(2) of the Consent Order, which prohibits exclusive dealing, and is the principal focus of the objecting commenters' concerns. After careful consideration of all comments submitted, the Commission has concluded that this portion of the Order, as well, should be set aside. We believe that the factual considerations identified by Gallo in its petition, and by the Commission in the *Coca Cola* and *Heublein* decisions, indicate that Paragraph I(3)(2) is not necessary or reasonably related to the prevention of competitive harm, and thus can only operate to chill procompetitive conduct by Gallo (*e.g.*, brand dedication efforts) that is open to its competitors. A blanket prohibition upon exclusive dealing is not necessary under all the facts presented, because Gallo's widespread resort to exclusive dealing arrangements would likely be thwarted by the competitive structure of the wine industry, while such resort to exclusive dealing as Gallo might attempt is unlikely to foreclose competitors from needed distributional outlets.

In reaching our conclusion, we do not suggest that use of exclusive distribution arrangements would be lawful in this market under every conceivable market scenario. That would remain to be determined on a case by case basis under the rule of reason. We conclude simply that under all the particular circumstances of this case the likelihood of competitive harm is sufficiently remote that it is in the public interest to vacate the blanket prohibition on exclusive dealing contained in the Order.

Therefore,

It is ordered, That the Order of August 26, 1976 in this matter be, and it hereby is, set aside.

Commissioner Bailey dissented. Commissioner Pertschuk did not participate.

DISSENTING STATEMENT OF COMMISSIONER PATRICIA P. BAILEY

I oppose the Commission's decision to grant in full Gallo's petition to reopen and to vacate a 1976 consent order because of my concern about potential anticompetitive exclusive dealing in the wine industry. I support much of the relief requested by Gallo, except for that order provision barring efforts by Gallo to condition continued distribution of its wines on the exclusion of competing brands. I do believe that some relaxation of even this order provision is justified, in order to permit reasonable and non-discriminatory minimal performance standards on the part of wholesalers of Gallo products. These might include brand dedication efforts, such as some kind of volume sales requirements, forms of promotion and store display, inventory level standards, and assurances of dealer financial stability.

I am concerned by the public record comments received from participants in the wine industry who object to our vacating the exclusive dealing aspect of the Gallo petition. They have argued that vacating the entire order is unjustified because even the existing proscriptions permit Gallo to impose legitimate reasonable brand dedication requirements on wholesalers. They believe that exclusive dealing is potentially a genuine problem because of Gallo's role as the wine industry's "dominant" firm. They have argued that Gallo's inherent market power stems not just from its national market share (in excess of 25%), but from its market share edge over all other competitors. Gallo's market share in some geographic areas may even exceed its position nationwide. Gallo is larger than its next several rivals combined, has maintained this share by capturing more market growth than have its competitors, and throughout has remained the firm with the most desirable "full-line" offering of wine products. The thrust of all these arguments is that Gallo may have the ability to force wholesalers in at least some major markets to decide between carrying Gallo products, which may account for a fourth of sales or more, and the products of other major competitors. Gallo apparently engages even now in exclusive dealing in eleven major markets through wholesalers controlled by Gallo or Gallo executives.

To counter these concerns, the argument is made that barriers to entry into wine wholesaling are so low that any Gallo efforts at exclusive dealing will only cause new wholesaling outlets to appear and carry the lines ousted from wholesalers electing Gallo-only distribution. While it is true that there are few technical obstacles to entry into wine wholesaling, it also appears to be the case that this business is characterized by high volume/low margin sales, with only a half-dozen or fewer incumbent wholesalers serving most urban markets. Most markets, being saturated, may be unattractive to new distributors of the size needed to ensure profitability.

Finally, Gallo has argued that the order places it at a competitive disadvantage because the order inhibits its distributional efficiency. Given Gallo's steady and longterm role as the largest and most successful of the nation's wine distributors, and its success in exploiting market growth so as to retain its overall market share, I do not see how Gallo has demonstrated that the Commission's order has hampered the success of its marketing practices.

The Commission has also taken notice of its decisions in the *Heublein* and *Coca-Cola of New York* Section 7 wine merger matters as creating a "special circumstance" justifying application of the facts of those cases to the Gallo petition. Those merger cases did not focus on exclusive dealing, or the acts, practices and market position of the Gallo wine firm, or even, in detail, the subject of wine wholesale distribution. They do not compel the granting of the Gallo petition, particularly with regard to any specific Gallo decision that might be made to require wholesalers to exclude competing brands in Gallo's favor.

Respondent bears the burden of proof that altering any part of an FTC order is justified. With respect to exclusive dealing, I believe Gallo has failed to meet this burden, even though the Commission retains the right to sue Gallo in the future if any of its actions amount to violations of the antitrust laws under a rule of reason analysis. The course of action that I proposed as a substitute for the Commission's decision would have permitted Gallo all the relief it seeks, except with respect to a single course of action, which Gallo neither proves it needs nor states that it intends, yet which was a vital part of the original FTC settlement that respondent agreed to in 1976.

My fear is that the vacation of the Commission's order encourages exclusive dealing by Gallo in at least some large and important markets, and that such a signal in the marketplace is an ominous portent for product distribution in other industries.[1]

See, for instance, a discussion of efforts to establish exclusive distributorship in the beer industry, *National rnal*, April 2, 1983, p. 1.

IN THE MATTER OF

BEATRICE FOODS CO., ET AL.

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

Docket 9112. Complaint, June 29, 1978—Final Order, May 26, 1983

This Final Order dismisses the complaint challenging Beatrice Foods Co.'s acquisition of Tropicana Products Inc. The Commission found that the loss of actual competition in the ready-to-serve orange juice industry was too little to establish a violation of the Clayton Act.

Appearances

For the Commission: *Katherine Boland, Layn R. Phillips, Timothy B. Walthall* and *AnnThalia Lingos.*

For the respondents: *Edward L. Foote, John W. Stack, David S. Acker, Jerome W. Pope* and *Sidney Margolis, Winston & Strawn,* Chicago, Ill. for respondent Beatrice Foods Co. and *Robert R. Feagin, III, Holland & Knight,* Tallahassee, Fla. for respondent Tropicana Products, Inc.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondents, each subject to the jurisdiction of the Commission, have entered into a merger agreement and Beatrice has also entered into a stock purchase agreement, each of which, if effected, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, that said agreements constitute violations of Section 5 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b), of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITION

1. For the purpose of this complaint, the following definition shall

apply: *ready to serve orange juice* is chilled single strength orange juice.

II. BEATRICE FOODS CO.

2. Beatrice Foods Co. (Beatrice), is a corporation organized, existing, and doing business under the law of the State of Delaware, with its principal place of business at 120 South LaSalle Street, Chicago, Illinois. [2]

3. Beatrice is engaged in the processing and distributing of food products and related dairy products, and in the manufacturing and distribution of various other products. Beatrice operates the nation's third largest dairy system. In its fiscal year ending February 28, 1977, Beatrice had total net sales of $5,288,577,780 and net earnings of $182,566,209.

4. As a part of its food processing and distributing activities, Beatrice in the past has and continues to purchase bulk frozen orange juice concentrate for the purpose of reconstituting it into ready to serve orange juice. Beatrice has ready to serve orange juice for resale.

III. TROPICANA PRODUCTS, INC.

5. Tropicana Products, Inc. (Tropicana) is a corporation organized, existing and doing business under the law of the State of Florida with its principal place of business at 1001 13th Avenue East, Bradenton, Florida.

6. Tropicana is engaged in, among other things, processing and distributing citrus products. In its fiscal year ending August 31, 1977, Tropicana had total net sales of $244,583,000 and net earnings of $22,461,000. In 1977, Tropicana ready to serve orange juice was the largest selling brand in the United States. Tropicana sells ready to serve orange juice to others, such as Beatrice, for resale to grocery stores.

IV. JURISDICTION

7. At all times relevant hereto, Beatrice and Tropicana have sold and shipped products in interstate commerce and engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and each is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V. THE MERGER AGREEMENT AND STOCK PURCHASE AGREEMENT

8. On or about April 27, 1978, Beatrice and Tropicana entered into a merger agreement which provides, *inter alia,* for the merger of Tropicana into a subsidiary of Beatrice. Upon consummation of the merger, Tropicana will become a wholly-owned subsidiary of Beatrice. [3]

9. On or about March 4, 1978, Beatrice entered into an agreement with two private foundations, the Aurora Foundation and Bible Alliance, Inc., under which Beatrice agreed to purchase from those foundations an amount of Tropicana common stock which accounts for approximately 15.4% of the currently outstanding shares of Tropicana common stock. The purchase of such shares is to occur on October 31, 1978, or on such earlier date as Beatrice may specify in writing.

VI. TRADE AND COMMERCE

10. A relevant line of commerce in which to assess the probable competitive effects of the merger is the processing, distribution and sale of ready to serve orange juice.

11. Relevant sections of the country in which to assess the probable competitive effects of the merger are the United States as a whole and submarkets thereof.

12. The retail distribution and sale of ready to serve orange juice is concentrated, with the top 4 firms accounting for approximately 58.6% of total sales in 1976.

VII. ACTUAL COMPETITION

13. Tropicana and Beatrice are and have been for some time actual competitors of each other in the processing, distribution and sale of ready to serve orange juice and actual competitors of others engaged in the processing, distribution and sale of ready to serve orange juice throughout the United States and submarkets thereof.

14. In 1976, Tropicana's market share was nearly twice the size of its nearest competitor, with Tropicana accounting for approximately 30.5% of ready to serve orange juice sales in dollar volume and 29.0% in unit volume (gallons). In 1976, Beatrice accounted for approximately 1 to 1.7% of ready to serve orange juice in unit volume.

VIII. EFFECTS; VIOLATIONS CHARGED

15. The effects of the proposed merger may be to substantially lessen competition or tend to create a monopoly in a relevant market in violation of Section 7 of the Clayton [4] Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) substantial actual competition between Beatrice and Tropicana in the processing, distribution and sale of ready to serve orange juice in the United States and submarkets thereof will be eliminated;

(b) actual competition between competitors generally in the processing, distribution and sale of ready to serve orange juice may be lessened;

(c) Tropicana will be eliminated as the major independent competitor in the processing, distribution and sale of ready to serve orange juice;

(d) the previously existing level of concentration in the processing, distribution and sale of ready to serve orange juice will be increased and the possibilities for eventual deconcentration may be diminished;

(e) mergers or acquisitions between other ready to serve orange juice processors, distributors and sellers may be fostered, thus causing a further substantial lessening of competition and tendency toward monopoly in the relevant market;

(f) processors, distributors and sellers of ready to serve orange juice may be denied the benefits of free and open competition to their detriment and to the detriment of the general purchasing public and ultimate consumer.

INITIAL DECISION BY

JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE

NOVEMBER 21, 1980

PRELIMINARY STATEMENT

The complaint in this matter, issued on June 20, 1978 alleged that Beatrice Foods Co. (Beatrice) entered into an agreement to purchase stock in Tropicana Products, Inc. (Tropicana) and that Beatrice and Tropicana entered, on April 27, 1978, a merger agreement providing for the merger of Tropicana into a subsidiary of Beatrice, resulting in Tropicana becoming a wholly-owned subsidiary of Beatrice, and that these agreements violate Section 7 of the Clayton Act, 15 U.S.C. 18

and Section 5 of The Federal Trade Commission Act, 15 U.S.C. [2] 345. The effects of the merger are alleged in paragraph fifteen of the complaint to be in the processing, distribution and sale of ready-to-serve orange juice in the following ways:

(a) substantial actual competition between Beatrice and Tropicana in the processing, distribution and sale of ready to serve orange juice in the United States and submarkets thereof will be eliminated;

(b) actual competition between competitors generally in the processing, distribution and sale of ready to serve orange juice may be lessened;

(c) Tropicana will be eliminated as the major independent competitor in the processing, distribution and sale of ready to serve orange juice;

(d) the previously existing level of concentration in the processing, distribution and sale of ready to serve orange juice will be increased and the possibilities for eventual deconcentration may be diminished;

(e) mergers or acquisitions between other ready to serve orange juice processors, distributors and sellers may be fostered, thus causing a further substantial lessening or competition and tendency toward monopoly in the relevant market;

(f) processors, distributors and sellers of ready to serve orange juice may be denied the benefits of free and open competition to their detriment and to the detriment of the general purchasing public and ultimate consumer.

Respondents generally denied the allegations of the complaint and raised issues involving (1) the relevant product market, (2) the relevant geographic market, (3) the type of the distribution systems used and the location and type of customers sold by Tropicana and Beatrice, (4) the barriers to entry in the ready to serve orange juice business.

Prior to the merger between Beatrice and Tropicana, the Federal Trade Commission sought a preliminary injunction against the proposed transaction. The application was denied. District [3] Court Judge George Hart determined that the two companies were not competitors in the processing, distribution and sale of ready-to-serve orange juice on a national basis in any significant amount. As a result, it did not appear likely that the plaintiff would succeed on the merits. *FTC* v. *Beatrice Foods Co. and Tropicana Products, Inc.*, [1978–2] Trade Reg. Rep. (CCH) ¶ 62,148 (D.D.C. 1978).

After a motions panel of the Court of Appeals for the District of Columbia affirmed the denial, the Commission filed a motion for rehearing alleging that the district court judge's findings of fact were insufficient to support his order. The panel vacated its previous order and remanded the record to the district court for specific findings of fact. *FTC* v. *Beatrice Foods Co. and Tropicana Products, Inc.,* [1978–2] Trade Reg. Rep. (CCH) ¶ 62,316 (D.C. Cir. 1978) [587 F.2d 1225 (1978)]. Thereafter, the district court entered specific findings and conclusions in support of the order denying injunctive relief. *Id.* at 75,923–26.

Judge Hart found that Beatrice and Tropicana were not competitors and any competition, if present, was *de minimis. Id.* at 75,926. He further concluded that the United States was not the appropriate geographic market in which to test the actual competition.

These findings are not binding here. A preliminary injunction does not dispose of litigation on the merits but is nothing more than a tentative judgement of the litigation in order to preserve rights pending its final outcome. *Wyrough & Loser, Inc.* v. *Pelmor Laboratories, Inc.,* 376 F.2d 543, 548 (3rd Cir. 1967); *United States* v. *School District of Omaha,* 367 F. Supp. 179, 193 (D. Neb. 1973). Findings and conclusions accompanying a preliminary injunction are for purposes of justifying that particular order only and have no binding effect on any later jury or other fact finder. Nor do such findings estop either the parties or the fact finder from proceeding with the case on its merits. *Westchester General Hospital* v. *Dept. of HEW,* 464 F.Supp. 236 (M.D. Fla. 1979); *Poe* v. *Charlotte Memorial Hospital,* 374 F.Supp. 1302, 1312 (W.D. N.C. 1974); *Sierra Club* v. *Morton,* 348 F.Supp. 219 (N.D. Ca. 1972). Such a result is particularly important where, as here, the parties had extensive discovery only after the hearing on the preliminary injunction. Findings on the ultimate issues in a case can only be made after the parties have had opportunity to prepare and argue the case in detail.

After substantial discovery and pretrial motion practice, the administrative trial commenced in November, 1979, and was interrupted several times by the Commission's [4] appropriation problems[1] and by a somewhat languid and negligent file search by Tropicana in response to discovery subpoenas, which belatedly produced numbers of documents material to the issues of this case.[2] These documents were subpoenaed in May and September 1978 and finally produced in April and May 1980 well into respondents' defense hearings. Respondents offered over 500 of these documents as exhibits.[3] This offer was rejected.[4]

In their pretrial brief complaint counsel stated that the relevant product market in which to assess the probable competitive effects of the merger is the retail sale of ready to serve orange juice through

[1] Orders dated March 14, 1980, April 30, 1980 and May 30, 1980.

[2] Orders dated April 3, 1980, April 7, 1980, April 9, 1980, April 14, 1980, two orders dated May 21, 1980.

[3] Complaint counsel also offered many of the documents as exhibits.

[4] Order dated July 23, 1980.

grocery stores.[5] Because of the documents belatedly produced by respondents in the spring of 1980, this market was expanded to include "processing" and "distribution" of chilled orange juice in the retail market, complaint counsel having found documents allegedly showing Beatrice as a direct horizontal competitor of Tropicana in the processing and in the distribution of chilled orange juice for the retail market.[6]

All objections or motions now pending, not decided by implication in this decision, are hereby denied.[7] **[5]**

The findings of fact include references to supporting evidentiary items in the record. These references are intended to serve as guides to the testimony and the exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence supporting each finding. The following abbreviations have been used:

Tr. – References to the transcript are designated by the name of the witness and followed by the page number;
CX – Complaint counsel's exhibit, followed by its number and the referenced page(s);
RX – Respondent's exhibit, followed by its number and the referenced page(s);
CPF – Complaint counsel's proposed finding;
RPF – Respondent's proposed finding.

I. DEFINITIONS

a. *Chilled orange juice* (*COJ*) is chilled single strength orange juice made: (1) by squeezing fresh oranges, (2) by adding water to FCOJ, or (3) by thawing frozen single strength orange juice.

b. *Retail COJ market* refers to COJ sold in grocery stores.

c. *Frozen concentrate orange juice* (*FCOJ*) is prepared by taking water out of fresh orange juice and freezing the residue.

d. *Bulk concentrate* is frozen concentrated orange juice shipped in drums or tankers at temperatures below 32 F. **[6]**

e. *Canned orange juice* (*CSSOJ*) is single strength orange juice sold in metallic containers.

[5] Trial Brief filed November 15, 1979 at p. 52.

[6] Order denying objection to complaint counsel's revised statement of issues, May 21, 1980. The complaint already alleged this market description. Furthermore, to avoid prejudice to respondents, they were allowed to recall any witnesses who had already testified, for the purpose of additional examination based on this market contention. Order dated May 21, 1980 at p. 2.

[7] Respondents argue that they were denied a fair hearing because of the admission into evidence of documents found in their files. Without pointing to any specific document, they make a general attack on rulings on admissability of documents. (RPF at p. 94) The thrust of the objection is that statements and opinions in documents prepared by Beatrice's advertising agency were admitted as admissions. The objection is denied. *Owens* v. *Achinson, Topeka & Santa Fe R.R.*, 393 F.2d 77, 79 (5th Cir. 1968), *cert. denied*, 393 U.S. 855; *Cox* v. *Esso Shipping Co.*, 247 F.2d 629, 634 (5th Cir. 1957)

f. *Grocery stores* are independent or chain grocery or convenience food stores.

g. *Packaging COJ*—when a milk plant buys COJ which has already been processed, puts it in containers and distributes it.

h. *Processing COJ*—making COJ from fresh oranges, bulk FCOJ, or bulk frozen fresh orange juice.

i. *Reconstituting COJ*—making COJ from bulk FCOJ by adding water and sometimes pasturizing it or adding sugar or other preservatives.

j. *Fresh COJ*—juice made by squeezing oranges. It is sometimes pasturized.

k. *Orange drink*—fruit juice with more water added than in juice which is freshly squeezed. Orange drink may be diluted by adding to orange juice water amounting to 50% up to 95% of the drink.

II. FINDINGS OF FACT

A. *The Acquiring Firm: Beatrice Foods Co.*

1. Beatrice Foods Co. ("Beatrice") is a corporation doing business under the laws of Delaware, with its principal place of business at 120 South LaSalle Street, Chicago, Illinois. (Complaint and Answers of Beatrice and Tropicana, ¶ 2)

2. In fiscal 1978, Beatrice had total net sales of $6,313,888,000 and net earnings, after taxes, of $221,538,000. (CX 194A) In 1978 Beatrice was the nation's 31st largest industrial corporation in terms of net sales, 79th in total assets and 57th in terms of net income. (CX 194A; Dutt 3794) Beatrice sells more than 8,000 products. (CX 19B)

3. Beatrice is the nation's leading diversified food company. (CX 527M, no. 49; Dutt 3793; Karnes 4799–4800) Beatrice sells more than 4,000 retail dairy and grocery products, through supermarkets and grocery stores, using 1,400 food brokers. (CX 20D; CX 31D; Karnes 4798)

4. In 1978 Beatrice was the nation's 17th largest advertiser among all industrial corporations. (CX 192B) [7]

5. In 1978 Beatrice operated the nation's third largest dairy system. (Complaint and Beatrice Answer, ¶ 3) Beatrice is the largest milk processor and distributor in the country and is more national in scope than any other dairy. (CX 509A–E; CX 1554; Karnes 4809)

6. Beatrice's dairy plants process and distribute COJ to grocery stores. (Complaint and Answers of Beatrice and Tropicana ¶ 4)

7. At all times relevant hereto, Beatrice has sold and shipped products in interstate commerce and engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15

U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. (Complaint and Answers of Beatrice and Tropicana, ¶ 1)

B. *The Acquired Company: Tropicana Products, Inc.*

8. Tropicana Products, Inc. (Tropicana) was a corporation doing business under the laws of the Florida with its principal place of business at 1001 Thirteenth Avenue, East Bradenton, Florida. (Complaint and Answers of Beatrice and Tropicana, ¶ 5)

9. Tropicana is engaged in processing and distributing FCOJ, and other citrus juices and drinks (CX 40B–C), and is the leading processor of COJ in the United States. (Complaint and Tropicana Answer, ¶ 6; CX 40D)

10. In its fiscal year ended August 31, 1977, Tropicana had net sales of $244,583,000 and net earnings, after taxes, of $22,461,000. (Complaint and Answers of Beatrice and Tropicana, ¶ 6)

11. In fiscal 1978 Tropicana sold 106,821,648 gallons of COJ in the United States for $206,649,295. (CX 376A; CX 560Z–17)

12. Tropicana's COJ is supported by intensive brand advertising expenditures and advertisements on national television. (CX 39, p. 6; CX 38E) Tropicana COJ is sold in 48 states, with a sales force and 57 food brokers. (CX 22F, I; CX 378A–B)

13. At all times relevant hereto, Tropicana sold and shipped products in interstate commerce and engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as [8] amended, 15 U.S.C. 12, and was a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission, as amended, 15 U.S.C. 44. (Complaint and Answers of Beatrice and Tropicana, ¶ 7)

C. *The Acquisition*

14. Mr. Richard Voell, deputy chairman of the board and chief corporate officer of Beatrice, negotiated the agreement-in-principle to proceed with the acquisition of Tropicana Products, Inc. (RX 2402A)

15. Mr. Richard Truelick, vice president of Beatrice, brought Tropicana to the attention of Mr. Voell sometime in the summer of 1977. (CX 2310A)

16. On September 14, 1977, Beatrice's senior management, other than Mr. Voell, exhibited an interest in acquiring Tropicana. (CX 318) In October of 1977, Mr. Voell received a copy of an October 18, 1977 memorandum to James Dutt, Beatrice's chief operating officer, which analyzed various possible stock exchanges between Beatrice and Tropicana. (CX 320A–G; CX 2310A) Sometime late in 1977, Mr. Voell

discussed the acquisition of Tropicana with Mr. Wallace Rasmussen, then chairman of the board and chief executive officer of Beatrice. (CX 2310A–B)

17. Mr. William Polidoro, a Beatrice dairy division official, contacted Tropicana regarding its possible acquisition in the fall of 1977. (Barnebey 4097–98)

18. At Mr. Truelick's suggestion, Mr. Voell arranged to meet with Mr. Anthony Rossi, then Tropicana's chairman and chief executive officer, on February 8, 1978. (CX 2310B; CX 321A-C; CX 322; CX 324) On February 28, 1978, Messrs. Rasmussen, Voell and Truelick met in Bradenton, Florida with Mr. Rossi and Mr. Barnebey, then president of Tropicana. (CX 319; RX 2402A-B)

19. On Saturday, March 4, 1978, Beatrice officials reached an agreement-in-principle with Tropicana officials concerning a merger between the two companies. (CX 327A-C; CX 5280, no. 65; RX 2402B) On the evening of that day, at a special meeting of Beatrice's board of directors, the agreement-in-principle was approved. (CX 2310B; RX 2402B)

20. The first public announcement of the proposed merger came in the March 6, 1978 edition of the *Wall Street Journal.* (RX 2402B) The proposed merger was mentioned at a Beatrice management meeting on March 7 or 8, 1978. (CX 528Z–21, no. 188) **[9]**

21. In April 1978, pursuant to the agreement with Beatrice, Tropicana Products, Inc., was purchased by the entity T.O.J., Inc., a wholly-owned subsidiary of Beatrice created solely for purposes of the acquisition. (Complaint and Answers of Beatrice and Tropicana, ¶¶ 8, 9) Immediately following the purchase, T.O.J., Inc., changed its name to Tropicana Products, Inc. Under the terms of the purchase arrangements, 52% of Tropicana's shares were converted into Beatrice preferred stock, and 48% were purchased outright by Beatrice for cash. Tropicana is now a wholly-owned subsidiary of Beatrice. (CX 22, Annex I, p. 1)

D. *Product Market*

a. The Retail COJ Market

22. The sale of orange juice to consumers is divided into three segments: FCOJ, COJ and CSSOJ. (CX 345A-Z–89; CX 347Z–6, Z–7; CX 353A; CX 394; CX 400A; CX 410 I-K; CX 413 I-N; CX 414C-E; CX 415B; CX 423B-D, L, R; CX 432A-C; CX 505C; CX 512A-P; CX 513L; CX 514A-R; CX 1650, p. 125; CX 2302, p. 19; Munkelt 748; Jessup 2877, 2879; Barnebey 4008)

23. COJ is recognized by members of the industry and public officials as a market separate from FCOJ and CSSOJ. (CX 6C; CX 13A-J;

CX 147; CX 149B-C; CX 353A; CX 410K; CX 412H, J; CX 413I, M; CX 414E; CX 415B-C, E; CX 432B; CX 505C; CX 512A-P; CX 513L; CX 514A-R; Munkelt 736–37)

24. Tropicana and Beatrice have recognized the existence of the COJ market in their filings with the Securities and Exchange Commission ("SEC"). (CX 22F; CX 38E; CX 39C; CX 40B, D; CX 41B; CX 42B; CX 527Z–1)

25. The Florida Citrus Processors Association ("FCPA") is a trade association of Florida citrus processors. (CX 594J, p. 4) FCPA, formerly the Florida Canners Association, collects and disseminates to its members separate data on COJ, CSSOJ and FCOJ. (CX 594J, pp. 4–6, 10, 14, 66–67; Barnebey 3992)

26. The federal and state governments have promulgated different standards for FCOJ and CSSOJ, and COJ. (CX 399C)

27. The Florida Department of Citrus ("FDC"), a state agency financed by the citrus growers, has recognized separate markets for COJ, FCOJ and CSSOJ. (Hoffer 1813, 1816–17)

28. Separate advertising campaigns for COJ are used **[10]** by firms which sell COJ and FCOJ and/or CSSOJ. (CX 337A-Z–21; CX 367; CX 527Z–8)

b. The Retail COJ Market is Distinct From the Institutional COJ Market

29. The COJ market is recognized by the industry as being divided into two submarkets: sales to grocery stores ("the retail market") and sales to institutional customers ("the institutional market"). (CX 505E; CX 1650, pp. 33–34; Munkelt 717–18; Lang 1049; Donovan 1297–98; Miller 1481; Jessup 2882; Barnebey 4014)

30. Tropicana recognizes the institutional COJ market as separate from the retail COJ market. (CX 523, pp. 298–99; CX 1650, pp. 168–69)

31. Industry and government documents separately report on conditions in the COJ retail and in the institutional markets. (CX 6C; CX 54A; CX 416A-H; CX 418A-E; CX 421A-E; CX 505C, E; CX 506D-E; CX 593, pp. 388–89; CX 2303F-I; Munkelt 780–81; Barnebey 4013)

32. A.C. Nielsen reports relied on by Tropicana, Minute Maid, Kraft and H.P. Hood are limited to COJ sold to the retail market. (CX 252–253; CX 593, p. 389; CX 801D; Munkelt 781, 784; Donovan 1461; Miller 1496–97, 1502, 1554; Hoffer 1825–26; Jessup 2902, 3098–99; Barnebey 3917)

33. Recognizing distinct institutional and retail markets, processors of COJ have established separate sales divisions to serve the customers in these two markets. (CX 506E; CX 1650, pp. 31–32, 56; Munkelt 716–17; Goldman 996; Donovan 1293–94, 1297–98, 1441; Miller 1481; Barnebey 4013, 4018)

34. COJ is usually sold to the institutional market in small size containers (4 oz. and 6 oz.). (CX 3H; Goldman 961; Donovan 1298) Sales of COJ to the retail market are principally made in quart, one-half gallon and gallon sized containers. (Munkelt 711; Lang 1106; Donovan 1295, 1298; Miller 1480–81; Mirapaul 1576; Hoffer 1956)

35. Brand name recognition is important in selling to grocery stores but unimportant in selling to restaurants. (Hoffer 1822)

36. Typically there are separate buyers for retail and institutional COJ. (CX 523, pp. 298–299; Donovan 1297–98, 1323) Many institutional accounts are serviced by specialized institutional wholesalers who do not sell to the retail trade. (CX 523, p. 299) [11]

37. Institutional customers usually want a commitment that COJ producers will supply them for a one year period. (Donovan 1443–45; Mirapaul 1577–80; Koch 4880) Such commitments hinder the shifting of COJ production from the institutional to the retail market. (Donovan 1443–45; Mirapaul 1577–80)

38. Retail buyers of COJ are concerned with whether consumers have been presold on the product. Institutional consumers of COJ do not know what brand they are drinking. (Donovan 1323; Mirapaul 1576)

39. There is no cross elasticity of demand between the COJ retail and institutional markets. A consumer does not choose between home consumption of COJ and institutional consumption of COJ based on the relative prices of COJ. (Munkelt 923; Miller 1495) Many factors other than the price of COJ go into a consumer's selection of a particular airline, hospital, school or restaurant.

40. In pricing COJ for sale to the retail market, processors of COJ do not consider the price of COJ in the institutional market. (CX 1650, pp. 38, 40; Goldman 963; Lang 1061–63; Miller 1495; Mirapaul 1580)

c. The Retail COJ Market is Distinct From the Retail Markets for FCOJ and CSSOJ

41. Beatrice officials recognize the separateness of the retail COJ market. (CX 141F; CX 301B)

42. Tropicana's marketing documents recognize that the COJ retail market is distinct from the FCOJ and CSSOJ retail markets. (CX 490Z–77) In its 1977 annual report, Tropicana separately analyzed its position in the retail COJ and FCOJ markets. (CX 39B) Similar separate analyses of the distinct markets for COJ and FCOJ are found in Tropicana's filings with the SEC. (CX 40D; CX 41B; CX 42C)

43. H.P. Hood Company discontinued retail FCOJ production because it was so different from retail COJ production. (Donovan 1303) Hood never considered entry into CSSOJ. (Donovan 1315)

44. The Florida Department of Citrus ("FDC") recognizes the dis-

tinct markets for COJ, FCOJ and CSSOJ in its marketing activities to promote orange juice to consumers. (Hoffer 1822–24) FDC has employed separate advertising campaigns for CSSOJ, COJ and FCOJ. (Hoffer 1822–23)

45. Tropicana and Minute Maid recognize the [12] distinctness of the retail COJ and FCOJ markets by purchasing separate sales data with respect to each from the A.C. Nielsen Company. (Munkelt 749; Jessup 2950–52)

46. None of the leading sellers of COJ has ever produced CSSOJ. (CX 1650, p. 81; Donovan 1315; Miller 1505; Barnebey 4018) Tropicana, Kraft and Hood have never considered entry into CSSOJ. (Donovan 1315; Miller 1505; CX 1650, p. 81)

47. Sellers of COJ to grocery stores, including Tropicana and Beatrice, examine the prices of other brands of COJ but do not examine the prices of retail FCOJ, CSSOJ, or other citrus juices or beverages in setting their price for COJ. (CX 593, p. 286; CX 1650, p. 43; Munkelt 750–51, 759; Goldman 963–66, 1029; Lang 1059–63, 1111; Donovan 1314; Miller 1493–94; Mirapaul 1472–74; Jessup 3140; Parker 4322–25, 4327, 4333; Koch 4937, 4940; CX 732B; CX 747A)

48. FCOJ producers do not consider the prevailing price of COJ or CSSOJ in setting their FCOJ prices. (Bock 1658)

49. Tropicana is the price leader in the COJ market. (CX 301B; CX 593, p. 423; Munkelt 760; Lang 1059; Donovan 1314; Miller 1507) Minute Maid is the price leader in the FCOJ market. (CX 301B)

50. In 1977 private label COJ amounted to about 19% of total COJ sales (CX 13G), and over 50% of FCOJ sales. (CX 353A)

51. Different production and distribution facilities are used for the three types of processed orange juice sold through retail outlets. (CX 527Z–29; CX 593, pp. 28–30, 35, 68–69; CX 1219C; CX 1650, p. 82; Goldman 988; Miller 1505; Barnebey 4018) Tropicana's FCOJ is processed in a separate building at its Bradenton facilities. (CX 593, p. 132) The production of retail pack FCOJ requires freezing equipment not used to produce COJ for the retail market. (CX 527Z–22; CX 593, pp. 29–30, 68–69; Bock 1655) The filling and packaging equipment used to produce COJ is different from that used in the production of FCOJ. (Bock 1654–55, 1660–61) A firm producing only COJ could not produce FCOJ on its equipment, and to enter the production of FCOJ would require an investment of several million dollars, part of which cost would be represented by a can plant. (Donovan 1304; Miller 1505)

52. The storage and transportation facilities used for COJ sold to retail outlets differ from those used for FCOJ. COJ is kept chilled, but not frozen, whereas FCOJ must be kept frozen at all times until it reaches the consumer. Processors transport and store COJ while keeping it at a temperature of 35–45°F and they recommend to their

customers that COJ be kept under refrigeration and stored at 35–55°F. (Munkelt 714–15, [13] 799; Goldman 967, 1004–05, 1041; Lang 1052; Miller 1489–90; Mirapaul 1570; Jessup 3051; Barnebey 4078; Koch 4910; Piskac 5170) The only exception to COJ being kept under constant refrigeration by grocery stores occurs when glass containers occasionally are put out on an aisle display for a week or two during a promotion. After such a promotion, the COJ is returned to refrigerated storage. (Goldman 1004–05; Miller 1550) If COJ in glass containers is left out at room temperature, it will more quickly deteriorate in quality by losing flavor and changing color. (Goldman 1045; Miller 1488; Mirapaul 1570)

53. The production of CSSOJ requires canning facilities whereas the production of COJ does not. (CX 593, p. 68) The storage and transport of CSSOJ differs from COJ for the retail market. (CX 2302, p. 60) COJ requires cold storage facilities and refrigerated transport while CSSOJ does not. (Munkelt 714–16, 729; Goldman 967; Lang 1051–52; Donovan 1291, 1309)

54. FCOJ suppliers use no salesmen, do no advertising or promotion for either their private or packer labels and provide no marketing assistance to its customers. (CPF 230; CX 297A; CX 593, pp. 436–37, 444; CX 1650, pp. 87–88, 99; Bock 1650; Hoffer 1822, 1869, 1873, 1978–80)

55. COJ is sold to different grocery store buyers than is FCOJ or CSSOJ. (Munkelt 714–15, 798; Goldman 964–65; Lang 1052; Donovan 1300, 1303, 1315; Bock 1650; Jessup 2770, 2927, 2956)

56. COJ is stored in a different part of the grocery store than are FCOJ and CSSOJ. COJ is typically found in the dairy case although it is also found to a lesser extent in the produce section of the grocery store. (Munkelt 714–15, 798–99; Goldman 967; Lang 1052; Donovan 1459; Miller 1489; Jessup 2926–27; Koch 4910; Piskac 5170) FCOJ is found in the frozen food case of the grocery store and CSSOJ is found in the dry grocery section. (Munkelt 714–15; Parker 4325)

57. Total COJ industry sales have been increasing at about 20% in gallons. Total FCOJ sales have been increasing at about 10% (CX 899B-C) but in 1979 total FCOJ gallon sales decreased 6% while total COJ sales increased 20%. (CX 389K, N) Of the total domestic orange juice market, FCOJ has dropped from 77.2% in 1975 to 67.9% in 1979 and COJ climbed from 18.3% to 28% during that period. (CX 13A, p. 149) The recent rapid increase in sales of COJ comes from new orange juice consumers and not from former FCOJ consumers. (Bock 1686; Hoffer 1926; Jessup 3056; Munkelt 814, 924)

58. When FCOJ is put on promotion, there is no perceptible effect on the sale of COJ in the retail market. (Goldman 965; Mirapaul 1572–73; Jessup 3056–57) [14]

59. A study done by a research economist, employed by the Florida Department of Citrus, prepared in the course of his employment and not for use in litigation, concluded that the demand for COJ was inelastic and that there were no significant substitutes for it, including FCOJ and CSSOJ. (Tilley 2232, 2236–37, 2367, 2397)

60. Consumers perceive COJ, when compared to FCOJ, as a pure 100% fresh orange juice, prepared with little processing. (Munkelt 789–90; Hoffer 1956; Barnebey 4063) The extensive growth of COJ in recent years has been due to more women working and buying COJ as a convenience product. (Hoffer 1915–17)

61. FCOJ has an indefinite shelf life if kept frozen, is more compact than COJ and can be more easily stored. (Donovan 1303; Bock 1652; Hoffer 1931; Tilley 2024–25, 2243–44; Barnebey 4063, 4084–86) Shelf life for COJ in paper cartons is about 20 to 30 days. (Munkelt 715; Donovan 1309; Barnebey 3911; Parker 4315; Piskac 5165; CX 62–B) Shelf life of COJ in glass is over one year. (Miller 1508; Barnebey 3911)

62. Consumers and industry members perceive CSSOJ as a product of inferior taste and quality. (Munkelt 790; Goldman 966; Lang 1060–61; Donovan 1315; Miller 1494, 1505; Mirapaul 1573; Hoffer 1956; Barnebey 4018–19, 4021; Parker 4340, 4406; Bock 1652–54)

d. The Retail COJ Market Includes Both COJ From Fresh Fruit and Reconstituted From Bulk Concentrate

63. COJ sold to grocery stores is processed directly from fresh oranges, bulk concentrate, bulk frozen single strength juice, or from a combination of fresh and frozen juice. (Jessup 879; Goldman 960; Mirapaul 1567; Barnebey 3983–85, 4009)

64. Retail COJ is packaged in glass, cartons or plastic, primarily of quart, half-gallon or gallon sizes. (Munkelt 710–711, 736–37; Goldman 960; Lang 1048, 1051; Donovan 1284–85; Miller 1480–81, 1496–97; Mirapaul 1567; Jessup 2876; Barnebey 3984–85)

65. During 1979, 70% of Tropicana's COJ was produced directly from fruit. (CX 2302, p. 107; Jessup 3015) Tropicana's source for its COJ varies during the year. In May it may be fresh squeezed oranges and in August it may be made from bulk concentrate. (CX 38M; CX 39C; CX 40D-E; CX 527Z–41) Throughout Tropicana's history, some of its COJ has always been **[15]** made from bulk concentrate. (CX 2302, p. 118) During 1978, Tropicana had a made-from-concentrate COJ on the market for six months. (Barnebey 4010; Munkelt 807)

66. H.P. Hood and Kraft process COJ for the retail market directly from fresh oranges and from bulk concentrate. (CX 678B; CX 680A, D; CX 759A; Donovan 1292, 1412; Miller 1483; Jessup 3044) H.P. Hood has processed COJ from single strength frozen blocks. (Donovan 1292)

67. Much of the same equipment used to produce COJ directly from

oranges is used to produce COJ reconstituted from bulk concentrate. (CX 382C, T-X, Z–28 to Z–32; CX 420; CX 593, pp. 138–39)

68. Producers of COJ made solely from bulk concentrate perceive themselves to be processors that are in competition with Tropicana's COJ from whatever source it was derived. (Munkelt 764, 805–06; Goldman 961, 963–64; Lang 1048)

69. Tropicana recognizes firms which process COJ only from bulk concentrate as competitors in the COJ market. (CX 752B; CX 759A; CX 951; CX 952; CX 1004B)

70. Consumers perceive little difference in COJ made from fresh oranges or from bulk concentrate. (Brick 5329; CX 2302, p. 105) In 1976 Hood switched from selling COJ made directly from oranges to reconstituting from bulk frozen concentrate. Hood changed the labeling on their carton, as required by law, to show that the COJ was reconstituted. Hood's sales increased rapidly thereafter. (Donovan 1304–06, 1308)

e. The Retail COJ Market Includes Glass, Paper Cartons and Plastic Containers

71. Members of the industry define the retail COJ market to include COJ sold in glass, paper cartons, and plastic containers. (CX 1650, p. 10; Munkelt 710–11; 736–37; Goldman 960, 1041–42; Lang 1048; Donovan 1284–85; Miller 1480; Mirapaul 1567; Bock 1654; Hoffer 1815–16, 1829–30; Tilley 2112; Jessup 2876; Barnebey 3983–84)

72. FDC, a state government agency financed by the citrus growers and an information center for the industry, includes COJ in glass, cartons and plastic containers under its definition of COJ as used in its official rules. (Hoffer 1815–16)

73. FCPA, the industry trade association, defines COJ in its reports and internal membership division to include COJ packaged in glass, cartons and plastic containers. (CX 594J, [16] pp. 10–11; Barnebey 3991)

74. Tropicana, Johanna Farms, Home Juice Company, Pure Foods and Bodines sell COJ in glass, paper and plastic containers (CX 1650, pp. 94–95; Goldman 960–61; Lang 1051; Mirapaul 1567–68; Jessup 2781–82) Hood sells COJ in paper and plastic containers. (Donovan 1285) Kraft sells COJ under its Sealtest label in glass and paper containers and under its Kraft label in glass. (Miller 1481, 1483–84) Minute Maid sells COJ only in paper cartons but sold in glass in a test market in upstate New York from 1971–1976. (Munkelt 711, 763) Prior to the merger, Beatrice sold COJ in glass, paper and plastic. (CX 47)

75. Tropicana marketing reports recognize the close relationship of COJ packaged in cartons, glass and plastic. (CX 661D; CX 662D; CX

665B, F; CX 666B; CX 671A; CX 739A; CX 741A; CX 951A; CX 987E; CX 988E; CX 1086C; CX 1111C; CX 1143B; CX 1145B; CX 1176; CX 1280D; CX 1342B)

76. In their pricing of one container type of COJ, sellers take into consideration the prices of other types of containers of COJ. (Munkelt 759–60; Goldman 963, 970–71; Mirapaul 1574) In pricing its COJ, Minute Maid which sells only cartons, takes into consideration the price of the Kraft brand of COJ which is sold only in glass. (Munkelt 711, 759–60; Miller 1480–81) Beatrice's Mattoon, Illinois, plant which processed COJ only in plastic containers examined the prices of competing COJ, including Tropicana's, packaged in glass or paper cartons. (Parker 4322–24, 4327) Beatrice's Dayton, Ohio plant which processed plastic gallons of COJ and sold glass quarts and half-gallons, examined the retail prices of Borden's paper half-gallons. (Koch 4936–40)

f. The Retail COJ Market Includes COJ Sold Through Various Distribution Systems

77. Processors of COJ for the retail market sell to chain stores, independent wholesale warehouses, individually owned grocery stores, dairies, and distributors who are independent routemen who own their own truck but no storage facilities. (CX 593, pp. 18, 86–87; CX 947G; CX 1070C; CX 1232; CX 1650, pp. 125–26; Lang 1067, 1094–96; Donovan 1309; Jessup 2763–65) Their COJ arrives at chain stores by sale and delivery to: (a) the warehouse of the chain; (b) individual stores of the chain; or (c) dairies or distributors who deliver to the individual stores of the chains. (CX 593, p. 45; CX 661A; CX 741A; CX 1070C; CX 1188A; CX 1650, p. 102; Lang 1063–64; Donovan 1309, 1354, 1359, 1366–68; Parker 4330) They also sell COJ to chain stores through dock pick up by the chain at the processor's facility or through dock pick up by distributors. (CX 593, p. 151–52; CX 1217B; Munkelt 836–37; Lang 1094–95; Donovan 1378; Mirapaul 1590–91; Davis 3170; Parker 4330–31, [17] 4383; Koch 4931) Sometimes a chain store will purchase COJ both for delivery at its warehouse and delivery to its stores. (CX 915F; CX 1111B; CX 1113A; Donovan 1354) Small chains and non-chain grocery stores receive delivery of COJ from: (a) warehouses of wholesalers; (b) dairies; (c) independent routemen; or (d) processors. (CX 593, p. 346; CX 1232; Lang 1067–68, 1109; Jessup 2765, 2894, 2954)

78. In the past few years, processors have increasingly delivered COJ to the warehouses of chain retail stores. (CX 1005B; Lang 1064; Donovan 1311–12)

79. Home Juice originally delivered COJ directly to individual grocery stores but now relies on deliveries by its customers, including

chain store warehouses, independent distributors and dairies to reach grocery stores. (Lang 1063–64, 1067, 1094–96, 1109)

80. Johanna Farms delivers COJ to chain store warehouses and makes store-door delivery to other grocery stores. (Goldman 972–73, 994) It also sells to independent distributors who deliver its products. (Goldman 974) In the past 10 years its sales of COJ to warehouses has increased. (Goldman 1019)

81. H.P. Hood also increasingly relies on sales to grocery stores through warehouse delivery and store-door delivery. (CX 505E; CX 752B; CX 760B; CX 1005B; CX 1006A; CX 1178B; Donovan 1309, 1311–12) Hood began warehouse delivery in 1975 in trailerload quantities directly to chain store warehouses instead of to their individual stores. (CX 505E; CX 760B; CX 1178B)

82. Dairies such as Dean Foods, Knudsen, Sealtest and Western General Dairies process and sell COJ to grocery stores both by delivery to chain warehouses and by store-door delivery to individual grocery stores. (Goldman 972–73; Lang 1063–64, 1108; Donovan 1309, 1354; Jessup 2866, 2919, 3045–47; Barnebey 4075–76)

83. In its early history Tropicana delivered its COJ in its own trucks in less than truckload lots. (CX 593, p. 10) Tropicana now distributes COJ by delivery to warehouses of chain stores, wholesale warehouses and dairies. (CX 593, pp. 44–45, 347; CX 919; CX 1650, pp. 125–26, 130; Jessup 2764–66; Barnebey 4078–79) In New York City, Boston and Miami it sells to independent routemen who deliver store-door to retail grocery stores. (Barnebey 4044, 4047–48) These routemen own their trucks, take title to the COJ, and pick it up at the Tropicana terminal. (CX 593, p. 150; Barnebey 4047)

84. Beatrice milk plants deliver COJ for the retail market to individual units of chain grocery stores, to [18] independent groceries and to wholesale distributors. These milk plants also distribute COJ through independent routemen who pick it up at the dock of the milk plant or have it delivered to their locations. (Parker 4366, 4383; Granger 4433)

85. From 1973 to 1975 the Beatrice Dayton milk plant delivered milk to the warehouse of a chain of 75–80 convenience stores and tried to sell the chain COJ at a price lowered to reflect warehouse delivery. (Koch 4952–57) In 1977 the Beatrice milk plant in Greeley, Colorado delivered COJ to the distribution facility of a chain of 46 grocery stores. (CX 528V, no. 86)

86. Beatrice and Tropicana both provide in-store help to grocery stores selling their brands of COJ. These in-store functions include checking product coding, shelf placement and rotation, and setting up displays and promotional programs. (CX 593, pp. 96–97; CX 665D-E; CX 666A; CX 672C-D; CX 768B; CX 1191B; CX 1258B, D-E; Jessup

2756–57, 2921, 2925–26; Barnebey 4066; Koch 4913–14; Piskac 5181–82) Tropicana uses brokers and salesmen and its territory managers to perform these functions. (CX 665D-E; CX 666A; CX 672C-D; CX 768B; CX 1191B; Jessup 2756–57; Barnebey 4066–67, 4080–81) Beatrice uses salesmen to perform these same in-store services. (Jessup 2927; Davis 3152, 3186; Parker 4390–91; Koch 4913–14; Piskac 5181–82)

87. Representatives of Tropicana, Minute Maid and Home Juice, while delivering COJ to warehouses, consider those who deliver on a store-door basis to be competitors. (CX 527Z–10; CX 661A; CX 667H; CX 944; Munkelt 764–65, 784–85, 850; Lang 1058–59, 1063–66)

88. Dairies delivering COJ store-door compete with producers of COJ who deliver to warehouses, sometimes displacing them in the sale of COJ to grocery stores. For example, in Tampa and Orlando, Florida, Borden COJ which was delivered store-door had the effect of decreasing Tropicana's sales of COJ at Winn-Dixie grocery stores, in part because of the advantages of store-door delivery. (CX 1321B) Similarly, in New England, Tropicana in 1975 found it difficult to compete for COJ sales with H.P. Hood's store-door delivered COJ because stores buying from Hood "get what they order, when they want it and there are very seldom *any* out of stocks on either size, in these stores." (CX 947–O) (Emphasis in original.)

89. Tropicana's north central division manager, Mr. Jessup, considers dairies that reconstitute and sell COJ on a store-door basis to be competitors of Tropicana. (Jessup 2905–15) Mr. Jessup's marketing reports to Tropicana's management discuss this competition. (CX 681B; CX 682B; CX 685B; CX 686B; CX 687B; CX 688B; CX 690B; CX 691B; CX 692B; CX 695B-C; CX 696B; CX 697B; CX 698B; CX 699C; CX 701B; CX 702B; CX 703C; CX 704C; CX 705C; CX 706B; CX 707B; CX 708B; CX 709B; CX 710B; CX 711B; [19] CX 712A; CX 713B; CX 714B; CX 715B; CX 716B; CX 717B; CX 718B; CX 1110B; CX 1111B; CX 1112B; CX 1113B; CX 1114B; CX 1115B; CX 1116B; CX 1117B) Tropicana has lost some customers to such dairies engaged in store-door delivery of COJ. (Jessup 2906)

90. Mr. Woerner, Tropicana's western division manager, considers dairies who delivered COJ on a store-door basis to be competitors of Tropicana. (CX 661A, D; CX 663; CX 670A; CX 672D; CX 666B) His weekly sales reports show sales lost by Tropicana and Minute Maid to dairies which were engaged in store-door delivery. (CX661A, C-D; CX 666B; CX 672D) These reports show that Tropicana lost sales to the 7–11 stores in Salt Lake City because of COJ packed by a Beatrice dairy and sold to that chain. (CX 661A; CX 663C) Another dairy in that market, Western General Dairies, was selling Dr. Lukes COJ at a low price in 1976, and Mr. Woerner told the Tropicana representa-

tive to keep a close watch and: "If we seem to be getting hurt, will advise so we can take appropriate corrective action." (CX 661D)

91. Tropicana's internal marketing summaries submitted to its top officer by its sales manager report "competitive activity" including prices of COJ that is store-door delivered by dairies. (CX 667H [Borden]; CX 669A-B [Borden and Farmbest]; CX 678 [Farmbest]; CX 679A and C 969C [Hood])

92. A 1976 Tropicana study of COJ distribution and pricing in San Francisco listed Meadow Gold COJ and the COJ of four other dairies all sold on a store-door basis as part of the "competitive distribution in the stores contacted." (CX 807F; Dutt 3829–30) Minute Maid, which uses no direct store-door delivery, also considered Meadow Gold brand COJ to be a competitor, as well as the brands of other dairies which use store-door delivery for their COJ. (Munkelt 765, 785, 850) When setting the price for Meadow Gold COJ, Beatrice's dairy manager in Mattoon went to an IGA store and looked at the retail prices of Tropicana, Minute Maid and Kraft glass COJ because they were in the dairy case with his plastic COJ; those products are delivered to the warehouse while Meadow Gold COJ is delivered store-door. (Parker 4322–27)

93. There is a limited amount of shelf space available for COJ in grocery stores. (CX 593, p. 322; CX 661D; CX 670B; CX 737B; CX 779B; CX 947M, Q; CX 951A; CX 996A; Munkelt 767, 796; Lang 1058–59, 1065–66; Jessup 2905–06,, 2921–23; Davis 3150, 3169–70; Parker 4322–25) Producers of COJ want shelf space in grocery stores ("facings") because loss of shelf space decreases their sales. (CX 947M; CX 996A; Jessup 2921–25) Tropicana has lost shelf space in grocery stores to processors who deliver COJ on a store-door basis. (Jessup 2922–23)

94. Minute Maid and Tropicana do not subscribe to the [20] market reporting service sold by Selling Areas Marketing Inc. ("SAMI") for COJ because SAMI reports measure shipments from grocery warehouses to retail stores and fail to include COJ that is store-door delivered. (CX 1650, pp. 143–44; Munkelt 785; CX 593, pp. 229, 457–58) Minute Maid and Tropicana do purchase A.C. Nielsen market reports which include COJ reaching grocery stores through all methods of delivery including store-door. (CX 517F, U; CX 593, pp. 228–29; Munkelt 749; Munkelt 851)

g. The Retail COJ Market Does Not Include Home Delivery

95. Home delivery of COJ is made by dairies or independent routemen who deliver dairy items and often other products along with COJ. (Complaint and Tropicana Answer ¶ 6; Goldman 974–75; Mirapaul 1581; Karnes 4765–66) COJ purchased through home delivery is more expensive than COJ sold in retail outlets. (Goldman 974–75; Donovan

1320, 1322, 1335–36; Mirapaul 1581; Parker 4387; Piskac 5110; CX 593, p. 90)

96. Processors of COJ for the retail market do not consider the home delivered price of COJ in setting their price. (CX 1650, p. 37; Munkelt 760; Lang 1063; Donovan 1322; Miller 1494; Mirapaul 1581)

97. Home delivery of COJ has been on the decline because of rising costs and today has almost disappeared from the market place. (CX 527J; CX 593, p. 90; Goldman 974; Lang 1063; Donovan 1320–22, 1334; Mirapaul 1581; Davis 3180–82; Parker 4387–88; Koch 4935; Piskac 5170; Brick 5316)

h. The Retail COJ Market Does Not Include Drinks and Other Juices

98. Fruit drinks and other fruit juices do not compete with COJ. (CX 301H; CX 520, pp. 56–57, 65–66, 95; CX 1196; Munkelt 758; Goldman 966; Lang 1063; Miller 1495; Mirapaul 1573; Bock 1658–59; Hoffer 1920; CX 593, pp. 392–93)

99. Producers of COJ do not take the prices of fruit drinks or other fruit juices into consideration in their pricing or marketing of COJ. (CX 667C, H; CX 1650, p. 38; Goldman 966; Lang 1063; Mirapaul 1573) One reason that grapefruit juice prices are not considered in pricing COJ is the different raw material cost for the two juices. (CX 1650, p. 38) Orange drink producers do not consider the price of COJ in pricing their drinks. (CX 520, pp. 56–57; CX 661E; CX 667H) Tropicana compares the price of Tropicana grapefruit juice only to that of other brands of grapefruit juice and the price of Tropicana [21] drink only to those of other drinks. (CX 675B; CX 688A; CX 689C; CX 730C; CX 748B; CX 750H; CX 7902F; CX 915A; CX 951B; CX 1126B; CX 1162A; CX 1177B)

E. *Geographic Market*

100. There virtually are no imports of COJ into the United States. (CX 527E, no. 19)

101. The three largest sellers of COJ to retail grocery stores, Tropicana, Minute Maid and Kraft, together sell COJ throughout all or almost all areas of the United States. (CX 46U, V-Z, Z–6, Z–7; CX 345T-V; CX 354A; CX 388, tables 4 & 5; CX 526A-S; CX 527Z–7, no. 182; CX 560, Z–88, Z–99, Z–109, Z–114, Z–119, Z–121, Z–123, Z–125, Z–130, Z–135, Z–140, Z–142, Z–144, Z–149, Z–151, Z–156, Z–161; Munkelt 718, 760, 763–64; Miller 1482, 1492; Barnebey 4021, 4033)

102. The brands of the three largest sellers of COJ sold in grocery stores are recognized by industry officials as "national brands" with differences in market penetration in parts of the country. (CX 354A;

CX 1650, p. 69–70; Munkelt 760; Lang 1058, 1141; Miller 1490–91; Mirapaul 1575; Barnebey 4069)

103. Industry officials examine and report on the national sale of COJ through grocery stores. (CX 13A-J; CX 38F; CX 39B; CX 386, p. 101; CX 394, pp. 38–40; CX 396M; CX 400A-U; CX 401A-K; CX 402A-K; CX 403A-K; CX 404A-K; CX 405A-K; CX 406A-K; CX 407A-S; Munkelt 749, 785–86) Minute Maid uses national Nielsen data on the retail COJ market in presentations to its customers and prospective customers. (Munkelt 749) Tropicana marketing documents characterize the movement of COJ through grocery stores in the United States as "Ready to Serve Orange Juice Sales Glass, Cartons and Plastic - Total U.S." (CX 13B; CX 394, p. 25; CX 560 p. 11)

104. Tropicana tries to sell its COJ throughout the United States. (Barnebey 4040) It has an internal sales organization and broker system which covers all of the United States. (CX 527Z–9, no. 188; CX 527Z–35, no. 302; Barnebey 4022–23, 4038; CX 1654) In 1977 Tropicana had 57 brokers working in 36 states and Washington, D.C. (CX 375)

105. Tropicana has a single f.o.b. Bradenton price—plus freight—for its COJ sold in truckloads to all types of customers throughout the United States. (Barnebey 4068) Tropicana also sells COJ in less than truckload amounts on a delivered price basis in several pricing zones. (Barnebey 4067, 4069–4070; Jessup 2791)

106. Most promotional and advertising programs at [22] Tropicana are centrally planned by its marketing staff at Bradenton. (CX 1650, p. 70–71; Jessup 2784, 3076–77) All pricing decisions at Tropicana are made in Bradenton, Florida. (CX 593, p. 26; Jessup 3054)

107. Tropicana and Minute Maid sometimes advertise their COJ nationally, using media which serve the entire country. (CX 38E; CX 39, p. 6; CX 916E; CX 936A-C; CX 1250C-D, J-K; CX 1650, pp. 71–73; Munkelt 791; Barnebey 4069)

108. Some chain grocery stores use national buyers for COJ. (CX 1339C; CX 1650, pp. 57–58) Such buyers are called "national accounts" by Tropicana. (CX 1650, pp. 57–58) Among firms considered to be national accounts by Tropicana are Safeway, Kroger, A&P, Winn-Dixie and Topco Associates. (Barnebey 4041–42)

109. Tropicana has a national accounts sales manager who calls on chain store accounts. (Barnebey 4041–42)

110. Tropicana sells COJ from its plant in Bradenton, Florida which ships to every state except Alaska and Hawaii. (CX 378A-E) Tropicana has been shipping COJ to California, Washington and Oregon since the early 1960's and has served the mountain states from Florida for more than five years. (CX 1650, pp. 61–62; Barnebey 4026)

111. Minute Maid sells COJ to grocery stores throughout the coun-

try, all of which is reconstituted at seven facilities including four milk plants, from bulk FCOJ shipped from Florida. (Munkelt 718, 721, 724)

112. Kraft processes its COJ for sale throughout the country to grocery stores under the Kraft brand at a plant in Florida and through a west coast co-packing arrangement. (CX 1650, p. 74; Miller 1482) The Florida plant primarily serves all areas of the United States except the west coast and Hawaii, but has shipped COJ to California; the west coast and Hawaii generally are served by the co-packing arrangement. (CX 1355A; CX 1650, p. 74; Miller 1483) Approximately 90% of Kraft brand COJ is packed in Florida and shipped to the warehouses of corporate foodchains. (Miller 1508–09)

113. Hood Dairy Company primarily sells COJ in New England and to grocery stores in Buffalo, Chicago, and parts of the southeastern United States. It sells in ten states. (CX 345T-U; CX 388 tables 4 & 5; CX 389 tables 4 & 5; CX 505C; CX 506C; CX 1650, p. 145; Munkelt 764–65; Donovan 1296)

114. Almost all COJ sold throughout the United States is made from orange juice or frozen concentrate from Florida. (CX 22F; CX 40D; CX 41B; CX 42C; CX 527D, no. 18; CX 1650, p. 12; Munkelt 723, 835; Goldman 961, 1001, 1032; Lang 1101; Miller [23] 1539; Mirapaul 1569; Barnebey 3950, 3990, 3999, 4001) At times of short supply, however, processors have relied on imports. (Barnebey 4001) California oranges are used for blending purposes or when the Florida supply is disrupted. (Munkelt 723; Goldman 1043–44; Barnebey 3950–51) COJ made entirely from concentrate of California or Arizona oranges has a low sugar content and is sour. (Munkelt 723; Goldman 1044; Bock 1665; Barnebey 3930, 3950) Texas oranges are too sweet for COJ. (Goldman 1044) California and Texas oranges have a low juice content, thereby making their use for COJ processing very expensive. (Barnebey 3950–51)

115. In 1977 Beatrice processed COJ was sold to grocery stores in 23 states (CX 46E-Z–4):

Alabama	Kentucky
California	Louisiana
Colorado	Montana
Florida	Nebraska
Georgia	Nevada
Hawaii	New Mexico
Idaho	Ohio
Illinois	Oklahoma
Indiana	Oregon
Iowa	South Dakota
Kansas	Utah
	Wyoming

116. Beatrice has dairy distribution facilities in Detroit; Baltimore; Alexandria, Virginia; New York; Los Angeles; Nashville; Fort Worth; and Pittsburgh which could be used for the distribution of COJ. (CX 526V-W)

117. In 1977 Beatrice and Tropicana directly competed in the sale of COJ to the retail market on all or part of twenty-one states. (*Compare* CX 46 with CX 526I-M and Z1–25)

F. *Market Structure*

a. Market Shares

118. In 1975 gallon sales of COJ at retail through grocery stores totalled 132.5 million gallons (CX 560Z–17) The retail dollar sales of COJ in that year totalled $250,000,000. (CX 560Z–24)

119. In 1976 the gallon sales of COJ at retail through grocery stores totalled 160.9 million gallons. (CX 423L; CX 560Z–17) The total retail dollar sales of COJ in that year totalled $310,200,000. (CX 423L; CX 560Z–24) [24]

120. In 1977 gallon sales of COJ at retail through grocery stores totalled 188.9 million gallons. (CX 426F; CX 560Z–17) The retail dollar sales of COJ in that year totalled $411,500,000. (CX 560Z–24)

121. In 1978 the gallon sales of COJ at retail through grocery stores totalled 204.1 million gallons. (CX 560Z–17) The retail dollar sales of COJ in that year totalled $545,200,000. (CX 560Z–24)

122. In 1975 the leading brands of COJ sold in grocery stores had the following market shares (CX 560Z–18):

Brand	Market Share (in gallons)	Market Share (in dollars)
Tropicana	28.9	30.3
Kraft	13.8	15.0
Minute Maid	7.3	6.7
Hood	5.8	5.0
	55.8%	57.0%

123. In 1978, the four leading brands of COJ sold in grocery stores had the following market share (CX 560Z–18; Z–25):

Brand	Market Share (in gallons)	Market Share (in dollars)
Tropicana	29.9	30.6
Kraft	10.4	11.5
Minute Maid	15.5	15.4
Hood	4.4	4.0
	60.2	61.5%

124. In 1978, private label gallon sales of COJ in retail groceries totalled 18.7% of the market in gallons and 17.4% in dollars. In 1975 this share of the market was about the same. (CX 560Z–18)

125. Sales of COJ to grocery stores has increased from 132.5 million gallons in 1975 to 204.1 million gallons in 1978. (CX 560Z–17) Tropicana's share of the market has been about the same during that time. (CX 560Z–18) Industry FCOJ sales volume has remained stable. (Hoffer 1928–1930)

126. In the 1977–78 growing season 256.3 million gallons of COJ were processed in the United States from Florida oranges. (CX 594J, pp. 24–25; CX 594K, pp. 14A, 1C) Of that amount, 134.4 million gallons of COJ were produced directly from fresh oranges while 121.9 million gallons of COJ were reconstituted. (CX 594J, pp. 24–25; CX 594K, pp. 14A, 1C) [25]

127. Almost all of the COJ processed in the United States comes from Florida oranges. (CX 1650, p. 12) In the 1977–78 season, Tropicana processed about 40% (109.6 million gallons). (CX 594J, p. 15–16, 19; CX 594I) Tropicana, Minute Maid, Kraft and Hood together processed in Florida more than 171.4 million gallons of COJ, more than 60% of the total processed in the United States. (CX 594J, p. 15–16, 19, 22–23; CX 594I)

128. In 1976 and 1977, Tropicana shipped 55% of the COJ processed in Florida. (CX 527E; CX 527R; CX 1650, p. 24; Barnebey 3993, 3999)

129. Minute Maid division of the Coca-Cola Company started processing COJ and selling it to grocery stores in 1971, and in 1979 had nationwide distribution. (CX 298; CX 593, p. 253; Munkelt 718, 761)

130. Some small processors of COJ have gone bankrupt in recent years, including Orange Blossom, Glacier Grove and Polar-Vim. (CX 527Z–11; CX 527Z–44; CX 680H; CX 1094C; Goldman 1032, 1035–36; Davis 3164)

b. Barriers to Entry

131. Ex-Cell-O Corporation makes carton-making machinery and has about 50% of the market. These machines make gable-topped paper milk or juice cartons. (Brick 5287–93) A small 30 quart per minute Ex-Cell-O machine can be leased for $150 per month. (Brick 5325) A half-pint packaging machine can be purchased for about $120,000. (Polidoro 5375)

132. A glass packaging line for COJ costs $250,000 to $600,000. (CX 1650, p. 96) The cost of a carton packaging line (case packers, box makers and pasturization equipment used with the Ex-Cell-O machine) is about $250,000. (Barnebey 4046–47) Separate packaging lines and Ex-Cell-O machines are required for quarts, half-gallons and gallons, and each size carton. (Brick 5325–26) Refrigerated warehouse space must be built or leased. (CX 527Z–56)

133. Blow molding is a process whereby polyethylene or polystyrene is melted and formed into a container by blowing air into the thin wall

of the plastic. (Donovan 1295) It may be used in packaging of milk and COJ (CX 1081B; CX 1084B; RX 17H; RX 18D; Donovan 1285, 1295–96) Equipment to produce blow molded plastic gallon containers costs about $500,000 to $750,000. (Munkelt 826; Donovan 1329; Dutt 3833)

134. Several hundred dairies in the United States process COJ. (Brick 5294; finding 261) **[26]**

135. Entry into the processing of COJ by dairies is usually quick and inexpensive. The plant manager simply orders frozen concentrate. The dairy already has all the necessary equipment and method of distribution. (Parker 4312–13; Koch 4873–74; Piskac 5167; Goldman 1022–23)

136. To obtain shelf space in a grocery store, national brands of COJ spend millions of dollars on advertising and promotion. (CX 572Z–4; Koch 4955–56; CX 345N) In 1974, Tropicana spent $4.2 million on advertising and promotion. (CX 527Z–4)

137. Grocery stores will stock nationally advertised COJ, even at a higher price than unadvertised brands, because of consumer acceptance of the advertised brand. (Koch 4955–56; CX 661F)

138. Regional and local processors sometimes advertise their brand of COJ in newspapers and on local radio and television, as well as billboards, and in-store promotions. (CX 660B; CX 662C-D; CX 778–784)

139. Regional and local processors and private labels use lower prices and promotional allowances to sell their COJ. (Goldman 964, 1010–1111; Mirapaul 1576; Lang 1133–34; CX 883A)

140. A typical grocery store handles about five brands of COJ including two national brands and sometimes a private label. (CX 764B; CX 769A; CX 1147B; CX 1650, p. 124; Lang 1058; Mirapaul 1575; Jessup 2981–82)

141. There are forty plants in Florida supplying bulk frozen orange juice concentrate. (Barnebey 3899–3900) Oranges, the raw material for COJ, are in limited supply, however, and new entrants have sometimes had difficulty obtaining an assured supply of quality frozen concentrate. (Mirapaul 1582; Bock 1657, 1682; Dutt 3779–80)

142. It takes five to seven years from the time an orange tree is planted until oranges can be harvested. (Tilley 2365)

143. In recent years the number of producing orange trees has declined slightly, but with newly planted, disease resistant trees and better production methods future supply should continue to increase. (CX 22G-H)

144. A freeze in January 1977 caused a reduction in the number of Florida oranges available for orange juice production. (CX 22G) **[27]**

G. *Beatrice and Tropicana Before the Merger*

a. Tropicana

145. Tropicana principally sells COJ to grocery chain store warehouses and wholesale grocery warehouses. (Barnebey 3886) Tropicana also sells COJ to dairies (CX 41B)

146. About 7% or 8% of Tropicana's COJ business is private label packed for Safeway, Kroger, Pet, Food Fair, Topco and A&P. (Jessup 2761; Barnebey 3972, 4041)

147. About 82% of Tropicana's COJ business is in the states bordering the Atlantic Ocean and Gulf of Mexico, plus Cleveland, Detroit, Chicago, Los Angeles and San Francisco. (Barnebey 3891–92)

148. In 1977 Tropicana's brands of COJ were offered to consumers through grocery stores in 242 of the 282 standard metropolitan statistical areas (SMSAs) determined by the Bureau of the Census. (CX 47; CX 526I)

149. In 1977, national COJ sales through food stores, in millions of gallons, were as follows (CX 13H):

	Gallons		Per Cent	
Tropicana	8.93		29	
glass		2.82		9.2
carton		6.11		19.9
Kraft	3.43		11.2	
Minute Maid	4.19		13.6	
Hood	1.21		3.9	
Private label	5.87		19.1[8]	
All other glass	2.07		6.7	
All other cartons	2.58		8.4	
All other plastic	2.46		8	
Total market	30.74		99.9	

150. In the mid 1950's, Tropicana's principal customers were dairies. By the mid 1960's the principal customers were warehouses of chain grocery stores and grocery [28] wholesalers. (Barnebey 3887)

151. In the mid 1960's only Tropicana and Kraft were selling COJ in glass. (Barnebey 3888)

152. Now, in addition to Tropicana and Kraft, COJ is packed in glass by other Florida processors: Citrus World, Adams Packing, Southern Fruit, Tree Sweet, Sealsweet and Ben Hill Griffin. (Barnebey 3889)

153. Tropicana is the price leader in the sale of COJ. Other COJ processers examine the prices of the Tropicana COJ in determining the price at which they will sell their COJ. (Argeros CX 593, p. 423; Goldman 964, 1029; Lang 1059; Donovan 1314) Tropicana makes its

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[8] About 700,000 gallons of the private label total were processed by Tropicana. (Barnebey 3972) This is more than 2% of the market.

own pricing decisions on COJ based on its costs rather than on the prices charged by its competitors. (Barnebey CX 1650, pp. 35–37, 41)

154. In 1977 Tropicana sold COJ in paper cartons, and glass bottles of various sizes, and some plastic individual serving containers. (CX 39, pp. 4–7; CX 334B-C)

155. Tropicana processes COJ at its plant in Bradenton, Florida and ships it by train to its warehouses in Kearney, New Jersey and Hammond, Indiana. (CX 382I) Tropicana also leases warehouses in Los Angeles, Seattle, Portland and Salt Lake City which it supplies by truck. (CX 527Z–25)

156. In 1977, Tropicana COJ was sold through grocery stores in all of the states of the United States except Hawaii, and Alaska. (CX 378A-E)

157. Tropicana owns 200 refrigerated rail cars. Every five days a unit train of at least 60 Tropicana rail cars, over one mile long, leaves the Bradenton Tropicana plant nonstop to the Kearney warehouse. Tropicana owns about 800 vehicles for transporting oranges and orange juice. (CX 39, p. 14)

b. Beatrice

158. In 1977 Beatrice's dairy division processed, distributed and sold three labels of reconstituted COJ. (CX 57A-Z–22; CX 58A-Z–22; CX 59A-Z–22) These brands included "Meadow Gold," the dairy division's primary brand name; "Sanitary Dairy" brand of COJ marketed by the Minden, Louisiana plant (CX 47Z–68; CX 521, p. 9; CX 528Z–18; Lang 1057); and "Dixie Sunshine," a brand of COJ which was being test marketed by Beatrice just prior to the acquisition of Tropicana. (CX 47A-Z–204; CX 528)

159. In 1977 Beatrice dairy plants bought and resold prepackaged COJ from processors such as Tropicana, Home Juice, [29] Early Bird and Minute Maid. (CX 47)

In the fiscal year ending February 28, 1978, Beatrice sold COJ through the following 37 fluid plants:

160. The Beatrice milk plant in Beckley, West Virginia sold 45,100 gallons of COJ for $126,000, processed by Tropicana and sold under the Tropicana label to the following types of customers: institutions, 35%; independent groceries, 38%; individual units of chain stores, 27%. (CX 47F)

161. The Beatrice milk plant in Billings, Montana sold 10,504 gallons of COJ for $24,478. About half of the total was purchased from Early Bird Juice Co. of Spokane, Washington and resold under the Early Bird label. The other half was purchased from another reconstituting Beatrice plant and was resold under the Meadow Gold label.

Sales of all this juice were 20% to institutions, 50% to independent groceries, and 30% to individual units of chainstores. (CX 47Z-Z; CX 47Z–157; CX 57–O)

162. The Beatrice milk plant in Boise, Idaho sold 52,700 gallons of COJ for $107,100. Of this total, 93% for 49,200 gallons and $99,600 was juice reconstituted at the plant, and 7% for 3,500 gallons and $7,500 was purchased in packaged form and resold by the plant. All of the reconstituted juice was sold under the Meadow Gold label. The resold juice was sold under the Early Bird label, processed by Early Bird, Spokane. The reconstituted juice was sold to the following types of customers: (a) independent groceries, 25%; (b) individual chainstore units, 75%. The resold juice was sold to the following types of customers: (a) independent groceries, 85%; (b) individual chainstore units, 15%. (CX 47Z–3)

163. The Beatrice milk plant in Champaign, Illinois had sales of 79,258 gallons of COJ for $167,837. None of this juice was reconstituted at the plant and all was purchased in packaged form and resold by the plant. Eighty percent of the packaged juice was sold under the Vita-Fresh brand name, processed by Central States Processing, and 20% was sold under the brand name of Meadow Gold, processed by the Beatrice dairy plant in Mattoon, Illinois. Institutions purchased 30% of the packaged juice, home delivery customers purchased 50%, independent groceries purchased 7%, and chain stores or individual units thereof, purchased 13%. (CX 47Z–6)

164. The Beatrice milk plant in Clarksburg, West Virginia sold 29,549 gallons of COJ for $88,909. No juice was reconstituted at the plant, and all was purchased in packaged form and resold by the plant. All resold juice was sold under **[30]** the Tropicana label, processed by Tropicana. This resold juice was sold to the following types of customers: (a) institutions, 45% for 13,297 gallons and $40,009; (b) home delivery, 5% for 1,477 gallons and $4,445; (c) independent groceries, 50% for 14,775 gallons and $44,455. (CX 47Z–11)

165. The Beatrice milk plant in Dayton, Ohio sold 81,170 gallons of COJ for $169,759. Sixteen percent was reconstituted, 84% was purchased in package form and re-sold. The reconstituted juice has been sold under the Meadow Gold label and the plant has been reconstituting juice in the years 1977 and 1978. Reconstituted juice customers were 10% for institutions, 80% for independent groceries and 10% for other restaurants and cocktail lounges. The packaged juice in 1978 was Tropicana with approximately 5% going to institutions, 80% to independent groceries, 2.5% to chain stores' individual units and 10% to restaurants and cocktail lounges. (CX 47Z–33)

166. The Beatrice milk plant in Denver, Colorado sold COJ under the Meadow Gold label obtained from Beatrice's Greeley, Colorado

plant. For 1978, this plant sold 112,812 gallons of COJ for $245,562. Its customer mix is 14% institutional, 16% home delivery, 50% independent groceries, and 20% individual units of chainstores. (CX 47Z–35)

167. The Beatrice milk plant in Durham, North Carolina did not reconstitute any orange juice. All was purchased and resold. Except for approximately 2% of 1978 purchases, all COJ purchased and resold was Tropicana. The 2% was purchased from Biltmore. COJ sales were 10,465 gallons at $25,061. The customer types were: institutions (20%); home delivery (10%); independent groceries (50%); IGA and co-op stores (20%). (CX 47Z–38)

168. The Beatrice milk plant in Eugene, Oregon sold 8,644 gallons of COJ for $16,800, purchased for resale from Dairy Gold of Eugene and sold under the Meadow Gold label. All sales were to independent groceries. (CX 47Z–40)

169. The Beatrice milk plant in Fort Wayne, Indiana never reconstituted orange juice. The re-sold juice which it carries, has been supplied by Benhill-Griffin or its predecessor, Dunlop, under that label. Approximately 5% of its orange juice sales have come from Tropicana, and have been sold under that label. In 1978, the plant sold 18,602 gallons of COJ for $44,620. The customer mix for this plant was: home delivery (35%), independent groceries (30%), and grocery wholesalers (35%). (CX 47Z–41)

170. The Beatrice milk plant in Gadsden, Alabama sold 115,691 gallons of COJ for $225,601. Of this, 87,394 gallons at $207,496 was reconstituted at the plant under the Meadow Gold label. The remainder of 28,297 gallons at $48,105 was Tropicana [31] that was purchased and resold. The customer type was the same for reconstituted and resold: institutional—25%; home delivery—15%; and independent groceries—60%. (CX 47Z–43)

171. The Beatrice milk plant in Grand Island, Nebraska has not reconstituted any COJ. All COJ is obtained from the Beatrice Lincoln plant. The sales volume was: 5,196 gallons at $10,810. In 1978, 30% of COJ sales was to institutions, 40% to home delivery and 30% to independent groceries. (CX 47Z–45)

172. The Beatrice milk plant in Grand Junction, Colorado sold 54,402 gallons of COJ for $128,800. Seventy percent was of Minute Maid and 30% of Meadow Gold obtained by intercompany transfer from Meadow Gold, Greeley, Colorado. Sales for these years were broken down into 20% to independent stores, 20% to distributors, and 60% to individual units of chain stores. (CX 47Z–46)

173. The Beatrice milk plant in Great Falls, Montana sold the following amounts of COJ: 16,134 gallons for $36,908. The plant has never reconstituted juice and has obtained its entire supply for resale

from Early Bird of Spokane, Washington. Sales were broken down to 30% institutional, 60% to individual units of chainstores, 5% to home delivery, and 5% to independent groceries. (CX 47Z–47)

174. The Beatrice milk plant in Greeley, Colorado sold 91,396 gallons of COJ of which 74,284 gallons for $142,334 was reconstituted and sold under the Meadow Gold label. The plant resold 17,112 gallons of COJ in 1978 for $39,621, 75% under the Oak Farm label and 25% under the Minute Maid label. Reconstituted juice was sold 60% to institutional, 20% to independent stores, and 20% to chainstores or individual units thereof. The plant also reconstituted COJ and sold large amounts on intercompany transfer to plants at Colorado Springs, Denver, Grand Junction, Topeka and elsewhere. (CX 47Z–48; CX 47Z–174; CX 57Z–7; CX 57Z–8; CX 57R; CX 57I; CX 521, p. 11)

175. The Beatrice plant in Honolulu, Hawaii has sold nothing but reconstituted COJ marketed under the Meadow Gold label. Twenty-five percent of the COJ has gone to independent groceries with the remainder going to individual units of chain stores. Sales in 1978 were 43,538 gallons of COJ for $127,317. (CX 47Z–50)

176. The Beatrice milk plant in Huntsville, Alabama sold 237,341 gallons of pure juice of all types, representing $586,284 in sales, of which approximately 90% was COJ. None of the juice was reconstituted at the plant, and all was purchased in packaged form and resold by the plant. Eight-three percent was purchased from Tropicana and sold under the Grove Queen label and 17% was purchased from Cal-Tex and sold under the Vita Fresh label. Six percent of the juice was sold to institutions, **[32]** 19% to home delivery customers, 67% to independent groceries, 8% to chain stores or individual units thereof. (CX 47Z–51)

177. The Beatrice milk plant in Lima, Ohio sold 48,313 gallons of COJ for $114,501 all of which was purchased for resale. A total of 6,000 gallons was purchased from Ohio Pure Juice of Columbus, Ohio and sold under the Ohio Pure Juice label. The remainder was bought from Tropicana and sold under its label. This resold juice was sold to the following types of customers: institutional, 15%; home delivery, 5%; independent groceries, 75%; individual units of chain stores, 5%. (CX 47Z–57)

178. The Beatrice milk plant in Lincoln, Nebraska sold 40,800 gallons of COJ for $74,600, reconstituted at the plant and sold under the Meadow Gold label. This reconstituted juice was sold to the following types of customers: (a) institutions, 60%; (b) home delivery, 25%; (c) independent groceries, 10%; and (d) individual units of chain stores, 5%. (CX 47Z–59)

179. The Beatrice milk plants in Louisville, Kentucky sold 56,731 gallons of COJ for $116,708, 42,799 gallons at $74,132 of reconstituted

and 13,932 gallons at $42,574 of resold. The reconstituted was all Meadow Gold label. The resold was 90% Home Juice and 10% Tropicana. In 1978, sales of COJ were 2% institutional, 25% home delivery, and 73% to independent groceries, restaurants and the like. (CX 47Z–62)

180. The Beatrice milk plant in Mattoon, Illinois sold 68,880 gallons of COJ for $75,641, reconstituted at the plant, and sold under the Meadow Gold label to independent groceries. (CX 47Z–64)

181. The Beatrice milk plant in Missoula, Montana has not reconstituted COJ. All was purchased and resold. In 1978, 32,610 gallons were sold for $84,485. Of this, 65% was packaged under the Meadow Gold label by the Early Bird Juice Co. of Spokane, Washington. The remainder was also purchased from the Early Bird Juice Co. but sold under the Early Bird label. The customer types in 1978 were: institutions (5%), home delivery (5%), independent groceries (70%), and individual units of chain stores (20%). (CX 47Z–69)

182. The Beatrice milk plant in Muncie, Indiana sold 24,032 gallons of COJ for $43,680. Five hundred gallons were purchased from Orchard Grove and sold under its label, with the rest being purchased from Ben Hill Griffin of Plymouth, Indiana for sale under its label. Eighty percent of sales were to independent groceries, 20% to institutional customers. (CX 47Z–70)

183. The Beatrice milk plant in New Bremen, Ohio sold 25,546 gallons of COJ for $58,099, all purchased in package form **[33]** and resold by the plant, under the Everfresh brand name, processed by Home Juice Company. Five percent of the COJ was sold to institutional customers, 75% to home delivery customers, 15% to independent groceries, 5% to chain store individual units. (CX 47Z–71)

184. The Beatrice milk plant in Opelika, Alabama sold 115,692 gallons of COJ for $309,570 purchased in packaged form and resold under the following labels: Vita Fresh, processed by Cal-Tex Citrus, 60% (for 69,415 gallons and $185,742); Tropicana, processed by Tropicana, 40% (for 46,277 gallons and $123,825). This resold juice was sold to the following types of customers; (a) institutions, 25%; (b) home delivery, 25%; (c) independent groceries, 30%; and (d) individual units of chain stores, 20%. (CX 47Z–76)

185. The Beatrice milk plant in Orange City, Florida resold 277,011 gallons of COJ for $506,653 and packaged 138,505 gallons for $253,324 of COJ. The packaged juice was sold under the Meadow Gold label and obtained from Ardmore Farms. The resold juice was purchased from Tropicana and sold under the Tropicana label. Of the packaged juice, 10% was sold to institutional customers, 60% to independent groceries, and 30% to individual units of chain stores. The resold juice was

sold to independent groceries for 65% of sales with 35% to individual units of chain stores. (CX 47Z–93)

186. The Beatrice milk plant in Ottumwa, Iowa sold 18,410 gallons of COJ for $43,020. All was purchased in packaged form and resold by the plant under the Vita-Fresh label, processed by Central States Processing, Columbia, Mo. This resold juice was sold to the following types of customers: institutions, 5%, home delivery, 15%; independent groceries, 57%; individual units of chain stores, 23%. (CX 47Z–95)

187. The Beatrice milk plant in Radford, Virginia sold 85,713 gallons of COJ for $225,381 all purchased in package form and resold by the plant. The COJ was purchased in package form from Biltmore Dairy Farms for $23,311 and sold under the Meadow Gold brand name, or from Tropicana and sold under the Tropicana brand name. The Radford plant purchased $159,086 of Tropicana brand orange juice. Ten percent of the COJ sold to institutional customers, 20% to home delivery customers, 60% to independent grocery stores and 10% to chain store independent units. (CX 47Z–108)

188. The Beatrice milk plant in Reno, Nevada sold 20,334 gallons of COJ for $35,966; 13,000 gallons, representing $19,000 in sales, were reconstituted at the plant, and 7,334 gallons for $16,966 was purchased in packaged form and resold by the plant. All of the COJ was sold under the Meadow Gold brand name. The pre-packaged juice was purchased from Edward's Marketing Company. Fifteen percent was sold to institutional [34] customers, 5% sold to home delivery customers, 10% to independent groceries, 70% to chain store individual units. (CX 47Z–113)

189. The Beatrice milk plant in St. Joseph does not reconstitute single strength orange juice. All COJ is purchased and resold. Ninety-five percent of this is obtained from Tropicana and 5% is Vita-Fresh from Central States. In 1978, orange juice sales were 7,591 gallons at $18,020. The customer types were: institutions (5%), home delivery (10–15%), independent groceries (70–80%) and individual units of chain stores (5%). (CX 47Z–117)

190. The Beatrice milk plant in Salt Lake City, Utah sold 109,000 gallons of COJ for $297,600, purchased in packaged form and resold by the plant under the Meadow Gold label, processed by Edwards Marketing. This resold juice was sold to the following types of customers: (a) institutions, 1%; (b) independent groceries, 60%; (c) individual units of chain stores, 39%. (CX 47Z–119)

191. The Beatrice milk plant in San Jose, California sold 128,713 gallons of COJ for $266,709. No juice was reconstituted at the plant, and all was purchased in packaged form and resold by the plant under the Meadow Gold label, processed by Edwards Marketing. This resold

juice was sold to the following types of customers; (a) institutions, 15%; (b) home delivery, 5%; (c) independent groceries, 20%; and (d) individual chain store units, 60%. (CX 47Z-122; CX 57Q).

192. The Beatrice milk plant in Topeka, Kansas did not reconstitute COJ. In 1978, all COJ was Meadow gold obtained by intercompany transfer from Greeley, Colorado. Sales for the plant are as follows: 1978, 8,203 gallons and $22,501. (CX 47Z-133)

193. The Beatrice milk plant in Tulsa, Oklahoma sold 170,412 gallons of COJ for $344,776, 50,049 gallons of which was reconstituted at the Tulsa plant and sold for $95,052. All of the juice reconstituted at the plant was sold under the Meadow Gold label. The juice which was purchased and resold by the plant was sold 90% under the Mr. Pure label, processed by the Home Juice Company, and 10% of the juice which was purchased and resold was sold under the Everfresh label, also processed at the Home Juice Company. Ninety percent of the reconstituted juice was sold to home delivery customers, 5% of the reconstituted juice was sold to independent grocery stores and 5% was sold to chain store units. Of the juice which was purchased and resold, 30% was sold to institutional customers, 15% to home delivery customers, 30% to independent groceries, and 25% to chain store units. (CX 47Z-134)

194. The Beatrice milk plant in Tuscaloosa, Alabama **[35]** sold 27,299 gallons of juice for $72,222, of which 95% was COJ. All was purchased in packaged form and resold by the plant. The resold juice was sold under the following labels: Vita-Fresh, processed by Vita-Fresh, 20%; and Tropicana, processed by Tropicana, 80%. This resold juice was sold to the following types of customers: (a) institutions, 20%; (b) home delivery, 20%; (c) independent groceries, 30%; and (d) individual chain store units, 30%. (CX 47Z-138)

195. The Beatrice milk plant in Westerville does not reconstitute juice. All orange juice that is distributed is purchased from outside sources. In 1978, total COJ were 81,015 gallons at $139,047. Of this, 75% was Meadow Gold obtained from the Louisville plant; 15% was Tropicana and 10% was Vita-Fresh. Five percent of sales were to institutions, 85% to home delivery, 5% to independent groceries and 5% to individual units of chain stores. (CX 47Z-147)

196. The Beatrice milk plant in Zanesville, Ohio sold 20,402 gallons of COJ at $40,931. Of this, 16,591 gallons at $27,948 was reconstituted under the Meadow Gold label. The remainder (3,811 gallons at $12,983) was purchased and resold Tropicana. For the reconstituted sales, the customer types were as follows: institutions (10%); home delivery (10%); independent groceries (80%). The customer type for the resold juice was: 97% home delivery and 3% independent groceries. (CX 47Z-150)

For the fiscal year ending February 28, 1978, Beatrice sold COJ through the following six additional plants which were not milk producers:

197. The Beatrice dairy plant in Colorado Springs, Colorado sold 58,035 gallons of COJ for $130,716, all purchased in packaged form and sold under the Meadow Gold label, processed by Meadow Gold, Greeley, Colorado. This resold juice was sold to the following types of customers: (a) institutions, 15%; (b) home delivery, 40%; (c) independent groceries, 20%; (d) individual chain store units, 25%. (CX 47Z–22)

198. The Beatrice dairy plant in Dothan, Alabama has not reconstituted any orange juice. Sales in 1978 were 28,266 gallons of COJ at $65,229. Of this, 70% was Vita-Fresh obtained from Meadow Gold, Opelika; 20% was Meadow Gold obtained from Orange City; 10% was Tropicana obtained from Orange City. Five percent of sales was to institutions and 95% was to independent groceries. (CX 47Z–36)

199. The Beatrice dairy plant in Meinerz, Louisiana had sales of $306,118, purchased by Meinerz Creamery in packaged form from Ben Hill Griffin and sold under the Sun-Blossom brand [**36**] label. All single strength orange juice was sold to other dairy companies. (CX 47Z–66)

200. The Beatrice dairy plant in Minden, Louisiana sold 169,753 gallons of COJ for $288,688, all of which was reconstituted at the plant. This reconstituted juice was sold under the Sanitary Dairy label. The juice was sold to the following types of customers: institutional, 5%; home delivery, 15%; independent groceries, 40%; individual units of chain stores, 40%. (CX 47Z–68)

201. The Beatrice dairy plant in Pocatello, Idaho sold 24,329 gallons of COJ for $56,574 purchased in packaged form and resold by the plant. The resold juice was sold under the Meadow Gold label, processed by Meadow Gold, Boise, Idaho. This resold juice was sold to the following types of customers: independent groceries, 50%; individual units of chain stores, 50%. (CX 47Z–106)

202. The Beatrice dairy plant in Wichita, Kansas sold 5,453 gallons of COJ for $14,722, all of which was purchased for resale from Vita-Fresh Company of Columbia, Missouri and sold under the Vita-Fresh label. Eighty percent of sales were to home delivery and 20% to independent groceries. (CX 47Z–149)

203. In 1977 Beatrice had the following 37 milk plants in the United States (CX 47; CX 241–243):

Beckley, WV	(CX 47F)
Billings, MT	(CX 47Z–2)
Boise, ID	(CX 47Z–3)
Champaign, IL	(CX 47Z–6)

Clarksburg, WV	(CX 47Z–11)
Dayton, OH	(CX 47Z–33)
Denver (Oxford-Englewood), CO	(CX 47Z–35)
Durham, NC	(CX 47Z–38)
Eugene, OR	(CX 47Z–40)
Fort Wayne, IN	(CX 47Z–41)
Gadsden, AL	(CX 47Z–43)
Grand Island, NE	(CX 47Z–45)
Grand Junction, CO	(CX 47Z–46)
Great Falls, MT	(CX 47Z–47)
Greeley, CO	(CX 47Z–48)
Honolulu, HI	(CX 47Z–50)
Huntsville, AL	(CX 47Z–51)
Lima, OH	(CX 47Z–57)
Lincoln, NE	(CX 47Z–59)
Louisville, KY	(CX 47Z–62)
Mattoon, IL	(CX 47Z–64)
Missoula, MT	(CX 47Z–69)
Muncie, IN	(CX 47Z–70)
New Bremen, OH	(CX 47Z–711)
Opelika, AL	(CX 47Z–76) **[37]**
Orange City, FL	(CX 47Z–93)
Ottumwa, IA	(CX 47Z–95)
Radford, VA	(CX 47Z–108)
Reno, NV	(CX 47Z–113)
St. Joseph, MO	(CX 47Z–117)
Salt Lake City, UT	(CX 47Z–119)
San Jose, CA	(CX 47Z–122)
Topeka, KS	(CX 47Z–133)
Tulsa, OK	(CX 47Z–134)
Tuscaloosa, AL	(CX 47Z–138)
Westerville, OH	(CX 47Z–147)
Zanesville, OH	(CX 47Z–150)

204. In 1977, Beatrice's Meadow Gold brand of COJ was sold to grocery stores in the following 18 SMSAs where Tropicana did not so sell its COJ (CX 47; CX 526I-M, Z–1–Z–5):

Anniston, Indiana
Billings, Montana
Boise City, Idaho
Eugene, Oregon
Evansville, Indiana
Fort Collins, Colorado
Greeley, Colorado
Honolulu, Hawaii
Lawton, Oklahoma
Lincoln, Nebraska
Omaha, Nebraska
Owenboro, Kentucky
Provo-Orem, Utah
Reno, Nevada
Salinas-Seaside-Monterey, California

Santa Cruz, California
Sioux City, Iowa
Springfield, Illinois

205. In 1977 Beatrice's brands of COJ were sold and delivered by Beatrice milk plants to individual stores of supermarket chain stores in the United States. (CX 528) These included stores of chains such as Safeway, Kroger, Albertson's, IGA, King Soopers, Winn-Dixie, Pantry Pride, Super Valu, Dillon, Allied, Humpty-Dumpty, Piggly-Wiggly, Star Market and Jewel and A&P. (CX 47Z-3-5, Z-22, Z-35, Z-50, Z-68, Z-69, Z-73, Z-93, Z-134, Z-195; CX 526Z-6 to Z-12; CX 526Z-6 to Z-12; Parker 4323, 4330)

206. In fiscal 1978, Beatrice dairy plants bought and resold 643,511 gallons of packaged Tropicana COJ. (CX 47)

207. Prior to its acquisition of Tropicana, Beatrice offered its brands of COJ in carton and plastic containers and had just started distributing the glass Dixie Sunshine private label. (CX 528Z-29; CX 180F) [38]

208. In the fiscal year ending February 28, 1978, the following amounts of Meadow Gold Brand COJ processed by Beatrice were sold by the following plants to grocery stores:

Plant	Gallons Sold to Grocery Stores	Dollar Sales	
Billings	4,202	$ 10,365	(CX 47Z-2; CX 57-O)
Boise	49,200	99,600	(CX 47Z-3)
Champaign	3,170	6,713	(CX 47Z-6; CX 57T)
Colorado Springs	26,116	58,822	(CX 47Z-22)
Dayton	10,389	21,729	(CX 47Z-33)
Denver	78,968	171,893	(CX 47Z-35)
Dothan	4,862	11,440	(CX 47Z-36; CX 57H)
Gadsden	52,436	124,498	(CX 47Z-43)
Grand Island	1,559	3,243	(CX 47Z-45, Z-171; CX 57X)
Grand Junction	16,321	38,640	(CX 47Z-46)
Greeley	29,714	56,933	(CX 47Z-48, Z-174; CX 57Z-9)
Honolulu	53,538	127,317	(CX 57Z-16)
Lincoln	6,120	11,192	(CX 47Z-59)
Louisville	31,243	54,116	(CX 47Z-62)
Matton	68,880	75,641	(CX 43; CX 47Z-64; CX 57D)
Pocatello	24,329	56,574	(CX 47Z-106; CX 57G)
Reno	10,400	15,200	(CX 47Z-113; CX 57Z-5)
Tulsa	27,567	52,279	(CX 47Z-134)
Westerville	6,076	10,428	(CX 47Z-147; CX 57Z-18)
Zanesville	13,273	22,358	(CX 47Z-150; CX 57Z-4)
Total	518,363	$1,028,981	

209. Grocery stores mark up dairy products 25% for resale to consumers. (Parker 4376; Clayton 6049) Hence the [39] retail shelf value of the COJ processed by Beatrice and sold through grocery stores in fiscal 1978 was $1,286,226.

210. In fiscal 1978, Beatrice processed and sold 135,802 gallons of COJ to grocery stores under the Sanitary Dairy brand name from its plant at Minden, Louisiana. The sales price of that COJ was $230,950 and it had a retail sales value of $288,688. (CX 47Z–68; CX 57S)

211. In fiscal 1978, Beatrice processed and sold to grocery stores in the United States a total of 654,165 gallons of COJ for $1,259,931. (findings 208 and 210) The retail sales value of that COJ was $1,574,-914. (findings 208–10)

212. In fiscal 1978 the following amounts of COJ not processed by Beatrice were sold to grocery stores under the Meadow Gold brand by the following Beatrice fluid milk plants:

Plant	Gallons Sold to Groceries	Dollar Sales	
Eugene	8,644	$ 16,800	(CX 47Z-40)
Missouli	19,077	49,423	(CX 47Z-69)
Orange City	124,655	227,992	(CX 47Z-93)
Radford	52,896	139,200	(CX 47Z-108; CX 57Z-12)
Reno	5,867	13,573	(CX 47Z-113)
Salt Lake	107,910	294,624	(CX 47Z-119; CX 57L)
San Jose	102,970	213,367	(CX 47Z-122; CX 57Q)
Total	422,019	$954,979	

The retail value of the Meadow Gold brand COJ sold through grocery stores in 1977 that was not processed by Beatrice was $1,193,724. (finding 209)

213. In fiscal 1978 the total amount of Beatrice Meadow Gold or Sanitary Dairy brand COJ sold to grocery stores was 1.08 million gallons with a retail value of $2.77 million. Beatrice label COJ had a market share of .57% of the retail COJ market measured in gallons or .67% measured in dollars. (findings 120, 208–12)

214. In fiscal 1978, the total amount of COJ processed by Beatrice sold to grocery stores was 654,165 gallons with a retail value of $1,574,914. (finding 211) Beatrice processed .35% of the retail COJ market measured in gallons or .38% measured in dollars. (finding 121) [40]

215. In fiscal 1978 the following amounts of COJ processed by Beatrice were sold by the following dairy plants:

Plant	Gallons Processed	
Billings	5,252	(CX 47Z-2; CX 57-O)
Boise	49,200	(CX 47Z-4)
Champaign	15,851	(CX 47Z-6; CX 57T)
Colorado Springs	58,035	(CX 47Z-22)
Denver	112,812	(CX 47Z-35)
Dayton	12,987	(CX 47Z-33)
Dothan	5,653	(CX 47Z-36)

Plant	Gallons Processed	
Gadsden	87,394	(CX 47Z-43)
Grand Island	5,196	(CX 47Z-45; CX 57X)
Grand Junction	16,320	(CX 47Z-46)
Greeley	74,284	(CX 348; CX 57Z-9)
Honolulu	53,538	(CX 47Z-50; CX 57Z-16)
Lincoln	40,800	(CX 47Z-59)
Louisville	42,799	(CX 47Z-62; CX 57N)
Mattoon	68,880	(CX 47Z-64; CX 57D)
Minden	169,753	(CX 47Z-68; CX 575)
Pocatello	24,329	(CX 47Z-106; CX 57G)
Reno	18,299	(CX 57Z-5)
Tulsa	50,049	(CX 57Z-3)
Topeka	8,203	(CX 47-133; CX 57I)
Westerville	60,761	(CX 47Z-147; CX 57Z-18)
Witchita	5,453	(CX 57V)
Zanesville	16,591	(CX 47Z-15D; CX 57Z-4)
Total	1,002,439 **[41]**	

216. Beatrice's market share in the total processing of COJ (wherever sold) in fiscal 1978 was about .39%. (findings 127, 219)

217. COJ processed by Beatrice is sold to retail grocery stores at a price low enough to allow sale to consumers at a price per serving which is 25% to 35% lower than national brands of COJ like Tropicana, Kraft and Minute Maid. Beatrice's production of COJ is primarily in cartons and blow molded plastic containers. (CX 738A; CX 739A; CX 740B; CX 753E; CX 755C; CX 770A; CX 922B; Parker 4324; Koch 4876) One gallon blow molded containers of COJ offer consumers a lower per serving cost than do half-gallon cartons of COJ. (Jessup 2900; Parker 4325–26; CX 1086C) Last year in Mattoon, Illinois, Beatrice's one gallon plastic container of COJ sold to consumers for $2.49 compared to a per gallon price for glass or carton half-gallon containers of Tropicana, Minute Maid and Kraft of $3.38 to $3.78. (Parker 4325–26)

c. Competition Between Beatrice and Tropicana

218. Beatrice dairy plants sell COJ by reconstituting bulk frozen concentrated orange juice and selling it under its own labels and/or reselling COJ processed by others and sold under Beatrice's or the processor's labels. (CX 47A-Z–204)

219. Tropicana recognized as competitors dairies which sell their own brand of COJ in the retail market. (CX 527Z–10, no. 191; CX 593, p. 348)

220. In 1976 through 1978, Tropicana's western division sales manager reported that Tropicana's sales to 7/11s had been hurt by

the COJ packed in plastic jugs sold by the Beatrice milk plant in Salt Lake City. (CX 661A; CX 663C; CX 770A; Dutt 3825) The Beatrice dairy in Salt Lake City was packing a private label COJ under the Meadow Gold label, processed by Edwards Marketing. (CX 57L) Tropicana's vice president for sales reported that the 7/11 store managers preferred Meadow Gold COJ because of the store-door delivery. (CX 808C)

221. Reports of Tropicana sales personnel recognized as competitors Beatrice milk plants distributing COJ in Alabama, California, Florida, Ohio and Oklahoma. (CX 744A; CX 1301B; CX 922B; CX 753E; CX 807F; CX 808C, H; CX 593, p. 350)

222. Beatrice dairy plants delivered COJ to the warehouses of King Soopers grocery chain store in Denver (CX 528V) and IGA in Durham. (CX 47Z–38) The Beatrice dairy plant in Champaign has had a chain store warehouse pick up COJ [42] from its loading dock. (Parker 4384)

223. In 1977, King Soopers was a chain of approximately 46 retail grocery stores located in eastern Colorado. (CX 528U, no. 83; CX 1107B) Beatrice's Greeley, Colorado milk plant delivered Meadow Gold COJ to King Sooper's dairy warehouse in Denver for distribution to individual grocery stores by King Soopers. (CX 528V, no. 86) In 1977, Meadow Gold COJ was sold in 34 Denver area King Soopers grocery stores. (CX 528V, no. 85)

224. In 1977, Tropicana sold Tropicana brand COJ to King Soopers grocery stores and delivered COJ to the distribution warehouse in Denver. (CX 528V, X)

225. In 1977, Beatrice's San Jose milk plant sold Meadow Gold COJ to Fry's Food Stores, a chain of 25 stores, in San Francisco. (CX 528W, no. 90; CX 236E) Also in 1977, Tropicana sold Tropicana COJ to Fry's Food Stores in San Francisco. (CX 528W, no. 89)

226. In 1977, Beatrice's Meadow Gold and Tropicana's brand of COJ were both sold to grocery stores in the following 48 SMSAs (CX 47; CX 526I-M, Z–1–Z–5):

Akron, Ohio
Atlanta, Georgia
Birmingham, Alabama
Bloomington-Normal, Illinois
Bradenton, Florida
Canton, Ohio
Champaign-Urbana-Rautol, Illinois
Chattanooga, Tennessee
Cincinnati, Ohio
Colorado Springs, Colorado
Columbus, Ohio
Dayton, Ohio
Daytona Beach, Florida
Lynchburg, Virginia
Melbourne-Titusville-Cocoa, Florida
Miami, Florida
Oklahoma City, Oklahoma
Orlando, Florida
Panama City, Florida
Pensacola, Florida
Peoria, Illinois
Pueblo, Colorado
Roanoke, Virginia
St. Louis, Missouri
Salt Lake Citv-Oaden.

Denver, Colorado
Fayetteville-Springdale, Arkansas
Fort Lauderdale, Florida
Fort Meyers, Florida
Fort Smith, Arkansas
Gadsden, Alabama
Gainesville, Florida
Hamilton-Middletown, Ohio
Huntsville, Alabama
Indianapolis, Indiana
Lakeland-Winterhaven, Florida
Lexington, Kentucky
Louisville, Kentucky
San José, California
Sarasota, Florida
Springfield, Missouri
Tallahassee, Florida
Tampa-St. Petersburg, Florida
Terre Haute, Indiana
Topeka, Kansas
Tulsa, Oklahoma
West Palm Beach-Boca Raton, Florida [43]

H. *Beatrice's Plans To Enter the Market*

a. Beatrice's Intent to Expand COJ Sales

227. In 1975, Beatrice was processing COJ at dairy plants in Gadsden, Honolulu, and Louisville. (CX 49A-B; CX 47Z–49; CX 47Z–5; CX 47Z–62)

228. In 1976, Beatrice urged its plant managers to process COJ for sales to schools because: "With capabilities of packaging orange juice . . . in various plants across the country, we are at a definite advantage." (CX 54)

229. Also in 1976, Beatrice requested Peter S. Goldman, an officer in a successful COJ processor, Johanna Farms, Inc., for an assessment of the feasibility of processing COJ, through a joint venture, using the Beatrice Deland (Orange City) dairy plant. After an inspection of the plant, Mr. Goldman rejected the idea on the grounds that an economical operation would have entailed a "very considerable investment." (CX 529A)

230. Realizing that the COJ market had more than doubled from 1971 to 1976 (77 million gallons in 1971, and 161 million gallons in 1976), Beatrice urged its plant managers to follow the example of the Beatrice milk plant in Tulsa which had successfully become a processor of COJ. (CX 3)

231. By February 28, 1978, COJ was processed by the following 12 Beatrice dairy plants (CX 47):

Boise, Idaho
Dayton, Ohio
Gadsden, Alabama
Greeley, Colorado
Honolulu, Hawaii
Lincoln, Nebraska
Louisville, Kentucky
Mattoon, Illinois
Minden, Louisiana
Reno, Nevada
Tulsa, Oklahoma
Zanesville, Ohio

b. Orange City Plant

232. In early 1977 Beatrice's Orange City milk plant, near Deland,

Florida had been losing money for two years because of the increase of transportation costs. (Polidoro 5376–77; 5381) The plant added a $120,000 packaging machine to increase production of paper cartons, which it could use to package COJ as well as milk. (Polidoro 5370) **[44]**

233. Since 1976 the plant had been packing and distributing COJ processed by Ardmore Farms of Deland, Florida. The processor squeezed the COJ from fresh oranges, pasturized it and delivered it to the Orange City plant in bulk tankers. (CX 62B; CX 94A; CX 125B; CX 47Z–189) The Orange City plant then packaged the COJ directly from the bulk tankers in gallon plastic containers, gave it a 21 day shelf life code, and distributed it under the Meadow Gold label. (CX 94A)

234. The Orange City plant also distributed Tropicana label COJ in glass containers which it had resold since 1970, and which amounted to 67% of its COJ sales in 1976 and 1977. (CX 47Z–93–94; CX 47Z–189)

235. By February 14, 1977, the Orange City plant manager had decided to expand sales by reselling COJ packed on his new machine to other Beatrice dairies. He saw a market for freshly squeezed COJ (as different from COJ made from concentrate). (CX 63B)

c. Dixie Sunshine

236. The Beatrice dairy marketing board was a committee of eight Beatrice dairy division executives, including the director of advertising and the four regional marketing directors, and a representative of Beatrice's advertising agency. The committee was chaired by the dairy division director of marketing. Top managers of Beatrice, such as James Dutt, then corporate executive vice president, and William Polidoro, dairy division executive vice president, attended meetings of the board. (CX 61; CX 117; CX 180) Mr. Dutt created the dairy marketing board. (CX 528Z–11)

237. One of the main purposes of the dairy marketing board was to generate and implement ideas for new products. (CX 528Z–10) It also provided marketing assistance to dairy plants (CX 528C); assessed each Beatrice plant for advertising of new products (CX 61B; CX 528Z–12, Z–22); approved names for new products (CX 528I); issued guidelines to dairy division plants concerning the advertising of dairy products (CX 528C); authorized advertising for new products (CX 528Z –12); and approved all advertising for dairy products. (CX 528Z–21)

238. On March 1, 1977, the dairy marketing board was briefed on the Orange City plant's plans to market fresh COJ (not made from concentrate). They also discussed the growing marketing opportunities for COJ packaged in paper containers and distributed by dairies. (CX 12A)

239. On April 4, 1977, the dairy marketing board **[45]** discussed the Orange City plant's packaging of COJ in paper and plastic and buying

a private label COJ in glass from Tropicana. (CX 12B)

240. On May 4, 1977, the dairy marketing board considered the name "Dixie Sunshine" as the Beatrice COJ to be distributed by the Orange City milk plant. (CX 12C)

241. By May 31, 1977, the brand name Dixie Sunshine had been adopted for the COJ to be processed by Ardmore Farms and packed by the Orange City plant. (CX 94A) For years Beatrice had used the label "Meadow Gold" for milk and for reconstituted COJ, and the dairy marketing board felt that this freshly squeezed COJ needed a new name. (Polidoro 5373)

242. By June 20, 1977, the dairy marketing board officials were deciding to expand the Dixie Sunshine program to include COJ packed in glass as well as paper and plastic, and had approached Tropicana to obtain a private label packed in glass quarts and half-gallons. (CX 101) By August 16, 1977, the dairy marketing board agreed that either Tropicana or Ardmore Farms should process the Dixie Sunshine glass containers. (CX 12C) In December 1977 Tropicana agreed to process the Dixie Sunshine COJ in glass. (French 5684)

243. In a meeting on July 12, 1977, the dairy marketing board decided that Dixie Sunshine COJ should be sold in markets as far as it could reasonably be shipped. (CX 12C) They were looking at the national market for COJ. (CX 110)

244. In the meeting on July 12, 1977 the dairy marketing board discussed competing with established brands of COJ like Tropicana by selling Dixie Sunshine at a lower price. (CX 12C)

245. By July of 1977, the dairy marketing board had considered expanding the sale of Dixie Sunshine by supplying 30–35 Beatrice milk plants that were already processing or could process COJ from frozen concentrate. They felt they could have national distribution in 18 months. At that time they looked at the introduction of Dixie Sunshine in Florida as a test market. (CX 121; CX 122; CX 124; Rosenberg 1172–73)

246. The planned production of Dixie Sunshine COJ in October 1977 was thwarted because of a shortage of fresh orange juice caused by the freeze in January 1977. Neither Ardmore Farms nor Tropicana could supply the Orange City plant for a short while. (French 5682)

247. In a national meeting of the Beatrice dairy division on November 15, 1977, held in Colorado Springs, the Dixie Sunshine COJ was introduced and promoted to plant managers from all Beatrice dairy plants by various Beatrice executives **[46]** including Wallace Rasmussen, Beatrice's chairman. (CX 140G,W)

248. In November 1977, the dairy marketing board appointed a "task force" composed of three Beatrice regional marketing directors to develop a marketing plan and pricing structure for Dixie Sunshine. They were to study the "wholesale prices of competitive products

(Tropicana, Minute Maid, Kraft, Hood, and private labels)," in Ohio and Alabama. (CX 143C; CX 107) In July of 1977, members of the board had studied COJ retail prices in Chicago and New York. (CX 109; CX 151)

249. In November 1977, Richard Voell, Beatrice chief corporate officer who negotiated the acquisition of Tropicana, became aware of the Dixie Sunshine program. (CX 2310C)

250. The Orange City plant was still losing money and in the fall of 1977 the decision was made to close the plant. The plant was closed on February 28, 1978. (Polidoro 5383)

251. Dixie Sunshine was being packaged in paper cartons by the Orange City plant by November 17, 1977. (CX 12C) By February 20, 1978, Tropicana was processing Dixie Sunshine COJ. (CX 168)

252. At the meeting on March 8, 1978, the dairy marketing board concluded that the Dixie Sunshine program would not be backed by advertising and that the paper packaging would cease. (CX 12E) The program stopped shortly thereafter. (French 5686–87)

I. *Beatrice's Ability To Expand Its COJ Operation*

253. The reconstituting of COJ by dairy milk plants has been responsible for much of the great growth of that market in recent years. (CX 593, p. 341; CX 911A; CX 1005C; CX 1084B; Jessup 2897)

254. Dairies process and package COJ on the same machinery used for the processing of milk. (CX 3D; CX 14D; CX 528S; RX 5D; RX 17H; RX 18D; Munkelt 724–25; Donovan 1292, 1300; Davis 3153; Dutt 3753–54, 3831; Parker 4313–18, 4320, 4393; Koch 4912–13; Piskac 5167; Brick 5292, 5295, 5314, 5318–19, 5325, 5335; Polidoro 5401–02)

255. A milk plant uses the same storage facilities for COJ and for milk. (Donovan 1293, 1300; Koch 4875)

256. The distribution system of milk plants and dairies can be used for the distribution of COJ to the retail market. (CX 663D; CX 770B; CX 995B; CX 1089B; CX 1160C; CX 1228; CX 1650, pp. 104–105; Lang 1067–69; Donovan 1300; [47] Jessup 2897–98; Parker 4393; Brick 5335)

257. Milk plants sometimes process COJ as an alternative to purchasing packaged juice from a processor such as Tropicana when the price of the packaged product gets too high. (CX 892A-E; CX 1221A-B)

258. Tropicana, in the early years of its existence, relied almost exclusively on dairies for the distribution of its COJ. (CX 1650, p. 104; Barnebey 3887) COJ, like milk, has a short shelf life, and the only dependable means of refrigerated distribution was by the dairies. (CX 1650, p. 105) Tropicana still uses dairies for some of the distribution of its COJ. (*e.g.* CX 1221B; CX 1223; CX 1233A-G; CX 1234; CX 1338A; CX 1342A-C)

259. COJ, with other dairy products marketed by milk plants, is marketed to consumers through the dairy case or, to a lesser extent, through the produce section of the grocery store. (CX 14F; CX 593, pp. 112, 116; CX 665C; CX 1251; Munkelt 714–15, 798–99; Lang 1052; Donovan 1310, 1313) Dairies selling COJ have an advantage in obtaining shelf space in the dairy case, having existing ties with the dairy case buyers. (CX 593, p. 325; Lang 1069–70; Donovan 1300, 1310)

260. Dairy products and COJ are subject to similar advertising and promotional techniques. (Donovan 1313) The reputation of a dairy's dairy products is of great assistance in the sale of COJ to grocery store customers. (CX 6F; CX 660B; CX 786B; Donovan 1313–16; Parker 4395)

261. In the past few years the number of milk plants in the United States has been declining. (CX 593, p. 349; Goldman 975; Donovan 1319; Mirapaul 1582–83; Davis 3182; Parker 4335–36; Karnes 4818; Koch 4899–4900; Greiner 5075; Brick 5305, 5332) The trend has been toward larger, more efficient dairies. In 1972 there were 1287 milk plants with 20 or more employees in the United States and in 1977 there were 907. (CX 598A-B)

262. Beatrice uses blow mold containers in its milk and COJ packaging at a number of its milk plants, and produces its own blow molded containers for use in its plants in Lincoln, Nebraska; Topeka, Kansas; Champaign, Illinois; Denver, Colorado; Salt Lake City, Utah and Alabama. (Piskac 5171–5174)

263. Beatrice sells milk in a broader geographic area than any other dairy in the United States. (Karnes 4809) Beatrice also operates more milk plants than any other dairy in the United States. (Karnes 4810)

264. In 1977, prior to its acquisition of Tropicana, Beatrice operated milk plants in 23 states, all of which plants [48] were capable of processing and selling COJ to the retail market (CX 526T; CX 528S, no. 76):

Alabama	Missouri
California	Montana
Colorado	Nebraska
Florida	Nevada
Georgia	Ohio
Hawaii	Oklahoma
Idaho	Oregon
Illinois	Texas
Indiana	Utah
Iowa	Virginia
Kansas	West Virginia
Kentucky	

265. Beatrice had dairy plants or distribution facilities in the following additional states (CX 526V, no. 75):

Arizona	New York
Maryland	North Carolina
Michigan	Pennsylvania
Minnesota	Tennessee
Mississippi	Wisconsin
New Jersey	Wyoming

266. In 1976, Beatrice operated eight refrigerated storage warehouses in New England, four in Florida, three in Chicago, one in Denver, three in Los Angeles, and one each in Scranton, Pennsylvania; Detroit, Michigan; Lincoln, Nebraska; Kansas City, Kansas; Denver, Colorado and the other in Allentown, Pennsylvania. (CX 18C; CX 19D; CX 28D)

267. Small dairies can encounter difficulty in processing and selling COJ. They may have their equipment already being used to full capacity producing milk, or may lack an assured supply of bulk FCOJ or the ability to produce a quality product, and they may not have a recognized brand name. (CX 915C; CX 1650, pp. 108–09; Mirapaul 1582; Jessup 3064–65; Davis 3165) Some dairies do not have sufficient refrigerated warehouse space and trucks available to make chain store warehouse deliveries although they do have the distribution system to deliver store-door. (CX 1650, pp. 105–106; Parker 4321)

268. In 1978, the Beatrice Greeley plant reconstituted and transferred COJ to other Beatrice plants or facilities in Pueblo, Colorado Springs, Grand Junction, and Denver, Colorado; Salt Lake City, Utah; Topeka and Wichita, Kansas; Lincoln, Nebraska; St. Joseph, Missouri; and Ottumwa, Iowa. (CX 521, pp. 9–11; Piskac 5102–03)

269. Beatrice's Mattoon plant reconstitutes COJ and [49] supplies COJ to Beatrice's milk plant in Champaign. (Parker 4313, 4388) Beatrice's Dayton plant reconstitutes and supplies COJ to the Westerville, Lima and New Bremen, Ohio plants. (Koch 4912, 4918, 4974)

270. Because of the perishability of their products and transportation costs, most dairies, delivering store-door, sell to customers in a radius of 150 miles from their plant, although some will try to deliver store-door up to 400 miles from the dairy. (CX 204K; CX 218J; CX 202K; Brick 5294; Polidoro 5379) Delivering to warehouses, however, COJ processors, including dairies, can effectively sell up to 500 miles from their plant. (Munkelt 718–20, 854; Goldman 961–63, 1010; Lang 1056, 1131; Donovan 1296–97)

271. Johanna Farms delivers COJ store-door and recently to chain store warehouses. (Goldman 974, 1019) Some chain store warehouses pick up direct COJ from the processor. (Goldman 994, 1019)

272. In 10 years Hood's delivery of COJ to the warehouses of grocery chains has gone from almost nothing to about 40% of its sales. (Donovan 1309, 1312)

273. In 1971, about 15% of the COJ produced by Home Juice was delivered to warehouses. By 1979, warehouse delivery accounted for approximately 50% of Home Juice's COJ shipments. (Lang 1063–64)

274. Beatrice has semitrailers and van trailers necessary to deliver COJ to warehouses. (RX 121A, Parker 4308, 4321, 4389–90; Koch 4872, 4898, 4926) For example, Beatrice's Lincoln plant owns 13 trucks of the 40 foot size. (Piskac 5184) These trucks are used to haul its products including COJ to its branches and its distributors. (Piskac 5184, 5188–89, 5194–96, 5201–05, 5239–40)

275. Beatrice delivers milk and other dairy products by its refrigerated truck fleet to the customer's store or warehouse, and to a lesser extent to the consumer's home. (CX 16B; CX 17B; CX 18, p. 2; CX 19B; CX 20D; CX 21C; CX 22, p. 38; Dutt 3798; Koch 4871, 4935)

276. The Beatrice Champaign milk plant serves a warehouse account through pick up at its dock. (Parker 4384; Polidoro 5403, 5427) From 1973 to 1975, Beatrice's Dayton plant delivered dairy products to a warehouse which serviced 75–80 convenience store outlets. (Koch 4952–53)

277. Beatrice's Mattoon plant manager would like to sell COJ via warehouse delivery. (Parker 4413, 4384) Beatrice milk plants could save money on transportation costs by having to make only one stop rather than incurring the costs of many **[50]** stops at individual stores. (Parker 4384–85; Koch 4954–55)

278. In 1978 Beatrice operated a large refrigerated truck fleet based at its New Bremen, Ohio plant. (Granger 4531–32; RX 121H) The fleet has been used to transport COJ between the processing plants and distribution centers. (Koch 4927)

279. Beatrice has 1,400 food brokers selling its products in the United States. Brokers are an effective method of obtaining access to shelf space in grocery stores. (CX 18B)

280. In 1978, Beatrice spent $150,000,000 on advertising and projected spending from $170,000,000 to $175,000,000 in 1979. (CX 192B; Dutt 3795–96) Its advertising expenses ranked 17th among all industrial corporations in the United States. (CX 192B)

281. The production, distribution and marketing of COJ and yogurt are similar. Both products are processed in dairy plants and require refrigerated storage and delivery facilities due to short shelf life; they are distributed to grocery stores and sold to the dairy buyer and placed in the dairy case of grocery stores. (Dutt 3814–18)

282. Dannon yogurt was sold only in the New York metropolitan area when it was acquired by Beatrice in 1959. (CX 29D; CX 527Z–66;

Dutt 3814; Karnes 4757) Dannon is now sold coast to coast by Beatrice's dairy division. (Dutt 3814–15; Karnes 4757)

283. Beatrice distributes Dannon Yogurt coast to coast using a store-door delivery system. (CX 2E; Dutt 3817; Karnes 4757–58) Johanna Farms and other firms distribute yogurt and COJ to warehouses of chain grocery store customers. (Goldman 972–73; Dutt 3816 –18; Karnes 4760)

284. Prior to its acquisition of Tropicana, Beatrice processed and distributed COJ in Australia by its subsidiary, Patra Holdings Pty. Ltd. ("Patra"). (CX 527–58, 70, 71, 74, 76, 81, 82)

285. Under Beatrice's ownership, Patra's COJ processing operations have been expanded. (CX 24F; CX 26F; CX 29I; CX 463A-B)

286. Beatrice executives learned production and marketing skills through Patra which could be used in this country. (CX 144A; CX 436–81)

287. A major corporate objective of Beatrice is to expand its products with local distribution into national distribution. (CX 2B; CX 527"O"; CX 1553; Dutt 3796, 3816; Karnes 4802–04) [51]

288. Milk plants which process COJ achieve more efficient distribution of their milk through combined deliveries of milk and COJ. (Goldman 1021–22; Dutt 3754, 3830–31) Dairies have added products to their milk trucks in order to reduce distribution costs. (Goldman 1022; Dutt 3754; Parker 4391)

289. Milk is a low margin product compared to most food items. (CX 1250B; Karnes 4751) COJ is a high margin product compared to other food products. (Karnes 4790)

290. Because of the higher profitability of COJ sold to the retail market compared to milk, and the excess capacity in almost all of Beatrice's milk plants, Beatrice had an economic incentive to expand its retail COJ business. (CX 14C; CX 29D; CX 202–CX 295; CX 528Z–20; Dutt 3754; Karnes 4790)

291. Dairy companies such as Hood, Johanna Farms, Dean, Knudsen and Foremost-McKesson have successfully entered the market by selling COJ to grocery stores along with their other dairy products. (CX 14B; CX 593, pp. 270, 272–73; CX 807F; CX 1086C; CX 1650, pp. 92–93, 100–101; Lang 1132; Jessup 2799; Barnebey 4049–50, 4053; Brick 5312–13)

292. Johanna Farms delivers COJ along with yogurt to chain grocery store warehouses and delivers COJ along with all its dairy products including milk store-door to other grocery stores. (Goldman 972–73, 994, 1021–22)

J. Entrenchment

293. A processor of fresh COJ shipping from Florida to other states incurs higher freight costs than a milk plant which buys bulk concentrate and reconstitutes COJ near the grocery store customers. (CX 1005B; CX 1007B; CX 1009A; CX 1650, pp. 169–71; Munkelt 824–29; Goldman 1024–25; Mirapaul 158)

294. Freight cost is relatively greater for glass containers than other COJ containers due to their heavier weight. (Miller 1513–14) The share of the retail COJ market packed in glass has been decreasing. (CX 915B; Munkelt 827; Lang 1102; Miller 1513–14; Hoffer 1952; Jessup 3114; Barnebey 4005)

295. In 1971, Minute Maid started processing and selling COJ and was selling COJ nationally by 1979. Minute Maid gradually established COJ processing facilities in Florida, California, and New Jersey and entered into co-packing arrangements with dairies in Boston, Massachusetts; Madison, Wisconsin; Indianapolis, Indiana; and Burkburnett, Texas (near Wichita Falls, Texas). (CX 1005A; Munkelt 718–19, 724; Barnebey [52] 3954, 4091–92; Brick 5313–14) Tropicana recognizes that co-packing arrangements with regional dairies gives Minute Maid a great cost savings. (CX 738b) Each of these seven locations processes bulk FCOJ obtained from Minute Maid's Auburndale, Florida facility. (Munkelt 721)

296. In 1977, Kraft entered into a co-packing arrangement with Sunkist to serve West Coast customers. (CX 992B; Miller 1484) Under this arrangement, the COJ is produced under the Kraft brand and specifications, and Kraft markets it. (Miller 1484–85) Kraft entered into the co-packing arrangement to lower its distribution costs on the West Coast. (Miller 1510) Kraft's Sealtest dairy in St. Louis began reconstituting COJ about three years ago. (Jessup 3145)

297. Prior to 1976, Hood processed COJ only at its Florida plant. (Donovan 1305) Now, 75% of its COJ for the retail market is processed at Hood's dairy plants in the northeast. (Donovan 1291–92, 1294–95)

298. Some dairies far from Florida have reconstituted COJ and sold it under their own label rather than paying the high cost of transportation for Tropicana. (CX 740B; CX 743A) Tropicana in 1977–78 had difficulty selling COJ in Salt Lake City, Utah, due to the cost of transporting and competition from other processors. (CX 661C-D; CX 663D-E; Barnebey 3928–29) Tropicana tried to sell COJ to the Beatrice dairy in Salt Lake but the dairy reconstituted COJ itself at a cost less than Tropicana's price. (CX 663D; CX 664E; CX 665F; CX 770B; Barnebey 3931)

299. There is an industry trend toward increased processing of COJ

from bulk FCOJ at dairies outside Florida. (CX 1650, pp. 27–29; Tilley 2290–91; Jessup 2897–98; Barnebey 3997–98, 4006)

300. Prior to its acquisition by Beatrice, Tropicana was interested in expanding its sales of COJ throughout the United States, particularly in the middle west and west where it is relatively the weakest. (Barnebey 4040)

301. Tropicana has recently considered shipping bulk FCOJ to a California dairy, and processing and distributing it, under a different label. (CX 811A-B)

302. Tropicana has been interested in acquiring a processor of COJ in California. (CX 528Z–26) Because of increased freight rates, Tropicana purchased a plant site in California in 1977 with the idea of reconstituting COJ there. (Barnebey 3972–73) The plant was not built because of high costs involved. (Barnebey 3973) It is likely that in the next ten years Tropicana will have a plant reconstituting COJ in California. The glass packed fresh COJ will continue to be [53] shipped from Florida. (CX 1650, p. 169–71)

DISCUSSION

The following discussion summarizes and supplements the findings of fact and presents conclusions of law.

A. *Introduction*

In the early days oranges were sold by food stores to consumers who took them home, squeezed the fruit and drank the juice. In the 1930's the canning process for orange juice was developed. In the mid 1940's the process of concentrating orange juice was developed, and in the early 1950's chilled orange juice (COJ) was introduced. (Barnebey 3904)

COJ is processed almost always entirely from oranges grown in Florida. (findings 100, 114) Oranges from other states are too sour or sweet or have a low juice content. (finding 114) Processors obtain the juice either by squeezing fresh oranges or blending water with frozen concentrated orange juice (called "reconstituting") or by melting frozen natural strength orange juice. (finding 63) They package the COJ for resale in grocery stores in glass bottles, paper cartons or plastic jugs. (finding 64) They distribute the COJ by delivery to chain grocery stores or the chain's warehouse, to smaller independent grocery stores, and to wholesalers. (finding 77)

Tropicana was founded by Anthony T. Rossi who was the chairman of the board and chief executive officer from its inception through its acquisition by Beatrice. In 28 years the company grew entirely through internal growth to be the largest citrus processor in the world. (CX 39, p. 2) In fiscal 1977, Tropicana had net sales of $244,583,-

000 and earnings after taxes of $22,461,000. (finding 10) Tropicana, the leading processor of COJ with over 30% of the retail market (finding 149), distributes primarily to the warehouse of grocery chain stores and to grocery wholesalers from warehouses across the country which it supplies by rail or trucks. (findings 145, 150, 155) Every five days, a train of Tropicana refrigerated rail cars, over one mile long, leaves the Bradenton plant for the warehouse in New Jersey. (finding 157) Although it sells in every state but Hawaii and Alaska (findings 110, 148), Tropicana is strongest on the east coast and markets closest to its plant in Florida. (finding 147) Transportation costs have limited its effectiveness in markets in the far west. (CX 661D) Tropicana is the price leader in the sale of COJ. (CX 153) **[54]**

Before the merger Beatrice was the 37th largest industrial corporation in the country, with over $6 billion in sales in fiscal 1978. (finding 2) Beatrice operates the nation's third largest dairy, with 37 milk plants and many other plants producing dairy products. (finding 5; CX 47) It operates more milk plants and has the widest geographic sales area of any dairy in the country, and distributes products in 35 states. (findings 5, 263, 264)

In 1975, Beatrice processed COJ at three dairy plants. (finding 227) Realizing that the COJ market was expanding rapidly, and that COJ is a high margin product compared to milk, Beatrice increased its processing of COJ and by the time of the merger it processed COJ at 12 plants (findings 230, 231, 289) and had about .35% of the market measured in gallons of COJ sold to grocery stores in the United States. (finding 214)[9] Beatrice also distributed COJ processed by other firms including Tropicana. (findings 206, 212; CX 47) In addition, just before the merger, Beatrice was completing plans to enter the retail COJ market with a strong, national effort to process, distribute and sell a COJ product which was to be called "Dixie Sunshine." (findings 237–52)

Three COJ processors sell nationally: Tropicana, Minute Maid division of The Coca-Cola Company and Kraft, Inc. H.P. Hood, Inc., a New England dairy, is the fourth largest seller, processing and selling in the northeastern and southeastern United States. (findings 101, 113) Tropicana distributes fresh and reconstituted COJ from its plant in Florida to the nation (findings 65, 110), and packages its COJ for the retail market in glass and paper containers. (finding 154) Minute Maid processes COJ by shipping bulk concentrate from Florida to seven processing plants across the country, and by packaging the reconstituted COJ in paper cartons. (finding 111) Kraft packs fresh and reconstituted COJ in glass bottles at its plant in Florida and

[9] I accept the Nielsen surveys in the record as more accurate evidence of the market than the testimony of respondents' paid expert. (CSC reply at pp. 78–84)

distributes to most of the country. It serves the west coast and Hawaii by a co-packing arrangement with a plant in California. (findings 66, 74, 112) Hood packs fresh and reconstituted COJ in paper and plastic at its plant in Florida and its milk plants in New England. (findings 66, 74, 113)

Hundreds of dairies, including Beatrice, also process and sell COJ to the retail market by mixing bulk concentrate with water, using the same equipment and packages they use in packing milk, and delivering to their milk customers at [55] individual grocery stores and to grocery chain warehouses. (findings 134, 253–261) These local and regional sellers of COJ depend primarily on a lower price to obtain shelf space in grocery stores. For example, before the merger, Beatrice processed and sold COJ to grocery stores at a price which allowed consumers to buy it at a per serving price which was 25% to 35% lower than national brands of COJ like Tropicana. (finding 217)

In the last ten years COJ sold through grocery stores has been a fast growing industry and now, of the entire orange juice market, COJ accounts for about 28% and frozen concentrated orange juice (FCOJ) accounts for 68%. (finding 57)[10] Consumers increasingly are buying COJ as a convenience product. It is ready-to-serve and requires no additional preparation. (Barnebey 4063) Consumers feel they are getting a purer product when they buy COJ, rather than FCOJ. (finding 60) This characteristic of consumers, preferring the quick drink of COJ rather than taking the time to mix FCOJ (which is cheaper, lighter and can be easily stored), is somewhat difficult to understand. It may be due, in large measure, to the advertising and promotion of COJ by the larger processors, such as Tropicana and Minute Maid. (CX 141F)[11]

The use of heavy advertising to enter new COJ markets is seen in the recent entry of Minute Maid COJ. Minute Maid, a division of The Coca-Cola Company, had 25,000 acres of orange groves in Florida and started selling COJ in 1960, but, because of a freeze in Florida, withdrew from the market in 1961. (Munkelt 761) In 1970 Minute Maid again started processing and selling COJ, opening one processing facility at a time, either by buying milk plants or by co-packing arrangements with COJ processors. Minute Maid COJ is now processed from bulk concentrate shipped from its Florida plant to its seven processing plants across the country, where it is reconstituted and packed in paper cartons. Minute Maid entered each new market with a program of high advertising and promotional expenditures. (Munkelt 792) In 1975, Minute Maid had 6.2% of the national retail COJ

[10] Canned orange juice accounts for about 4% of the industry. *Id.*

[11] One result of this advertising and promotion by the larger processors is that, while private label sales are 50% of all FCOJ sold at retail, they amount to only 19% of COJ retail sales. (finding 50)

market (CX 392, p. 38), and by 1979, it had 19.4% and was selling nationally. (CX 560Z–18; Munkelt 718) Most of this market share was taken from local and regional COJ [56] processors. (Munkelt 788–89)[12]

During this time Tropicana was holding its national market share, having 28.9% in 1975 and 30.5% in the summer of 1979. (finding 122; CX 560Z–18)[13] Tropicana responded to each incursion by Minute Maid into a new market by retaliatory advertising and promotional programs. (Munkelt 805)

B. *Relevant Product Market*

To test whether an acquisition may substantially lessen competition, the area of effective competition must be determined by reference to a product market. *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 324 (1962). The outer boundaries of a product market are determined by reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. *Id.* at 325. Within the broad market, well-defined submarkets may exist which constitute product markets for antitrust purposes, and the boundaries of such subsmarkets may be determined by looking at:

> industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. (*Id.* at 325)

Not all of these criteria must be met before a relevant submarket is found. *Brown Shoe,* 370 U.S. at 326; *United States* v. *Aluminum Co. of America,* 377 U.S. 271, 276–77 (1964).

The evidence here overwhelmingly shows a separate relevant product market of COJ sold to the retail market. The industry and government agencies, the public and the respondents themselves have recognized that market. (findings 23–39, 41–45, 71–75) COJ has peculiar characteristics which differentiate it from FCOJ and CSSOJ. It is ready to serve whereas FCOJ must be [57] thawed and have water added. (CX 593, pp. 28–29) COJ does not have the quality problems of CSSOJ. (findings 60, 62) COJ has distinct prices (findings 47, 48, 76, 99) and customers. (Barnebey 4063; Hoffer 1929) It has unique production, packaging, storage and distribution facilities (findings 51–53, 56) and specialized vendors and display areas in retail grocery stores. (findings 36, 55, 56)

While the record contains scattered proof relating to effects of the acquisition on the submarket of processing COJ (findings 126, 128,

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[12] Kraft, the other national processor and seller of COJ to the retail market also lost national market share during this period. (findings 122, 123) Kraft depends on general advertising of its dairy products and does not advertise its COJ brand to the consuming public. (Munkelt 805)

[13] Tropicana also had over 2% of the market in its sales of private label COJ. (finding 149)

130) and on the submarket of distributing COJ (finding 159), most of the evidence is centered on the market of processing, distributing and selling COJ to retail food stores and that is the relevant market in this case.

C. *Geographic Market*

This merger had its most evident effect in the geographic area where both the acquired and the acquiring companies sold COJ to the same kind of customers. That is where the impact of the merger will be most clearly felt and most easily measured. In addition to the effects on horizontal competition between Tropicana and Beatrice, however, the complaint alleges, in paragraph fifteen, unlawful effects from the merger on the COJ retail market: that competition may be lessened among competitors generally;[14] that Tropicana may be eliminated as an independent competitor;[15] that concentration may be increased and the chance for deconcentration diminished;[16] and that mergers among other processors may be encouraged.[17] The market facts below show that these issues must be examined on a national market basis.[18] **[58]**

Tropicana sold COJ to retail grocery stores in 48 states (finding 156) in 242 of the 282 metropolitan areas in the United States. (finding 148) Most of its sales are on the east coast, in the states bordering the Gulf of Mexico, and in large metropolitan areas. (finding 147) Nevertheless, Tropicana ships its COJ to the west coast from its plant in Florida (finding 110), and advertises and tries to sell throughout the United States. (findings 104, 107) These facts alone are sufficient to show that the nation is the relevant geographic market. *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 621 (1974); *Jim Walter Corp.* v. *Federal Trade Commission*, 5 Trade Reg. Rep. ¶63,535 (5th Cir., Sept. 12, 1980), at p. 76,878–79 [625 F.2d 676].

Beatrice, with a very small share of the national market, sold COJ in 23 states (finding 264) through 43 dairy plants (findings 160–202), and had plans to sell on an expanding basis, and eventually to sell nationally. (findings 243–45, 247–48) Furthermore, the market is increasingly acquiring a national character. *Kennecott Copper Corp.* v. *Federal Trade Commission*, 467 F.2d 67, 71 (10th Cir. 1972). The three largest brands of COJ, with a growing share of the market (findings 122, 123), sell nationally. (finding 101)

[14] Subparagraph (b) and (f)

[15] Subparagraph (c)

[16] Subparagraph (d)

[17] Subparagraph (e)

[18] For example, as proof that the merger diminishes the chance for deconcentration, complaint counsel allege that Beatrice's market share understated its future competitive impact because of the planned national expansion of Dixie Sunshine. Assuming that the allegation has merit, the geographic area to test that expansion would necessarily be national.

These facts compel a finding that the nation as a whole constitutes the relevant market. *Beatrice Foods Co.,* 86 FTC 1, 60 (1975), *aff'd,* 540 F.2d 303 (7th Cir. 1976). That freight costs are a significant factor (finding 293) giving an advantage to a seller with a plant located closer to the customer, does not foreclose firms from selling nationwide. *Id.*[19] Further, the complaint in this case alleges injury from the merger to other processors of COJ. Hundreds of dairies process COJ in this country (findings 134, 261), and many of them compete against Tropicana in the areas of the country where Beatrice does not now sell. (*e.g.* finding 113)

The effects of the merger should be weighed on a national scale. **[59]**

D. *Competitive Effects*

After determining the relevant market, the next step is to ascertain whether the probable effects of the acquisition may be substantially to lessen competition in the market. Statistics reflecting market shares and concentration are the primary index of this effect. *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 326–66 (1963). Where concentration in a market is already great, an acquisition which results in even small increases of market share will be presumptively unlawful. *United States* v. *General Dynamics,* 415 U.S. 486, 497 (1974).

The test for market effect of a horizontal merger was recently stated in *Hublein, Inc.,* 3 Trade Reg. Rep. (CCH) ¶ 21,763 (Docket 8904, Commission order issued October 7, 1980) [96 F.T.C. 385]. In *Hublein,* the merger involved market shares of 17.9% and .79% in the all wine market.[20] The Commission found, on consideration of the conventional elements of horizontal merger theory in a rapidly growing industry, that the increase in concentration resulting from the merger was not likely to produce significant anticompetitive effects. The Commission found that Hublein's market share of .79% in the all wine market overstated the competition between it and the acquired company because: (1) the two sold markedly different products at different ends of the price scale of wines; (2) Hublein had no special marketing skills and numerous other firms with a small share of the market were equally important future competitive factors; and (3) a three year increase in four firm concentration went from 47% in 1968 to 56.7% in 1971 after the merger, and then decreased to 54.2% in 1976.

Applying the *Hublein* test for market effect of horizontal mergers

[19] In *Federal Trade Commission* v. *Proctor & Gamble,* 386 U.S. 568, 571 (1967), a national market was found even though it was not practical to ship the product more than 300 miles from the plant because of high shipping cost and the acquired firm was the only company having plants throughout the country.

[20] Other market ratios in the *Hublein* case were 15.6% and .23% in table wine and 21% and .54% in dessert wine. The Commission did not consider these submarkets because these market shares do not substantially differ from the market share of the all wine market. *Hublein* at p. 21,939.

to this case, I find that the first two factors are inconclusive. The Tropicana COJ and the COJ processed and sold by Beatrice are not disparate products to the same extent that the wines in *Hublein* sold by the acquiring and acquired firms differed in price, quality and sweetness. The main difference between the COJ processed and sold by Beatrice and Tropicana is in price with Beatrice selling at retail for 25%–35% lower than Tropicana. (finding 217) The quality of the two products does not vary significantly. (findings 60, 70) Although Tropicana's COJ in glass has a longer shelf life than Beatrice's reconstituted COJ packaged in paper or plastic (finding 61), consumers perceive little difference in **[60]** Tropicana's COJ packed in paper cartons (which amounts to almost 70% of Tropicana's sales of COJ)[21] and Beatrice COJ. (finding 70)

The Commission also found that Hublein had no special marketing skills. In this case, while there is no showing that Beatrice has unique innovative or marketing skills, there is proof in the record that Beatrice had a great potential capacity for marketing COJ and has skills obtained from a successful subsidiary processing COJ in Australia. (findings 253–92)

The factor which clearly distinguishes this case from *Hublein,* however, is the trend toward concentration in the COJ industry. The top four companies in the national COJ market controlled 55.8% of the gallon sales in 1975. (finding 122) By 1978 the four leading brands sold in grocery stores had 60.2%, (finding 123) and a few months after the merger, in June-July 1979, they had 64.2%. (CX 560Z–18)[22] Further, the top two COJ firms had more than 50% of the gallons sold in that period (*id.*), perhaps an even greater indicator in predicting "interdependent anticompetitive behavior." *Hublein* at p. 21,939.

Beatrice's small market share of .35% does not automatically mean that the competitive effect of the merger was *de minimis.* In *Federal Trade Commission* v. *Pepsico, Inc.,* 477 F.2d 24 (2d Cir. 1973), a horizontal merger case for preliminary relief, the court of appeals upheld the finding that there was a reasonable probability of competitive injury resulting from an acquisition by Pepsico, with 16.3% of the market, of a company with .3% of the market, in a highly concentrated, growing **[61]** industry. *United States* v. *Crowell, Collier & MacMillan, Inc.,* 361 F.Supp. 983 (S.D.N.Y. 1973) does not help respondents.

[21] (finding 149)

[22] The legality of a merger under Section 7 is to be tested by whether at the time of the suit there is a reasonable probability that the acquisition will lessen competition. *United States* v. *E.I. du Pont de Nemours & Co.,* 353 U.S. 586, 589 (1957); *United States* v. *Penn-Olin Co.,* 378 U.S. 158, 168 (1964). However, post-acquisition evidence is admissible to confirm trends in the relevant market perceived at the time of the merger. *United States* v. *Falstaff Brewing Corp.,* 383 F. Supp. 1020, 1027 (D.R.I. 1974).

Adding Tropicana's private label sales of more than 2% of the market (finding 149), the four firm concentration ratio now approaches being "highly concentrated" by the FTC standard. *Federal Trade Commission* v. *Pepsico, Inc.,* 477 F.2d 24, 27 n.5 (2d Cir. 1973).

Crowell, Collier, with .6% of the market, acquired the leading firm in that market. The district court refused to find a horizontal violation even though the four leading firms' concentration was 69.6% and the acquired firm had 41.9%. There was, however, no trend toward concentration nor any other anticompetitive factors. In *United States* v. *Aluminum Co. of America,* 377 U.S. 271 (1964) and *Stanley Works* v. *Federal Trade Commission,* 469 F.2d 498 (2nd Cir. 1972), *cert. denied,* 412 U.S. 928 (1973), the facts were closer to this case. In *Alcoa* the percentage increases were 1.3% plus 27.8% and in *Stanley,* 1% plus 22–24%. Both cases involved the largest firms in their markets just as Tropicana is the largest COJ producer. In *Alcoa,* the top two firms controlled 50% of the market and there was a trend toward concentration. In *Stanley Works* the top four firm concentration was 50% and there was evidence the acquisition would turn the concentrated market into a rigid market with limited price competition and lead to greater concentration.

Here, the trend toward concentration was primarily caused by the rapid expansion of Minute Maid, which had gone from 7.3% in 1975 to 19.4% in the summer of 1979, and the increased advertising expenditures by Tropicana stirred up by Minute Maid's market invasions. (finding 122; CX 560Z–18; Munkelt 805) This market share has been taken primarily from the local and regional COJ processors (Munkelt 788–89), thus depriving the market of brands which compete by lowering prices (finding 217) and substituting competition by advertising and product differentiation. (Munkelt 792, 805; Lang 1065)

While the share of the market by Beatrice prior to the merger was extremely small (finding 214), I feel that the .35% of the retail market substantially understated competition between Beatrice and Tropicana in selling COJ to grocery stores because of Beatrice's recent growing interest in processing COJ (findings 227–231), and its unusual potential capacity for marketing that product. (findings 253–266, 274, 284–86) Furthermore, this small market share must be considered in the context of being added to Tropicana's more than 30%. In a concentrated relevant market even this small increase in market share is presumptively unlawful. *United States* v. *General Dynamics,* 415 U.S. at 497. Respondents have not successfully rebutted that presumption.

Respondents argue that Beatrice and Tropicana did not compete for chain store customers because Beatrice delivers only store-door while Tropicana delivers to the warehouses of chain stores. However, Tropicana and other processors who deliver COJ to chain warehouses recognize as competitors dairies delivering COJ store-door. (findings 87–92) Some chains prefer store-door delivery and Tropicana has lost shelf space to dairies **[62]** delivering store-door. (findings 88, 93) For example, in Salt Lake City Beatrice beat Tropicana for sales of COJ to a chain store by this extra service. (finding 220)

The record shows that Beatrice and Tropicana regarded each other as competitors in the processing, sale and distribution of COJ to retail food stores. (findings 76, 221; Koch 4954) The record shows instances where Beatrice milk plants and Tropicana sold or tried to sell COJ to the same chain food stores (findings 220, 222–25) and they vied for sales to grocery stores in at least 48 metropolitan areas. (226)

Respondents also argue that Beatrice could not deliver to the warehouses of chains because of union contracts with their truck drivers. No such executed contracts were put in evidence, nor was there any explanation why they could not be renegotiated if such contracts do exist. Furthermore, some Beatrice milk plants have serviced chain food stores by delivery to the warehouse or through pick up by the chain at the dairy (finding 276) and other Beatrice dairies were fully capable of doing so (findings 274, 277, 278) just as other dairies have expanded their COJ sales by delivering to chain store warehouses. (findings 272, 273, 292)

E. *Entry Barriers*

The strongest argument made by respondents to show that the merger does not tend substantially to lessen competition is that the barriers to entering the processing and distribution of COJ to grocery stores are relatively low for dairy companies. (findings 134–35)[23]

Dairies, the most likely potential entrants into the processing of COJ, typically undersell the national brands of COJ by offering a lower price. (finding 217) There are hundreds of these dairies waiting on the edge of the COJ market to supplement their gross income and to defray their **[63]** distribution costs by processing and distributing COJ. They just add tap water to FCOJ, and use the same production equipment, distribution facilities and personnel they use to sell milk. (findings 134–35, 228, 253–60) The only additional cost is for bulk concentrate. The dairy merely calls a concentrate supplier in Florida, flushes the milk from the production equipment with boiling water, and is quickly into the business of processing and distributing COJ. (Parker 4309, 4313, 4317)

Unfortunately, however, local and regional dairy processors of COJ are becoming an increasingly less important factor in grocery stores across the country. (findings 122–23) Supplies of bulk FCOJ are not always available to the prospective new entrant into the business of

[23] Respondents also argued that chain stores are potential entrants by private label COJ. Such new competition would be in the market for selling COJ at retail but there is no evidence that additional private labels would have a substantial effect on the processing of COJ. Respondents also argue that firms which concentrate FCOJ in Florida are potential entrants. These firms lack an assured supply of oranges, equipment, sales force and established brand names, and are unlikely entrants into the business of processing COJ. (Bock 1656–64)

processing and distributing COJ to food stores (findings 141, 246) and other barriers are there. (finding 267) The national COJ processors, with their powerful advertising budgets, are winning an ever growing market share. (findings 122–23) A small COJ processor testified about this (Lang 1065):

As a regional packer, again we are competing with nationally-known, well advertised, well-promoted competitive products who by and large almost automatically are represented in every store and for a local brand, such as ourselves, we are fighting for what is left of that space in the dairy case. It's a very difficult job to compete with these nationally known brands for shelf space in view of the fact that our company cannot afford to advertise anywhere near as significantly as our competitors do.

Absence of high entry barriers, moreover, cannot be depended upon to ensure effectively competitive conditions. *Ekco Products Co.,* 65 F.T.C. 1163, 1208 (1964), *aff'd,* 347 F.2d 745 (7th Cir. 1965):

A merger may violate Section 7 even though there do not appear to be formidable barriers to entry into the market affected by the acquisition; the existence of potential competition does not justify or excuse elimination of actual competition. In such a case, where the merger's effects on competition are those proscribed by Section 7, its illegality cannot be overcome by a showing of ease of entry.

The reasons that low entry barriers are not a defense to a Section 7 violation are because (1) entry by significant new **[64]** competitors is likely to be at best a long term affair and (2) even an entry-discouraging low price is not likely to be as low as if there were actual competition. *Id.* at 1208.

F. *Conglomerate Theories*

Complaint counsel argue that the complaint alleges not only unlawful effects from the merger on actual competition but also unlawful future effects in that the "possibilities for eventual deconcentration may be diminished." They argue that the merger will entrench Tropicana as the leading processor of COJ sold to food stores and already has eliminated Beatrice's planned role as a deconcentrator through the introduction of the Dixie Sunshine brand of COJ.

Respondents argue that complaint counsel, in pointing to the future effects of the merger, were trying to prove a violation based upon theories which were not pled in the complaint. They argue that actual and potential competition are not interchangeable concepts.

In addition to the traditional horizontal theory of the complaint, the Commission in *Hublein* also decided the case under conglomerate theories, holding that Hublein was not a unique potential deconcentrator of the market and that the merger did not entrench the acquired company's market position. The Commission looked at these conglomerate theories both as an independent basis of violation and also as an aggravating factor in the alleged horizontal violation. *Hublein* at p. 21,942.

Section 7's incipiency standard requires not merely an appraisal of the immediate impact of the merger upon competition, but also a prediction of its impact upon competitive conditions in the future. *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 362 (1963); *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 322 n.38 (1962). Therefore, even in a horizontal merger case, the future effects of the merger must be weighed. *Hublein, supra; Stanley Works* v. *Federal Trade Commission,* 469 F.2d 498, 502 n.8, 505 (1972), *cert. denied,* 412 U.S. 928 (1973).

G. *Dixie Sunshine*

In the middle 1970's Beatrice grew interested in the processing of COJ, since that market was expanding quickly and was a complement to the processing and distribution of milk. (findings 228–30, 253–60, 288–90) From 1975 to 1978 Beatrice expanded its COJ processing from three to twelve dairy plants. (findings 227, 231) **[65]**

In early 1977, the highest executives in the Beatrice dairy division became interested in expanding the COJ processing business more rapidly. (finding 236, 237) This plan included a new label COJ to be sold by Beatrice—Dixie Sunshine.

The test market stage for Dixie Sunshine included distributing COJ processed and packed in glass bottles under that label by Tropicana, and packaging fresh orange juice supplied by Admore Farms in paper cartons at the Beatrice milk plant in Orange City, Florida. (finding 241, 242) The Beatrice dairy division executives soon started thinking about a national market for Dixie Sunshine COJ, with COJ to be reconstituted by Beatrice at 30 to 35 milk plants with national distribution in 18 months. (findings 243, 245, 248)

Just as Dixie Sunshine was coming on the market, Beatrice bought Tropicana. The merger was approved by the Beatrice board of directors on March 4, 1978. (finding 19) At a meeting on March 8, 1978, Beatrice dairy division executives stopped the Dixie Sunshine program. (finding 252)

Beatrice had a unique ability to enter the business of processing and distributing COJ on a national level. Dairies process and package COJ on the same machinery used for processing milk. (findings 254, 262) Milk plants use the same storage facilities and distribution system for milk and COJ and generally find the products compatible. (findings 255, 256, 258–60) Beatrice has more milk plants and sells in a wider geographic area than any other dairy in the United States.

The likelihood of Beatrice expanding the business of processing, distributing and selling COJ was eliminated by the merger, thus reducing the chance for deconcentration in the market.

H. *Entrenchment*

A large acquiring firm can confer on an acquired firm competitive advantages over competitors in the acquired firm's market and those advantages may substantially reshape the competitive structure of the industry by raising entry barriers and by dissuading smaller firms from aggressively competing. *Hublein* at p. 21,948.

Here, complaint counsel argue that the acquisition conferred on Tropicana advantages in advertising and distribution which will entrench it as the market leader. There is no substantial evidence in the record that Beatrice brought to Tropicana a significant competitive advantage in advertising. Although Beatrice is a large advertiser (finding **[66]** 280), there was no proof of advertising efficiencies not available to other firms in the retail COJ market. *Hublein,* at p. 21,949–50.

I find, however, that the acquisition did confer on Tropicana advantages in distribution which will lead to greater expansion of Tropicana's sales of COJ to the retail market in areas of the country where shipping costs have prevented it from domination, and will undoubtedly increase the already high concentration in the market.

Tropicana has been the leader in the retail COJ market for many years and now has over 30% of an increasingly concentrated market. (findings 122, 123; CX 560Z–18) Tropicana is the price leader in selling COJ and in making pricing decisions Tropicana considers only its own costs rather than prices charged by its competitors. (finding 153)[24] Tropicana's only obvious marketing disability before the merger involved difficulty in selling to markets far from Florida because of increased freight rates incurred in shipping COJ to those markets. (finding 293) This deficit should be alleviated by the merger.

Before the merger, Tropicana was interested in expanding its sales of COJ to food stores in California and other areas in the west and midwest. (finding 300) Tropicana could have done this by shipping bulk COJ to dairies in those areas, which would process it and distribute it under a different label. (finding 301) It was likely, but for the merger, that Tropicana would have a plant reconstituting COJ in

[24] This aversion to price competition in selling COJ to grocery stores is coupled with an aversion to price competition by grocery stores in selling COJ. In 1978, Mr. Barnebey, the president of Tropicana, wrote to a dairy customer who had complained about a chain store selling Tropicana COJ as a loss leader. Decrying this price competition, Mr. Barnebey said that "Because Tropicana represents such a large portion of the total chilled juice sales, we have tried to maintain the most orderly market possible." Mr. Barnebey related in the letter how Tropicana, in order to avoid such retail price competition, had resisted direct sales to grocery warehouses for several years after Kraft had started the practice. (CX 802A)

California in the next ten years. (finding 302)[25]

The merger solved this problem for Tropicana. Beatrice **[67]** already has milk plants in San Jose, California (finding 191) and throughout the west and midwest. (RX 1750, RX 1752) Tropicana now has the ability to lower its costs in California, as well as the other markets now serviced by Beatrice dairy plants.

The merger has entrenched Tropicana as the market leader in the processing, distribution and sale of COJ to grocery stores.

CONCLUSION

Beatrice violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act,[26] by acquiring Tropicana, because the effect of the acquisition may be to substantially lessen competition in the processing, distribution and sale of COJ to retail food stores in the United States.

RELIEF

Only complete divestiture can return Tropicana to a position as an independent competitor in this concentrated market. *United States* v. *E.I. du Pont de Nemours & Co.,* 366 U.S. 316, 326–31 (1961). In addition, a 10 year ban on future acquisitions is now customary when Section 7 is violated. *Kaiser Aluminum & Chemical Corp.,* [1976–79 Transfer Binder] Trade Reg. Rep. ¶ 21,578 at p. 21,697 (appeal pending).

Complaint counsel argue that Beatrice should be required to divest Tropicana through a public stock offering or by a pro rata distribution of stock to Beatrice shareholders, and not by a sale to another corporation. The basis of their proposal is that, because of the size of Tropicana, only a large corporation could buy it and the "deep pocket" thus afforded would further entrench Tropicana as the market leader in the COJ market. I have found, however, that Tropicana has been entrenched by the merger because of the enhancement of its processing and marketing of reconstituted COJ through the Beatrice milk plants, not because of a deep pocket theory. While it may be desirable to have an independent market leader **[68]** which is not affiliated with any conglomerate corporation, an equally forcible argument can be made that ownership by a large, well-financed non-dairy company may be a more realistic way to have Tropicana battle competitors such as The Coca-Cola Company, Kraft, and, hopefully, Beatrice. *Ligget & Meyers, Inc.,* 87 F.T.C. 1074, 1141, *aff'd, Ligget & Meyers, Inc.* v. *Federal Trade Commission,* 567 F.2d 1273 (4th Cir. 1977)

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[25] Much of Tropicana's COJ is already processed by reconstituting bulk concentrate. (finding 65)

[26] No separate proof or argument was made under the Section 5 count but any violation of Section 7 is a violation of Section 5. *Federal Trade Commission* v. *Brown Shoe Co.,* 384 U.S. 316, 321–22 (1966)

I also believe that Beatrice should divest the profits made by Tropicana during the illegal tenure. The notice order attached to the complaint in this case, in paragraph 2, stated that, should the Commission conclude that there had been a violation of law, it might order ". . . divestiture by Beatrice of Tropicana and of any profits derived therefrom so as to create a viable, independent entity engaged in the processing, distribution and sale of ready to serve orange juice." While that language appears to include divestiture of profits as part of divestiture of Tropicana, it certainly put the respondents on notice that the profits made by Tropicana during Beatrice's ownership of the company might be divested. Divesting the profits of Tropicana would merely raise the price to be received by Beatrice from the sale of Tropicana,[27] and I believe they should be divested separately, to the United States Treasury. The purpose of this divestiture of profits is not only to avoid unjust enrichment but "to prevent illegal practices in the future," *Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S. 470, 473 (1952), by avoiding a continuing violation of Section 7 by the possible use of the profits obtained through the illegal acquisition to further restrain trade even after Tropicana is divested. The Commission has the authority to compel such affirmative acts of compliance. *Ecko Products Co., supra,* 65 F.T.C. at pp. 1212–16.[28] **[69]**

ORDER

I.

It is ordered, That Respondent Beatrice Foods Co. (hereinafter "Beatrice") shall:

A. Within one (1) year from the date on which this order becomes final, divest all its interest in the assets and business of Tropicana Products, Inc. (hereinafter "Tropicana") which Beatrice acquired in August 1978, together with all additions and improvements.

B. Within three (3) months from the date on which this Order becomes final, submit to the Federal Trade Commission for its approval, the plan of divestiture referred to in paragraph A of this part, and make such changes in the plan and submit such additional information with respect to it as the Commission may require. The plan shall be designed to reconstitute Tropicana with all its pre-acquisition assets and business (and any new business in which it has engaged subsequent to the new acquisition) as a viable, independent, corporate and competitive entity, and shall include divestiture to the United

[27] *Ligget & Meyers, Inc., supra,* at p. 1141.

[28] This provision is not meant to punish Beatrice. *Cf. United States* v. *Papercraft Corp.,* 393 F.Supp. 415, 425–26 (W.D.Pa. 1975)

States Treasury of all of the profits made by Tropicana while that company was owned by Beatrice.

II.

It is further ordered, That following the divestiture of Tropicana required by Part I of this Order, no employee, officer [70] or director of Beatrice shall at the same time be an employee, officer or director of Tropicana.

III.

It is further ordered, That pending divestiture as required by Part I of this Order, Beatrice shall cause Tropicana's business to be conducted in the normal manner; no plans for expansion or improvement of its plants or business shall be halted or interrupted; and Beatrice shall not permit any changes in Tropicana's business, corporate or financial structure, or otherwise, which would impair Tropicana's volume of business, profitability or ability to survive following divestiture.

IV.

It is further ordered, That for a period of ten (10) years from the date this Order becomes final, Beatrice shall not acquire, or acquire and thereafter hold, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, assets, any interest in or any interest of, any business, corporate or noncorporate, engaged in processing, distributing, and selling ready to serve orange juice. [71]

V.

It is further ordered, That on the first anniversary date of the effective date of this Order and on each anniversary date thereafter until the expiration of the prohibitions in Paragraph IV of this Order, Beatrice shall submit a report in writing to the Federal Trade Commission listing all acquisitions, mergers and agreements to acquire or merge made by Beatrice; the date of each such acquisition, merger or agreement; the products involved and such additional information as may from time to time be required.

VI.

It is further ordered, That for ten (10) years following the divestiture required by Part I of this Order, Tropicana shall not agree to merge with or be acquired by any individual, partnership or corporation without the prior approval of the Federal Trade Commission; and neither the officers nor the directors of Tropicana shall recommend the merger or acquisition of Tropicana to Tropicana's shareholders without such prior approval.

Opinion of the Commission

By Pertschuk, *Commissioner:*

The question before the Commission is whether the 1978 acquisition by Beatrice Foods Co. (Beatrice) of Tropicana Products, Inc. (Tropicana) violated Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The complaint, issued on June 20, 1978 following denial of an application for a preliminary injunction against the proposed merger, *FTC v. Beatrice Foods Co. and Tropicana Products, Inc.,* 587 F.2d 1225 (1978), alleged that the effects of the merger may be to substantially lessen competition or tend to create a monopoly in the processing, distribution and sale of ready-to-serve orange juice in the United States.

The complaint alleged that the acquisition eliminated actual competition between Beatrice and Tropicana and between competitors generally, and that it might foster other mergers [2] between competitors, causing a further loss of competition in the processing, distribution and sale of ready-to-serve orange juice. The complaint further charged that the previously existing level of concentration in the relevant market will be increased, and the possibilities for eventual deconcentration decreased, as a result of the acquisition. The administrative law judge (ALJ) found the acquisition unlawful based on a horizontal theory of violation. In addition, stating that future effects must also be assessed in a horizontal merger case, he found the acquisition unlawful based on the "conglomerate" theories that it eliminated significant potential competition by Beatrice in the relevant market and entrenched Tropicana as the market leader. The ALJ ordered Beatrice to divest itself completely both of Tropicana and of the profits made by Tropicana during the time it was owned by Beatrice.

We disagree with the ALJ's conclusion that the acquisition violates the antitrust laws and order that the complaint be dismissed. We find the loss of actual competition resulting from the merger to be too little to establish a violation of Section 7. We find the loss of potential competition not to have been pled in the complaint, and therefore we are constrained from reaching the merits of that allegation. Were we able to decide that question, however, we would be unlikely to find a substantial loss of potential competition resulting from the acquisition. Finally, we find that the proof of entrenchment of Tropicana is insufficient to warrant dissolution of the merger on that theory of violation. [3]

I. THE MERGING FIRMS AND THE INDUSTRY

Beatrice is the nation's leading diversified food manufacturer, producing and selling to consumers more than 8,000 products, I.D.F. 2, including over 4,000 dairy and grocery products. I.D.F. 3.[1] In fiscal 1978, Beatrice had total net sales of $6,313,880,000, making it the 31st largest industrial corporation in America in net sales. I.D.F. 2. In the same year, Beatrice was the nation's third largest dairy and the largest milk producer and distributor, with 37 milk plants serving 35 states. I.D.F. 5; I.D. 54. In conjunction with its milk business, Beatrice sold ready-to-serve chilled orange juice (COJ) to grocery stores and institutional customers, such as hospitals and restaurants. [4] I.D.F. 6.[2] Using its dairy plants, Beatrice reconstituted COJ from bulk concentrate, I.D.F. 158, and also distributed COJ processed by other orange juice producers. I.D.F. 159. In comparison to many other of its product lines, Beatrice's sales of its COJ products were a small part of its business prior to the merger, generating only $2.4 million in fiscal 1978 on the total sale of 1.2 million gallons of COJ. I.D.F. 210–12. Although its actual ranking was unknown, Beatrice had a tiny fraction of the relevant market, but had been increasing its production and sale of ready-to-serve orange juice in the years just before the merger. I.D. 54.

Tropicana, the acquired firm, is a major processor and distributor of orange juice products, and the leading processor of COJ in the

[1] The following abbreviations will be used:

I.D.F.	-	Initial Decision Finding of Fact No.
I.D.	-	Initial Decision Page No.
Tr.	-	Transcript of Testimony Page No.
CX	-	Complaint Counsel's Exhibit No.
RX	-	Respondent's Exhibit No.
CPF	-	Complaint Counsel's Proposed Finding of Fact No.
RPF	-	Respondent's Proposed Finding of Fact No.
CR	-	Complaint Counsel's Reply to Respondent's Proposed Findings of Fact
RR	-	Respondent's Reply to Complaint Counsel's Proposed Findings of Fact
CAB	-	Complaint Counsel's Appeal Brief Page No.
TAB	-	Tropicana's Appeal Brief Page No.
BAB	-	Beatrice's Appeal Brief Page No.
TRB	-	Tropicana's Reply Appeal Brief Page No.
BRB	-	Beatrice's Reply Appeal Brief Page No.

[2] For precise definitions of chilled orange juice and other technical terms that will be used herein, such as bulk concentrate, processed and reconstituted COJ, and frozen concentrate orange juice (FCOJ), *see* I.D. at 5–6.

United States. I.D.F. 9. In 1977, Tropicana had total net sales for all its products of $244,583,000. I.D.F. 10. In fiscal 1978 it sold 106,821,-648 gallons of COJ for $206,649,295. I.D.F. 11.

Approximately 90 percent of the oranges used in producing various orange juice products in the United States comes from Florida, the rest coming from the Southwest, Mexico, and Brazil. I.D.F. 127; CX 1650, pp. 12–13. Processors like Tropicana either turn the oranges directly into COJ, frozen concentrate orange juice ("FCOJ"), bulk concentrate (frozen juice in bulk form, which is the [5] raw material for reconstituted COJ), or canned single strength orange juice ("CSSOJ"). I.D.F. 22.

The chain of production and sale in this industry includes the citrus growers who supply the oranges; the processors, such as Tropicana, who own or buy the oranges directly from the growers and process them for use in various forms;[3] firms (usually dairies), such as Beatrice, who purchase "bulk concentrate" and "reconstitute" it into orange juice by adding water to it, much as a person adds water to FCOJ; wholesale distributors, who include the (1) processors who sell their product directly to the retail or institutional customer, (2) the dairies, who in addition to reconstituting orange juice from bulk concentrate, resell juice already processed into COJ, which is supplied to them by the processors, and (3) others such as independent warehouses and food brokers; and the end-line industry customers, the grocery stores and institutions, who sell the orange juice to consumers. Processors, like Tropicana, Minute Maid, and Kraft, usually distribute their product directly to central retail warehouses and institutions, and less frequently through independent distributors such as the dairies. Dairies which sell orange juice, such as Beatrice, typically distribute their product directly to the grocery or institution. [6]

There is incomplete vertical integration in the industry, in that processors own little citrus acreage themselves[4] and do not own any retail outlets. However, processors like Tropicana, Minute Maid and Kraft, who have direct access to oranges and the facilities for turning them into orange juice products, are more vertically integrated than dairy reconstituters of COJ, who are dependent on producers of bulk concentrate for supply.

In sales of COJ to the retail segment of the market, shelf space is the prize, and there is intensive competition for it.[5] To win shelf space, suppliers of orange juice must convince store owners that their brands

[3] For the most part, they obtain supply from the growers.

[4] In 1977, Tropicana owned 690 acres of citrus groves, which it used primarily for experimental purposes, CX527G; it purchased nearly all of its supply of oranges from independent growers. CX527F.

[5] Grocery stores usually carry about five brands, including major brands such as Tropicana or Minute Maid and a few regional or private label products. I.D.F. 140.

will sell. To do that, they must offer a competitive price or cultivate consumer loyalty to their brands, relying heavily on consumer advertising and promotion. I.D.F. 136–139. Tropicana and the other leading firms engage in substantial brand advertising to consumers. I.D.F. 12, 136–37; I.D. 55. Beatrice was not a strong advertiser in the COJ market prior to the merger, but it is a very large advertiser generally, ranking 17th in the nation in 1978 among all industrial corporations. I.D.F. 4.

Beatrice acquired Tropicana at a time of significant and sustained growth in the orange juice market. Historically, frozen orange juice (FCOJ) has been, and remains, the leading orange juice [7] product, but COJ has made rapid gains in the last several years. From 1975 to 1979, FCOJ dropped from 77 percent in 1975 to 68%, while COJ climbed from 18 to 28 percent at an annual growth rate of 20%, twice that of FCOJ. I.D.F. 57. Although COJ costs more than FCOJ, it is easier to use, apparently a major reason for its growing popularity with consumers. I.D. 55. The recent growth of the COJ segment of the market has attracted, and been assisted by, new entry, most notably that of Minute Maid. *Id.*[6] Prior to Minute Maid's entry, Tropicana and Kraft had been the only two COJ firms who sold COJ throughout most of the country. Minute Maid has provided significant competition to these two leading firms, as well as to smaller local and regional rivals. Still, despite this growth and new entry, the ALJ found the level of concentration and loss of competition from the merger substantial enough to warrant a finding that the merger violated Section 7. We will address the question of concentration and the other relevant antitrust considerations of the merger in the discussion that follows.

II. THE RELEVANT PRODUCT MARKET

The market definition questions in this case are complicated. Concerning the product market, the complaint alleges that a relevant line of commerce in which to assess the legality of the merger is "the processing, distribution and sale of ready-to-serve orange juice," Paragraph 10. The ALJ held that the evidence "overwhelmingly shows" a separate line of commerce for COJ [8] sold to the retail market, I.D. 56, justifying the exclusion of orange juice sales to institutions from consideration in assessing the competitive impact of the merger. I.D.F. 29–40. We agree with the ALJ's determination to exclude institutional sales, and note that respondents have not seriously challenged it on appeal.[7]

[6] Minute Maid entered the COJ business from its position as the leading processor of FCOJ. It owns a bulk concentrate processing plant in Florida, which supplies seven regional reconstituting plants located throughout the country.

[7] Respondent Tropicana did challenge the factual basis of IDF 39 concerning a lack of cross-elasticity of demand between the retail and institutional markets, TAB 32, but it did not question the fundamental soundness of the

(footnote cont'd)

A. *The Relevant Products*

The ALJ found, as the complaint alleged, that COJ sold to retail is a separate relevant product market, distinguishable from the sale of FCOJ and CSSOJ. The ALJ made his determination on the basis of the criteria for product market definition enunciated in *Brown Shoe Co. v. United States,* 370 U.S. 294, 325 (1962). Specifically, he cited evidence that COJ is recognized as a separate market by industry and consumers, that it is ready to serve whereas FCOJ must be prepared, that it is far superior in quality to CSSOJ, and that it has distinct prices, customers, and facilities for production, distribution, and in-store display. I.D. 56–57. He stressed that it is not essential to satisfy all of the *Brown Shoe* criteria in order to establish a relevant submarket. *Brown Shoe,* 370 U.S. at 326, *United States v. Aluminum Co. of America ("Alcoa-Rome"),* 377 U.S. 271, 276–277 (1964).

On appeal respondents do not question the ALJ's findings on industry and public recognition of a separate COJ market or on the peculiar usage characteristics and quality of COJ. They argue, [9] however, that there is sufficient price interaction and cross-elasticity of demand between COJ and FCOJ to warrant a finding that they belong in the same relevant product market. Respondents are correct to identify cross-elasticity of demand as the most important factor in product market definition. *See* FTC Statement Concerning Horizontal Mergers at 12 and the revised Department of Justice Merger Guidelines at ¶II(A), both issued on June 14, 1982.[8] However, respondents' contentions about price elasticity are not borne out by the evidence.

Industry representatives, including a Tropicana official, testified that promotional sales of FCOJ do not perceptibly influence the sale of COJ in the retail market. I.D.F. 58. Further industry testimony indicated that sellers of COJ to retail customers pay no attention to the prices of FCOJ and CCSOJ in setting their own COJ prices. I.D.F. 47. In addition, a national statistical study of price and consumer purchasing patterns for orange juice products between 1972 and 1979 concluded that there are no statistically significant substitutes for COJ, including FCOJ and CCSOJ, and that consumer demand for COJ is relatively price inelastic.[9] Dr. Tilley attributed his findings of price [10] inelasticity for COJ to the peculiar characteristic of COJ buyers to get into the "habit" of drinking COJ; unlike FCOJ, he observed that many consumers will develop a stable attachment to COJ and contin-

ALJ's finding of a separate market of COJ sales to the retail segment. Respondent Beatrice's appeal briefs did not address this issue at all.

[8] Cross-elasticity of supply represents another important factor, as the FTC Statement and the DOJ Guidelines also recognize. Respondents alleged below that there was cross-elasticity of supply between COJ and FCOJ which also justified inclusion of both in one market. However, respondents did not make this argument on appeal.

[9] CX 514 B,D,I,J,P,R; Tr. 2236–37, 2243, 2397. The study was done by Dr. Daniel Tilley, then a research economist with the Florida Department of Citrus and an adjunct professor at the University of Florida.

ue to buy it regardless of price fluctuations in COJ and the availability of interchangeable products such as FCOJ. Tr. 2241, 2243.[10] Under cross-examination, Dr. Tilley conceded there is some price sensitivity between COJ and FCOJ, Tr. 2383–84, but read in the context of the study itself and his entire testimony, this statement does not undercut his basic thesis that the cross-elasticity of demand between the two products is low.[11] Beyond reference to this thread of testimony, TAB 33–34, respondents have not attacked the validity of Dr. Tilley's statistical findings, nor provided any other reason why we should not give them substantial weight.

Respondents complain that the Initial Decision relies on the Tilley study while completely overlooking two studies of the New York City market which, they claim, provide significant evidence of substantial switching or substitution of COJ and FCOJ. RX 1, 1P; TAB 33. We believe, however, that these studies of a single local market, an area which is nowhere suggested to be representative of [11] the COJ market as a whole, are substantially less probative on the question of cross-elasticity of demand than the national Tilley study and industry testimony on COJ pricing practices already cited.[12]

Respondents argue that if the COJ market is going to include COJ sold in both cartons and glass containers, as the ALJ says it should, I.D.F. 71–76, then it logically must include FCOJ too, since FCOJ and carton COJ are closer together in price than are carton and glass COJ. TAB 24–25; CX 560T (*in camera*). Alternatively they argue that if FCOJ is excluded, then a separate submarket must be found for COJ sold in glass, because of its higher price. TAB 25.[13] These arguments place too much weight on absolute price differences as opposed to price *elasticities* that, under the FTC Merger Statement and DOJ Merger Guidelines, should bear most decisively on the inclusion or exclusion of various types or packages of orange juice products in the relevant product market. Despite a price spread between COJ and FCOJ that is narrower than that between glass and carton COJ, evidence of other distinguishing factors, particularly a relatively low [12] cross-elasticity of demand, warrants a market division between these two products. Further, despite the greater price disparity be-

[10] He admitted, however, that his study did not consider the possibility that a regular buyer of COJ might occasionally buy FCOJ when it is on sale, and then resume the habit of buying COJ. Tr. 2391. Even so, allowing for this possibility does not necessarily refute Dr. Tilley's general findings of a "purchase-habit response" and substantial price insensitivity on the part of COJ buyers.

[11] Moreover, due to the nature of the data base used, the study may have tended to overstate the degree of any price sensitivity and cross-elasticity of demand. CPF 127, citing Tr. 2094–96.

[12] Obviously FCOJ and, perhaps, even CCSOJ, are to some extent interchangeable with COJ in the sense that their end use is the same and their price ranges, while substantially below those of COJ, are not dramatically so. It would be surprising if there were no interchangeability at all among such closely-related types of products as these. But it is not at all inconsistent to say that products can be somewhat interchangeable but, in light of prevailing commercial attitudes and realities, that their division into separate markets will provide a more useful starting point for antitrust analysis. *See, e.g.*, Sullivan, *Handbook of the Law of Antitrust* 607–08 (1977).

[13] Such a finding would exclude Beatrice from the relevant product market, since it sold little if any COJ in glass.

tween glass and carton containers of COJ, and other alleged differences in quality and handling between these forms of packaging, RPF 22–28, the record indicates both that the industry recognizes them as being in the same market, and that there is a close competitive relationship between them, in which COJ producers typically consider the price of all types of containers in pricing their own products. I.D.F. 71–73, 75; Tr. 711, 759–60, 963, 970–71, 1480–81, 1492. The existence of such price sensitivity is persuasive evidence that carton and glass COJ belong in the same product market.

Respondent Tropicana relies on *Alcoa-Rome* and *A.G. Spaulding & Bros. v. FTC,* 301 F.2d 585 (3d Cir. 1962) in contending that price disparity between glass and carton COJ is a sufficient basis for placing them in separate submarkets here. In *Alcoa-Rome,* however, the prices of insulated aluminum and copper conductors did not respond to each another, and the price difference of 50 to 65 percent[14] was the "single most important factor," overriding other clear aspects of competitive overlap which, ordinarily, would have been enough to place the products in the same market. 377 U.S. at 275–276. The evidence here, which shows price and promotional interaction between sales of COJ in glass and carton [13] containers, clearly distinguishes this case from the facts in *Alcoa-Rome.*[15]

A.G. Spaulding & Bros. also is unpersuasive authority for respondent Tropicana's position. There the court grouped several different types of athletic equipment into a single market. The very same factors that justify a separate COJ market in this case, *e.g.,* industry recognition and a regular competitive relationship between products, justified the finding of an all-inclusive industry market in that case. The court did find distinct product classes within that broad market divided into high and low-price categories of athletic goods, but it did so on the basis of evidence showing that there were high and low-price groupings of customers. In this case there is little evidence that price stands out as the *determinative* factor in the selection of either a certain type of orange juice or type of orange juice container.

In short, applying principles of cross-elasticity of demand recognized by the Commission and the Justice Department as a central consideration in product market definition, we find no internal contradiction between the inclusion of glass-packed COJ in [14] the rele-

[14] This is substantially greater than the 20 to 50% difference between glass and carton COJ alleged here. TAB 34. Complaint counsel have argued that this allegation overstates the actual price difference. CR 26–27.

[15] On the average, carton-packed COJ undoubtedly does have a price advantage over glass-packed COJ and appears to be the trend in the industry, largely for that reason. Nevertheless, sellers of COJ in glass, most notably Tropicana and to a lesser extent Kraft, have competed effectively in this package form on the basis of a premium image, superior quality and shelf life, promotional advantages, and brand identification. Tropicana and other sellers of COJ in glass are thus far better off than the fabricators of insulated copper conductor in *Alcoa-Rome* who were competitively crippled by their price disadvantage. 377 U.S. at 276.

vant product market and the exclusion of FCOJ from that market.[16]

Of course, any attempt to define a single relevant market will involve some measure of arbitrary line-drawing. Market definition is only the start of the analysis, and the definition of a "relevant market" should not preclude consideration of any competitive pressures provided by products outside that definition. See the FTC Merger Statement at 5–6, and the DOJ Merger Guidelines at ¶III(c)(1)(b). Nor, if a broad market is selected, are we precluded from recognizing that the products within that broad market may be something less than perfect substitutes. In this case, a fair reading of the evidence is that competing producers of FCOJ may well have some impact on the price and production of COJ, though clearly not as much impact as do the actual producers of COJ.

As long as these effects are properly recognized, the question of market definition takes on less importance. We recognize that there are arguments for taking these effects into account by defining a broad product market and using the resulting smaller market share figures (as Commissioner Douglas urges in his concurring opinion). We are more inclined to take them into account by using the narrower, COJ market figures, but considering the presence of FCOJ producers in evaluating the significance of those [15] shares. However, given the result we reach it is unnecessary to resolve this issue here. As we discuss below, even using the narrower market definition we do not find this acquisition likely to be anticompetitive.

B. *The Relevant Level of Distribution*

As previously noted, the complaint alleges that a relevant line of commerce in this matter is the processing, distribution and sale of COJ. The ALJ found that the relevant market is the processing, distribution and sale of COJ to retail food stores.[17] He essentially defined this market to include processed, reconstituted, and relabeled COJ distributed directly or indirectly to the retail level by the owner of the COJ brand label.[18] I.D.F. 210–218. This definition groups together processors, reconstituters, and private relabelers as horizontal competitors to the extent they all sell their own brands of COJ to the retail level.[19] It derives from the nature of the evidence in the record, which

[16] The ALJ found that respondents' contention below that fresh and reconstituted COJ were separate submarkets was also unconvincing. I.D.F. 63–70. We agree with these findings, and note that respondents have given short shrift to this issue on appeal.

[17] This finding is premised, of course, on his prior finding that sales of COJ to the retail level are a segregable market.

[18] As noted, Tropicana, like other processors, sells most of its own brand of processed COJ directly to retailers, and the rest to retail through distributors. Beatrice sells its own brand of reconstituted and relabeled COJ to retail, in addition to distributing pre-processed COJ under the processor's label. I.D.F. 159.

[19] Processors, as previously discussed, make COJ and/or bulk concentrate straight from the oranges. Reconstituters, such as dairies, use their milk production plants to make their own COJ from bulk concentrate bought from a processor. Private relabelers, often dairies as well, buy ready-to-serve COJ from a processor and resell it to retail

centers on brand sales to retail, I.D. 57, and from [16] evidence that competition for shelf space and sales to consumers are primarily based on brand promotion. If this market definition is accepted, it would necessarily include all direct and indirect COJ sales to retail by Tropicana under the Tropicana label, and all COJ sales to retail by Beatrice under Beatrice-owned labels,[20] whether or not the Beatrice product was bulk concentrate reconstituted into COJ by Beatrice or pre-processed COJ bought from a processor and resold by Beatrice under its label.[21] This [17] definition seems basically to comport with complaint counsel's view of the relevant line of commerce.

Respondent Tropicana contends that this line of commerce is overly broad, arguing that reconstituters and relabelers like Beatrice do not belong in a market with processors because they are functionally different from processors and operate at an entirely different level, namely, distribution. TAB 12–17. It asserts they are not true competitors because reconstituters and relabelers lack the same control over supply and play no part, as do processors, in the conversion of oranges into COJ and bulk concentrate. TAB 16. It further argues that no competitively meaningful distinction can be made among dairy sales of reconstituted COJ, relabeled COJ, and COJ distributed by dairies under a processor's label. For these reasons, respondent Tropicana concludes that dairies are not in competition with processors because they act essentially as distributors, even when they reconstitute or relabel the product. TAB 16.

We find this argument unconvincing. In contending that processors and dairies which reconstitute or relabel their own brand of COJ are not horizontal competitors, it is too little to say that processors enjoy an advantage over dairies in their access to orange supply. This would prove only the existence of unequal degrees of access or vertical integration, not the non-existence of competition between such entities at a mid-level between processing [18] and pure distribution. Conse-

[20] The main Beatrice label was Meadow Gold; others were Sanitary Dairy and Dixie Sunshine. I.D.F. 158.

[21] The Initial Decision is somewhat ambiguous on this definition, however. While it contains findings on the sales volume and market share of all COJ sold by Beatrice to retail under a Beatrice label, whether reconstituted or relabeled, I.D.F. 212–213, and gives great weight in its potential competition analysis to Beatrice's Dixie Sunshine Project, which originated as a private relabeling program, I.D.F. 236–52, I.D. 65, *see* discussion at pp. 59–60, infra, the Beatrice market share it refers to in discussing the competitive effects of the merger represents only the amount of COJ reconstituted by Beatrice. The difference between these two market shares, however, is only 0.2% (0.57% versus 0.35%). We adopt the 0.57% figure.

Neither side nor the ALJ has said that the mere distribution of COJ is in and of itself a relevant line of commerce. This level would include COJ distributed to retail without regard to brand ownership; for example, Beatrice's share of the distribution market would include COJ which it sold to retail under the Tropicana and other processors' labels, while Tropicana's share would include that portion of its COJ products which it distributed itself directly to retail, *e.g.*, the vast percentage of its total sales. Hundreds of dairies compete with each other as distributors of COJ processed and labeled by others, and Beatrice and Tropicana occasionally competed directly as wholesale distributors of Tropicana-labeled juice. Nevertheless, while the distribution level theoretically could be a relevant line of commerce, neither the complaint nor the parties focused on it, and, not surprisingly, the record contains no evidence of concentration ratios, market shares, or possible competitive effects from the acquisition at this level. Further, given the ease of entry and multitude of firms operating as distributors in this industry, it is extremely doubtful that the merger could have had any significant anticompetitive effects at this level.

quently, this assertion is legally significant only insofar as it raises the possibility that access to supply may be a barrier to entry into the processing or reconstituting of COJ, and does not lead to the conclusion that processors do not compete with reconstituters. Furthermore, respondent Tropicana's argument fails to recognize the fact that processors regard many dairies which reconstitute COJ, such as Johanna Farms, Home Juice, Ohio Pure Foods, Sealed Sweet, and Vita Pak, to be competitors in the production and sale of COJ. I.D.F. 87–92.[22]

In addition, respondents' argument overlooks evidence of commercial realities in the COJ industry which lend support to a finding that processors, reconstituters, and relabelers of COJ sold to retail may be appropriately grouped in a single product market. It is true, as they contend, that dairies which distribute COJ supplied to them by processors are customers of those processors and in that sense are not in a horizontal relationship [19] with them. RPF 102–03.[23] Both complaint counsel and the ALJ recognize this reality. CR 44; I.D.F. 159. Indeed, until recently at least, the role of the dairies in the COJ industry traditionally had been as distributors of processors' brands of COJ as an adjunct to their regular dairy lines. The existence of a vertical relationship between a processor and dairy does not mean, however, that they do not become competitors when the dairy assumes COJ reconstituting or relabeling functions. In this respect, we believe the central question is whether the transformation of dairy distributors into reconstituters or relabelers of COJ sold by them under their own brand names has independent economic significance and places them in a horizontal competitive relationship with processors in the sale of COJ to the retail market.

Despite important functional differences between processors and dairies in the COJ market, which may serve to operate as significant barriers to large-scale COJ production by dairies, there is substantial evidence in the record to indicate that dairies, such as Beatrice, can operate as independent competitive forces in the sale of their own brand of COJ to the retail market. In the first place, they have the capacity, as reconstituters, to generate and add to the production of COJ that [20] is made available to the retail market.[24] They obtain

[22] Moreover, it appears that Kraft, regarded by Tropicana and others as one of the three leading processors of COJ, actually operates as a relabeler in a small percentage of its sales to the retail market. Kraft has a co-packing agreement with Sunkist for about 10% of its product, under which Sunkist *processes* and packages the juice for Kraft, and Kraft then distributes it under its own label. I.D.F. 112. Respondents never explain why these relabeled product sales by Kraft are considered to be in the relevant line of commerce, but not all other brands of reconstituted or relabeled COJ products sold to the retail market.

[23] It should be noted that there are no vertical allegations in the complaint arising from this seller-buyer relationship.

[24] Indeed, the ALJ found that increased reconstituting by dairies has been an important contributor to the rapid growth of COJ production in recent years. I.D.F. 253. One dairy, Hood, which reconstitutes COJ from bulk concentrate, is the fourth largest producer of COJ in the country. In addition, several other dairies which make reconstituted COJ are recognized as significant competitors to processors and others in the sale of COJ to retail customers. While adequate supply of concentrate may not always be assured, it is significant to note that there

(footnote cont'd)

bulk concentrate, which they reconstitute into COJ, from suppliers who are not necessarily also processors of COJ; in fact, the leading processors of COJ, Tropicana and Minute Maid, sell no bulk concentrate at all to dairies. Processors such as Tropicana and Minute Maid thus are in no position to restrict the output of bulk concentrate needed by dairy reconstituters. In view of these factors, and despite other possible limitations on the extent of their ability to reconstitute COJ, such as inadequacies in plant capacity, supply, and marketing resources, dairies can be the practical equivalent of processors in terms of the production of COJ for sale to the retail market.

Second, brands of COJ reconstituted or relabeled by dairies tend to represent a lower-price alternative to the more established national brands sold under the Tropicana, Minute Maid, and Kraft [21] labels. I.D. 55; I.D.F. 217, 257, 298.[25] Indeed, as even respondents recognize, dairies commonly cease distributing COJ under the processor's more expensive label, and make the relatively easy switch to reconstituting or relabeling their own product, when it is necessary for them to offer more competitive prices or promotional allowances to retailers in order to get shelf space. TAB 12. Price thus works both as a variable which helps to determine whether a relationship between a processor and a dairy is going to be vertical or horizontal, and as a means of creating competition between processor and dairy-owned brands for shelf space. Competition for shelf space, based on significant price variations among brands owned by processors and dairies, can result in a greater range of prices, and price-savings, for consumers. We believe this fact alone confers a degree of economic significance in the COJ market to the reconstituting and relabeling activities of dairies.

Third, dairies which produce and sell their own brands market and advertise them to retail customers and consumers in the same manner—if not to the same degree—that processors promote the [22] brands they sell.[26] They are typically wholly responsible for the promotion of their brands, deriving little if any marketing assistance from their suppliers of bulk concentrate or processed COJ. CX 593, p.

are numerous suppliers of bulk concentrate (40 in Florida), I.D.F. 141, such that dairies are not dependent on the major COJ processors for bulk concentrate supplies. Respondents argue that they are in horizontal competition with suppliers of bulk concentrate to these dairies, but not with the dairies themselves when they sell COJ to the retail market. While such horizontal competition between processors and bulk concentrate suppliers for dairy customer orange juice accounts obviously exists, it does not follow that there cannot be horizontal competition between processors and dairies at a lower level in the distribution chain, namely, the sale of COJ to retail establishments.

[25] Respondent Tropicana argues that dairy distribution of juice sold under another processor's label cannot be distinguished from sales of COJ reconstituted or relabeled by dairies under their own label. TAB 15–16. To the contrary, the lower price at which dairies can sell reconstituted or relabeled juice, and their substantially greater involvement in the promotion of their own brand products, represent significant competitive distinctions from juice which they merely distribute for another firm, under that firm's label.

[26] Again, this is in marked contrast to the more passive promotional role dairies play when they merely distribute juice bought from and sold under another company's label. In the latter case, they typically have little responsibility for or direct investment in the marketing and advertising of the brands distributed, those being primarily the functions of the processor which owns the brand.

117–18, 340–41. Through in-trade promotions and consumer advertising designed to gain consumer recognition and build consumer demand for their brands, they compete with processors for shelf space. CX 663A. Insofar as dairies produce, package, price, market, and advertise their own brands of COJ, and thereby expand the universe of products available to grocery outlets and consumers, they provide competition and operate on the same plane as processors in the sale of COJ to retail. The fact that they are less vertically integrated than processors—one step removed from the point of supply and original manufacture of COJ and bulk concentrate—is of little consequence in defining the relevant line of commerce under the terms of the complaint, and does not negate the commercial reality of their horizontal relationship to processors and others in the sale of COJ. Attempts to draw bright lines between firms engaged in the processing of COJ on the one hand, and the reconstituting and relabeling of COJ on the other, cannot obscure the fact that those lines are blurred in reality, and that the battle for retail shelf space among [23] processors and dairies which own brands is a relevant area of competition in the COJ industry.

In view of the above, it is not surprising that the evidence overwhelmingly indicates that processors, including Tropicana, see dairies as competitors when they engage in the reconstituting of COJ for sale to retail under their own brand names. I.D.F. 87–92, 219; CPF 181–88, 369; CX 593, p. 348; CX 527Z–10; CX 620, p. 34–35, 90, 96; CX 661A; CX 661D; CX 662D; CX 892B; CX 953; Tr. 764–65, 786, 1058, 1065, 2906, 2922–23, 2983–84.[27] Dairies which fall into this group are the large regional reconstitutors, such as Hood and Home Juice, and assorted smaller reconstituters, such as Beatrice.[28] Given the prevailing industry recognition that processors and reconstituters do compete for sales to retail outlets, respondents' argument that they do *not* compete because they tend to use different delivery methods is overstated and not [24] persuasive.[29] Where processors and dairies are selling their products in the same geographic region, they are competing, and see themselves as competing, for the retail shelf space regardless of the method of delivery they use. CPF 183.[30]

[27] *But see,* Tr. 4892 (Beatrice witness testified that Beatrice competes not with Tropicana, but with dairies that buy and distribute Tropicana).

[28] It is less certain that processors view dairies as competitors in the sale of COJ to retail when they relabel COJ bought from a processor; Tropicana does appear to consider such relabeled juice to be competition at the retail level, however. *See, e.g.,* CX 593, p. 348.

[29] The major processors typically distribute to independent and chain warehouse buyers, or individual chain stores, while dairies tend to deliver COJ straight to the grocery door. I.D.F. 77–84. Processors and dairies do utilize both types of delivery, however. I.D.F. 77, 79–82, 84–85, 222–223, 258, and the recent trend of dairies has been to make warehouse rather than direct, "store-door" delivery. I.D.F. 78–81, 272–273, 292. Greater distributional and cost efficiencies can be achieved through delivery to central warehouse locations. I.D.F. 270.

[30] Indeed, brands of dairies delivered store-door have displaced warehouse-delivered brands on the grocery shelf, or at least have adversely affected their sales in many instances. I.D.F. 88–93.

Respondent Beatrice asserts that the Commission's decision in *Beatrice Foods Co.* ("Sexton"), 81 F.T.C. 481 (1972)

(footnote cont'd)

Lastly, there is the question of whether retail chains which sell their own brands of COJ are in the relevant product market. In addition to their sale of processor and dairy-owned brands to consumers, many retail chains, such as A&P, Safeway, and Kroger, buy juice from processors and sell it under their own brand label, which they market, advertise, and otherwise promote without substantial assistance from the processor. I.D.F. 122–24, 139, 146, 149; CX 593, p. 340–41. Their private label brands do compete **[25]** with brands owned by processors and dairies for sales to consumers. With very few exceptions, however, retailers are not vertically integrated backward into the processing and reconstituting of COJ, and the ALJ found that their private label sales would not have a substantial effect on competition at these levels. I.D. 62. Furthermore, retailers with their own private labels are dependent for their juice supplies on those processors with whom they compete for consumer sales; they are thus subject to any potential output restrictions imposed by their processor-suppliers, which serves to limit the competitive significance of their horizontal relationship with processors at the retail level. For these reasons, we conclude that the relevant market does not include retailers. At the same time, it does not follow that retail COJ brand share cannot be used as a measure of concentration in the relevant product market, to the extent it reflects reasonably accurately concentration and market shares in that market, *see* discussion at pp. 40–41 *infra*.[31]

We affirm the ALJ's conclusion that the relevant line of commerce in this matter is the processing, reconstituting, and relabeling of COJ for sale to the retail market. **[26]**

III. THE RELEVANT GEOGRAPHIC MARKET

The complaint alleged that the relevant section of the country for assessing the competitive effects of this merger is the United States as a whole and submarkets of it. Complaint counsel argue that the most appropriate geographic market is the nation, and offered no proof below of any relevant regional markets. Respondents contend the industry is divided into regional markets, citing the federal district court's finding in the preliminary injunction action of a nine-state area ranging from Colorado to Ohio as the relevant geographic market for assessing the merger. BAB 28. Respondents did not offer

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is persuasive precedent for their position that the existence of different methods of delivery establishes distinct lines of commerce between COJ sold by processors and dairies. BAB 31–32; BRB 38. We disagree. The Initial Decision and Commission opinion in that matter did note significant differences in two methods of distribution in the dry grocery institutional wholesaling industry. 81 F.T.C. at 496–98, 521. However, contrary to what respondents assert, or at least imply, BAB 32, neither the ALJ nor the Commission held that these different methods of delivery constituted separate and distinct lines of commerce within the institutional market. 81 F.T.C. at 504, 521 n.3.

[31] *See, e.g., Proctor & Gamble,* 63 F.T.C. 1465 (1963), *rev'd,* 358 F.2d 74 (6th Cir. 1966), *rev'd* 386 U.S. 568 (1967); *General Foods,* 69 F.T.C. 380 (1966), *aff'd,* 386 F.2d 936 (3rd Cir. 1967).

proof of that or any other regional market definition in this proceeding, however, beyond minimal testimonial evidence. TAB 36–38. The ALJ agreed with complaint counsel, finding the nation to be the relevant geographic market. He based his conclusion on a finding that the three largest firms in the industry, Tropicana included, sell nationally, and on the need to analyze the merger on a national scale in view of the complaint's allegations that the competitive effects of the merger were industrywide. I.D. 57–58.

Tropicana, Minute Maid, and Kraft, the top three firms, sell their product to grocery stores throughout all or most of the country. I.D.F. 101. Tropicana distributes to the entire continental U.S. from its plant in Florida, but most of its sales (82%) are in the eastern half of the country. It offers a single cost-based F.O.B. Bradenton, Florida price, plus freight, throughout the U.S. I.D.F. 105; TAB 39. Accordingly, the distributional costs and price of Tropicana rise in direct **[27]** proportion to shipping distances, the primary reason most of its business is in the east, close to its single plant in Bradenton, Florida. Tropicana's single price, plus freight, is the price available to all of its retail customers, wherever located, except when Tropicana offers promotional discounts in local markets around the country. CPF 206–07. Tropicana has sales representatives in every state but Alaska and Hawaii, CPF 206, and advertises in the national as well as the local media. I.D.F. 212. Minute Maid produces COJ by first processing bulk concentrate at its facility in Florida and then shipping it to its seven reconstituting plants located around the country. I.D. 54. Minute Maid sells COJ in almost all parts of the country. Kraft processes and ships most of its COJ from its plant in Florida, concentrating its business in the eastern and central portions of the country. It reaches the west coast through a co-packing arrangement with Sunkist in California, whereby Sunkist processes the juice and provides it to Kraft for distribution under Kraft labels. I.D. 54.

These three national sellers of COJ generally base their prices to retail customers on processing and shipping costs, CX 593, p. 423–24, but monitor and respond to prices and other competitive conditions prevailing in various locales and regions. *See, e.g.,* TAB 19–20. They examine each other's prices most closely through sales data purchased from the A.C. Nielsen survey service. CX 560; Tr. 760, 1507. In addition, they use sales data and results from different regions in seeking sales in other areas of the country. CR 15. **[28]**

Almost all of the other hundreds of COJ processors and reconstituters sell to retail customers in various parts of the country ranging in size from large multi-state areas to sections of a single state.[32] By

[32] The president of Beatrice stated that he thought one and perhaps a few Florida COJ processors besides Tropicana shipped their product to California. CX 1650, p. 74.

1978, Beatrice had 12 milk plants reconstituting COJ in 11 states and distributing it to retail outlets in over 20 states, although its total market share was quite small. I.D.F. 231, 264. Its COJ operations are based mainly in the central and west central regions of the country, although they reach the west coast and the south as well.

Several dairies are large regional reconstituters of COJ which compete with local firms and usually one or more of the three national companies in their areas of operation. Hood, the fourth largest producer in the nation, operates primarily in the northeast and some in the southeast. I.D.F. 113. Ohio Pure Foods, Johanna Farms, and Home Juice are big in the midwest and plains states. Foremost-McKesson and Knudson are among those who are prominent in the west. With the exception of these and other large regional reconstituters, dairies which sell COJ tend to operate in only one or a few states. The scope of a dairy's COJ sales can be limited by little available capacity for reconstituting and packaging COJ, and by the advertising and marketing costs of competing for shelf space against well-known national and regional brand names. Perhaps more importantly, the distance which dairies can ship COJ from their individual plants is inhibited by transportation costs, **[29]** method of delivery, and product perishability. Such distances generally range from 150 to 500 miles. I.D.F. 270.

Like the leading firms, local and regional dairies in the industry get nearly all of their bulk concentrate supply from oranges grown and processed in Florida. The availability and price of COJ sold to the retail level throughout the nation thus is directly affected by conditions of supply in Florida. The local and regional dairies, in monitoring the prices of competitors in their areas, pay the most attention to the prices of the national brands with which they compete. Tr. 964–65, 1029, 1059, 1314, 1575; CPF 223, 242. In order to vie effectively for shelf space against the greater brand acceptance, loyalty, and advertising capacity of the national sellers, smaller competitors everywhere are forced to price their products substantially below those of the national brands. CX 560 (local and regional brands usually found to cost less than national brands in regional price surveys); I.D.F. 139, 217, 257; I.D. 55, 63. In this way, the three national sellers of COJ—Tropicana, Kraft, and Minute Maid—influence the terms of competition not only among themselves but also with those sellers with whom they compete only in local and regional areas across the country.

As this description indicates, the COJ processing and reconstituting industry shows many of the characteristics of a highly regionalized geographic market. The vast majority of firms in the industry operate locally and regionally, constrained from expansion by a variety of factors, most notably marketing costs and **[30]** restricted shipping distances from individual plants.[33] They are not significant competitive factors in the sale of COJ to retail beyond their localized regions and, practically speaking, cannot readily expand into new areas in response to increases in price in those areas.[34] Thus, there could well be regional markets which might also be considered in judging the competitive effects of this merger—though, of course, the ability of national firms to expand into particular regional markets would have to be recognized in assessing any possible regional effects.

Unfortunately, we are unable to identify any relevant regional markets on the basis of this record. As previously indicated, complaint counsel made no attempt to prove a relevant regional market as an alternative to a national market. Respondent Beatrice, in asserting that the market is regional, did little more than rely on the Nine-State area found by the district court and contends that assessment of the competitive effects of this horizontal merger has to be limited to this alleged area of **[31]** pre-merger competitive overlap between Beatrice and Tropicana. We reject this view as contrary to existing authority, which recognizes that the competitive effects of a merger between competitors can sometimes be felt beyond the immediate areas where they directly competed with each other. *See, e.g., Jim Walter Corp.,* 625 F.2d 676 (5th Cir 1980); *Brown Shoe,* 370 U.S. at 336–37; *RSR Corp. v. FTC,* 602 F.2d 1317 (9th Cir. 1979); *Spaulding,* 301 F.2d at 606; *U.S. v. Bethelem Steel,* 168 F.Supp. 576, 600 (S.D.N.Y. 1958).[35] Further, there is little evidentiary proof in the record that this Nine-State region comprises a reasonably well-defined, distinct group of COJ processors and reconstituters. The fact that it may be a general area of overlap of the two merging firms proves little if anything in defining the relevant geographic market.

The other regional markets proposed are internally inconsistent with respondent Beatrice's own erroneous "overlap" test of definition, in that they are not stated to be areas of competitive overlap, and otherwise suffer from a similar lack of proof. Respondent Tropicana suggests there are 7 to 12 regional markets, none of which corre-

[33] By way of illustration, it is useful to mention the unsuccessful attempt by Hood, the largest regional reconstituter in the country, to expand beyond its New England base to the midwest. The record indicates the expansion effort failed due to advertising, marketing, and shipping barriers.

It also bears mentioning that while Minute Maid sells throughout most of the U.S., its reconstituting centers can only distribute COJ regionally in light of the limited distances COJ can be transported. Only Tropicana, and to a lesser extent Kraft, have managed to overcome the barriers to shipping COJ long distances from individual plants on close to a national scale. And, as the ALJ found, transportation costs have limited Tropicana's growth in the far west. I.D. 53.

[34] *See* discussion of geographic market considerations in the DOJ Merger Guidelines.

[35] Respondents rely heavily on *U.S. v. Philadelphia National Bank,* 374 U.S. 321, 357 (1963), in which the Supreme Court said that the relevant inquiry should be where "within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." That decision does not support respondent Beatrice's proposition. In the first place, the geographic market found in that case did not reflect perfect competitive overlap between the merging banks and other banks included in the market. Secondly, a horizontal merger can have a "direct and immediate" effect *outside* the precise area of competition between the merging firms.

sponds to Beatrice's nine-state area. [32] The 12-market estimate comes from Kraft's 12 sales areas, as described at the trial below by an official for the company. These areas were designated by Kraft only for its own sales management purposes, and there is no other evidence in the record to indicate they are separate markets. CAB 33. The 7-market estimate, also proposed by respondent Tropicana, corresponds only to Minute Maid's areas of distribution from its regional reconstituting centers. *Id.* In sum, there is insufficient proof in the record to establish these areas as relevant geographic markets under the accepted methods of definition. We conclude that the record fails to delineate any relevant regional markets which, on the basis of regional shipping patterns and other factors, could be reasonably assumed to exist in the COJ industry.

We are thus left to decide whether the record will support the ALJ's finding of a national market in the absence of proof of relevant regional sections of the country within which to test the merger. In determining whether such a broader market exists, it is necessary to consider the ability of firms in the industry to overcome shipping limitations in attempting to reach more distant markets, the extent to which prices found in various regions are interdependent with one another, and other pertinent factors.

Upon review of the record, we believe there is enough evidence to support the finding of a national market, although it is quite possible that regional markets could also exist which would reflect, perhaps more precisely, the commercial realities of the COJ industry and the competitive effects of the merger. In the first place, the area of actual and potential competitive [33] confrontation was itself not insubstantial; it appears that before the merger Beatrice and Tropicana actually or potentially overlapped in nearly 55 cities in 21 states in several diverse regions of the country comprising a substantial majority of the national population.[36] Evidence that merging firms were serving most of the national buying population in the relevant product market prior to the merger has been taken into account in defining the geographic market as the entire country.[37] We believe the nationwide sales of COJ by Tropicana, coupled with Beatrice's geographically broad reconstituting and distributional system, constitutes one indicia of a national geographic market in this case.[38]

[36] CAB 29. Prior to the merger, both Beatrice and Tropicana sold their COJ products to the retail market in the far west, rocky mountain, southwest, midwest, and southern regions of the country. I.D.F. 110, 115. According to 1970 census figures, the population within the area generally or potentially served by Beatrice through its vast milk distribution network, and with which Tropicana's natiowide sales substantially overlapped, represented nearly 80% of the entire U.S. population. CX 2306 A-Z-2.

[37] *RSR Corp. v. FTC*, 602 F.2d 1317, 88 F.T.C. 873, 883 (1976).

[38] Beatrice's *de minimis* market share, smaller than that of the large regional dairy reconstituters such as Hood, belies its geographically wide area of distribution, which spans much of the country and is much larger than that of those firms.

Another one is the fact that the other leading firms in the COJ industry, Kraft and Minute Maid, along with Tropicana, also sell COJ to the retail market throughout all of most of the nation. I.D.F. 101. Like Tropicana, Kraft concentrates its COJ sales from its Florida plant in the southeast, but has been able to ship product from that plant to the midwest and west central U.S. [34] beyond the usual upper limit of 500 miles. As already mentioned, it also reaches the west coast through a co-packing arrangement with Sunkist. Minute Maid sells nationally through its 7 reconstituting plants, which receive their supply of bulk concentrate from Minute Maid's processing plant in Florida, which is not subject to shipping restrictions. There are thus three firms in the industry, controlling a majority of total industry sales, which have developed means to distribute COJ great distances to all or most of the nation despite the associated high transportation costs.[39] They represent alternate sources of COJ supply to the retail market throughout the country and, generally speaking, have the capacity to increase or expand sales into most areas of the country in response to price rises or other competitive openings. There is a fourth company, Beatrice, which through its geographically diverse distribution network also represented an actual or potential alternate source of supply to much of the nation prior to the merger. Transportation barriers to distant shipping, a reality for most of the firms in the industry, have not been an insurmountable obstacle to these particular firms. While we reiterate that the regional shipping restrictions which apply to the great majority of firms in the industry strongly suggest the existence of regional markets as well, the wide geographic, or even nationwide, scope of sales by all the leading firms and Beatrice constitutes evidence of a national market. [35]

Pricing patterns in this industry also lend some support to a national definition of the geographic market. A common pricing factor taken into account by retail customers in different sections of the country is the uniform F.O.B. price, plus freight, which Tropicana charges wherever it sells its COJ product. I.D.F. 105.[40] The ALJ found that other COJ processors and reconstitutors around the country typically regard this price as a ceiling, and accordingly set their own prices beneath it.[41] Such smaller firms, including Beatrice, tend to charge less than the price of Tropicana and the other national brands because that is the only way they can compete against the strong

[39] The ALJ also found that these firms centrally plan, price and advertise sales of COJ to retail on a national basis. I.D.F. 104, 106, 107, 109.

[40] Tropicana, as well as Minute Maid and Kraft, discounts price in various sections of the country as local competitive circumstances dictate.

[41] The ability of a firm to impose a price ceiling in a distant area has been cited as evidence of regional interdependence indicative of a broad geographic market. *See Bethlehem Steel Corp.*, 168 F.Supp. at 600.

consumer loyalty attached to these brands. Conversely, the national firms centrally monitor local prices through regional sales reports and Nielsen data, and are in a position to move shipments around in response to localized price changes and promotions. We believe the external influence that Tropicana's uniform pricing policies (and those of the other two leading firms) have on local pricing decisions, along with their practice of adjusting their centrally set prices where necessary to respond to local competitive conditions, demonstrates some regional interdependence mildly supportive of a determination of a national market in this industry. **[36]**

We find the record capable of sustaining the ALJ's finding that the relevant section of the country in this matter is the nation as a whole. The three largest firms in the industry, including one of the merging partners, compete on a nationwide level.[42] While freight costs limit the distance to which individual plants can readily ship COJ, the constraint is only relative, and, as we have seen, certain firms do send their product into regions far distant from their plants, where they are able to respond to local competitive conditions. In particular, both of the merging firms here serve, or have the capacity to serve, all or almost all sections of the country and most of its buying population, and overlapped before the merger in diverse regions of the country.

Our finding that the competitive effects of the merger can be weighed in a national market is not inconsistent with our belief that regional markets, albeit undefined, probably exist as well. It indicates only that the relevant line of commerce in this case is both regional and national in character, and illustrates once again the often unavoidable imprecision of geographic market drawing in antitrust analysis. Yet the imprecision is not so great here as to prevent a determination that the U.S. as a whole is an appropriate geographic market for an examination of the competitive effects of the merger, to which we will now turn. **[37]**

IV. COMPETITIVE EFFECTS OF THE MERGER

Before we discuss the competitive impact of the merger, we need to resolve a threshold dispute between the parties over the appropriate data base which should be used to estimate market shares and concentration levels in the COJ industry. Over respondents' objection the ALJ relied on Nielsen retail brand surveys in making these determinations, finding that they provided the most accurate evidence of the

[42] In the matter of *The Procter & Gamble Co.*, 63 F.T.C. at 1561, where a national market was stipulated but nonetheless questioned by the Commission because of the prevalence of regional shipping patterns, only one firm in the industry was a national producer. Here there are three, and a fourth that had a preexisting distributional capacity for nearly nationwide sales.

market available. I.D. 54.[43] Below we examine the merits of respondents' attack on the reliability of the Nielsen evidence.

The essence of respondents' objection is that the Nielsen surveys cannot be relied upon because they seriously understate the actual size of the relevant market by concentrating inordinately on the major chains in big city markets while missing grocery stores outside urban areas. Respondents argue that this alleged defect has the effect of significantly overstating industry concentration and the market shares of Tropicana and the other leading firms, which make most of their sales in the big cities. Respondents attempt to establish this allegation by questioning the validity of the Nielsen methodology itself, by asserting that it is not relied upon by the industry to measure market shares, and by citing the industry sales data of Dr. Jay Gould, an economist retained by respondents, which allegedly show that the market is much larger than the Nielsen estimates. **[38]**

The Nielsen Retail Index, established in 1934, CX 517C, has become a household name in American business. It is widely used by a variety of industries to monitor business performance by measuring sales and market shares for its subscribers and their competitors. CX 517 F, J. The accuracy of Nielsen's findings depends, of course, on the reliability of its sample as an indicator of the structure and size of the market. Nielsen's national store sample is derived from regularly updated U.S. Census data and its own detailed accounts of large and small stores by geographic area. CX 517 R. Selection of stores for the sample is determined mathematically to minimize bias. CX 517 R-S. Of particular relevance to the present proceeding, Nielsen indicates that it designs its grocery store sample to include the extremely important universe characteristics of geographic location of stores and their sales volume. CX 517 S. Its 1600-store grocery sample "is designed to achieve maximum geographic dispersion, containing stores located in some 600 counties in the 48 contiguous states."[44] *Id.* At the same time, it attempts to take a realistic picture of actual overall sales activity by including more stores with large sales volumes than with small ones.[45] **[39]**

Respondents contend that this methodology produces an unrepresentative picture of the market because it misses hundreds of brands sold in smaller stores not reflected in the sample, and because Meadow Gold, which is sold by Beatrice in over twenty states, showed up in only one store in a special Nielsen survey commissioned for

[43] The ALJ made this finding without discussion. Some analysis in support of the finding would have been helpful to the Commission in its review of the issue.

[44] Nielsen maintains that such dispersion makes its sample of value to regional as well as national sellers. CX 517 S.

[45] Such disproportionality "creates the equivalent, from the standpoint of accuracy, of a much larger sample," CX 517 T, serving to assign the correct proportional weight to the relative sales of large and small stores in the market. CR 83–84.

respondents. BAB 23; RX 255.[46] Yet the logic of the Nielsen methodology seems self-evident and likely to enhance the projectability of its findings to the entire retail market. Insofar as the national and major regional brands dominate the market and sell in the high-volume stores, while the smaller brands like Beatrice's are found less in the big stores and more in the smaller ones, Nielsen is not "missing" smaller brands, it is simply reflecting their proportionately smaller presence in the market.

Testimony from the representatives of all the leading firms and other industry officials clearly establishes that Nielsen is regarded as the most reliable and most relied upon measure of the [40] market. CPF 247–255.[47] Respondents contend, however, that it measures only market trends, not brand shares. This assertion is not supported by the record. The witnesses for every major firm, including Tropicana, testified that they rely on Nielsen—often exclusively—for market share as well as market trend information. CX 593, p. 24, 94–95 388–89; CX 1650, pp. 135, 139–40; Tr. 780, 782, 1318, 1496–97, 2903. This testimony corroborates Nielsen's own statement and reports, *see, e.g.,* CX 517 F,G, which indicate that it provides market share as well as various other kinds of data to its users.[48]

Despite the strong evidence in support of Nielsen, respondents urge us to find, on the basis of Dr. Gould's estimates, that the Nielsen data materially understate the size of the market to [41] Tropicana's legal detriment.[49] For fiscal 1978, Nielsen found that there were 204.1 million gallons of COJ sold for $545.2 million at retail.[50] This is substantially less than Dr. Gould's estimate, which for calendar year 1977 was $780 million. RX 2401.[51] Dr. Gould's $780 million estimate includes sales of other types of citrus juice, not just COJ. CR 78; RX 2401, pp. 205–210; Oral Arg. Tr. at 41. Further, his estimates for total

[46] The above-mentioned Nielsen survey indeed proves that Meadow Gold was observed while it does not, on its face, establish respondent Beatrice's proposition that it was seen in only one store in the national survey. RX 255; *see also* CR 59.

[47] The witness for the Florida Department of Citrus, which uses Nielsen, said it "represents the entire retail food market . . . certainly the best for retailing." Tr. 1827–28. The sales manager for Tropicana testified that Nielsen is accurate to a 95% confidence level and is representative of retail stores throughout the U.S. CX 593, p. 194, 255–57. He further testified that it covers even small "convenience" stores, and that he could not name one type of retail food outlet that it did not include in its survey. Id. at 181 (*in camera*). A spokesman for Minute Maid also vowed that Nielsen was reliable and produced results remarkably close to Minute Maid's own sales data. Tr. 783. Finally, Dr. Gould, respondents' expert, testified that he had a high regard for Nielsen methodology. CX 2313, p. 56.

Respondent Beatrice implies that the reliability of Nielsen is unproven because no one from Nielsen testified in support of it. We reject such an inference, concluding that Nielsen's reliability has been established by its wide use and acceptance in the industry.

[48] We have relied on Nielsen grocery store samples in prior proceedings to obtain market share and concentration statistics. *See, e.g., FTC v. Proctor & Gamble,* 63 F.T.C. at 1536.

[49] Acceptance of respondents' estimates of Tropicana's market share over complaint counsel's would leave Tropicana with a substantially smaller market share and considerably lessen the level of concentration in the market. BAB 25.

[50] I.D.F. 121; CX 5602–24.

[51] RX 2401 contains Dr. Gould's testimony in the federal district court proceeding concerning this acquisition. He was deposed in the administrative proceeding below, *see* CX 2313, but did not testify at the trial.

production of COJ, which fall in the $600–650 million range, include sales to institutional (*e.g.,* restaurants, hospitals, schools) as well as to retail customers. RX 2401, pp. 206–210. If institutional sales are subtracted,[52] Dr. Gould's estimates would not necessarily be inconsistent with the retail sales of $545 million estimated by Nielsen. Further, the Nielsen estimates are corroborated by the calculations of other citrus industry experts. *See, e.g.,* Tilley, CR 79–81 *in camera.* In short, Dr. Gould's testimony, when broken down, does not refute the reliability of the Nielsen data. **[42]**

We conclude the record evidence strongly supports the use of the Nielsen surveys as a reliable measure of the relevant market in this case. While Nielsen observes market activity only at the retail level, it appears here to provide a reasonably accurate reflection of concentration and market share in the processing and reconstituting of COJ for sale to the retail level. The universe of retail sales of COJ should be about the same size as that of COJ sold to the retail market, except for unsold inventory. The percentage of retail sales that a reconstituter like Beatrice realizes should reasonably reflect its market share at the producing level, since it sells all of its brand *directly* to the retailer. Further, the retail brand share of processors like Tropicana should conservatively reflect their share of the relevant market, since a small percentage of the product they process is distributed to retail by other firms under those firms' labels, and under our definition of the relevant product market would be attributed to the other firm's market share.

A. *Horizontal Effects*

This case involves the acquisition of the largest firm in the relevant market by the nation's largest diversified food processor, which had a very small presence in the COJ market at the time of the acquisition. A key precedent for analysis of such a merger is the Commission's decision in *Heublein Inc.,* 96 F.T.C. 385 (1980). Under that case, it must be shown that the market is concentrated and that the market share of the smaller merging firm materially understates its true competitive significance and potential at the time of the acquisition. The ALJ found that these criteria were **[43]** met. We disagree, and reverse the ALJ's finding of a Section 7 violation on a horizontal theory.

Using Nielsen data, the ALJ found that for 1978, the year of the merger, Tropicana's market share was 29.9%, I.D.F. 123, the highest in the COJ industry, and Beatrice's was .57%, I.D.F. 213, a neglible

[52] While the record does not indicate the total annual amount of such institutional sales, we can reasonably infer from the great number and size of the institutional purchasers of COJ that they are in the scores of millions.

percentage.[53] At the time of the acquisition, four-firm concentration was 60.2%, reflecting "moderately high" concentration under existing authority[54] and the Justice Department Merger Guidelines.[55] Two-firm concentration was 45.4%, which is quite high and a source of greater concern than the four-firm ratio, at least under the view that two-firm ratios may be more useful than four-firm figures in assessing the likelihood of anticompetitive interdependent behavior.[56] However, while these concentration levels are high enough to trigger antitrust concern, we still must examine other relevant characteristics of the market to determine whether the merger is likely to be anticompetitive. This additional analysis is particularly necessary here, given the somewhat imprecise character of the relevant product and geographic **[44]** markets that are capable of being drawn on this record. As noted by our Merger Statement at pp. 5–6 and the DOJ Guidelines at ¶III(C)(1)(b), market share data should be given somewhat less weight than usual when the market definition is ambiguous or when products outside the relevant market may still be reasonably close substitutes.

Horizontal violations have been found in a few cases involving only a minimal increase in concentration, but rarely in one with an increase as tiny as that in this proceeding.[57] In assessing the competitive consequences of mergers which increase concentration to such a slight degree the courts have focused on the following qualitative criteria in addition to market share and concentration statistics: (1) merger and concentration trends; (2) the existence of barriers to entry; (3) evidence of interdependent pricing and other potentially collusive behavior; (4) the extent of actual competition between the merging firms; (5) the degree of vertical integration among competing firms; and (6) the degree to which the **[45]** market share of the smaller firm understates its true competitive importance in the relevant market.[58]

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[53] Market share and concentration statistics used herein reflect gallon sales, not dollar sales.

[54] *See Heublein,* 96 F.T.C. at 577, n. 9.

[55] Under those guidelines, this 4-firm ratio would fall within the range of moderate concentration (1000 to 1800) on the Herfindahl-Hirschman Index.

[56] Id. at 577. The disparity between the market shares of the top 2 firms, Tropicana and Minute Maid (15.5%), or the top 3 if we include Kraft (10.4%), and the rest of the firms in the industry, is quite dramatic. This is a factor which the Commission recently said requires "particular attention" in market share and market performance analysis. *See* FTC Merger Statement at 3.

[57] The ALJ relies on *Federal Trade Commission v. Pepsico, Inc.,* 477 F.2d 24 (2d Cir. 1973), which involved an action for a preliminary injunction against the acquisition of a firm with 0.3 to 1% of the relevant market. While the court of appeals upheld the finding of a reasonable probability that the merger was anticompetitive, it did so on the basis of an incomplete record and incomplete analysis of the likely competitive effect of the merger. Id. at 27. As such, only limited weight can be given to the decision. To the extent it is authority, moreover, the decision is factually distinguishable from the present matter in that there was evidence of much higher concentration and a pre-merger trend in the soft drink industry. Id. at 26. Finally, it remains the only decision to date we are aware of which has held that a merger involving a market share as low as Beatrice's may be a horizontal violation of Section 7.

[58] *See* our application of horizontal merger case law in *Heublein,* 96 F.T.C. at 578–82; *see also* FTC Merger Statement at 3–8 and DOJ Merger Guidelines at ¶ III (B)-(C).

On the surface the present acquisition resembles somewhat past acquisitions which were held unlawful by reference to the above criteria. Like *Alcoa-Rome* and *Stanley Works v. FTC,* 469 F.2d 498 (2d Cir. 1972), *cert. denied,* 412 U.S. 928 (1973), the present case involves the leading firm in an industry which was fairly heavily concentrated at the time of the merger.[59] In addition, the ALJ found that Tropicana was a "price leader" in the COJ market, I.D.F. 153, a factor that received considerable weight in the finding of violation in *Stanley Works.* On closer analysis, however, the two cases are not analogous. In *Stanley Works,* price competition was already limited in the relevant market and there was evidence Stanley would bring to that market its policy of minimizing price competition that it had displayed in other product lines.[60] Under these circumstances the Second Circuit concluded that the acquisition of the market leader by a company like Stanley posed a dire threat to competition in an already competitively weak industry. We do not find the same circumstances here. The ALJ made no findings that Beatrice has operated in other markets as a **[46]** price leader in the same anticompetitive fashion as Stanley. Also, there is little evidence of such limited price competition in the COJ industry. While Tropicana and the other national sellers are "price leaders" insofar as they establish price ceilings, there is nonetheless evidence of meaningful price competition in this industry. The record shows that the rest of the industry competes by underpricing Tropicana and the other large firms, indeed, that they must do so in order to compete effectively against the brand name recognition and consumer loyalty attached to the national brands. I.D.F. 139, I.D. 62–63. It is not surprising, therefore, that the ALJ found the COJ prices of a dairy like Beatrice to be on the average 25–35 percent below those of national brands like Tropicana. I.D.F. 217. Given these findings and the lack of evidence in the record that Beatrice through its acquisition of Tropicana is likely to suppress price competition in the COJ market, we do not find the imminent threat to competition resulting from the merger that was central to the Second Circuit's holding in *Stanley Works.*

Barriers to large-scale entry in this industry are high but do not appear to have unduly impaired competition in the COJ market. Large-scale entry requires access to large and reasonably certain supply, substantial plant and distributional capacity, a big advertising budget and/or established brand name, and a large, aggressive sales force. I.D.F. 267. A few firms, most notably **[47]** Minute Maid and the big regional processors, have overcome these barriers to varying de-

[59] Indeed the market share of Tropicana is even higher than that of the larger firm in each of those cases. Also, 4-firm concentration in the COJ industry at the time of the acquisition was greater than that in *Stanley Works,* but less than that in *Alcoa.*

[60] 78 F.T.C. 1023, 1067–1074 (1971).

grees and become significant competitors.[61]

In addition respondents contend that Minute Maid represents just the beginning of a new wave of entrants who will be trying to capitalize on the growing demand for COJ over FCOJ. They argue that FCOJ packers and even grocery chain stores are likely entrants. It is not clear, though, that such entities, even if they have the incentive to enter, have the necessary capacity for entry on a national or even broad regional scale. Minute Maid's growth, while extraordinary, illustrated what it takes to become a significant, potentially destabilizing force in the national COJ market.[62]

While large-scale entry appears extremely difficult, the record indicates that small-scale entry by dairies into the COJ market is easy and fairly common. I.D.F. 131, 134–35. The ease and prevalence of such entry by dairies on the local and regional level, who compete by underpricing the big firms, serve to maintain a reasonably competitive marketplace offering consumers **[48]** a fairly wide range of COJ quality and price.[63] In our judgment this reality, along with the economic incentives for at least modest entry and expansion created by the great growth in demand for COJ, checks at least somewhat the risk to competition otherwised posed by the high barriers to major entry.

Next we must decide whether the market shares of Tropicana and Beatrice reasonably reflect the degree of competition between them that would be sacrificed by the merger, and whether Beatrice's *de minimis* share accurately reflects its true competitive significance in the COJ market. The ALJ seemed to indicate that the evidence that they regarded each other as competitors and directly competed with each other in various locales, *see* I.D.F. 218–226, is sufficient to establish that Beatrice's .57% share of the national market reasonably reflects the degree of actual competition between them. This is open to question. While the two firms generally overlapped in several regions, their respective operations were concentrated in different regions—Tropicana in the east, Beatrice in the midwest and west. While the record does show actual competitive confrontation in some areas, and the potential for direct **[49]** competition in many others, it will

[61] Minute Maid, of course, has been an exceptionally successful entrant as a national seller of COJ, using heavy advertising to increase its market share from 7.3 percent in 1975 to 19.4% in 1979, the 2nd highest. I.D. 55.

[62] While Minute Maid's entry did not reduce overall industry concentration before the merger, it may still have benefited consumers and price competition by accelerating the trend from glass to lower cost paper orange juice containers. There is some evidence that Tropicana, which once sold COJ only in glass bottles, has increased its sales of COJ in paper cartons, perhaps in response to the Minute Maid challenge.

[63] The ALJ found such entry responsible for much of the recent growth in COJ sales, I.D.F. 253, and further found that industry trends are moving in the direction of increased reconstituting of COJ by dairies outside Florida to avoid the high freight costs associated with juice processed in and shipped from Florida. I.D.F. 293–99. Somewhat contradictorily, however, he also found that local COJ processors are becoming a less important factor in the COJ industry, based not on evidence of less competition by such firms but on a moderate increase in concentration prior to the acquisition. I.D. 63; I.D.F. 122–23. We question whether the latter finding can be made on the basis of the concentration data alone.

not support a finding of heavy competitive overlap of their sales.[64] If anything, it suggests that overlap in the national market is far from substantial and that Beatrice's .57% market share may well overstate the head-on competition that was eliminated by the merger.

The ALJ further found that Beatrice was a more significant competitive force in the market than its *de minimis* market share would suggest. This finding must be examined by reference to *Alcoa-Rome*, as interpreted in *Heublein*. In *Alcoa-Rome*, the Supreme Court said that Rome's small market share significantly understated its competitive potential, based on evidence that Rome was an unusually aggressive competitor and technologically-skilled innovator in the relevant product market. In *Heublein*, the Commission read *Alcoa-Rome* to require proof that the firm is a truly special or unique small competitor—with a clear capacity to destabilize the market—as measured by such qualities as originality in product research and development and boldness in price competition. 96 F.T.C. at 581. Absent these qualities, we said there, evidence that the firm was outstanding in other areas, such as advertising and **[50]** marketing, would not be enough to find that a firm was a special small competitor within the meaning of *Alcoa*. *Id.*[65]

In support of his finding, the ALJ said that while Beatrice was not an innovative competitor, it possessed "great potential capacity" and a "unique ability" for marketing COJ nationally through its vast system of milk plants—the largest in the country. I.D. 60, 65. Combined with evidence of Beatrice's growing interest and expansion in the reconstituting and marketing of COJ prior to the merger, *see* discussion at pp. 58–60 *infra*, the ALJ believed this was enough to support a finding that Beatrice's small market share substantially understated its competitive significance and made it, in effect, a "special small competitor" within the meaning of *Alcoa* and *Heublein*. I.D. 61.

We agree with the ALJ that great skill and resources in advertising and marketing appear necessary to gain sizeable market share in the COJ industry. Tropicana and Kraft, the traditional leaders in the market, have won consumer loyalty largely by virtue of established brand name recognition and sustained promotion of their products. The other large firm, Minute Maid, soared from zero to over 19% of the market in less than a decade on the strength of massive advertis-

[64] We do not mean to imply that evidence of substantial competitive overlap is necessary to a finding of horizontal violation. However, as we said in *Heublein*, the extent of head-on competition in a merger case involving a firm with a very small market share is relevant in evaluating whether that share realistically represents the firm's actual competitive position and significance in the industry. 96 F.T.C. at 581, n. 15. *See also* DOJ Merger Guidelines at ¶ III (C)(1)(c).

[65] Specifically, we said "it would distort *Alcoa's* definition of the special small competitor to make advertising or marketing, except in special circumstances not present here, a distinguishing characteristic." *Heublein*, 96 F.T.C. at 581.

ing and marketing expenditures which had the effect of extending preexisting loyalty to the Minute Maid name to its COJ product. I.D. 55. These three national sellers have the capacity to [51] utilize and rely on their well-known names and superior advertising resources as a means of maintaining their market strength to one degree or another against numerous competitors who have to compete on price rather than promotion because they lack a comparable ability to win sales through heavy advertising and marketing.

In short, large-scale entry and expansion in the national COJ market has not been achieved, and appears virtually unattainable, without the capacity to advertise, market and promote one's product on a large scale.[66] Beatrice, as the largest diversified food processor in the nation and second largest advertiser of consumer food, has demonstrated that capacity in many of its other product lines. I.D.F. 279–83, 287. Although it showed no special or unique marketing skills or commitment in its *COJ line* prior to the merger, one may reasonably assume that if in fact it had intended to expand significantly in the COJ market other than by a large acquisition, it possessed the requisite advertising and marketing resources, as well as distributional means, to achieve its ends. Indeed, in view of its track record in other product areas and status as the only "conglomerate" among the "small" firms in the national COJ market at the time of the acquisition, it is [52] probable that Beatrice's ready capacity for such expansion was unique. Accordingly, this possibly could be seen as one of those *exceptional* cases mentioned in *Heublein* where the possession of a unique advertising and marketing capacity makes a company a "special small competitor" within the meaning of *Alcoa*.[67] To the extent such capacity is essential to enable a firm to become a destabilizing force in the relevant market, it is arguably the functional equivalent of product innovation or aggressive pricing as a catalyst for competition.

Still, the record does not show that Beatrice had begun or firmly committed itself to actually utilizing its full advertising and marketing capacity in the relevant product line prior to the merger, and we are thus reluctant to classify it on this basis as a special small competitor in the COJ market at the time of the acquisition. We believe that *Alcoa-Rome* requires primarily a look at factors other than a

[66] Of course, a firm must also possess the capacity to process and distribute on the same scale. This requires the capacity to operate several geographically varied processing and distribution centers, which Minute Maid has, or the unusual capacity to ship long distances, which Tropicana has shown. It is no doubt true that many of the dairies which reconstitute COJ lack these capacities for growth, in addition to lacking the requisite advertising and marketing capacity.

[67] It is important to emphasize that unlike the market in *Alcoa-Rome* and perhaps the market in *Heublein*, technological innovation is not a critical competitive factor here. Despite differences in quality and shelf life among competing COJ products which reflect how the product is processed and packaged, the potential for technological advancement in the making and shipping of COJ is finite.

firm's mere possible plans for expansion, in assessing its true market significance in a horizontal merger analysis. Otherwise the legal theories of horizontal and actual potential competition, which rest on different analytical criteria, would begin to lose their individuality. The absence of factors which would allow us to conclude that Beatrice was a special small competitor within the [53] meaning of *Alcoa* and *Heublein,* combined with Beatrice's extremely small market share, argues strongly against a finding that the merger is unlawful on a horizontal theory of violation.

Lastly, concentration trends are available as an index of the competitive effect the Beatrice-Tropicana merger is likely to have on the COJ market. The ALJ found this factor dispositive in his horizontal analysis of the merger. Unlike the Commission's findings in *Heublein,* the ALJ found here a strong trend toward concentration prior to and continuing after the merger. Four-firm concentration rose from 55.8 percent in 1975 to 60.2 percent in 1978, the year of the merger, and to 64.2 percent for a two-month period shortly after the merger. I.D.F. 122–23; I.D. 60. In contrast, there was no similar pre-merger trend in *Heublein,* and a sharp post-merger increase in concentration in that case was tempered by a subsequent decline. We said that the net increase there from 47.9% to 54.2% in an eight year period was "insufficient to elevate to the level of a violation the increase in concentration resulting from this merger." *Heublein,* 96 F.T.C. at 582. We reach the same conclusion here. While the COJ market was somewhat more concentrated than the *Heublein* all-wine market at the time of the present acquisition, and while the increase in concentration over a several year period was slightly higher in this case than in that one,[68] we cannot say that the difference is great enough, particularly in view of recent trends discussed below, to support the ALJ's finding that [54] the trend toward concentration in the COJ market, by itself, is what "clearly distinguishes" this case from *Heublein.* I.D. 60.[69]

Furthermore, updated Nielsen data indicate there has been a trend toward *less* concentration in the COJ market since the merger, including a recent drop of several points in Tropicana's market share.[70]

[68] 8.4% here between 1975 and 1979, and 6.3% there for a 7 year period.

[69] In distinguishing the two cases, the ALJ seemed to focus more on a 2.5% decrease in concentration in *Heublein* over the latter half of the period in question, rather than on the overall net increase of 6.3% for the entire period. Looking at the whole trend, rather than just the part, the distinction appears to be one without much of a difference.

[70] We grant respondents' motion for limited reopening of the record, filed November 3, 1981, to receive the new Nielsen evidence. Post-acquisition evidence of concentration trends can be relevant and the Nielsen data, as the record shows, is highly reliable. Also, the post-acquisition evidence in this case largely corroborates the evidence of record supporting our finding that concentration trends are not dispositive of the anticompetitive effect of this particular merger. Were post-acquisition evidence dramatically different from the record evidence, we would be much less inclined to admit it until and unless it had been subjected to cross-examination by the party adversely affected by it.

After rising to 62.9% in 1979, 4-firm concentration dropped slightly to 61.3% in 1980 and appears from the bimonthly data to have slid even further in early 1981, although yearly figures are not available.[71] Finally, the new Nielsen figures show an increase from 20.2% in 1980 to around 24% in the first half of 1981 in the "all other" category of COJ, which includes, *inter alia,* the sales of the local and regional producers. This post-acquisition evidence, while not dramatic, **[55]** does undercut a finding of horizontal violation based on concentration trends in the relevant market.

In summary, the record does not support the ALJ's view that the merger substantially lessens horizontal competition in the relevant COJ market. We emphasize that in a case in which one of the merging firms has only .57% of the relevant market, the party challenging the merger is under a particularly heavy burden to show that notwithstanding the *de minimis* increase in concentration, the merger is anticompetitive and a violation of Section 7. That showing was not made here.

B. *Potential Effects*

The more plausible theory of violation in this proceeding is that the merger had the probable effect of eliminating Beatrice as a special potential expander and deconcentrator in the national COJ market. Complaint counsel alleged, and the ALJ agreed, that the merger could be held unlawful on this theory. We disagree, finding the record insufficient to support this conclusion. Before we can even reach the merits of this issue, however, it is necessary to deal with respondent Beatrice's threshold argument that complaint counsel's allegations of Beatrice's plans to expand are based on a "potential competition" theory of liability which was not pled by the complaint and which, therefore, cannot be used to establish a finding of illegal conduct.

In the particular circumstances of this case respondent Beatrice's argument presents a very close question, but on **[56]** balance we hold that no potential competition theory of liability was pled in the complaint and that it is therefore inappropriate to consider evidence under this theory. We accordingly decline to rely on this theory in assessing the legality of the acquisition.

We recognize that a respectable argument can be made in support of the proposition that an implied potential competition count was pled in the case. Although the complaint does not expressly allege that the merger would eliminate potential competition by Beatrice, the absence of such language does not necessarily compel a reversal

[71] Two-firm concentration did rise from 45.4% in 1978 to 49.3% in 1980, appearing to reflect an increase in Minute Maid's market share to 20.8%. However, it declined considerably in the first half of 1981, mainly as a result of Tropicana's market share dropping to around 24% during that time.

of the Initial Decision on this ground. The Commission's rules simply require that complaints provide "a clear and concise factual statement . . . of the type of acts or practices alleged to be in violation of the law,"[72] and need not plead the evidence upon which complaint counsel will rely. In construing such complaints, including the one here which uses legal terms such as "actual competition," it is appropriate to look to the case law interpreting the term, particularly contemporaneous case law that might shed light on what questions the Commission, in exercising its law enforcement discretion, intended to authorize complaint counsel to litigate. Under such contemporaneous precedent, a Commission complaint that pled only actual competitive effects has not automatically foreclosed inquiry into the loss of potential competition as well, particularly in the case of the elimination **[57]** of a potential expander, as Beatrice was alleged to be here. In such cases, the Commission has recognized that there is "no clear line between actual and potential competition theories," *Retail Credit Co.,* 92 F.T.C. 1, 152 n. 43 (1978), *rev'd on other grounds,* 616 F.2d 63 (9th Cir. 1980), and—of particular importance to the instant case—has held potential expander evidence relevant to a horizontal as well as a potential competition theory of liability. *Stanley Works,* 78 F.T.C. at 1064; *Pillsbury Co.,* 93 F.T.C. 966 (1979).

On the other hand, while the line between these two theories has not always been "pristine" clear, generally speaking they have become sufficiently distinct and well-established that a complaint pleading one theory, unless amended in accordance with Commission Rule 3.15(a)(1), would not ordinarily allow proof primarily relevant only to the other.[73] The complaint here not only does not specifically allege any effect on potential competition, it clearly speaks in terms of an effect on "actual **[58]** competition." *See* Paragraphs 13, 15 (a)-(b).[74] Given the reasonably clear distinction between the two theories, the Commission, with its own antitrust expertise, presumably would have distinguished between them and understood the legal significance of using only the term "actual competition" in pleading the anticompetitive effects of this acquisition. Considering the Commission's conscious choice of this particular complaint language, com-

[72] Commission Rules of Practice, Section 3.11(b)(2).

[73] This became particularly true following the Commission's decision in *Heublein,* which clarified that it is necessary to examine the issue of potential expansion within the analytical framework of potential competition antitrust theory, under the criteria for conglomerate merger enforcement established in *United States v. Marine Bancorporation,* 418 U.S. 602 (1974).

[74] The complaint allegation that as a result of the acquisition, "the previously existing level of concentration . . . will be increased and the possibilities for eventual deconcentration may be diminished", ¶ 15(d), provides at best oblique support for adjudication of a potential expander theory. Such "eventual deconcentration" language does not amount to a specific allegation that the acquiring firm was a potential expander; indeed, similar language has been used in Supreme Court and Commission decisions that did not rely upon potential expander evidence or analysis. *See e.g., United States v. Philadelphia Nat'l Bank,* 374 U.S. at 365 n.42; *Liggett & Myers, Inc.,* 81 F.T.C. 1074, 1165 (1976).

plaint counsel were authorized by the Commission to try this case on a horizontal, but not a potential competition, theory of violation. Notwithstanding some precedent to the contrary, any other understanding would have represented a strained interpretation of the reasonably clear meaning and intent of the "actual competition" allegations in the complaint.

As such, when complaint counsel advised the ALJ and respondents' counsel, at the very first prehearing conference, that it intended to prove a violation based on the unpled theory of the loss of potential as well as actual competition, the obligation arose under Rule 3.15 (a)(1) to file a motion for amendment of the complaint which should have been certified by the ALJ to the Commission. **[59]**

In its dual role as prosecutor and judge, the Commission has a special obligation, different from that of ordinary courts of law, to maintain effective control over the purpose, construction, and adjudication of the complaints it issues. Rule 3.15 (a)(1) was placed on the books to facilitate the Commission's exercise of such control. To allow new theories to be added, provided only that the respondent has adequate notice and an opportunity to litigate the issues, would defeat the very purpose of this important safeguard in our rules, and undermine the Commission's control over its prosecutorial discretion.

Fortunately, the constraint on our ability to reach a potential competition theory in this case is immaterial, since the merger does not appear from the record to have substantially lessened potential competition in the COJ industry anyway. While the evidence indicates that Beatrice was interested in expanding its production of COJ for sale to the retail market, and probably would have become a larger competitor in the industry, it falls short of establishing a probability that Beatrice would have gained sufficient market share from the leading firms to deconcentrate the industry or otherwise contribute significantly to a more competitive national market. Though Beatrice increased **[60]** the number of its plants reconstituting COJ from three to twelve between 1975 and 1978, I.D.F. 227, 231, this does not seem to have represented a major corporate commitment to COJ—backed up expanded plant capacity for COJ and big promotional campaigns—that could have resulted in a shake-up of the national market or capture of substantial market share from the market leaders.

In addition, it does not appear that Beatrice's new Dixie Sunshine brand, test marketed briefly before the merger and abandoned shortly thereafter, would have become the major, nationally sold product that would have vaulted Beatrice into the big time in this industry. Despite some evidence cited by complaint counsel to the contrary, there were formidable commercial obstacles to the accomplishment of long-range, nationwide distribution of this product from its planned processing center in Orange City, Florida. Dixie Sunshine was a "fresh" juice, and Beatrice lacked the supply and special freezing facilities necessary to large-scale production and distribution of a fresh COJ product from the Orange City plant, which also happened to be a financially unstable operation with an uncertain future. Further, there is very little evidence that Dixie Sunshine ultimately would have been reconstituted and sold nationally through Beatrice's milk plant system, as complaint counsel claimed, or that Beatrice's plant managers were even interested in distributing the new product. The weight of the evidence, viewed in light of these commercial realities, is that absent the merger, Dixie Sunshine would have been sold primarily **[61]** as a fresh product, packaged in Florida and limited in distribution principally to the southeast.

C. *Entrenchment Effects*

The ALJ found that the merger had the anticompetitive effect (as alleged in paragraph 15 (b)-(d) of the complaint) of entrenching Tropicana as the market leader. While he rejected complaint counsel's entrenchment theory that the acquisition conferred special advertising advantages on Tropicana through access to Beatrice's considerable advertising assets, he agreed that it did confer special advantages in distribution through access to Beatrice's milk plant network that would strengthen Tropicana's market position in the west and thereby entrench its position nationally. I.D. 65–66. Underlying this conclusion were the ALJ's findings that Tropicana was searching for a more economically efficient way than shipments from Florida to penetrate the western market, that the industry trend of reconstituting at plants closer to the retail destination was the most economical way to do it, and that access to Beatrice's plants assured the attainment of its western expansion plans. I.D.F. 293–302; I.D. 66–67. While entrenchment can be an independent basis of antitrust liability,[75] the record does not support the ALJ's conclusion that the distributional advantages resulting from the merger were likely to entrench Tropicana in violation of Section 7. **[62]**

First, we affirm the ALJ's findings that the record proves no *unique* advertising efficiencies to the merged firm that are a direct consequence of the acquisition. With respect to the alleged competitive advantage in distribution, we agree with the ALJ that the acquisition would appear to enable Tropicana to expand substantially in the west by using Beatrice's dairy plants as distribution or reconstituting centers. However, the record fails to establish that Tropicana had plans to integrate the Beatrice milk plant network for this purpose following the merger. There is little evidence that Tropicana was prepared

[75] *Heublein,* 93 F.T.C. at 592, citing *FTC v. Procter & Gamble Co.,* 386 U.S. 568 (1967).

to abandon its historical commitment to marketing a fresh glass product even though the industry trend was toward lower-cost reconstituting and Tropicana had made some movement itself in that direction.[76] A continuing primary commitment by Tropicana to its fresh glass product and its premium image could explain the absence—at least so far—of integration of the reconstituting facilities of Beatrice's plants into Tropicana's COJ business. Moreover, even if Tropicana eventually did use Beatrice's distributional resources for the purpose of making a reconstituted Tropicana product and achieving greater inroads in the west, the record does not support a finding that that would necessarily result in a substantial lessening of competition in the national COJ processing and reconstituting market. In view of the growth in demand for COJ, the ongoing expansion by Minute **[63]** Maid as well as major regional reconstituters in response to that demand,[77] and the general case of entry (at least on a small scale), it is at least questionable whether even full utilization of Beatrice's distribution system by Tropicana would have the effect of significantly raising barriers to entry or expansion or otherwise substantially decreasing competition in the national COJ processing and reconstituting market. Finally, the post-acquisition stabilization and recent decline of Tropicana's market share do not bear out complaint counsel's prediction, made in support of its entrenchment allegation, CAB 56, that the merger would increase both Tropicana's dominant market share and industry concentration.

In *Heublein* we said that because "adverse competitive effects from 'entrenchment' can be rather elusive, it is particularly important that a factual basis be carefully constructed." *Id.* at 593. That predicate has not been established here.

CONCURRING OPINION OF COMMISSIONER DOUGLAS[1]

I concur in the result that the majority reach in this case. However, I am troubled by portions of the majority opinion, including the product and geographic market discussions. This concurring opinion summarizes the most important of those concerns.

Relevant Product Market

As the majority opinion recognizes, cross-elasticities of demand and supply are important determinants of the relevant product market.

[76] In fact, Tropicana's commitment to its fresh product would appear to have been reaffirmed by its completion of a new $16 million glass factory in 1978. Tr. 3784, 3915–16.

[77] Along with Minute Maid, such significant reconstituters as Johanna Farms, Home Juice and Ohio Pure Foods all grew after the merger and anticipate more expansion. RR 30; Tr. 1603, 1607. Further, economist Tilley conservatively estimated industry growth at 50% over the next 5 years. Tr. 2348–49.

[1] Chairman James C. Miller, III joins in this concurring opinion.

A universe can be characterized as a separate product market if—within an appropriate period of time—a small change in the price of products within the universe does not induce significant changes in the quantities of products outside the universe that are demanded or supplied.[2] Of course, it may sometimes be difficult to develope the empirical data needed to measure these factors in particular cases. Nevertheless, they provide the theoretical basis for product market definition. [2]

In this case, the majority opinion concludes that the relevant product market includes chilled orange juice (COJ), but does not include frozen concentrated orange juice (FCOJ).[3] I disagree with this conclusion. The majority opinion also recognizes that including or excluding FCOJ in or from the relevant product market does not affect the outcome of the case.[4] Nevertheless, I believe that accurate market definition should be an important part of merger cases, and that the record evidence on cross-elasticities of demand and supply is sufficiently clear in this case to establish that FCOJ should be included in the relevant product market.

Cross-Elasticity of Supply

The record evidence suggests that the cross-elasticity of supply between FCOJ and COJ is high.[5] Since COJ can be produced from fresh oranges, from bulk concentrate (FCOJ) or from bulk frozen single strength juice,[6] any firm that can produce or purchase bulk concentrate can sell both FCOJ [3] and COJ.[7] Moreover, much of the equipment used to produce COJ directly from oranges can also be used to

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[2] *FTC Statement On Horizontal Mergers* (June 14, 1982), *reprinted in* 42 ATRR Special Supplement (June 17, 1982) (hereinafter cited as *FTC Statement*), at S–15; *Justice Department Merger Guidelines* (June 14, 1982), *reprinted in* 42 ATRR Special Supplement (June 17, 1982) (hereinafter cited as *DOJ Guidelines*), at (S-3) - (S-5). The Justice Department suggests that, as a first approximation, the test of the viability of a prospective market should be whether a 5% price increase for products in that market would induce—within one year—a significant percentage of buyers of products already included in the market to shift to other products not yet included in the market. *DOJ Guidelines, supra*, at S–4.

[3] Majority opinion at 25.

[4] *Id.* at 15.

[5] The respondents did not press this argument on appeal. However, that does not foreclose the Commission from considering the record evidence on this important issue *sua sponte.*

[6] I.D.F. 63. The majority opinion treats COJ made from fresh oranges and COJ made from concentrate as part of the same product market. Majority opinion at 14 n. 16.

[7] For example, Minute Maid began producing COJ after becoming the leading processor of FCOJ. Majority opinion at 7 n. 6. It should also be noted that the hundreds of dairies operating nationwide can easily switch from fluid milk production to COJ production. *See* note 29 and accompanying text, *infra.*

The packaging equipment needed to produce COJ and FCOJ differs, because FCOJ is typically sold in small cardboard cans, while COJ is sold in cartons, plastic containers, or glass containers. I.D.F. 51. However, the equipment needed to manufacture the different containers is apparently widely available and not particularly expensive. Moreover, producers can purchase the finished containers from specialized manufacturers—or set up co-packing arrangements with firms that already have the necessary equipment—if they wish to do so. For example, Kraft presently has a co-packing agreement with Sunkist, under which Sunkist processes and packages approximately 10% of Kraft's juice, and Kraft then distributes it under its own label. Majority opinion at 18 n. 22.

produce COJ from bulk concentrate.[8] Furthermore, there are a number of processors in Florida, including grower cooperatives, that currently have all the equipment needed to process oranges into COJ or FCOJ and can change their capacity from one to the other as a function of the relative profitability of each form.[9] As a consequence, the evidence indicates that FCOJ producers would encounter relatively little difficulty in shifting to COJ production in response to higher and more profitable COJ prices. It would not be as easy for COJ producers to switch to the production of FCOJ, [4] because different equipment is required. However, the crucial issue in treating COJ as a separate market is whether an increase in COJ prices and profitability could be expected to induce FCOJ producers to divert any productive capacity from FCOJ to COJ. The record evidence indicates that they could do so easily.

Cross-Elasticity of Demand

Intuitively, one would expect demand for FCOJ and COJ to be highly correlated because of their highly similar taste and use characteristics. Most COJ is produced from bulk concentrate and therefore tastes exactly like the orange juice that consumers themselves prepare from frozen concentrate. Moreover, as the majority opinion apparently suggests, COJ made from fresh oranges and COJ made from bulk concentrate should both be included in the relevant product market, in part because consumers apparently perceive little or no difference in taste between them.[10] It therefore seems illogical to treat COJ made from fresh oranges and COJ made from frozen concentrate as part of the same market while excluding frozen concentrate itself from that market. The only apparent differences between COJ and FCOJ relate to storage and preparation. COJ can be stored for twenty to thirty days in a refrigerator, while FCOJ occupies less space and can be stored indefinitely. In addition, COJ is ready to serve, while FCOJ must be thawed and diluted. These differences hardly seem sufficient to justify placing COJ and FCOJ in separate markets. [5]

The pricing evidence in the record does not refute this intuitive judgment. As the majority opinion recognizes, FCOJ and COJ prices do not differ dramatically. As of August 1, 1979, the average nationwide price of a six ounce serving of FCOJ was only 14 percent lower than the average price of an equivalent serving of chilled orange juice packaged in cartons or plastic.[11] That represents a considerable re-

[8] I.D.F. 67. Tropicana, for example, makes 70% of its COJ directly from fruit, and the remaining 30% from bulk concentrate. I.D.F. 65. Similarly, Hood and Kraft make COJ from both fresh oranges and FCOJ. I.D.F. 66.

[9] CX 594I,J,K,O,R; Tr. 902–04, 1287–89, 1418–19, 1543, 1668–71, 3899, 3904–07.

[10] Majority opinion at 14 n.16, *citing* I.D.F. 63–70.

[11] CX 560T (*in camera*). Over two-thirds of all COJ is sold in plastic containers or cartons. CX 560z–4 (*in camera*).

duction from the 32 percent price disparity recorded in 1970.[12] Moreover, during the 1971 – 1979 time period, the ratio of total ready-to-serve orange juice sales to total frozen concentrate sales increased from less than 25 percent (in gallons) to over 50 percent (in gallons).[13] This evidence is consistent with the inference that price competition between COJ and FCOJ has strengthened considerably since 1971.[14] The record does not contain any evidence [6] on current FCOJ and COJ prices with which we could determine whether this trend has continued, but there is no reason to believe that it has weakened or ended.

One study submitted by complaint counsel (the Tilley study) provides more direct evidence on the issue of demand cross-elasticity. The study's principal objective was to determine the degree to which COJ and FCOJ consumption can be explained by habit and inventory effects. As a corollary to the effort, the study produced a number of demand cross-elasticity estimates. The Tilley study represents a professional and sophisticated statistical effort, and I should like to emphasize that well formulated statistical evidence can be of substantially greater importance in delineating relevant markets than the anecdotal type of "industry or public recognition" evidence suggested in *Brown Shoe Co. v. United States*.[15] However, the results of the Tilley study raise several concerns that limit its utility in determining whether COJ and FCOJ lie in the same or in separate markets.

The first concern relates to the data upon which Dr. Tilley relied. The price and quantity data were based upon beverage purchase reports from a consumer panel.[16] [7] However, Douglas Hoffer, the Director of Marketing for the Florida Department of Citrus (and formerly its Director of Market Research), testified that he did not believe that the data were particularly reliable.[17] Possibly as a consequence of his testimony, complaint counsel declined to introduce the data themselves into evidence as a basis for establishing prices and price trends.[18] Moreover, apparently as a result of these reliability problems, the Department of Citrus later stopped purchasing the

[12] CX 560T (*in camera*).

[13] CX 560W (*in camera*).

[14] It is true that the price of FCOJ remains considerably lower—approximately 29 percent lower—than the price of COJ in *glass* containers. CX 560T (*in camera*). However, as the majority opinion points out, the disparity between the price of COJ in glass containers and the price of COJ in plastic containers or cartons is actually greater than the disparity between the latter and the price of FCOJ. Nevertheless, the majority opinion treats COJ sold in glass containers and COJ sold in plastic containers or cartons as part of the same product market. Majority opinion at 11–14.

[15] 370 U.S. 294, 325 (1962).

[16] Tr. 1990, *referring to* CX400 through CX407.

[17] Tr. 1886–87, 1927. The Administrative Law Judge later characterized this opinion as "very persuasive." Tr. 2221.

[18] Tr. 1888. Complaint counsel did offer the data for the purpose of showing that they were categorized on the basis of beverage type—rather than "for the truth of the price-trend data contained therein"—and the Administrative Law Judge accepted them for that limited purpose only. Tr. 1888–89.

data.[19] The Tilley study results may therefore have been affected by inaccuracies in the data base.

Second, the study results may have been affected by multicollinearity problems, which can cause substantial errors in the regression estimates that a study produces.[20] If several independent variables tend to move together, it is difficult to determine whether the value of a given coefficient for any one of those variables actually measures [8] the effect of that variable (*e.g.*, the cross-elasticity of demand between FCOJ and COJ), or instead simply reflects the strong influence of other related independent variables. Dr. Tilley agreed that multicollinearity might have affected his regression estimates, and that if he had limited the number of substitutes in his study to chilled, frozen, and canned juice, his study might have established a greater degree of substitutability among the three.[21]

Third, the study results may have been affected by serial correlation. The system of equations Dr. Tilley employed includes the quantity of each product consumed in the immediately preceding period as an independent variable. Since, for each time period, quantity serves as the dependent variable while prices serve as the independent variables, including the immediately preceding quantity as an additional independent variable makes each quantity observation a function not only of *current* prices but also of all *previous* price observations. This technique may introduce serial correlation into the dependent variable, further affecting the accuracy of the regression estimates. The study results [9] do indicate that both FCOJ and COJ consumption in any given period were strongly influenced by the quantity of each product consumed in the immediately preceding period.[22]

Apart from these systematic difficulties, the cross-elasticity coefficients generated by the study are themselves not inconsistent with treating COJ and FCOJ as part of the same market. For example, in the first relevant equation, which regresses per capita consumption of COJ on the prices of FCOJ and other types of orange juices and orange drinks, the study found a cross-elasticity of demand of -0.0633 between FCOJ and COJ.[23] Because of its high standard error, this value is not significantly different from zero. Zero would be the expected value if the demands for the two products were completely independent from each other. However, the fact that the statistical

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[19] Tr. 2382.

[20] J. Kmenta, *Elements of Econometrics* 380–91 (1971).

[21] Tr. 2144–47.

[22] CX 514I. The study also generated some anomalous results. For example, it indicates that the cross-elasticity of demand between the price of canned single strength orange juice (CSSOJ) and per capita consumption of FCOJ is negative and significantly different from zero at the 90% level. *Id.* This suggests that CSSOJ and FCOJ are actually complements; that is, when the price of CSSOJ increases, FCOJ consumption declines. This result does not make particularly good sense, and suggests that the study may suffer from some specification problems.

[23] CX 514I.

test failed to *reject* the null hypothesis does not allow one to conclude that the null hypothesis is true and that the [10] cross-elasticity of demand must be zero.[24] In other words, the statistical finding is consistent with—but does not prove—the hypothesis that demand for the two products is independent.

In the second relevant equation, which regresses per capita consumption of FCOJ on the prices of COJ and other types of orange juices and drinks, the study found a cross-elasticity of 0.2267 between FCOJ and COJ.[25] This result is significantly different from zero at the 90% confidence level.[26] Therefore, as Dr. Tilley testified, one can have a

> fairly high level of confidence, above 90 percent, that COJ is in fact a substitute for FCOJ.[27] [11]

Moreover, the true value of the short-run cross-elasticity measure may actually be as high as 0.4346, and in any event no lower than 0.0188.[28]

It is difficult to determine precisely how to evaluate the Tilley study results. The cross-elasticity estimates the study produced are not particularly high, but the data reliability, multicollinearity, and serial correlation concerns described above limit the utility of the estimates. Moreover, the estimates themselves focus upon short-run effects, and although the study did not produce any long-run cross-elasticity estimates, it does indicate that the long-run price elasticities of demand for FCOJ (-0.8589) and COJ (-0.8474) are nearly identical, and considerably higher.[29] These conflicting considerations suggest that on balance, the Tilley study—although a professional effort—cannot be relied upon to determine the degree to which FCOJ and COJ can be treated as substitutes. [12]

By contrast, two New York studies submitted by the respondents suggest a substantial degree of substitutability or cross-elasticity between COJ and FCOJ.[30] As the majority opinion points out, the New York studies are regional rather than national in scope. However,

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[24] *See, e.g.*, R. Wonnacott and T. Wonnacott, *Econometrics* 64–66. (1970).

[25] CX 514I.

[26] The absolute value of the ratio of the observed value (here, 0.2267) to its standard error (here, 0.1225) determines the degree to which one can be confident that the value of the coefficient actually differs from zero. When the number of observations exceeds 30, as is the case here, then a ratio of 1.697 permits one to be 90% confident that the value actually differs from zero. Since the ratio of the observed value (0.2267) to its standard error (0.1225) exceeds 1.697, one can be over 90% sure that the actual value of the variable is positive and different from zero.

[27] Tr. 2384.

[28] These figures represent the bounds of the 90% confidence interval. That interval can be created by respectively adding and subtracting the product of the standard error (here, 0.1225) and 1.697 to and from the observed value (here, 0.2267).

[29] CX 514K. The "long run" for FCOJ and for COJ were estimated to be 8 months and 5 months, respectively.

[30] Because the New York studies were prepared by the same firm that collected the data that Dr. Tilley relied upon and, presumably, relied upon the same type of data, their utility may be similarly limited.

since COJ accounts for a greater proportion of orange juice sales in New York than in other parts of the country, one might actually expect the New York studies to show a lower degree of substitutability of FCOJ for COJ there than elsewhere. That did not prove to be the case. One of the studies found a substantial level of substitution between Minute Maid and Tropicana COJ, on the one hand, and a variety of brands of FCOJ, on the other.[31] The second study indicated that Minute Maid FCOJ buyers devote 27 percent of their purchases (in fluid ounces) to brands of COJ; that Minute Maid COJ buyers devote 39 percent of their purchases to brands of FCOJ; that Tropicana FCOJ buyers devote 23 percent of their purchases to brands of COJ; and that Tropicana COJ buyers devote 45 percent of their purchases to brands of FCOJ.[32] In short, the New York studies suggest that there may be a substantial degree of substitutability between FCOJ and COJ. [13]

Industry Perceptions

The record evidence concerning industry perceptions appears to be rather inconclusive. As the majority opinion recognizes, industry perceptions can sometimes help to delineate the relevant product and geographic markets. However, in this case the perceptions of different industry participants conflict substantially,[33] and it is difficult to determine which should be relied upon and which should be ignored. Moreover, the fact that some industry firms consider COJ and FCOJ to differ from one another to some degree does not mean that they should be treated as separate products. The crucial issue is whether the price of one could be increased significantly without inducing increases in the quantities of the other that are demanded and supplied. The best way to resolve conflicting industry perceptions is to consider the more objective and reliable evidence provided by cross-elasticities of supply and demand.

Conclusion

The record evidence indicates that the cross-elasticity of supply between COJ and FCOJ is relatively high, and that the cross-elasticity of demand between the two versions of orange juice may be at least somewhat significant. As a result, any effort to raise COJ prices to a significant degree could be expected to induce FCOJ producers to increase [14] COJ production substantially, and to induce at least some COJ consumers to switch to FCOJ. I would therefore treat FCOJ and COJ as part of the same product market.

[31] RX 1–p, 1–q.
[32] RX 1–3–91.
[33] *Compare, e.g.*, CX 6C, CX 147, CX 149B–C *with* Tr. 4328, 4479, 4877, 5107, RX 120–T.

Relevant Geographic Market

The majority opinion concludes that the relevant geographic market in this case is the nation as a whole. However, the opinion also states that "it is quite possible that regional markets could also exist which would reflect, perhaps more precisely, the commercial realities of the COJ industry and the competitive effects of the merger . . .," and that "regional shipping restrictions . . . strongly suggest the existence of regional markets as well . . ."[34] Together, these statements suggest that the relevant markets in this case can be both regional and national simultaneously. I disagree with this approach. I believe that carefully delineating the single most accurate geographic market possible should be a prerequisite to evaluating the competitive effects of any given merger. I would therefore simply conclude that in this case, the nation as a whole represents the most competitively significant market within which to assess the effects of the acquisition at issue.

The relevant geographic market can be delineated most accurately by calculating the degree to which—within an appropriate period of time—price changes in a given area **[15]** will induce changes in the quantities of the relevant product supplied from and demanded in other areas. This suggests that geographic markets—like product markets—can be visualized as a series of concentric circles radiating outward. As the diameter of the circle expands, the cross-elasticities of demand and supply between the relevant product within the circle and the relevant product outside the circle can be expected to decline.

In this case, the record evidence establishes that the three largest producers, Tropicana, Minute Maid, and Kraft, all sell their products on a nationwide basis, and monitor and respond to prices and other competitive conditions that prevail in different parts of the country. Moreover, they compete directly with large numbers of local and regional producers. Furthermore, although transportation costs apparently represent a significant proportion of product value, they do not regionalize competition to any significant extent. Approximately 90 percent of the product—in the form of fresh oranges, chilled juice, or bulk concentrate—must be shipped from Florida.[35] It is therefore highly unlikely that any national, regional, or local producer would have a significant freight advantage over any other.[36] **[16]** As a result of these market characteristics, any effort to increase prices significantly above the competitive level in a given part of the country can

[34] Majority opinion at 32, 34.

[35] The remaining ten percent comes from the Southwest, Brazil, and Mexico. Majority opinion at 4.

[36] Since bulk concentrate is more concentrated than fresh oranges or chilled juice, it may be more economical to ship on a per pound basis. However, it must be kept frozen, unlike fresh oranges or chilled juice, and that may conversely increase its shipping costs relative to the other two product forms.

be expected to induce increased shipments of the product from other parts of the country relatively quickly. I would therefore conclude that the relevant geographic market is the nation as a whole, and dispense with the suggestions in the majority opinion that the relevant geographic markets in this case may be both national and regional simultaneously.

Competitive Effects

If the product market is defined to include both chilled orange juice and frozen concentrate, and if the geographic market is defined to be nationwide, then it is highly unlikely that Beatrice's acquisition of Tropicana had any significant anticompetitive effects. Market share data strongly support this conclusion. In 1978, Tropicana and Beatrice respectively accounted for approximately 11 percent and 0.0016 percent of sales in the relevant market.[37] These shares are considerably lower than the shares that Tropicana and Beatrice respectively accounted for in the [17] chilled orange juice sector alone, according to the majority opinion.[38] Industrywide concentration levels in the larger FCOJ-COJ market probably are also considerably lower, because Tropicana's share of sales in the larger market is only one-third as large as its share in the COJ sector alone.[39] The majority opinion concludes that—in conjunction with other evidence—the market share and concentration levels in the COJ sector establish that the merger is unlikely to have any anticompetitive effects. The much lower share and concentration levels in the more relevant product market that includes both COJ and FCOJ make it substantially less likely that the merger would have any anticompetitive effects.

Other relevant economic factors strengthen this determination even further. As the majority opinion points out, small-scale entry into the chilled orange juice sector is both easy and common.[40] I would also conclude—unlike the majority opinion—that large-scale entry into the larger, more relevant market would not be particularly difficult. Any dairy—including the very large regional dairies with well-established trademarks located throughout the country—can quickly and inexpensively shift from [18] fluid milk production to chilled orange juice production, because their fluid milk plants already possess all the production and distribution equipment needed to produce

[37] These estimates are necessarily approximate; they were derived as follows. In fiscal 1978, Tropicana and Beatrice respectively accounted for $166.8 million (I.D.F. 123) and $2.4 million (Majority opinion at 4) in sales of chilled orange juice to the retail sector. Total chilled orange juice sales in that sector amounted to $545.2 million. I.D.F. 121. Total non-institutional sales of FCOJ amounted to approximately $1.05 billion in fiscal 1978. *Federal Trade Commission v. Beatrice Foods Co.*, 587 F.2d 1225, 1233 (D.C. Cir. 1978). Total non-institutional sales of FCOJ and COJ therefore together amounted to approximately $1.5 billion, yielding the market shares cited above.

[38] Majority opinion at 43.

[39] The record does not include market share data for any of the four largest firms in the FCOJ-COJ market except Tropicana (which apparently makes almost no FCOJ sales).

[40] Majority opinion at 46.

chilled orange juice from bulk concentrate.[41] Large-scale new entry into the industry therefore would probably not be particularly difficult. In fact, a number of strong regional firms have recently entered the orange juice industry on a substantial scale.[42]

Conclusion

The record evidence establishes that the merger would be unlikely to have any anticompetitive effects in the nationwide market for chilled and frozen concentrated orange juice. I therefore concur that the complaint in this matter should be dismissed. I would like to emphasize that my conclusion in this regard would be the same if I were to accept the narrower product market definition in the majority opinion. Moreover, it would almost certainly be the same if we were today considering a complaint proposal rather than a final disposition. It is interesting to note that the complaint in this matter alleged almost precisely the same facts that the majority opinion now relies upon to dismiss the proceeding. In particular, the complaint alleged that **[19]** the relevant product and geographic markets consisted of "the processing, distribution and sale of ready to serve orange juice . . . . [in] the United States as a whole and submarkets thereof. . . ." The complaint also alleged that the four largest firms in the market accounted for 58.6% of total sales in that market in 1976, that Tropicana and Beatrice respectively accounted for 29% and 1% – 1.7% of total unit volume (in gallons) in 1976, and that Tropicana's share was nearly twice that of its nearest competitor.[43] The Commission relied upon these allegations to issue the complaint in this matter. The majority opinion now relies upon essentially the same market definitions, determines that concentration levels and the market shares of Tropicana and Beatrice within those alleged markets are roughly the same, and nevertheless concludes that the acquisition did not injure competition. This change in perspective illustrates the Commission's growing understanding that economic characteristics other than market shares and concentration levels are crucially important to determining whether any particular acquisition is likely to injure competition. I welcome the majority opinion's recognition of that fact, and I look forward to applying these principles both to future cases and to future proposals for complaints alleging violations of Section 7 of the Clayton Act.

[41] I.D.F. 135. The only conceivable constraint to shifts of this sort would be access to bulk frozen concentrate.
[42] These firms include Johanna Farms on the Atlantic Coast, the Ohio Pure Foods Co. and the Home Juice Co. in the Midwest, and Knudsen Dairy on the West Coast. Tr. 994, 1018–19, 1029–30, 1094, 1591, 1603, 1607, 4053–56.
[43] *Beatrice Foods Co.*, Docket No. 9112 (Complaint) (Issued on June 29, 1978), at 3.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of respondents from the initial decision and upon briefs and oral argument in support of and in opposition to their appeal. For the reasons stated in the accompanying Opinion, the Commission has determined to sustain respondents' appeal. All motions which have not yet been disposed of in the accompanying Opinion or by prior orders of the Commission are denied. Accordingly,

It is ordered, That the complaint is dismissed.