## IN THE MATTER OF

# THE MAGNAVOX COMPANY

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

*Docket 8822. Consent Order, June 9, 1971—Modifying Order, July 11, 1983*

This order reopens the proceeding and modifies the Commission's order issued on June 9, 1971 (78 F.T.C. 1183), by amending Part I-T and deleting Part I-V of the order, to permit the company to control the transshipment of its consumer electronic products. The modification also deletes Part III of the order, which had prohibited the company from engaging in exclusive dealing, full line forcing and tying practices in connection with the sale of its products.

### ORDER MODIFYING DECISION AND ORDER

On February 2, 1983, respondent The Magnavox Company ("Magnavox") filed its "Request To Reopen And Modify Consent Order" ("Request"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice. The Request asked that the Commission reopen the consent order that was issued on June 9, 1971, in this matter ("the order") and modify it in two respects. First, Magnavox requested that certain words in Part I-T of the order and all of Part I-V be deleted to eliminate order language that prevents Magnavox from prohibiting transshipment of its consumer electronic products. Second, Magnavox requested that the Commission delete Part III of the order, which forbids respondent from engaging in exclusive dealing, full line forcing and tying practices in connection with the sale and distribution of its consumer electronic products. Magnavox's Request was on the public record for thirty days and no comments were received.

After reviewing respondent's Request, the Commission has concluded that the public interest warrants reopening and modification of the order in the manner requested by respondent.

The transshipment provisions of the order were adopted as "fencing-in" restraints ancillary to the order's ban on resale price maintenance. *See FTC v. National Lead Co.,* 352 U.S. 419 (1957). Respondent has specifically represented in its Request that it does not fix the price at which its customers resell any of the products purchased from it, that prices vary from outlet to outlet, and that current market conditions would prevent it from fixing resale prices even if it were so inclined. Respondent also has argued that the image of the Magnavox brand is being harmed by its inability to control transshipment of its products to outlets that, at least in some instances, do not have the resources to provide adequate pre-sale and post-sale service.

The transshipment provisions in question have been in effect for nearly twelve years, and appear to have served their remedial purposes. There is no indication that respondent during that time has engaged in resale price maintenance or has breached the order's provisions governing transshipping restraints. Particularly in view of the continued existence of the order's underlying prohibitions against resale price maintenance, there no longer appears to be a need to continue the transshipment provisions of the order.

Part III of the order forbids respondent from engaging in exclusive dealing, full line forcing and tying practices in connection with the sale and distribution of its consumer electronic products. The Commission has determined that the public interest will be served if it deletes Part III of the order. It does not appear that respondent has the market power to impose exclusive dealing or related arrangements on a competitively significant number of its dealer outlets. Any exclusive dealing or similar arrangements that respondent may adopt with respect to its outlets is not likely to result in any significant market foreclosure of competitors, or to raise entry barriers. Moreover, Magnavox contemplates that any exclusive arrangements that it may adopt would be terminable by dealers at will. As the Commission pointed out in *Beltone Electronics Corp.*, Docket No. 8928 (Slip Opinion, July 6, 1982) [100 F.T.C. 68], the length of time that competitors are foreclosed by exclusive transactions has been an important element in the evaluation of such contracts. Slip Opinion, at 34, n. 39 [100 F.T.C. at 204]. The provisions of Part III of the order apparently are acting to inhibit respondent's ability to build a strong distribution network. At the same time, respondent's competitors, including its larger competitors, are not under comparable restraints.

Accordingly, *it is ordered* that this matter be, and it hereby is, reopened and that Part I-T of the order be, and it hereby is, amended to read as follows:

T. Terminating, harassing, threatening, intimidating, coercing or delaying shipments to any dealer because the dealer has sold or is selling its products at other than its established or suggested retail prices.

*It is further ordered,* That Part I-V of the order be, and it hereby is, deleted.

*It is further ordered,* That Part III of the order be, and it hereby is, deleted.

Commissioners Pertschuk and Bailey voted in the affirmative as to the modification to Part III of the original order and voted in the negative as to the modification deleting Part I, subparts T and V, of the original order relating to transshipping.

STATEMENT OF COMMISSIONER PERTSCHUK DISSENTING IN PART

I dissent from the Commission's decision to modify the order in this matter to permit the North American Philips Consumer Electronics Corporation (NAP), the successor to the Magnavox consumer electronics line, to ban transshipment of its consumer electronic products.[1] The petition sets forth no changed circumstances or public interest sufficient to require the complete lifting of the order's prohibition on transshipping bans, which was one of the restrictions put into place to prevent Magnavox from resuming the practice of resale price maintenance (RPM). Further, while NAP asserts that its market share has declined since the Magnavox order went into effect in 1971, it has made no showing that this was the result of transshipping. Also, while claiming that market prices in this industry are competitive, NAP has presented no specific evidence of discounting by its authorized dealers. It is thus uncertain whether there would be much intrabrand price competition in NAP's consumer electronic products if it could completely stop transshipments to other retailers, including price-cutters.

NAP argues that it no longer engages in RPM and that the order's fencing-in measure outlawing transshipping bans is therefore no longer necessary. Presumably, however, an important reason Magnavox no longer fixes resale prices is because the order's many anti-RPM provisions, including the one allowing transshipping, have prevented it from doing so. There is no hard evidence in the record that Magnavox would go back to RPM, or necessarily use the reacquired right to bar transshipping as a means for furthering new RPM schemes. But there is growing evidence that many manufacturers, including some in the consumer electronics industry, are increasingly cutting off discounters, relying in part on the new freedom to restrict transshipping. For example, according to the *Wall Street Journal* (June 21, 1983, p. 37), "many manufacturers besides Pioneer [a competitor of Magnavox] have choked off supplies to discounters in recent months . . ."[2]

I am frankly concerned that the FTC's present policy of non-enforcement of the law against RPM, together with the relaxation of transshipping restrictions on a number of past resale price fixers, has

[1] The Magnavox Co. continues to exist, but is no longer in the consumer electronics business.

[2] In the same article, the Secretary of Lenox, Inc.—which just last year was allowed by the FTC to resume banning transshipments of its fine china, *see Lenox, Inc.*, Docket No. 8718, July 12, 1982 [100 F.T.C. 259]—implied a readiness to restrict transshipments to discounters in saying that while "we don't terminate anybody for discounting," transshipping to unauthorized price-cutters "takes away control of our image."

contributed to this reported trend of cutting off discounters. It is this overriding worry, as well as NAP's failure to make the requisite statutory showing for relief, that has led me to oppose the company's request for permission to prohibit transshipping.

Admittedly, product image and adequate pre-sale and post-sale services are important components of marketing and customer satisfaction in the consumer electronics industry, and NAP—like its competitors—is entitled to maintain them. However, this legitimate business objective can be achieved by means far more compatible with price competition than the rather blunt instrument of transshipping bans, which are typically used to cut off discounters. The NAP Magnavox Dealer Agreement already requires retailers to maintain sufficient product services. NAP's main complaint seems to be that it is barred by the transshipping ban from establishing similar standards for other dealers with whom it has no relationship. If so, that problem could be easily fixed by modifying the order to allow NAP to set reasonable non-discriminatory criteria on transshippees, while still permitting its dealers to sell to other retailers who meet those objective criteria. This is what the Commission did in the *Pioneer* and *JBL* matters,[3] and what it could and should have done here.[4] It is a sensible solution that would protect both NAP's competitive interest in freely choosing its dealers and the consumer's economic interest in vigorous price competition.

## STATEMENT OF COMMISSIONER BAILEY DISSENTING IN PART

As my votes in the order modification requests by *JBL Sound, Inc.*, *Lenox Inc.*, and *U.S. Pioneer Electronics* show, I will not lightly give companies under an order to cease and desist resale price maintenance *carte blanche* to control product transshipment. I firmly believe that principles of finality dictate that FTC orders should be reopened only upon a strong showing of need. Also, transshipment bans can so easily be used as a facilitating device for resale price maintenance that less draconian means should always be sought to achieve the stated goals of ensuring pre-and post-sale service. Here petitioner has made an adequate, though not overwhelming, showing of "free rider" problems associated with the Magnavox brand being transshiped to outlets that, in some instances, fail to provide adequate service. How-

[3] *U.S. Pioneer Electronics Corp.*, Docket No. C-2755, Nov. 5, 1982 [100 F.T.C. 526]; *James B. Lansing Sound, Inc.*, 97 F.T.C. 914 (1981). In retrospect, this may be what the Commission should also have done in *Lenox*.

[4] NAP contends that unlike Pioneer it is entitled to a complete lifting of transshipping restrictions because it has no "current plan" to eliminate classes of retailers, including discounters (Petition at 29). That may be so, though NAP admits that it "may want to adopt a . . . categorical policy" itself on barring transshipping (Petition at 27). In any event, objective, non-discriminatory standards governing transshipping would give NAP flexibility in preventing unsatisfactory retailers from dealing in its products, while preserving qualified discounters' access to those products and thus some enhanced degree of intrabrand competition.

ever, petitioner has not shown why a total ban on transshipping is needed to correct this sporadic problem or why a *Pioneer*-type order would not suffice. Accordingly, I must partially[1] dissent from the Commission's decision.

[1] I have voted to grant petitioner's request for deletion of Part III of the order which absolutely prohibits exclusive dealing, full line forcing and tying practices. The legality of these practices depends upon market conditions and other factors associated with rule of reason analysis. While *per se* treatment may have been appropriate as a fencing in device when this order was issued twelve years ago, enough time has passed to justify a return to the normal standard.

IN THE MATTER OF

# THE GRAND UNION COMPANY, 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 9121. Complaint, Nov. 21, 1978—Final Order, July 18, 1983*

Finding no violation of antitrust law, the Commission has ordered that the complaint challenging The Grand Union Company's 1978 acquisition of Colonial Stores, Inc. be dismissed.

## *Appearances*

For the Commission: *James T. Rohrer, Katherine B. Alphin, Douglas B. Brown, David R. Flowerree* and *Linda Earley Chastang.*

For the respondents: *William C. Pelster, Joan M. Secofsky, Barbara Z. Blumenthal* and *Kenneth A. Plevan, Skadden, Arps, Slate, Meagher & Flom,* New York City.

## COMPLAINT

The Federal Trade Commission, having reason to believe that The Grand Union Company; Grand Union Holdings Inc.; Cavenham (USA), Inc.; and Cavenham Holdings, Inc., corporations subject to the jurisdiction of the Commission, have acquired the stock of Colonial Stores, Inc., a corporation 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)] and states its charges as follows:

### I. DEFINITIONS

For the purposes of this complaint, the following definitions shall apply:

1. *Retail food stores* are retail establishments primarily engaged in selling food for home preparation and consumption.

2. *Supermarket* is a retail establishment primarily engaged in selling a wide variety of canned and frozen food, dry groceries (either

packaged or in bulk), other processed food and non-edible grocery items, fresh meat and prepared [2] meat products, fresh fish and poultry, fresh fruits and vegetables, and dairy products, for home preparation and consumption and having a minimum of six thousand (6,000) square feet of floor space and at least one million dollars ($1,000,000) in annual sales.

## II. GRAND UNION COMPANY

3. Respondent, Grand Union Company (hereinafter "Grand Union"), is a Delaware corporation with its principal office located at 100 Broadway, Elmwood Park, New Jersey.

4. Grand Union Holdings Inc. is a wholly-owned subsidiary of The Grand Union Company with its principal office at 115 East Putnam Avenue, Greenwich, Connecticut.

5. Grand Union is a wholly-owned subsidiary of Cavenham (USA), Inc., a Delaware corporation, with its principal office at 115 East Putnam Avenue, Greenwich, Connecticut.

6. Cavenham (USA), Inc., is a wholly-owned subsidiary of Cavenham Holdings, Inc., a Delaware corporation, with its office at 115 East Putnam Avenue, Greenwich, Connecticut.

7. As of April, 1978, Grand Union operated a chain of approximately 474 food retail stores in the States or Territories of New Hampshire, Vermont, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, West Virginia, Florida, Puerto Rico and the Virgin Islands. Grand Union also operates fourteen (14) Grand Way Stores, selling general merchandise, and nine (9) catalog showrooms.

8. For its fiscal year ending March 31, 1978, Grand Union had total sales of $1,649,274,000; sales from its food retail operations totaled $1,574,119,000. Grand Union is the eleventh largest food retailer chain in the United States.

9. At all times relevant herein, Grand Union was engaged in the purchase or sale of products in interstate commerce and was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, and was a corporation whose business was in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

## III. COLONIAL STORES

10. Colonial Stores, Inc. (hereinafter "Colonial"), is a Virginia corporation with its principal office at 2251 North Sylvan Road, East Point, Georgia. [3]

11. Colonial operates a chain of approximately 378 food retail stores in the States of Virginia, North Carolina, South Carolina, Maryland,

Alabama, Georgia and Florida. Colonial owns and operates several facilities which manufacture or process various products, including bakery items, dairy products, jams and jellies, mayonnaise, salad dressings and other items, as well as store fixtures. Substantially all such products are sold to Colonial retail food stores.

12. For its fiscal year ending December 31, 1977, Colonial had total sales of $1,053,167,343. Colonial is the eighteenth largest food retail chain in the United States. Colonial's assets for fiscal year 1977 were $189,118,000 and net earnings for that year were $10,907,000.

13. At all times relevant herein, Colonial was engaged in the purchase or sale of products in interstate commerce and was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, and was a corporation whose business was in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

### IV. THE ACQUISITION

14. On June 29, 1978, Grand Union made a cash tender offer of $30 per share for all outstanding shares of Colonial stock.

15. On July 7, 1978, Colonial's Board of Directors rejected the offer. Grand Union then made a tender offer directly to Colonial shareholders. Colonial responded by filing suit in Federal District Court in Atlanta to enjoin the hostile tender offer.

16. Grand Union revised its tender offer to $35 per share. On August 1, 1978, Colonial's Board of Directors voted 7 to 5 to recommend the revised offer to its shareholders and to dismiss all pending litigation. By October 13, 1978, Grand Union had purchased over 90 percent of Colonial's shares.

17. Previous to the tender offer for Colonial shares, Grand Union purchased eight Colonial stores in the Tampa-St. Petersburg, Florida, area. This transaction was closed on July 6, 1978.

18. On August 18, 1978, Grand Union and staff of the Federal Trade Commission entered into a Hold Separate Agreement for the Colonial operations. The initial term of this agreement is for 90 days and runs out on November 17, 1978. [4]

### V. TRADE AND COMMERCE

#### A. *Product Market*

19. The relevant product market is the retail sales by retail food stores, and submarkets thereof, including the submarket of sales by supermarkets.

B. *Geographic Market*

20. The relevant geographic markets are some of the Standard Metropolitan Statistical Areas (S.M.S.A.s), cities or towns in which Colonial operates supermarkets.

21. The retail food store business in each of the relevant geographic markets is dominated by a few large retail food chains. The prospects for increased competition in these markets depends heavily upon potential competition from perceived or actual potential entrants.

22. In many of the relevant geographic markets Colonial is a dominant or leading competitor.

C. *Barriers to Entry*

23. Barriers to entry into the relevant markets are high. The increased economic power of a Grand Union-Colonial combination is likely to further inhibit competition in these markets.

VI. THE COUNTS

A. *Grand Union—Actual Potential Competition*

24. Grand Union has the capability and motivation to enter some of the relevant geographic markets within the southeast region in which Colonial operates.

25. Grand Union can enter some relevant geographic markets of Colonial from its current distribution centers. It is also feasible for Grand Union to make a *de novo* entry into other relevant geographic markets in which Colonial operates. In the alternative, Grand Union could enter one or more of those markets through one or more toehold acquisitions.

26. Grand Union is likely to enter some of the relevant geographic markets by means other than the acquisition of Colonial if it were deprived of the Colonial acquisition. Grand Union is extremely interested in expanding its operations beyond its current marketing area. It is especially motivated to enter the southeast region containing relevant geographic markets of Colonial. Grand Union has seriously explored acquisitions throughout this region and has been interested [5] in filling in the gap between its Florida and northern Virginia operations.

27. Grand Union is an actual potential entrant into some of the relevant geographic markets in the southeast region, but for the Colonial acquisition. Grand Union is one of the few most likely potential entrants into certain of the relevant markets.

### B. *Grand Union—Perceived Potential Competition*

28. Grand Union is perceived as the most likely or a leading potential entrant by food retail chains in some of the relevant geographic markets of Colonial. Its presence on the fringe of those geographic markets has had a beneficial effect on competition at all times relevant herein.

### C. *Grand Union—Entry Through One of the Most Anticompetitive Options*

29. Paragraphs 24 through 26 are incorporated herein.

30. Grand Union, through its acquisition of Colonial, has selected one of the most anticompetitive methods for entering the Southeastern United States.

## VII. EFFECTS

31. The effects of the acquisition of Colonial by Grand Union may be substantially to lessen competition or to tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, and constitute an unfair act and practice or unfair method of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, in the following ways, among others:

a. Some or all of the relevant geographic markets are highly concentrated and have become or are likely to become increasingly concentrated in the product market alleged above. Grand Union's acquisition of Colonial may increase the probability of further concentration and decrease the probability of deconcentration in some or all of those markets;

b. Substantial actual potential competition through internal expansion or toehold acquisition may be eliminated;

c. Concentration in the retail food business in some or all of the relevant geographic markets in the southeast region may increase the economic power of the Grand Union Company after the acquisition, and may dampen competition among retail food chains in some or all of the relevant geographic markets; [6]

d. Already high barriers to entry of new competition may be heightened and increased;

e. It may eliminate the procompetitive effects of perceived potential competition in certain relevant geographic markets;

f. The effect of the merger may be to encourage tendencies for combination and merger by other actual and potential competitors in relevant geographic markets; and

g. Members of the purchasing public may be denied the benefits of free and open competition.

VIII. VIOLATIONS

32. The acquisition of Colonial common stock by Grand Union and the merger between Grand Union and Colonial constitute violations 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).

INITIAL DECISION BY

ERNEST G. BARNES, ADMINISTRATIVE LAW JUDGE

OCTOBER 30, 1981

PRELIMINARY STATEMENT

The Federal Trade Commission issued its Complaint in this matter on November 21, 1978, charging that The Grand Union Company, by its acquisition of over 90% of the stock of Colonial Stores Incorporated, violated Section 7 of the Clayton Act [15 U.S.C. 18, as amended], and Section 5 of the Federal Trade Commission Act [15 U.S.C. 45, as amended].

Grand Union, on July 14, 1978, announced its intention to acquire Colonial through a cash tender offer and on August 8, 1978, made an offer to purchase any and all shares of Colonial stock. Grand Union purchased 91% of this stock by the expiration date of its offer, September 1, 1978. [2]

On August 18, 1978, Grand Union and the Commission staff entered into an agreement whereby the staff would not seek to enjoin or otherwise delay the consummation of the sale, and Grand Union would keep Colonial's assets as a separate subsidiary. This agreement expired on December 1, 1978.

On November 20, 1978, Grand Union acquired the outstanding shares of Colonial stock and the Commission's Complaint was issued the next day. An agreement between the Commission and Grand Union to preserve Colonial's trade names and trademarks was entered into on November 29, 1978. This agreement, subsequently modified, remains in effect currently.

The Complaint alleges that Grand Union's acquisition of Colonial may have the effect of substantially lessening competition or tending to create a monopoly in violation of Section 7 of the Clayton Act; or may constitute an unfair act and practice or unfair method of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The product market was alleged to be sales by retail food stores, including the submarket of sales by supermarkets. The relevant geographic markets were alleged to be some of the Standard Metropolitan Statistical Areas, cities or towns in which Colonial operated supermarkets.

The Complaint listed three counts constituting theories of the alleged violations:

Count A: Grand Union was eliminated as an *actual potential entrant* into the markets constituting Colonial's operating area.

Count B: Grand Union was eliminated as a *perceived potential entrant* into the markets constituting Colonial's operating area.

Count C: Grand Union's acquisition of Colonial constituted entry into the Southeastern United States through one of the most anticompetitive methods.

Specifically, the Complaint alleges that Grand Union's acquisition of Colonial had the following effects:

a. Some or all of the relevant geographic markets are highly concentrated and have become or are likely to become increasingly concentrated. Grand Union's acquisition of Colonial may increase the probability of further concentration and decrease the probability of deconcentration in some or all of those markets;

b. Substantial actual potential competition through internal expansion or toehold acquisition may be eliminated; [3]

c. Concentration in the retail food business in some or all of the relevant geographic markets in the southeast region may increase the economic power of Grand Union after the acquisition, and may dampen competition among retail food chains in some or all of the relevant geographic markets;

d. Already high barriers to entry of new competition may be heightened and increased;

e. It may eliminate the procompetitive effects of perceived potential competition in certain relevant geographic markets;

f. The effect of the merger may be to encourage tendencies for combination and merger by other actual and potential competitors in relevant geographic markets; and

g. Members of the purchasing public may be denied the benefits of free and open competition.

(Complaint ¶ 31)

On December 15, 1978, Grand Union filed its "Motion to Dismiss the Complaint or in the Alternative for a More Definite Statement." Pursuant to an Order of January 5, 1979, respondents' motion to dismiss was denied, but the motion for a more definite statement was granted. Complaint counsel was ordered to make a more definite statement regarding relevant product submarkets and geographic markets, and to consider whether Count C was necessary to the Complaint or whether it should be stricken as redundant.

On January 18, 1979, complaint counsel filed a statement supporting the Complaint, alleging an additional product submarket of "grocery stores" as defined by the Bureau of the Census, and identified thirteen relevant local geographic submarkets in addition to designation of Colonial's entire area of operation as a relevant geographic market. These submarkets are:

Atlanta, Georgia
Augusta, Georgia
Charlotte/Gastonia, North Carolina
Fayetteville, North Carolina
Gainesville, Florida
Greenville/Spartanburg, South Carolina
Jacksonville, Florida
Macon, Georgia
Newport News/Hampton, Virginia
Norfolk/Virginia Beach, Virginia
Orlando, Florida
Raleigh/Durham, North Carolina
Richmond, Virginia [4]

Complaint counsel also reserved the right to allege further submarkets constituting several distinct markets within one or more of the submarkets listed.

On February 5, 1979, respondents filed their Answer, and requested expedited procedure pursuant to Section 3.21(b) of the Rules of Practice. In addition, respondents filed a Reply Memorandum in support of their motion to dismiss Count C of the Complaint. On February 14 the parties were ordered to file non-binding statements setting forth the issues to be tried and the theories of defense. Complaint counsel filed their statement on February 28 and respondents on March 12, 1979.

A prehearing conference was held in Atlanta, Georgia on March 19 and oral arguments were heard regarding Count C. On April 17, 1979, respondents' motion to dismiss Count C was denied.

A second prehearing conference was held on October 3, 1979.

Presentation of complaint counsel's case-in-chief began on December 11, 1979, in Atlanta and continued through January 17, 1980. Hearings were stayed on January 30, pending review by the Commission, pursuant to Rule 3.23, of a subpoena issued to Dr. John Albertine, Director, Joint Economic Committee, United States Congress. On June 30, 1980, the Commission quashed the subpoena,[1] and hear-

[1] The Commission held that the broad subpoena power of Section 9 of the Federal Trade Commission Act does not authorize the Commission to subpoena documents that are part of the legislative process of the Congress.

ings were resumed on September 23, 1980. Presentation of respondents' defense began December 16, 1980 in Washington, D.C. and concluded on January 30, 1981. On April 7, 1981, respondents presented supplemental direct testimony of their expert witness and complaint counsel presented one of their expert witnesses in rebuttal to that testimony. The record was closed on May 1, 1981.

Approximately 540 exhibits were accepted into evidence and the following witnesses were called:

| Witness | Title | Called By |
|---|---|---|
| Henry S. Addison, Jr. | Carolinas Regional Vice President, Colonial Division of Grand Union | Respondents [5] |
| M.A. Adelman | Professor, Massachusetts Institute of Technology | Respondents |
| Cosby R. Byrd, Jr. | Chief Executive Byrd Food Stores Burlington, North Carolina | Complaint Counsel |
| Carrol W. Cheek | Chairman of Board OWC Companies (Great Scott of Florida) Clearwater, Florida | Complaint Counsel |
| Thomas A. Connell | Director of Merchandising, Richmond Division of A & P Richmond, Virginia | Complaint Counsel |
| Ronald C. Curhan | Professor, Boston University | Respondents |
| Joseph Foy, Sr. | President, Certified Grocers of Florida Ocala, Florida | Complaint Counsel |
| James E. Gooding | President, Gooding's Markets Maitland, Florida | Complaint Counsel |
| Peter V. Gregerson, Sr. | Chairman of Board Warehouse Groceries Management, Gadsden, Alabama | Complaint Counsel |
| Joseph E. Isaacs | Vice President Colonial Atlanta Division of Grand Union | Respondents |

| Witness | Title | Called By |
|---|---|---|
| Bruce W. Marion | Agricultural Economist, Dept. of Agriculture Madison, Wisconsin | Complaint Counsel |
| Russell C. Parker | Economist, FTC | Complaint Counsel |
| Samuel H. Posey | President, Middle Florida Supermarkets, subsidiary of Malone & Hyde (Fairway Markets) Orlando, Florida | Complaint Counsel **[6]** |
| Edward B. Roehm | Vice President, Colonial Thomasville Division of Grand Union | Respondents |
| Albert N. Solomon | President, Albert N. Solomon Co. (So-Lo Foods) Atlanta, Georgia | Complaint Counsel |
| William G. Spearman | Atlanta Regional Vice President, Colonial Division of Grand Union | Complaint Counsel |
| William F. Stewart | Former President, Colonial and Senior Vice President Colonial Division of Grand Union | Complaint Counsel |
| Bert L. Thomas | President, Winn-Dixie Stores, Inc. Jacksonville, Fla. | Complaint Counsel |
| Charles L. Thomas | Group Vice President, The Kroger Company Cincinnati, Ohio | Complaint Counsel |
| Eugene Walters | President, Commonwealth Foods (Farm Fresh Supermarkets) Norfolk, Virginia | Complaint Counsel |
| Ronald S. Woodberry | Vice President and General Manager Ingles Markets Asheville, N.C. | Complaint Counsel |

In addition, complaint counsel introduced the testimony of nine employees of respondents taken during depositions in this matter and/or in the private litigation between Grand Union and Colonial arising out of Colonial's court challenge of Grand Union's tender offer. The deponent witnesses were:

| Name | Title | Date | Exhibit No. |
|---|---|---|---|
| Roland Franklin | Director, Cavenham | 7/18/78* | CX 570 |
| Sir James M. Goldsmith | Chairman, Cavenham | 7/31/78* | CX 572 [7] |
| Alan C. Goulding | Executive Vice President Grand Union | 11/6/79 | CX 574 |
| Roger W. Kennedy | Treasurer, Grand Union | 10/17/79 | CX 576 |
| John L. Laska | Assistant Comptroller, Colonial | 11/13/79 | CX 608 |
| James W. Rowe | Executive Vice President, Grand Union | 11/11/79 | CX 607 |
| Earl R. Silvers, Jr. | Vice President and Secretary | 8/1/78* | CX 579 |
| | Grand Union | 9/10/79 | CX 580 |
| Stuart S. Tarrant | Executive Vice President, Grand Union | 9/11/79 | CX 586 |
| James Wood | President | 7/25-26/78*[2] | |
| | Grand Union | 10/1/79 | CX 588 |
| | | 10/14/79 | CX 589 |

Stipulated testimony of the following witnesses was also introduced in evidence:

| | | |
|---|---|---|
| Murray Aboff | Managing Editor *Supermarket News* | Stipulated Testimony |
| Joe Blanton | President Publix Supermarkets, Inc. | Stipulated Testimony |
| Antoinette Machiaverna | Field Editor *Chain Store Age and Supermarkets* | Stipulated Testimony [8] |

[2] All depositions taken in 1978, (those names followed by asterisks), were taken by Colonial in the private litigation brought by Colonial alleging violations of the federal securities laws, captioned "Colonial Stores, Incorporated and *Ernest F. Boyce v. The Grand Union Company,*" United States District Court, Northern District of Georgia (Atlanta Division), Civil Action Nos. C78-1132A and C78-1148A.

| | | |
|---|---|---|
| Boyd L. George | President<br>Merchants Distributors, Inc.<br>Hickory, North Carolina | Stipulated Testimony |
| Dale C. Higgins | Vice President<br>Super Food Services, Inc.<br>Orlando, Florida | Stipulated Testimony |

## Findings of Fact

### I. IDENTITY AND BUSINESS OF RESPONDENTS

### A. *The Grand Union Companies*

1. The Grand Union Company ["Grand Union"] is a Delaware corporation founded in 1872, with its principal office located at 100 Broadway, Elmwood Park, New Jersey. (Complaint ¶ 3; Answer ¶ 2; CX 10F)

Since 1974, Grand Union has been a wholly-owned subsidiary of respondent Cavenham (USA) Inc. which, in turn, is a wholly-owned subsidiary of respondent Cavenham Holdings Inc. Cavenham Holdings Inc. is a wholly-owned subsidiary of respondent Cavenham (Overseas) Limited. Cavenham (Overseas) Limited is a wholly-owned subsidiary of Cavenham Limited. (RX 1H) Cavanham Limited is an indirect wholly-owned subsidiary of Generale Occidentale, S.A., a French company. Generale Occidentale, S.A. is a holding company, the principal assets of which, in addition to Cavenham Limited, include, *inter alia,* interests in companies engaged in food manufacturing, banking and the insurance brokerage business. (RX 1H-I)[3] **[9]**

2. As of April 1978, prior to its acquisition of Colonial Stores Incorporated ("Colonial"), Grand Union operated a chain of approximately 479 retail food stores located in the states or territories of New Hampshire, Vermont, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, West Virginia, Florida, Puerto Rico and the Virgin Islands. (Complaint ¶ 7; Answer ¶ 4; RX 2I, 1P) Grand Union also operated 14 Grand Way stores selling general merchandise, and nine catalog showrooms. (Complaint ¶ 7; Answer ¶ 4) Excluding its acquisition of Colonial, at the end of its 1978–79 fiscal

[3] References to the record and other material are given in parenthesis, and the following abbreviations are used:

F. – Findings of this Initial Decision followed by the finding number being referenced. Reference to the transcript of record is designated by the name of the witness and the page being referenced.
CX – Commission Exhibit followed by the number of the exhibit being referenced.
RX – Respondents' Exhibit followed by number of the exhibit being referenced.
CPF – Complaint counsel's proposed findings, followed by the number of proposed finding being referenced.
RPF – Respondents' proposed findings, followed by the number of proposed finding being referenced.

year, company officials projected that Grand Union would be the eleventh largest supermarket chain in the United States. (CX 6Z11)

Grand Union's stores were divided into three regions comprising eleven operating divisions. The New York region included the Metropolitan, Long Island, Suburban and Jersey Divisions; the Northern Region included the Empire North and South and Central Divisions; and the Southern Region included the Washington, Florida East Coast, Florida West Coast and Caribbean Divisions. (CX 6Z11–Z31)

Nine company-owned distribution centers served the stores. The New York region was served by warehouses in Mt. Kisco, New York and Carlstadt, New Jersey; the distribution centers serving the Northern Region were located in Waterford, Waverly, Cortland, and Binghampton, New York; and the Southern Region was serviced by warehouses in Landover, Maryland and Miami (Hialeah), Florida. An additional warehouse in South Hackensack, New Jersey serviced the New York and Northern Regions and the Washington Division with general merchandise. (CX 6Z13)

3. All of Grand Union's retail food stores are supermarkets. (RX 1–P; CX 10–D; F. 20) Prior to the merger with Colonial in 1978, more than 95% of Grand Union's sales came from its Supermarket Division. (CX 11C) In the fiscal year ending March 31, 1978, Grand Union had $1,649,274,000 in total sales and $1,574,119,000 in retail food sales. (CX 10–I; Complaint ¶ 8; Answer ¶ 4) At the time of its acquisition of Colonial, Grand Union's sales were approximately 1% of national retail food sales. (Respondents' 3.21 Statement of March 12, 1979, at 4)

4. Respondent Grand Union Holdings Inc. was a Delaware Corporation and a wholly-owned subsidiary of Grand Union **[10]** (RX 2C), with its principal executive offices at 115 East Putnam Avenue, Greenwich, Connecticut. It was incorporated on June 30, 1978, for the purpose of making a tender offer and acquiring any and all shares of Colonial. (RX 1–G, 2 H-I) Other than the acquisition and holding of Colonial stock, it conducted no business. (RX 2I)

B. *Cavenham Respondents*

5. Respondent Cavenham (U.S.A.) Inc. is a wholly-owned subsidiary of respondent Cavenham Holdings Inc. and the parent of Grand Union. (RX 1H) It was incorporated in 1975 for the purpose of holding Grand Union's common stock. (RX 2I) It is a Delaware corporation and has its principal office at 115 East Putnam Avenue, Greenwich, Connecticut. (Complaint ¶ 6; Answer ¶ 4)

Cavenham Holdings Inc. was organized for the purpose of holding shares of Cavenham (U.S.A.) Inc. Cavenham (Overseas) Limited and Cavenham Limited are English companies with their principal executive offices at Cavenham House, Millington Road, Hayes, Middlesex, UB 34AY, England. (RX 2I) Cavenham (Overseas) Limited was organized for the purpose of holding securities of companies located outside of the United Kingdom. (RX 2I) Cavenham Limited is engaged primarily in the operation of supermarkets and other retail food outlets in the United Kingdom and in the manufacture and sale of food and food products in the United Kingdom and elsewhere in Western Europe. (RX 2I). In 1973, Cavenham Limited initially purchased 51% of Grand Union's outstanding common stock. (CX 15D) Cavenham Limited is a multi-national food retailing and manufacturing organization with operations in fourteen nations. (CX 13H)

Generale Occidentale S.A., a French company, owns all the outstanding stock of Cavenham Limited. Generale Occidentale S.A. is ultimately controlled by Sir James Goldsmith. Generale Occidentale S.A., and Sir James Goldsmith may be deemed to be the parents of Grand Union, Grand Union Holdings Inc., Cavenham (USA) Inc., Cavenham Holdings Inc. (RX 2A, 2I-J)

### C. *Respondent Colonial*

6. In 1901, the David Pender Grocery Company was incorporated in Norfolk, Virginia. When the Pender Company merged with the Southern Grocery Company in 1940, the resulting corporation was called Colonial. (CX 10F, 313B) Colonial was a Virginia corporation with its principal executive offices located at 2251 North Sylvan Road, East Point, Georgia. (RX 2U) Colonial no longer exists as a separate corporate entity. It was merged into Grand Union on February 3, 1979, and is operated as a division of Grand Union. (Answer ¶ 5; RX 2C)

As of November, 1978, Colonial operated a chain of approximately 378 retail food stores in the states of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama and Maryland. (Complaint ¶ 11; Answer ¶ 6; CX 313J) Colonial [11] owned and operated several facilities which manufactured or processed various products, including bakery items, dairy products, jams and jellies, mayonnaise, salad dressings and other items, as well as store fixtures. Substantially all such products were sold to Colonial retail food stores. (Complaint ¶ 11; Answer ¶ 6) In 1978, most of Colonial's stores operated under the name "Big Star." A few were still called Colonial. (Isaacs 2529; Stewart 476) All Colonial's retail food stores were supermarkets. (CX 10D, 10F, 313A, 314L; RX 1P; F. 20)

The company [Colonial] is engaged primarily in the operation of a chain of self-service, cash-and-carry retail food stores (supermarkets), in seven southeastern states, offering a full line of packaged grocery products, meat, poultry, fish, fruits and vegetables, bakery and dairy products, and other items of the type customarily sold in supermarkets, such as health and beauty aids and household items.

(CX 313J)

7. In the fiscal year ending December 31, 1977, Colonial had total sales of $1,053,167,343. (Complaint ¶ 12; Answer ¶ 6; CX 313C) Colonial's assets for fiscal year 1977 were $189,118,000 and net earnings were $10,907,000. (Complaint ¶ 12; Answer ¶ 6) In its 1977 Annual Report, Colonial stated that "[b]ased upon available published sales figures for 1976, the company believes it is the fifteenth largest supermarket chain in the United States." (CX 313J)

At the time of the acquisition, Colonial accounted for approximately 0.6% of national retail food sales. When combined, Grand Union and Colonial had a total share of national retail food sales of about 1.6%. (Respondents' 3.21 Statement of March 12, 1979, at 4) Colonial's stock was traded on the New York Stock Exchange. Between the first quarter of 1976 and the first quarter of 1978 [the last full quarter prior to the tender offer], Colonial's stock ranged from a high of $25 per share in the first quarter of 1976 to a low of $18 per share in the first quarter of 1978. (RX 1D)

D. *Interstate Commerce*

8. At all material times herein, respondents were engaged in commerce within the meaning of the Clayton Act and the Federal Trade Commission Act. (Complaint ¶¶ 9, 13; Answer ¶¶ 4, 6)

II. THE EIGHT STORE ACQUISITION

9. Commencing in late 1976 or early 1977, discussions were held between Colonial and Grand Union concerning the [12] possible disposition by Colonial of a Big Star store located on the West Coast of Florida. In early 1978, Colonial offered to sell its leasehold interest in 11 Big Star stores on the West Coast and in Central Florida to Grand Union. (RX 1L) Negotiations for the acquisition of eight of those stores occurred prior to the acquisition of Colonial stock.

Pursuant to the "FTC Enforcement Policy With Respect to Mergers in the Food Distribution Industries", 1 Trade Reg. Rep. (CCH) ¶ 4525, issued January 17, 1967 (CX 5), Grand Union notified the FTC on May 3, 1978 of its intention to acquire the eight stores from Colonial. (RX 1P; CX 654A) Thereafter, on July 6, 1978, Grand Union acquired the eight Big Star stores. One store was located in Manatee County, three were located in Hillsborough County, and four were located in Pinellas County (Tampa and St. Petersburg), all in the State of Florida. (RX 1L; CX 112B; CX 154B; CX 155B; CX 156B; CX 157B; CX 158B; CX 159B; CX 160B) Grand Union paid an aggregate consideration of approximately $1.45 million for the eight stores (RX 1L) Grand Union did not choose to acquire any of the Colonial stores in Central Florida. The acquired stores had been closed by Colonial prior to their acquisition by Grand Union. (CX 588 [Wood] at 189) Subsequently, seven stores were renovated by Grand Union and reopened in the fall of 1978 under the Grand Union name. (*Id.*) At the time of its notice to the Commission of its proposed acquisition of the eight supermarkets, Grand Union operated seven supermarkets on the west coast of Florida, including one in Pinellas County, Florida. (Complaint Counsel Phy. Ex C)

On June 21, 1978, the Commission's Consent Decree with Grand Union expired; it had required Grand Union for a ten-year period to seek prior Commission approval in the event of any proposed acquisition involving five or more grocery stores, or annual grocery store sales in excess of $5,000,000, or where Grand Union's stores and the grocery stores to be acquired would account for grocery store sales of 5% or more of total grocery or food store sales in any city or county. (CX 62Z163; RX 1Q) The purchase of the eight Big Star supermarkets by Grand Union was closed on July 6, 1978, fifteen days after the expiration of the Consent Decree. (Complaint ¶ 17; Answer ¶ 8, CPF 36)

### III. THE ACQUISITION OF COLONIAL

#### A. *The Acquisition*

10. At a meeting in London on May 7, 1978, James Wood, at that time the President and Chief Executive Officer of Grand Union, and Roland Franklin, a director of Cavenham, discussed specific acquisition possibilities. Roger Kennedy, Grand Union's Treasurer, had prepared at Mr. Wood's request, a document entitled "Acquisition Possibilities" which mentioned 45 retail food chains, including Colonial. (CX 44) According to Mr. Wood in his deposition, this was when Grand Union first considered Colonial as an acquisition possibility. (CX 589 [Wood] at 53–58) After the [13] meeting, Mr. Franklin discussed Grand Union's interest in Colonial with Sir James Goldsmith and this topic was covered by Mr. Wood at the regularly scheduled monthly Cavenham Board meeting. (CX 588 [Wood] at 114–15, 195–98) Sir James approved the acquisition. (CX 588 [Wood] at 115–16, 202)

At a meeting later that week at Grand Union's New Jersey headquarters, Messrs. Wood, Franklin, Tarrant (Grand Union's Executive Vice Presidents), and Silvers (Grand Union Vice-President and Secretary) discussed the possible acquisition of Colonial. Other companies, including A & P and Weingarten, were also discussed at that meeting.

(CX 586 [Tarrant] at 56–57) Following the meeting, Mr. Tarrant prepared a financial appraisal entitled "Company Profile, Colonial Stores Inc." (CX 63) for the purpose of analyzing Colonial as an investment, and to accompany any recommendation to the Cavenham Board that Grand Union attempt to acquire Colonial. (CX 588 [Wood] at 126)

During the week of May 8, 1978, after the initial meeting in London, Mr. Wood telephoned Ernest F. Boyce, Chairman and Chief Executive Officer of Colonial, to suggest a meeting. Mr. Boyce and Mr. Wood met at Colonial's headquarters on June 1, 1978. Following that meeting, Mr. Wood sent a letter to Mr. Boyce dated June 2, 1978 to confirm Grand Union's interest in exploring the possible association of Grand Union and Colonial. (RX 1L) On June 29, 1978, Grand Union wrote a letter to Mr. Boyce proposing a merger between Grand Union and Colonial offering $30 per share, in cash, to Colonial stockholders. (RX 1L, 2D) On July 6, 1978, Colonial's Board of Directors rejected Grand Union's merger proposal. (RX 1L, 2D)

11. On July 6, 1978, Colonial and Mr. Boyce commenced an action against Grand Union in the United States District Court for the Northern District of Georgia, Atlanta Division, seeking, *inter alia,* injunctive relief, divestiture of any Colonial shares owned by Grand Union, and costs. (RX 1L) On July 7, 1978, Colonial and Mr. Boyce instituted an action against Grand Union in the Superior Court of Fulton County, Georgia, seeking, under the Georgia state takeover law and the Georgia Securities Act of 1973, substantially the same relief sought in the abovementioned federal action. (RX 1L-M) On July 7, 1978, Colonial and Mr. Boyce petitioned the State Corporation Commission of Virginia to enjoin Grand Union from an alleged violation of the Virginia Take-Over Bid Disclosure Act and seeking relief similar to that sought in the federal action. On July 26, the State Corporation Commission dismissed the petition filed by Colonial, finding that the Commission had no jurisdiction to entertain private actions for injunctive relief. (RX 1M) None of these actions alleged a violation of the antitrust laws. (RX 1L-M)

On July 14, 1978, Grand Union delivered to Colonial, pursuant to Georgia and Virginia takeover laws, a proposed form of Offer to Purchase and announced its intention to make, as soon as it had satisfied all applicable legal requirements, a [14] cash tender offer for any and all outstanding Colonial shares at $30 per share. (RX 1M)

On July 24, 1978, Colonial filed a request for a hearing with the Virginia State Corporation Commission pursuant to the provisions of the Virginia Take-Over Bid Disclosure Act. On July 31, 1978, the State Corporation Commission determined that no cause for a hearing existed. (RX 1M)

12. At a meeting on August 1, 1978, between representatives of Grand Union and Colonial, Grand Union indicated that if a majority of Colonial's Board of Directors, including Russell B. Stearns, a director who was a major stockholder of Colonial, were receptive, Grand Union would consider increasing the price of its previously announced cash tender offer to $35 per share. Later that day, Colonial's Board of Directors, by a vote of seven to five (Mr. Stearns voting affirmative), recommended acceptance by Colonial's stockholders of an offer at $35 per share if it were made, and Grand Union agreed to make such an offer. (RX 2D-E) Following the recommendation of the offer by a majority of Colonial's Board, the legal actions instituted against Grand Union were dismissed or otherwise withdrawn. (RX 2E)

On August 8, 1978, Grand Union Holdings Inc. made an offer to purchase any and all shares of Colonial common stock at $35 per share. When the offer expired on September 1, 1978, Holdings had acquired 3,471,886, or approximately 91%, of Colonial's shares then outstanding. (RX 2E) Commencing on November 17, 1978, in a series of three mergers pursuant to Virginia state corporate law, Colonial became a wholly-owned subsidiary of Grand Union. (RX 2C, E) Colonial was subsequently merged into Grand Union. (Answer ¶ 5) As of February 5, 1979, Colonial Stores Incorporated, a Delaware corporation, had ceased to exist as a separate corporate entity and was being operated as a division of Grand Union. (Answer ¶ 5; CX 10D)

B. *The Hold Separate Agreement*

13. On June 30, 1978, in accordance with the "FTC Enforcement Policy with Respect to Mergers in the Food Distribution Industry," Grand Union gave the Commission 60 days advance notice of its intention to acquire Colonial. FTC staff then began an investigation of the proposed merger. (Answer ¶ 18) In a letter to counsel for Grand Union dated July 6, 1978, FTC staff stated that it would give "full attention and consideration" to this acquisition and that: **[15]**

> The eight Florida supermarkets Grand Union has recently acquired from Colonial [the Big Star acquisition, discussed F. 9] will be considered as part of what is now a much larger proposed transaction—that transaction will be analyzed as though the eight stores were still Colonial's.

(Affidavit in Support of Respondents' Motion to Dismiss the Complaint or in the Alternative for a More Definite Statement, at 6) The staff also indicated that the proposed acquisition was "the type of merger that the [FTC Guidelines] indicates raises serious questions under the statutes administered by the [FTC]." (RX 1Q)

On August 18, 1978, Grand Union and the Commission staff reached an agreement pursuant to which the staff agreed not to recommend that the Commission seek to enjoin or otherwise delay the acquisition, and Grand Union agreed to hold Colonial's assets as a separate subsidiary until the FTC's investigation was closed or until November 17, 1978. (Hold Separate Agreement, at 3) The Hold Separate Agreement was extended until December 1, 1978 (Agreement to Extend the Hold Separate Agreement), at which point it lapsed.

### C. *The Filing Of The Complaint And The Agreement To Preserve Trade Names*

14. On November 21, 1978, the Complaint in this action was filed. On November 29, 1978, in consideration for the Commission not seeking a temporary restraining order or preliminary injunction, the staff and Grand Union entered into an "Agreement to Preserve Names and Trademarks Used By Colonial Stores, Inc." That agreement, subject to certain modifications, is currently in force.

## IV. THE PRODUCT MARKET

### A. *In General*

15. The Complaint alleges that the effect of the acquisition of Colonial by Grand Union may be to substantially lessen competition in the product market of "retail sales by retail food stores, and submarkets thereof, including the submarket of sales by supermarkets." (Complaint ¶ 19) Complaint counsel, on January 19, 1979, filed a statement alleging an additional submarket of grocery stores, as defined by the Bureau of the Census. Complaint counsel offered three alternative market share calculations based upon three definitions of relevant product market: retail food stores (CX 2), grocery stores (CX 3), and supermarkets. (CX 664) **[16]**

16. The product market, "food stores", is defined by the Bureau of the Census, *Census of Retail Trade,* as:

> *Food Stores* (SIC Group 54)—The major group includes retail stores primarily engaged in selling food for home preparation and consumption. Establishments primarily engaged in selling prepared foods and drinks for consumption on the premises are classified in major group 58, and stores primarily engaged in selling packaged beers and liquors are classified in SIC 5921.

The product market, "grocery stores", is defined by the Bureau of the Census, *Census of Retail Trade,* as:

> *Grocery Stores* (SIC 541)—Establishments primarily selling (1) a wide variety of canned or frozen foods such as vegetables, fruits, and soups; (2) packaged or bulk dry groceries, such as tea, coffee, cocoa, dried fruits, spices, sugar, flour, and crackers; and (3) other processed foods and nonedible grocery items. These establishments often also sell

smoked and prepared meats, fresh fish and poultry, fresh vegetables and fruits, and fresh or frozen meats. Establishments commonly known as supermarkets, food stores, and delicatessens are included if receipts from sales of groceries and food items for off-premise preparation and consumption are 50 percent or more of total sales.

17. Complaint counsel define the most relevant product market in this case as sales by supermarkets. This definition is supported by Dr. Marion, one of complaint counsel's economic experts (Marion 1881), and also by Dr. Parker, another economic witness for complaint counsel:

[B]oth Colonial and Grand Union are supermarket-operating firms, . . . the firms they compete with are supermarket-operating firms, . . . they compete indirectly with other grocery retailers, but . . . the competition for supermarket sales are sufficiently distinct that I would call it a separate market.

(Parker 2220)

Dr. Marion identified three factors which are distinctive of supermarkets: (1) variety of products, volume of business, average amount of each consumer transaction, and the stores' gross margins; (2) the consumers' view that the [17] supermarket can fill all major food shopping needs; and (3) the supermarket owners' view that other supermarkets are their competitors. Dr. Marion also stated that there are trade associations and trade journals that cater to supermarkets. (Marion 1881–84)

18. Trade witnesses ascribe various definitions to the term "supermarket":

[O]rdinarily, you think of supermarketing as a way to market foods at a low price.

(Gregerson 309)

Well, to me a supermarket would be a store perhaps in this day and age at least 10,000 square feet doing a minimum of $1 million a year in sales.

(Gooding 1115)

It would be the selling or distributing to consumers the products from the farm, from the packers through the sale of this merchandise in the stores. It would encompass not just food, but like say, non-food items, household items, things of this nature.

(Connell 1221)

A supermarket, my own personal opinion, is any store that provides a wide variety of grocery, produce, and meat items. That offers a degree of service to the customers.

(C. Thomas 1303)

Well, a supermarket, as I said—as I envision them—is big enough to sell a full line of food, health and beauty aids, some housewares, products to be consumed in the kitchen and the home, in the bathroom, on a turnover basis. A lady should not have to go elsewhere to get food in my definition of a supermarket.

(B. Thomas 1470)

It would mean to me and to you, probably, a different thing. I don't think a supermarket could be called a supermarket if it is less than 14, 15,000 square feet and bigger.

(Byrd 1536) [18]

Industry witnesses testified that 10,000 to 56,000 square feet constitute the size range of supermarkets. (Gooding 1115; Stewart 523; Connell 1220–21; Byrd 1536; Posey 1633; C. Thomas 1296; CX 611B) In 1978, the average size of Colonial's supermarkets was 20,500 square feet. (CX 63A)

19. Another defining characteristic of a supermarket versus other food stores is the array of items it offers. Industry members described supermarkets as selling fresh meat and produce, groceries, health and beauty aids, and general merchandise (B. Thomas 1470; C. Thomas 1303; Walters 14501–02), and carrying from 8,000 to 12,000 products. (Thomas 1470; Spearman 736; Stewart 523; Gooding 1116) An aspect of supermarket merchandising is that it offers "one-stop shopping." (B. Thomas 1470; Connell 1239; Posey 1638; Roehm 2779; CX 92E)

20. Sales volume may be used to differentiate supermarkets from other food stores. (Marion 1877) In the early to mid–1970's, sales volume for supermarkets was described as a minimum of $1 million per year. (Walters 1402; Gooding 1115) Currently due to inflation, the cut-off of $1.5 million has been advanced by complaint counsel's economic experts. (Marion 1877–78; Parker 3462–63) In 1977, Colonial operated 376 supermarkets, and Grand Union operated 484 supermarkets. These supermarkets averaged in excess of $3 million dollars in sales per year. (*See* CX 313C, F; CX 252Z39; CX 11K.) Dr. Curhan, respondents' marketing expert, in testifying that a small regional chain was unsuitable for acquisition by Grand Union, stated: "But Lowe's operates very small stores. They have 63 stores and their sales in '78 are $130 million. That's a scant $2 million a store. That's not Grand Union's kind of stores." (Curhan 2972)

21. Supermarket operators generally price-check only other supermarkets, because only supermarkets have similar competitive pricing structures. (CX 589 [Wood] at 123; Roehm 2772; Connell 1230; Gregerson 318–19; Walters 1404–05; Marion 1884) Gross margins in supermarkets average 20% whereas in other grocery stores, *i.e.*, convenience stores, margins average 30%. (Marion 1881–82, 1884; Parker 2220) Former Colonial officials now employed by Grand Union

stated that they price-checked main competitors only, and these were other supermarkets. (Isaacs 2624, 2626; Addison 2691–92; Roehm 2772) Colonial price-checking documents generally list only other supermarkets. (CX 493A-Z11; CX 497A-Z14; CX 498 I; CX 501A-Z15; CX 502A-Z23) Pre-acquisition Grand Union price-check documents in evidence only list other supermarkets. (CX 302A-H; CX 303A-L)

B. *Convenience, Mom-and-Pop, and Limited Assortment Stores*

22. Convenience stores are seldom price-checked by supermarket operators. (C. Thomas 1300; Posey 1637–38; Connell 1239) Trade witnesses testified that only checking of bread **[19]** and milk prices in convenience stores was done (CX 607 [Rowe] at 60; B. Thomas 1490), and the prices of these items are generally higher in convenience stores. (Stewart 529; Curhan 3038)

Convenience stores range in size from 800 to 3000 square feet (Parker 2221; Stewart 523–24, 528; Posey 1637; Gooding 1124), and have a limited assortment of items, about 500 to 3,000. These are dominated by high volume, fast turnover items such as beverages, bread, cigarettes, and milk. (B. Thomas 1471; Stewart 523–24; Parker 2222; Posey 1637) They carry little, if any, produce and a limited assortment of meats. (Gregerson 313; Spearman 732) In Macon, Georgia, 26 Majik convenience stores averaged approximately $140,000 in sales per store in 1977. (CX 665Z293) In Richmond, Virginia, 87 7–11 convenience stores averaged approximately $325,000 in sales per store in 1977. (CX 665Z506–Z507) In Orlando, Florida, 83 7–11 convenience stores averaged approximately $290,000 in sales per store in 1977. (CX 2Q; CX 665Z412)

Convenience stores generally have one employee per shift (Stewart 524), and have higher price structures and margins than supermarkets. (Stewart 523; Gooding 1124; Posey 1638; Spearman 734–35; Parker 2222; Marion 1882) Sales per customer average $11.00 to $15.00 in supermarkets and $1.00 to $3.00 in convenience stores. (Parker 2223; Spearman 736; Marion 1882; Gooding 1125) "They are very high priced, quick in, quick out." (Gooding 1124)

While several supermarket operators considered convenience stores as competitors on the items the convenience stores sell (Spearman 842; B. Thomas 1490; Byrd 1367–68; Woodberry 1731), other trade witnesses indicated that the main competition convenience stores offer is in their hours of operation. (C. Thomas 1372; Curhan 2840) Convenience stores are not generally considered in supermarket expansion plans and store location studies. (CX 92A-C through CX 169; CX 391A-G through CX 399; *see* CX 95B; CX 1–B; CX 106C)

23. Mom-and-pop stores have been defined as "little corner stores generally operated by mom and pop that had a little produce, a little

meat, limited line of groceries, kept varying hours." (B. Thomas 1471) Mom-and-pop stores generally do not advertise in major metropolitan newspapers. (Roehm 2775) They offer different services than those provided by supermarkets. (Parker 2225) Supermarkets do not generally price-check mom-and-pop stores. (Spearman 738)

24. Limited assortment or box stores sell roughly 400 to 800 items, frequently do not carry meat or produce, and require the customer to bring his own bag or box. (Gregerson [20] 313; Spearman 738; Gooding 1129; Curhan 2848) They rely heavily on manufacturers' allowances and deal merchandise (Gooding 1129–30), and do not offer services like bagging and payment by check. (Gooding 1129) Prices are generally lower than supermarket prices. (Posey 1635–36; Spearman 740) However, opinion is divided regarding what effect this has had on supermarket prices. (Posey 1637; Parker 2224; Gooding 1130; Spearman 924; Byrd 1568)

One industry member, in commenting that a limited assortment store was directly across the street from his supermarket, said that he had not reacted to the limited assortment store because it cannot supply a housewife's total food needs. Because the limited assortment store does not carry perishables, the housewife must make another stop in her shopping if she goes to a limited assortment store. (Posey 1637; Parker 2224) Another supermarket operator, acknowledging that there were two limited assortment stores within a mile or two of his supermarkets, indicated that he had seen no appreciable effect on his stores' volume after the opening of the limited assortment stores. (Gooding 1130) A third industry member stated he had not made any response to the opening of a Jewel-T limited-assortment box store because he did not believe it would affect his business and, in fact, it did not. (Gregerson 314; *see also* C. Thomas 1358; Spearman 739–40)

However, these stores require small capital investments and are easily located. (Gooding 1133) They are "very competitive with price." (Spearman 924; Byrd 1568; Curhan 2849) Several "conventional" supermarket operators are applying box store principals to their stores (Walters 1445–46), or are opening box stores. (Curhan 2851)

So-Lo Food Stores operates a "case-stack" store which did a little over $3 million in sales in 1979. (Solomon 1017–18) It was described as a "cross-section of business," part "warehouse type" operation and part "total shopping." (Solomon 1018) Unlike some box stores, it carries fresh meat and produce. (Solomon 1019–20) Mr. Solomon considers his store to be a supermarket. (Solomon 1023)

25. A "warehouse" store is one in which the product is displayed in its own shipping container, without a price label on it. It offers limited service. (Gregerson 367–68) Mr. Gregerson of Warehouse Groceries Management, Inc. ("Warehouse Groceries"), was one of the innova-

tors of this type of store about ten years ago (Gregerson 365), and now others, including Grand Union, have opened similar stores. (Gregerson 366) One of complaint counsel's experts testified that warehouse stores are direct competitors with conventional supermarkets. (Parker 2223)

26. Charles Thomas, Group Vice President of Kroger, described the variety of food stores operated by his company: [21]

> Kroger has a variety of retail stores. We have what we call the older type—we refer to it as a conventional store. That is a store that is under 25,000 square feet, built prior to 1972. We then have what we refer to internally as a super store. This is a store that was built after 1972 and exceeds 25,000 square feet.
>
> We have combination stores, which is [sic] basically in the 56,000 square-foot range and is [sic] a combination of food, drug, and pharmacy.
>
> We have family center stores. These are basically in the southwest, in Houston and Dallas, which are in the 50,000 square-foot range. These are similar to the combination store, except they have a wider variety of general merchandise.
>
> We have a few experimental units that would be classified as box stores which are small, limited-item discount stores.
>
> We also have a limited number of very large warehouse-type stores under the name of Barney.

(C. Thomas 1295–96)

C. *Supermarkets Versus Other Grocery Stores*

27. Respondents note (RPF 58) that although the retail food stores described (F. 22 to F. 26) may not be considered as competitors by supermarket operators, "supermarkets are keenly concerned with the continued encroachment of convenience stores taking away business." (Curhan 2843) Respondents also discount (RPF 59) the importance of supermarket operators' general failure to price-check convenience and mom-and-pop stores. (F. 23) Respondents argue that supermarkets are interested in the prices charged by convenience and mom-and-pop stores (Posey 1668), and that supermarkets do price-check items such as bread, milk, soft drinks and beer in such stores. (Byrd 1546; Addison 2651; Woodberry 1731)

Respondents' expert economic witness, Dr. Adelman, testified that the sporadic nature of price-checks of convenience and mom-and-pop stores does not warrant their exclusion from the market (Adelman 3260), because firms price-check to obtain information about the market and, because of the expense of such information, they are initially interested in their largest competitors. (Adelman 3260) Price-checking [22] convenience and mom-and-pop stores would merely confirm the obvious, *i.e.*, that their prices are, in general, higher than those charged by supermarkets. (B. Thomas 1490)

28. Respondents also point out (RPF 60) that Dr. Marion conceded

that "supermarket is a somewhat imprecisely used term" (Marion 1876) and that "the most difficult choice here is really between whether you choose to go with all grocery stores or all supermarkets." (Marion 1881) A cut-off of $1.5 million in determining relevant market is "admittedly arbitrary." (Marion 1877; *see also* Adelman 3253, 3451–52) In 1980, *Progressive Grocers,* an industry trade publication, used a $1 million cut-off to define a supermarket. (Parker 3841) Some industry witnesses placed the cut-off at $1 million. (Gooding 1115; Walters 1402)

D. *Other Food Retailers*

29. There are two other operations, the sales of which are not included in the Bureau of the Census, *Census of Retail Trade,* which respondents contend have an influence on competition in food retailing: fast-food outlets, and military commissaries. (RPF 69)

1. Fast-Food Outlets

30. Grand Union's 1977/78 Business Plan and Budget, considered the vendors of prepared food in light of the competition such vendors offered to supermarket operators:

> Eating out, an increasingly important form of supermarket competition, continued to show substantial growth, particularly limited menu fast food operations, which accounted for 32.3 percent of all foods eaten out. Dollar sales of both total restaurant, and of fast-food outlets, have grown considerably faster than food store sales, total food sales, and the food price index. The impact of changing food lifestyles is reflected in growth rates from 1968 through 1976. During this eight-year period, growth for all eating out was 208.9 percent, versus the growth in food from food stores of 156.9 percent. The fast foods gain in share of total foods from 1975 to 1976 was 0.5 percent. Translated on the basis of no inflation, no gain in consumption, this would represent a loss of approximately a billion dollars in sales for food stores.

(CX 7Z–84)

Similarly, a Colonial document written prior to the Grand Union acquisition notes: "Competition, like Colonial, [23] recognizes that supermarket tonnage is on a plateau and is being eroded by eat-out establishments." (CX 251Z39)

When asked whether he competed with fast-food operators, Mr. Posey, President of Fairway Markets, said, "Well I would say it's probably our best competition, or worst, I should say." (Posey 1702) An exhibit introduced by complaint counsel during Mr. Posey's testimony, an advertisement for pizza and hamburgers, shows how supermarkets attempt to compete with fast-food operations. (CX 640F, G) Mr. Posey explained:

> I think the biggest thing they are trying to accomplish, and so are we, is to let the

public know they can buy hot foods, plate lunches, and take them home. I do not have sit-down [restaurants], nor do most of the grocers; but we sell them a complete meal to carry out to, again, try to be competitive against fast-food houses.

(Posey 1703–04)

Mr. Charles L. Thomas, Group Vice President of Kroger, also agreed that fast-food stores competed with Kroger operations (C. Thomas 1372), and testified that Kroger reacted to such competition with delicatessens and bakeries and, in Kroger's larger stores, with "snack bars and/or restaurants." (C. Thomas at 1373)

Mr. Walters, President of Farm Fresh, noted that fast-food operations had affected his business and that he had responded to that competition:

Yes. We feel that we are in the total food business, and our major thrust and our image is to serve the customers with whatever they want in food needs and other products that are regularly used in supermarkets. So we have developed fast-food operations within our stores: fried chicken, service delis, party trays, little cafeterias, all the things that go with it, as many other people have done throughout the country.

(Walters 1448; *see also* Isaacs 2578–79)

Despite this and similar testimony, one of respondents' economists would not include fast-food outlets within the food retailing market. Dr. Adelman testified:

. . . [I] would say that the two products are sufficiently different in appearance, in use, and in the costs that go into their production to where, although there may be competition in the sense of one industry competing with another and there is **[24]** competition enough to damage the food-retailing industry substantially, that, I think, is a somewhat different concept that we are addressing.

(Adelman 3252–53)

On the other hand, respondents' other expert witness, Dr. Curhan, while acknowledging differences, would put fast-food operators in the food retailing market:

. . . I can see some reason for differentiating between conventional food retailers . . . and to contrast them to McDonald's. I can understand where one may want to analyze them in many respects as separate industries. But I would not retreat one inch from the fact that they are competitors in what is a fuzzy market for food for people who are satisfying their daily needs.

(Curhan 2863–64)

### 2. Commissaries

31. Bureau of the Census, *Census of Retail Trade,* excludes commissaries from its grocery store statistics.

The competition to supermarket operators offered by commissaries is limited because only active or retired military personnel and their dependents are granted access. (Curhan 2855) Supermarket operators cannot gain access for price-checking purposes. (Connell 1242; Walters 1405)

Industry witnesses testified that they could not afford to match the generally lower price structure of commissaries (Curhan 2857; Addison 2662; Walters 1406), which are subsidized by the federal government. (Walters 1406; B. Thomas 1509) In addition, commissaries do not charge state sales tax on any items (Stewart 526, 650; Walters 1406; Curhan 2857), whereas supermarkets in Virginia, for example, charge 4% on all purchases, including food. (Walters 1406)

In a number of the alleged relevant markets, sales through military commissaries constitute a significant portion of retail food sales. This is particularly true in the Newport News/Hampton area, Norfolk, Fayetteville, and Jacksonville (Curhan 2854–55), and it also applies to a lesser extent to Orlando, Augusta, Macon and Atlanta. Colonial documents written prior to the Grand Union acquisition listed commissaries as "competition" in certain areas. (*See* CX 251Z–24.)

Where commissaries are important market factors, food retailers try to capture the business which would otherwise go to commissaries by offering more variety and better quality **[25]** products (Addison 2662–63; Curhan 2857), and by offering lower prices on bread, milk, beer and other staple items. (Addison 2662; Roehm 2732) However, supermarkets do not include commissaries in their marketing or advertising strategies. (Connell 1242) Commissaries do not advertise. (Roehm 2773)

## V. THE GEOGRAPHIC MARKETS

### A. *The SMSA As A Relevant Geographic Market*

32. The Complaint alleged that "the relevant geographic markets are some of the Standard Metropolitan Statistical Areas (SMSAs), cities or towns in which Colonial operates supermarkets." (Complaint ¶ 20) At the time of Grand Union's acquisition of Colonial, the latter operated in 25 SMSAs and in over 200 cities and towns. (Affidavit In Support of Respondents' Motion To Dismiss, December 15, 1980, at 4)

On January 18, 1979, complaint counsel identified the following SMSAs as alleged relevant geographic markets:

Atlanta, Georgia
Augusta, Georgia
Charlotte/Gastonia, North Carolina
Fayetteville, North Carolina
Gainesville, Florida
Greenville/Spartanburg, South Carolina

Jacksonville, Florida
Macon, Georgia
Newport News/Hampton, Virginia
Norfolk/Virginia Beach, Virginia
Orlando, Florida
Raleigh/Durham, North Carolina
Richmond, Virginia

Complaint counsel reserved the right to allege submarkets within one or more of these SMSAs.

33. An SMSA is a group of political subdivisions defined by the Office of Statistical Policy, Department of Commerce. Each of these political subdivisions includes a core **[26]** city of 50,000 people, or an urbanized area of 100,000 people. An SMSA is determined by the political subdivisions (normally counties) where at least 15% of the labor force commutes to the central core city or town. (Parker 2213) As of July 1, 1978, 73.4% of the population of the United States lived in the country's 268 SMSAs. (Bureau of the Census, *Population*)

34. Industry publications such as *Metro Market Studies, Progressive Grocer,* and the *Food Chain Directory* collect and publish data in terms of SMSAs. (Parker 2216; Marion 1890) These publications are read and used by industry members. (CX 576 [Kennedy] at 73, 89; Spearman 750) Supermarket companies, including Grand Union and Colonial, acquire most of their market share information in terms of SMSAs. (C. Thomas 1303–04; Roehm 2769; CX 580 [Silvers] at 74, 125–26; CX 597; Commission Physical Exhibit B) Companies gauge their success as competitors in terms of relative market position and gains and losses in SMSAs. (Stewart 623–33; Walters 1429–31) Pricing policies are generally made on an SMSA basis. (Parker 2216–17) Supermarket companies are very concerned with the advertising and pricing strategies of their supermarket competitors in an SMSA market area and tend to observe and analyze these competitors when setting their own prices. (Walters 1403; Stewart 512–13; Connell 1230–31)

35. An SMSA generally reflects the major coverage area of the local media, a major criteria used by supermarket companies in delineating markets. (Stewart 505–06; Connell 1221–22; CX 574 [Goulding] at 25–26) "Advertising is for the SMSA, not for separate trading areas. Occasionally you may have handbills for a particular store, but that is unusual, not the usual thing. Other types of promotional program[s], image-building and so forth, [are] for the whole SMSA, not for a particular trading area." (Parker 2217) Experts testifying in this case agree that SMSAs are generally good approximations of local markets (Marion 1891; Parker 2214–15; Adelman 3213), and that consumers in one SMSA are not likely to be affected by the offerings of stores in the next SMSA. (Adelman 3213)

B. *Progressive Grocer's Market Areas*

36. Geographic markets may differ on the demand and the supply side. (Adelman 3246) The supply for all retail food stores within an SMSA does not originate entirely within that SMSA. It may originate from warehouses which may be located within a nearby SMSA. (Adelman 3213) Because more than one SMSA can often be reached from any particular warehouse, market conditions in one SMSA are not entirely independent of those in other nearby SMSAs. (Adelman 3214; Marion 1890)

The boundaries of the geographic market from the supply side may resist precise determination. Respondents' expert, [27] Dr. M. A. Adelman, provided an exhibit (RX 30A-Z14) which was based on "market areas" defined by *Progressive Grocer* in its *1981 Marketing Guidebook*. This exhibit includes 14 of the 15 "market areas" at issue in this case (all but Augusta) into eight "market areas." In each instance, these "market areas" are larger than SMSAs. "In establishing the boundaries of individual market areas, *Progressive Grocer* gave first consideration to the pattern of distribution to stores from typical grocery warehouse operation." (RX 30Z–13)

Each of the eight *Marketing Guidebook* "market areas" is served by some six to ten distribution centers located outside of the "market area" and other distribution centers within the "market area." (RX 30F, K, O, S, W, Z–1, Z–5, and Z–10) There are also a number of additional firms with distribution centers as close or sometimes closer to each of the "market areas" as those already serving the area. (RX 30–G, L, P, T, X, Z–3, Z–7 and Z–11) Dr. Adelman testified that it would not be possible to draw the boundaries for these market areas, but that the relevant geographic area is larger than the SMSA and that, therefore, concentration ratios based on SMSA figures are overstated. (Adelman 3199)

Complaint counsel points out that *Progressive Grocer* also publishes annually *Market Scope,* which utilizes Metro Areas "measured by the official designation of the U.S. Office of Management and Budget as Standard Metropolitan Statistical Areas (SMSAs), except in the few instances where counties are split." (*Market Scope 1980,* p. 12.)

C. *The SMSAs Designated As Relevant Geographic Markets*

37. Complaint counsel designated thirteen SMSAs as relevant geographic markets (F. 32), in addition to the entire area in which Colonial operated which was designated as a relevant market for Count C of the Complaint. (Statement of Counsel Supporting the Complaint in Response to Order of January 5, 1979, at 6) On October 6, 1980, complaint counsel eliminated the Spartanburg, South Carolina sub-

division and Fayetteville, North Carolina, as geographic markets in which it is alleged Grand Union was an actual potential entrant. (Complaint Counsel's Response To The Request Made By The Administrative Law Judge On September 26, 1980)

1. Atlanta, Georgia SMSA

38. The Atlanta SMSA consists of 15 counties: Butts, Cherokee, Clayton, Cobb, DeKalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Henry, Newton, Paulding, Rockdale, and Walton. (Bureau of the Census, *Retail Trade*) [28]

The current Vice President of Operations for the Atlanta Division of Colonial/Grand Union, and the former President of Colonial, both defined the Atlanta market as the fifteen counties. (Isaacs 2525–26; Stewart 506–10; *see also* CX 597) In discussing a purchase of Alterman Foods, Grand Union documents assessed Colonial's and Alterman's market shares in terms of the 15–county area, and assessed the competitive situation in Atlanta on the basis of the population of the 15–county metropolitan area. (CX 29C)

Respondents concede that from the demand, *i.e.,* consumer standpoint, the Atlanta SMSA may be a relevant geographic market, but contend that from a supply standpoint the SMSA is too small. (RPF 839–840; *see* F. 36) Respondents point out that *Progressive Grocer,* a major trade publication, includes the Atlanta SMSA and the Macon, Georgia SMSA, and also some 61 counties within its "Atlanta Market Area." (RX 30E)

Within the Atlanta SMSA there are six food distribution centers: Alterman, Associated Grocers, A & P, Colonial, Kroger, and Winn-Dixie. (RX 30E-J; Stewart 534) Retail food stores in Atlanta are also served by distribution centers in Greenville, South Carolina; Knoxville, Tennessee; Athens, Georgia; and Anniston, Alabama. (RX 30E-H; Solomon 1060–61; Gregerson 320; Stewart 534) In addition, suppliers located in Rockmart, Georgia; Montgomery, Alabama; and Columbus, Georgia, serve independents in the "Atlanta Market Area." (RX 30F-G; Isaacs 2534–35)

2. Augusta, Georgia SMSA

39. The Augusta, Georgia SMSA consists of Columbia and Richmond Counties in Georgia and Aiken County in South Carolina. (Bureau of the Census, *Retail Trade*) Columbia, Richmond and Aiken Counties are considered parts of the same market, District # 6, for Colonial's planning and operating purposes. (CX 351Q)

Dr. Parker testified that the Augusta SMSA is an appropriate geographic market for grocery stores and supermarkets. (Parker 2356) Colonial officials testified that the Augusta market included the cities of Augusta and Martinez, Georgia, and North Augusta, Clearwater and Aiken, South Carolina, all of which are in the SMSA. (Stewart 585; Spearman 764; Addison 2675; *see also* Rand McNally)

Respondents concede that from the demand, *i.e.,* consumer standpoint, the Augusta SMSA may be a relevant geographic market, but contend that from a supply standpoint, the warehouses which either presently do or could supply Augusta from existing locations, the SMSA is too small. Augusta is not included within any *Progressive Grocer* "Market Area." (*See* RX 30.) The retail food stores in Augusta are served by distribution centers located as follows: [29]

| Supplier | Location |
|---|---|
| Winn-Dixie | Spartanburg, S.C. |
| Colonial | Columbia, S.C. |
| Bi-Lo | Maulden, S.C. |
| Piggly Wiggly Southern | Vidalia, Ga. |
| Kroger | Atlanta, Ga. |
| A & P | Atlanta, Ga. |
| Harris-Teeter | Charlotte, N.C. |

(Addison 2677–78)

3. Charlotte/Gastonia, North Carolina SMSA

40. The Charlotte/Gastonia SMSA consists of Gaston, Mecklenburg, and Union Counties. (Bureau of the Census, *Retail Trade*) Colonial/Grand Union officials agreed with this market delineation. (Addison 2693; Spearman 776) Dr. Parker cited this as the most appropriate geographic market for grocery stores and supermarkets in that area. (Parker 2333)

Respondents believe that from the standpoint of the consumer, the Charlotte SMSA may be a relevant geographic market, but that from the standpoint of those warehouses which either supply Charlotte at present or which could do so from existing locations, the SMSA is clearly too small. Use of the SMSA to describe the market results in a dramatic overstatement of concentration. (RPF 664)

*Progressive Grocer* includes the Charlotte SMSA in the "Charlotte Market Area," which is the counties of Alexander, Anson, Ashe, Avery, Burke, Cabarrus, Caldwell, Catawba, Chester, Chesterfield, Cleveland, Gaston, Iredell, Lancaster, Lincoln, Mecklenburg, Mitchell, Richmond, Rowan, Stanly, Union, Watauga, Wilkes and York. (RX 30J) There are eight distribution centers in the Charlotte Market Area as defined by *Progressive Grocer:* Associated Grocers Mutual of the Carolinas, A & P, Harris-Teeter, Thomas & Howard Co. and Winn-Dixie, all in Charlotte proper, and Food Town in Salisbury, Merchants Distributors, Inc. in Hickory, and another Thomas & Howard Co. in

Newton.[4] Some retail food stores in the "Charlotte Market Area" are served by suppliers located in Greenville, South Carolina; Columbia, South Carolina; Spartanburg, South Carolina; [30] Charleston, South Carolina; High Point, North Carolina; Black Mountain, North Carolina; and Salem, Virginia. (RX 30K)

### 4. Gainesville, Florida SMSA

41. The Gainesville, Florida, SMSA consists of Alachua County. (Bureau of the Census, *Retail Trade*) Colonial documents treated Gainesville separately for purposes of profits and sales. (CX 333A-O; *see also* CX 358Z17, Z18)

Dr. Parker testified, as did a Grand Union official, that the Gainesville SMSA is an appropriate delineation of the Gainesville geographic market for grocery stores and supermarkets. (Spearman, 793; Parker 2361A) The current Vice President of the Thomasville Division for Colonial/Grand Union found Alachua county to be a fair approximation of the Gainesville geographic market. (Roehm 2790)

Respondents contend (RPF 316) that from the standpoint of the consumer, the Gainesville SMSA may be a relevant geographic market, but from the standpoint of those firms with warehouses which either could or presently do supply Gainesville from existing locations, the SMSA is too small and this results in a dramatic overstatement of concentration. (Adelman 3212–14)

*Progressive Grocer* includes Gainesville in the 22 county "Jacksonville Market Area." (*See* F.43.) There is no distribution center in the Gainesville SMSA. Retail food stores located in Gainesville are served by warehouses located as follows:

| Firm | Warehouse Locations |
|---|---|
| Publix | Tampa |
| Winn-Dixie | Jacksonville or Tampa |
| Super Foods Service, Inc. | Orlando |
| Food Fair (Pantry Pride) | Jacksonville |
| Munford | Unknown |
| Hitchcock's | Unknown |
| Southland | Orlando |

(RX30S,T; CX 643B)

### 5. Greenville, South Carolina Subdivision

42. The Greenville/Spartanburg SMSA consists of three counties: Greenville, Pickens, and Spartanburg. (Bureau of the Census, *Retail Trade*)

[4] *Progressive Grocer* also lists Kroger Sav-On Stores in Charlotte (RX 30K), but this is an error. Although Kroger has plans for a warehouse in the Carolinas, it does not have one yet. (C. Thomas 1310)

Complaint counsel alleges that the Greenville/Spartanburg SMSA consists of two approximate, but separate geographic markets for grocery stores and supermarkets: Greenville and Pickens Counties are one geographic market; [31] Spartanburg County is the other. (Parker 2340; Marion 1893–94; Curhan 2991) The Greenville newspaper generally serves Greenville and Pickens Counties while the Spartanburg newspaper generally serves Spartanburg County. (Marion 1893; Stewart 623) Some industry members agree that the Greenville and Spartanburg markets are separate and distinct. (Woodberry 1730–31; Spearman 766; Stewart 586) Firms have historically entered one market at a time, either Greenville or Spartanburg. (Stewart 652; Spearman 938-39) According to the former President of Colonial, because the markets are different, if he were to enter Greenville and Spartanburg, he would "isolate them and enter them one at a time." (Stewart 586)

Respondents' position is that from the demand standpoint, *i.e.*, the perspective of the consumer, the Greenville/Spartanburg SMSA may be a relevant market. Conceivably, Greenville and Spartanburg may even be two separate relevant markets from the demand standpoint. From the supply standpoint, *i.e.*, those warehouses which either supply Greenville/Spartanburg at present or which could do so from existing locations, they argue that the SMSA is clearly too small. Use of the SMSA to describe the geographic market results in an overstatement of concentration. (Adelman 3212; RPF 782)

*Progressive Grocer* describes the "Greenville Market Area" as including the following 28 South Carolina counties:

| | |
|---|---|
| Abbeville | Macon |
| Anderson | Madison |
| Buncombe | Newberry |
| Cherokee | Oconee |
| Elbert | Pickens |
| Franklin | Polk |
| Greenville | Rabun |
| Greenwood | Rutherford |
| Hart | Spartanburg |
| Haywood | Stephens |
| Henderson | Swain |
| Jackson | Transylvania |
| Laurens | Union |
| McDowell | Yancey |

(RX 30N)

There are five food distribution centers in the SMSA: Associated Grocers Inc. of South Carolina, Bi-Lo (Mauldin), Community Cash Stores, Kash & Karry Super-Super Market, and Winn-Dixie. There are three more within the "Greenville Market Area": Dexter Grocery Co. in Anderson, Ingles in Black Mountain (Asheville), North Carolina; and Thomas & Howard Co. in East Startex. (RX30N–P) Retail food stores in the [32] Greenville Market Area are also served by warehouses located as follows:[5]

| Supplier | Location |
|---|---|
| Associated Grocers Co-op | Atlanta (College Park), Ga. |
| Fox Industries (Division Webb-Crawford) | Athens, Ga. |
| Piggly Wiggly Carolina Co. | Charleston, S.C. |
| A & P | Charlotte, N.C. |
| Food Town | Charlotte (Salisbury), N.C. |
| Harris-Teeter | Charlotte, N.C. |
| Merchants Distributors, Inc. | Hickory, N.C. |
| Thomas & Howard Co. | Newton, N.C. |
| Thomas & Howard Co. | Columbia, S.C. |
| Winn-Dixie Charlotte | Charlotte, N.C. |
| Colonial | Columbia, S.C. |
| K.M.C. Co. Inc. | Knoxville, Tenn. |

(CX30N-P; *see also* Stewart 532–33)

### 6. Jacksonville, Florida SMSA

43. The Jacksonville SMSA consists of five counties: Baker, Clay, Duval, Nassau, and St. Johns. (Bureau of the Census, *Retail Trade*) Complaint counsel's expert, Dr. Parker, believed that this was an appropriate geographic market for grocery stores and supermarkets. (Parker 2361A)

Colonial documents regarding sales and profit analysis and marketing strategy reference the Jacksonville metropolitan area. (CX358E-G; CX333A-O) Colonial/Grand Union pricing strategy is based on this SMSA. (Roehm 2786) Colonial/Grand Union officials analyze competitors and their own market shares in terms of the Jacksonville SMSA. (Roehm 2783–85)

Respondents contend (RPF 354) that, while this may be a relevant geographic market from the consumer standpoint, from the demand standpoint, the warehouses which supply Jacksonville at present or could do so from existing locations, the SMSA is too small. Use of the SMSA to describe the geographic market, therefore, results in an overstatement of concentration. [33]

*Progressive Grocer* describes the "Jacksonville Market Area" to include eight counties in Georgia and 14 counties in Florida, to wit:

[5] Although Super Food Services, Inc. of Orlando is listed by *Progressive Grocer* as serving the Greenville Market Area, the distance between Orlando and Greenville is almost 500 miles. Therefore, it must be assumed either that the situation is idiosyncratic or that *Progressive Grocer* is wrong. (*See* Adelman 3239–41.)

Bacon, Brantley, Camden, Charlton, Clinch, Glynn, Pierce and Ware, Georgia; and Alachua, Baker, Bradford, Clay, Columbia, Duval, Gilchrist, Hamilton, Levy, Nassau, Putnam, St. Johns, Suwannee and Union, Florida. (RX30R)

There are five food distribution centers in the Jacksonville SMSA: Daylight Grocery Co.; Pantry Pride (Food Fair); Publix; United Food Stores, Inc., an independent wholesaler; and Winn-Dixie. (RX 30S; Stewart 535) Retail food stores in Jacksonville are also served by warehouses located as follows:

| Firm | Warehouse Locations |
|---|---|
| Publix | Lakeland, Fla.[6] |
| Colonial | Thomasville, Ga. |
| A & P | Orlando, Fla. |
| Albertson's | Orlando, Fla. |

(RX 30T; CX 643A-B; CX 611B [Stipulated testimony of J. Blanton, President of Publix])

7. Macon, Georgia SMSA

44. The Macon SMSA consists of four counties: Bibb, Houston, Jones and Twiggs. (Bureau of the Census, *Retail Trade*) According to Dr. Parker, the Macon SMSA is an appropriate geographic market for grocery stores and supermarkets. (Parker 2351)

According to Colonial/Grand Union officials, the Macon market consists of Macon, Warner Robbins and other suburbs; all are in the four SMSA counties. (Stewart 535, 589; Spearman 761–62; Roehm 2741) For Colonial's operating purposes, because of the common media coverage and the types of programs the competition runs in the area, the Colonial stores in the Macon SMSA share a sales and marketing program. (Stewart 505; *see also* Complaint Counsel Phy. Ex. B) Colonial documents also reflect price-checks for a market area which corresponds to the Macon SMSA. (CX 502A-Z23) **[34]**

Respondents argue that from the standpoint of the consumer, the Macon SMSA may be a relevant geographic market, but from the supply standpoint, the SMSA is clearly too small. (RPF 919) Therefore, market shares based on the SMSA significantly overstate concentration. (Adelman 3212–14)

*Progressive Grocer* includes Macon in the 61-county "Atlanta Market Area." (F. 38) There is only one distribution center in Macon: Timberlake Grocery Company, an independent wholesaler. (RX 30E,

[6] Publix also has a warehouse in Jacksonville. (Stewart 535) It uses both warehouses to supply its Jacksonville stores. (CX 611B [Stipulated testimony of J. Blanton])

F) Retail food stores located in Macon are served by distribution centers located as follows:

| Supplier | Location |
|---|---|
| Piggly Wiggly | Vidalia, Ga. |
| Winn-Dixie | Atlanta, Ga. |
| Colonial | Thomasville, Ga.[7] |
| Kroger | Atlanta, Ga. |
| Alterman | Atlanta, Ga. |
| Munford | Atlanta, Ga. |

(RX30E, F)

8. Newport News/Hampton, Virginia SMSA

45. The Newport News/Hampton SMSA consists of three independent cities and three counties: Hampton, Newport News and Williamsburg cities; Gloucester, James City and York Counties. (Bureau of the Census, *Retail Trade*) Dr. Parker testified that this is a relevant geographic market. (Parker 2309)

Colonial referred to this area as "the Peninsula" and maintained specific market share information for the SMSA. (Stewart 656; CX 350B, D, F, I, M, O, V; Complaint Counsel Phy. Exh. B; CX 597)

Newport News has its own newspaper, the *Daily Press/Times Herald.* (Connell 1223, 1227) Colonial advertised in the *Daily Press/Times Herald* and allocated the costs for that advertising only to stores in the Newport News/Hampton SMSA. (CX 267A-B; *see also* Isaacs 2609) Some supermarket chains operating in the Newport News/Hampton SMSA do not operate in the Norfolk SMSA, which is across Hampton Roads Bay. (Curhan 3173) **[35]**

Respondents contend that this geographic market may be relevant from a demand standpoint, but, even when combined with the Norfolk SMSA, is too small from a supply standpoint. (RPF 476) Use of this SMSA, their argument goes, results in a "dramatic" overstatement of concentration. (Adelman 3212–14)

*Progressive Grocer* describes the "Norfolk Market Area" as including the Norfolk SMSA, the Newport News/Hampton SMSA and several other counties in Virginia and North Carolina. The "Norfolk Market Area" includes the following counties:

[7] Colonial supplies its Macon stores out of the Thomasville warehouse but supervises the stores out of the Atlanta Division. (Isaacs 2620)

| Virginia | North Carolina |
|---|---|
| Gloucester | Camden |
| Isle of Wight | Chowan |
| James City | Currituck |
| Mathews | Gates |
| Nansemond | Hertford |
| Southhampton | Northhampton |
| Surry | Pasquotank |
| York | Perquimans |

(RX 30V)

There are no distribution centers located within the Newport News/Hampton SMSA. (RX 30W) There are three distribution centers within the Norfolk SMSA—Bisese & Console Inc. (corporate name of Giant Open Air), Camellia Food Stores Inc. (Economy Stores),[8] and Colonial. (*Id.*)[9] The other retail food stores located in Tidewater are served by distribution centers located as follows:

| Supplier | Location |
|---|---|
| Food Fair | Baltimore, Md. |
| Richfood | Richmond, Va. |
| A & P | Richmond, Va. |
| Southland | Fredericksburg, Va. |
| Safeway | Richmond, Va. |
| Winn-Dixie | Raleigh, N.C. |

(RX 30) **[36]**

## 9. Norfolk/Virginia Beach, Virginia SMSA

46. The Norfolk/Virginia Beach SMSA consists of five independent cities and one county: Chesapeake, Norfolk, Portsmouth, Suffolk (including the former Nansemond County), and Virginia Beach, Virginia; and Currituck County, North Carolina. (Bureau of the Census, *Retail Trade*) Dr. Parker found this SMSA to be a relevant geographic market. (Parker 2317)

In support of this position, complaint counsel notes that Norfolk has its own morning and afternoon newspapers, the *Virginia Ledger-Star* and the *Virginian Pilot.* (Connell 1223) Colonial allocated advertising costs for the *Ledger-Star* and its companion, the *Pilot,* only to stores in the Norfolk SMSA. (CX 267A-D; *see also* Isaacs 2609) In addition, supermarket companies such as Valu Fair and Earles only operate in the Norfolk/Virginia Beach SMSA, and not across the bay in the Newport News/Hampton SMSA. (Isaacs 2608–10; Curhan 3173)

Colonial referred to this area as Tidewater or Norfolk Metro, and

[8] Economy Stores supplies Be-Lo, Valu Fair and Earles, among others. (Isaacs 2551)

[9] The military also has a distribution center in Norfolk. (RX 30W)

maintained separate market share statistics for the SMSA. (Stewart 658; Complaint Counsel Phys. Exh. B, CX 597; CX 350B, D. F, G, H, M, N, V)

Respondents argue (RPF 476) that this SMSA should include the Newport News/Hampton SMSA. (F. 45)

10. Orlando, Florida SMSA

47. The Orlando SMSA consists of three counties: Orange, Osceola, and Seminole. (Bureau of the Census, *Retail Trade*) Dr. Parker testified that the Orlando SMSA is a relevant geographic market. (Parker 2358)

Competitors in the Orlando market identify the Orlando metropolitan area as a market. (Posey 1632; Gooding 1119; Spearman 798) Colonial documents report profits, sales and return on investment on a city-wide basis that corresponds to the SMSA delineation. (CX 333A-O; CX 358Z–5)

Respondents concede that, from a demand standpoint, the Orlando SMSA may be a relevant geographic market, but argue that from a supply standpoint, those warehouses that either could or presently do supply Orlando from existing locations, the SMSA is too narrowly drawn. (RPF 208) Accordingly, they argue that use of this SMSA as a relevant geographic market results in an overstatement of concentration. (Adelman 3212–14)

*Progressive Grocer* describes the "Orlando Market Area" as including the following ten counties: Flagler, Marion, Volusia, Citrus, Sumter, Lake, Seminole, Orange, Osceola, and Brevard. **[37]**

There are only three food distribution centers in the Orlando SMSA: Southland, serving 7–11's, Super Food Services, Inc., serving independents and chains, and Winn-Dixie. (RX 30Z–2) Retail food stores in Orlando are also served by warehouses located as follows:

| Supplier | Location |
|---|---|
| Affiliated of Florida Inc. | Tampa |
| Kash 'N Karry Discount Centers | Tampa |
| E.J. Keefe Co. | Lakeland |
| Malone & Hyde Co. | Miami |
| Pantry Pride Supermarket | Jacksonville |
| Publix Super Markets | Lakeland |

(RX 30Z–2; Gooding 1151, 1182)

11. Raleigh/Durham, North Carolina SMSA

48. The Raleigh/Durham SMSA consists of three counties: Wake, Durham, and Orange. (Bureau of the Census, *Retail Trade*)

Complaint counsel contends that the Raleigh/Durham SMSA consists of two geographic markets for grocery stores and supermarkets. Wake County, containing the city of Raleigh, is one market; and Durham and Orange Counties, containing the cities of Durham and Chapel Hill, constitute a separate market. (Marion 1894; Parker 2320–21, 2328)

Based on his analysis of the ABC Audit Reports for newspapers, Dr. Marion testified that Raleigh newspapers circulate largely to Wake County residents, while the Durham newspaper was circulated largely in Durham and Orange Counties. (Marion 1894; *see also* Parker 2320–21) Dr. Curhan, respondents' marketing and management expert, also analyzed these markets separately. (Curhan 2977–84)

a. *Raleigh, North Carolina Subdivision*

49. Colonial's five-year store development plan for 1976–1980 defined the towns of Raleigh, Cary and Garner, North Carolina as a single "primary market" for Colonial's long-range store planning purposes; all are in Wake County. (CX 353H; Rand McNally) The Raleigh market (as represented by Wake County) is seen by supermarket competitors as separate and distinct from the Durham/Chapel Hill market (as represented by Durham and Orange Counties). (Spearman 779; Byrd 1546–47; CX 353H)

The Raleigh *News and Observer* is the dominant newspaper in Wake County. (Stewart 519) Colonial and most of its supermarket competitors advertise their stores in Wake County in [38] the *News and Observer*. (Stewart 520; Byrd 1545) Only the Colonial and Big Star supermarkets located within Wake County are allocated advertising costs for the *News and Observer*. (CX 268A–C)

In 1977, Kroger and Harris-Teeter were operating supermarkets in the Durham-Chapel Hill market but not in the Raleigh market. (Byrd 1546; CX 2Q, R)

b. *Durham, North Carolina Subdivision*

50. Chapel Hill is situated in Orange County, and Durham in Durham County, North Carolina. Messrs. Byrd and Addison considered these to equal "the Durham Market," (Byrd 1547; Addison 2651, 2693), separate from the Raleigh market. (Addison 2646)

Durham is approximately 25 miles west of Raleigh. (Rand McNally) Supermarket operators in Durham and Orange Counties use the Durham *Herald* to advertise in that market. (Byrd 1546–47; CX 268A-C) Moreover, Colonial's five-year store development and marketing plan for 1976–1980 identified Durham and Chapel Hill as a single market, and as one of Colonial's primary markets in North Carolina. (CX 353H, R, Z–8)

Respondents argue that from the perspective of the consumer, the

Raleigh/Durham SMSA may be a relevant market, and that conceivably, Raleigh and Durham may even be two separate relevant markets from the demand standpoint. (RPF 710) Respondents point out that Colonial's newspaper advertisements are the same in Raleigh, Durham, and Chapel Hill, although instore features may be different, depending on local competition. (Stewart 520, 522) Mr. Spearman, a Grand Union official, viewed Raleigh and Durham as "two distinct marketing areas." (Spearman 779)

From the supply standpoint, *i.e.,* those warehouses which either supply Raleigh/Durham at present or which could supply the area from existing locations, respondents insist the SMSA is too small. Use of the SMSA to describe the geographic markets results in a dramatic overstatement of concentration. (Adelman 3212–14)

*Progressive Grocer* describes the "Raleigh Market Area" as including the Raleigh/Durham SMSA and the Fayetteville SMSA, as well as several other counties in North Carolina. The "Raleigh Market Area" includes the following 15 counties:

| | |
|---|---|
| Chatham | Johnston |
| Cumberland | Lee |
| Durham | Orange |
| Franklin | Person |
| Granville | Sampson **[39]** |
| Harnett | Vance |
| Hoke | Wake |
| | Warren |

(RX 30Z–5)

There are only two food distribution centers within the Raleigh/Durham SMSA: Colonial and Winn-Dixie. (RX 30Z6) There are two more within the "Raleigh Market Area": J.T. Davenport & Son Inc. in Sanford, and Thomas & Howard Co. in Fayetteville. (RX 30Z6) Retail food stores in Raleigh/Durham (a much smaller area than the "Raleigh Market Area"), are also served by warehouses located as follows:

| Supplier | Location |
|---|---|
| A & P | Charlotte, N.C. |
| Kroger | Salem, Va. |
| Food Town | Salisbury, N.C. |
| Food World | High Point, N.C. |
| Harris-Teeter | Charlotte, N.C. |
| Piggly Wiggly N.C. | Kinston, N.C. |
| Byrd Food | Burlington, N.C. |
| Merchants Distributors, Inc. | Hickory, N.C. |
| Richfood | Richmond, Va. |

(RX 30Z–6; Walters 1418; Byrd 1543–44)

Quinn Co. Inc. in Warsaw, N.C., and Thomas & Howard of Rocky Mount, N.C. serve the "Raleigh Market Area" (RX30Z–6), and may also serve stores within the SMSA.

### 12. Richmond, Virginia SMSA

51. The Richmond SMSA consists of two independent cities and five counties: the cities of Richmond and Charles City; and Chesterfield, Goochland, Hanover, Henrico and Powhatan Counties. (Bureau of the Census, *Retail Trade*) Dr. Parker testified that the Richmond SMSA is an appropriate geographic market for grocery stores and supermarkets. (Parker 2294) Colonial recognized the Richmond SMSA as a separate marketing area. (CX 332A-X; CX 392A-I; 350D, F, I, Q, W; CX 607 [Rowe] at 37; Stewart 363–64; CX 392A-I)

Many competitors in the Richmond SMSA are unique and separate from competitors in other nearby metropolitan areas. For example, Ukrop's, Lukhard's, Siegels, Edward's Foodtown, Farm Fresh, Giant Food, and Giant Open Air do not have stores in the Petersburg/Colonial Heights SMSA, which is contiguous to the Richmond SMSA on the south. (Connell 1229–30) Ukrop's, a major independent and thus potentially a factor to consider in **[40]** developing marketing strategies, only operates in the Richmond SMSA. (Stewart 525; Connell 1228; Walters 1410; CX 2S; CX 3S)

Although the Richmond newspaper does have a certain amount of coverage in the Petersburg/Colonial Heights SMSA, most supermarket chains which do serve both SMSAs, including Colonial, advertise in both the Richmond newspaper and the Petersburg paper. (CX 267C; Connell 1225) "[In] Petersburg, the penetration of the Richmond newspaper sort of dwindles when it gets down into that area. There is some penetration, but the penetration in the area by the Petersburg paper is much greater." (Connell 1225)

In testifying as to a combined Richmond/Petersburg SMSA, a Colonial/Grand Union Vice President admitted that the Colonial supermarkets in Richmond and Petersburg only paid for the advertising in their respective papers (Isaacs 2604), a fact which is confirmed by CX 267A-D. He also admitted that six or seven competitors found in Richmond have no stores in Petersburg. (Isaacs 2606–07)

Respondents claim that complaint counsel failed to introduce substantial evidence that the Richmond SMSA is a relevant geographic market. (RPF 404) A & P includes Hopewell and Petersburg, which are outside the SMSA, within the Richmond market area. (Connell 1224) A & P runs the same advertising in the Richmond and Petersburg papers, although it compresses the weekend Petersburg advertisement from two pages to one. (Connell 1226) Colonial's three Petersburg stores are managed as part of its Richmond district and are included within the Richmond market. (Isaacs 2555)

Respondents reason that from the demand standpoint, *i.e.,* that of the consumer, the Richmond SMSA plus Petersburg may be a relevant geographic market. From the supply standpoint, *i.e.,* those warehouses which either supply Richmond at present or which could do so from existing locations, the SMSA is too small. Use of the SMSA to describe the Richmond geographic market results in overstating concentration. (Adelman 3212–14)

*Progressive Grocer* includes Richmond in the "Richmond Market Area," which includes the following Virginia counties:

| | | |
|---|---|---|
| Albermarle | Greensville | North Umberland |
| Amelia | Hanover | Nottoway |
| Augusta | Henrico | Orange |
| Brunswick | King and Queen | Petersburg |
| Caroline | King William | Powhatan |
| Charles City | Lancaster | Prince Edward |
| Chesterfield | Louisa | Prince George |
| Essex | Lunenburg | Richmond |
| Fluvanna | Middlesex | Sussex **[41]** |
| Goochland | Madison | |
| Greene | New Kent | |

(RX 30Z–9–11)

There are only four distribution centers within the Richmond SMSA—A & P, Richfood, Safeway and Blue Ridge Grocery Co. (Division of Fleming Co.'s, Inc.). (RX 30Z–10) The other retail food stores located in Richmond are serviced by distribution centers located as follows:

| Supplier | Location |
|---|---|
| Biese & Console (Giant Open Air) | Norfolk, Va. |
| Camellia Food Stores (Economy Stores) | Norfolk, Va. |
| Colonial | Norfolk, Va. |
| Food Fair | Baltimore, Md. |
| Giant Food | Landover, Md. |
| Kroger | Salem, Va. |
| Malone & Hyde | Salem, Va. |
| Southland | Fredericksburg, Va. |
| Winn-Dixie | Raleigh, N.C. |

(RX 30Z10; *see also* Stewart 524–35)

## VI. CONCENTRATION

### A. *Grocery Store Concentration Ratios*

52. The four-firm concentration ratios for *grocery stores,* (SIC 541), as provided by Bureau of the Census, *Retail Trade,* for the individual SMSAs are the following:

| | 1972 | 1977 |
|---|---|---|
| Atlanta | 54.6% | 62.9% |
| Augusta | 47.2% | 55.2% |
| Charlotte/Gastonia | 48.6% | 54.9% |
| Gainesville | 61.8% | 65.5% |
| Greenville/Spartanburg | 63.4% | 69.8% |
| Jacksonville | 56.2% | 64.8% |
| Macon | 50.3% | 67.4% |
| Newport News/Hampton | 56.7% | 49.1% |
| Norfolk/Virginia Beach | 48.7% | 51.3% |
| Orlando | 65.7% | 60.1% |
| Raleigh/Durham | 63.5% | 63.6% |
| Richmond | 45.2% | 53.2% |

(CX 4A, CX 664C) [42]

The four-firm concentration ratios for grocery stores, (SIC 541), for SMSA *subdivisions* are derived from complaint counsel's survey of sales of firms in the market and from data published in the 1972 and 1977 Census of Retail Trade:

| | 1972 | 1977 |
|---|---|---|
| Greenville (Greenville & Pickens County) | 68.3% | 72.3% |
| Raleigh (Wake County) | 63.8% | 62.1% |
| Durham (Durham & Orange Counties) | 62.4% | 66.8% |

(CX 3A)

### B. *Supermarket Concentration Ratios*

53. The four-firm concentration ratios for *supermarkets* in 1972 and 1977 in the individual SMSAs are the following:

| | 1972 | 1977 |
|---|---|---|
| Atlanta | 74.5% | 78.7% |
| Augusta | 68.4% | 73.7% |
| Charlotte/Gastonia | 65.5% | 75.6%*[10] |
| Gainesville | 85.4% | 91.5%* |
| Greenville/Spartanburg | 85.9% | 86.6% |
| Jacksonville | 82.5% | 82.1% |
| Macon | 79.1% | 81.8%* |
| Newport News/Hampton | 70.8% | 65.6% |
| Norfolk/Virginia Beach | 60.5% | 62.8% |
| Orlando | 83.5% | 79.5%* |
| Raleigh/Durham | 93.5% | 86.8% |
| Richmond | 58.0% | 68.7%* |

(CX 4A; CX 664C) [43]

The Bureau of the Census did not provide concentration data for units smaller than SMSAs. No concentration ratios were available for 1972 SMSA subdivisions. Dr. Marion estimated supermarket four-firm concentration for those subdivisions for 1977 as follows:

| | 1977 |
|---|---|
| Greenville (Greenville & Pickins Counties) | 94.3% |
| Raleigh (Wake County) | 89.2% |
| Durham (Durham and Orange County) | 86.8% |

(CX 4A)

### C. *Sources of Supermarket Concentration Ratios Data*

54. The four-firm concentration ratios for supermarket sales for relevant SMSAs or subdivisions thereof are found in both CX 4A-B and CX 664A-C. CX 4A-B contains reported 1972 supermarket concentration ratios from Census data. It also contains estimated 1977 supermarket concentration ratios for subdivisions of Greenville, South Carolina, and Raleigh and Durham, North Carolina. (Marion 1898–909)

At the time of preparation of CX 4A-B, the sales of the top four supermarket firms for 1977 in each SMSA had been discovered by

[10] Bureau of the Census, for confidentiality reasons, would not give a "four largest firm" supermarket total for 1977. Totals followed by an asterisk come from either the sales of the top four firms in 1977 as shown in CX 2B-S, or the "4 largest firms all establishments" figures of CX 664A-B. As the total sales of the top four firms in each SMSA were not identical in CX 2B-S and CX 664A-B, the smaller totals were utilized in each respective numerator in order to give the lower concentration ratios. Denominators for the respective SMSAs are provided in CX 664A-B as the 1977 universe of all large establishments within SIC Code 541, grocery stores.

confidential returns from the firms as part of complaint counsel's market survey. The denominators used in determining the 1977 supermarket concentration ratios in CX 4A-B were obtained by estimating the total supermarket sales in each SMSA (or subdivision thereof), using $1,500,000 in annual sales as the present definition for a supermarket. (Marion 1899–1900)

CX 4A-B was prepared by complaint counsel's expert, Dr. Marion, based on the available Bureau of the Census figures for supermarket and grocery store sales, as well as CX 3A. His supermarket concentration estimates for 1977 were derived by the two methods explained in CX 4B and further explained in his testimony. (Marion 1900–05)

CX 664A-B, entitled "Special Tabulation of Data from the 1977 Census of Retail Trade: Grocery Stores (SIC 541)," is a tabulation run by the Bureau of the Census for the 13 SMSAs. It reports the sales of all grocery stores and the top four grocery stores as well as sales for all large establishments with sales over $1,500,000 (supermarkets) and the top four largest establishments. Census refused to release data in the "four largest establishments" category for the following SMSAs: Charlotte/Gastonia, North Carolina; Gainesville, Florida; Macon, Georgia; Orlando, Florida; and Richmond, Virginia. Census [44] feared breach of confidentiality in that individual company data might be determinable for each of those SMSAs. (*See* Tr. 3454–59; Parker 3460–83.)

For those markets for which Census did not release information concerning the four largest establishments, an approximation of the data can be obtained from CX 2B-S and CX 3B-S. The underlying data is also available in CX 665A-Z529.

In regard to CX 2A-S, CX 3A-S and CX 4A-B, respondents' economic expert did not believe these concentration ratios to be in error or biased in analyzing the demand side of the markets and further described them as "reasonably good proxies." (Adelman 3398)

D. *Concentration Trends*

55. According to Dr. Marion, concentration is greater and increasing more rapidly in complaint counsel's alleged relevant markets (CX 4A) and in the southeastern states in which Colonial operated prior to the merger, than in the 155 SMSAs representing the remainder of this country. (Marion 1915) "For the 15 southeastern markets listed in Exhibit CX 4A, the average unweighted grocery store concentration is 57.3% in 1972, 60.2% in 1977. For 32 SMSAs in a five-state area, southeastern states' concentration was 56.1% in 1972, 59.5% in 1977. For 155 SMSAs in the rest of this country, excluding those five states, the concentration was 51.5% in '72, 52.6% in '77." (Marion 1916) [These figures refer to four-firm concentration levels.]

The market share of single (grocery) store operators in the United

States has declined from 59% in 1948 to 32% in 1972 and to 27% in 1977. (Respondents' Physical Exhibit C at 6; Marion 1936) The market share of independent grocery operators (operating one to ten stores) has declined from 65% of all grocery sales in 1948, to 43% in 1972, to approximately 40% in 1977. (Respondents' Physical Exhibit C at 6; Marion 1937) The twenty largest grocery chains have increased their share from 26.9% of sales in 1948 to 37% in 1972. The figure for 1977 remains at approximately 37%. (Respondents' Physical Exhibit C at 7; Marion 1938)

In 1954, 32% of SMSAs had a four-firm concentration level of below 40% for grocery store sales. By 1972, only 11% of SMSAs had four-firm concentration levels below 40%. SMSAs with a concentration of over 60% increased from 5% in 1954 to 25% in 1972. (Respondents' Physical Exhibit C at 18; Marion 1940) The average four-firm concentration ratio of all SMSAs nationwide (in terms of grocery store sales) increased **[45]** from 45.5% in 1954 to 52.4% in 1972. (Respondents' Physical Exhibit C at 16, Marion 1941)

## VII. BARRIERS TO ENTRY

### A. *Market Entry*

56. Complaint counsel's expert, Dr. Marion, testified that ". . . if a market has low entry barriers, it means that the firms that are in that market recognize that if they get out of line, price wise, or if they have sloppy operations or are not competitive, that they stand a definite threat of firms on the outside moving into that market." (Marion 1896) Respondents' expert, Dr. Adelman, agreed, stating that:

> Because the purpose of concentration would be, as I indicated earlier, to raise prices and profits above the competitive level. If entry is easy, then new firms will come to the scene to take advantage of this condition and will compete away those excess profits rapidly.

(Adelman 3200)

Market entry occurs when a new actor enters a market. (Parker 2227) Acquisition of a firm already in the market constitutes a transfer of ownership (Parker 2259); it does not increase immediately the capacity of the market. (Curhan 3140)

### B. *Entry By Independent Operators*

57. Entry by an independent, single-store operator is usually a transfer of ownership because such operators rarely build stores *de novo*. Their method of operation is generally to acquire second-use locations, *i.e.*, those previously occupied by supermarket chains. (Curhan 3055) Dr. Curhan was unable to recall an instance where a single store operator built a new store. (Curhan 3055) Independent store

operators opening in a single location often cater to specialized, *e.g.*, "ethnic," interests (Parker 2232–33; Solomon 1018–19), which has the disadvantage of offering a finite market. (Parker 2232–33; Solomon 1020–22)

Entry into the food retailing market at the local level has been described by respondents as "relatively unrestricted" for independent entrepreneurs who operate one or two stores and are affiliated with a viable or cooperative wholesaler. (Respondents' Physical Exhibit C at 26; Adelman 3203); (*see also National Tea Co.*, 69 F.T.C. 265, 278 (1966)) The existence of voluntary and cooperative wholesalers to provide financial assistance and other aid to potential entrants facilitates the entry of independents into the market. (Curhan **[46]** 2881–83) However, ease of market entry is no indication of successful operation, as acknowledged by Dr. Curhan, respondents' marketing expert, who explained his lack of success in two attempts to operate an independent grocery outlet. (Curhan 3049–52)

Mr. Walters, President of Farm Fresh and past Chairman of the National Association of Retail Grocers, testified about the advantage of a good wholesaler:

> The advantages—I think without—in the case of an independent, I do not believe that they could successfully compete without the services that are provided by a good wholesaler, and the services that are—from store engineering to mass buying to sales planning to merchandising to consulting on retail operations and make it all up. I think that is one of the things that's transposed—has transpired in the country over the past 10, 15 years. There's been dramatic—it's been dramatic in the success of independents; voluntaries and cooperatives have given independents the help, the expertise, so that they can do a good job; and without it, I think that they would fail.

(Walters 1421)

For example, Certified Grocers in Ocala, Florida (70 miles north of Orlando), has "probably the most complete warehouse facilities in the southeast, more so in one central place than any of the chains" (Gooding 1153), and has "far more variety available on [their] order book than a chain warehouse would have." (Gooding 1155) The products are available to independent operators at a cost which is competitive with the wholesaling cost of major chains. (Gooding 1157; *see also* Spearman 869–70; Curhan 2884–86)

Malone & Hyde is one of the larger wholesale food distributors in the country. (Posey 1631) Samuel Posey, President of Fairway Markets, a Malone & Hyde subsidiary (Posey 1631), testified in detail about the many services provided to independent retailers by Malone & Hyde. (Posey 1675–88) Wholesalers can purchase products as cheaply as major chains (Gooding 1156), and independents can purchase at a cost which is competitive with the wholesaling cost of major chains. (Posey 1157)

In each of the alleged relevant markets in this case someone wanting to open a new store has available to him a voluntary or a cooperative wholesaler such as Malone & Hyde or Certified who are generally seeking for more outlets to sell their grocery products. (Parker 2425; Stewart 579–82, 587–90; Curhan 2883) Wholesalers, of course, are looking for [47] responsible independents who have a reasonable chance of operating a successful grocery operation. (Parker 2425; Adelman 3409) These voluntary or cooperative wholesalers assist their members with advertising, purchase of equipment, and site selection. (Curhan 2881–83; Parker 2233)

C. *Entry by a Market Factor*

58. Supermarket chains are usually defined by the industry as those firms with at least ten or more stores. (Marion 1937; Walters 1392–93) Most supermarket chains enter a new market on a multi-store basis. (Marion 1965; Walters 1431; C. Thomas 1333–34; B. Thomas 1485) Successful multi-store entry will make a supermarket firm a "factor" in a market (Walters 1388, 1431; Connell 1246; Gooding 1161), a "factor" being defined as a firm to which other firms respond. (Parker 2234) Firms that achieve effective multi-store entry, or firms already firmly entrenched in a marketing area, are "factors" in that market. (Connell 1246; Posey 1652; Walters 1429–31)

A factor may be a company with a market share of over 5% (Connell 1246; Walter 1430), or a major chain that is entering the market:

> Anybody the size of Winn Dixie that wants to come into a market, if you do not think that they are a factor in the market, you are making a crucial mistake. They have the assets and they have the resources the same as any other substantial company to come in. You better consider them, because they are not coming in there for one store.

(Walters 1431; *see also* Connell 1246)

Supermarket companies in a market area generally price-check either market leaders or aggressive firms attempting to gain in market share. (Connell 1234, 1236; Walters 1404–05; C. Thomas 1299; Spearman 728; Stewart 632–33; F. 21) Supermarket companies adjust their prices in accordance with the results of their price-checks. (CX 589 [Wood] at 118–22; Connell 1230–31, 1234, 1236–37; C. Thomas 1298, 1325; Stewart 632–33) Thus, it is these firms that influence pricing policies in a market area.

D. *Barriers to Multi-Store Entry by a New Market Factor*

59. The size of the SMSA will determine the number of stores a supermarket company must operate in order to gain effective entry (C. Thomas 1305–06), the larger the population, the greater the number of stores necessary for effective entry. William Stewart, a former president of Colonial and former vice president of Grand Union, es-

timated the number of supermarkets necessary for successful *de novo* entry into each of the original [48] thirteen SMSAs designated by complaint counsel. His estimates ranged from a low of two in Fayetteville, North Carolina, to a high of twelve in Atlanta, Georgia, where he indicated he was talking only of entry into a three-country base of Atlanta, not the entire 15-county SMSA. (Stewart 577, 584–85)

Supermarket firms incur an obligation of approximately $3 million to $3.5 million per site for leases on new store sites. (Roehm 2763) James Wood, Chief Executive Officer of Grand Union, stated in his deposition that a company must have a seventy percent success rate in site selection to have efficient company performance. (CX 589 [Wood] at 50–51)

Supermarket companies carefully analyze potential new store sites. (Walters 1399; C. Thomas 1304–06; B. Thomas 1495) Major chains usually have separate real estate departments which have the responsibility of locating new stores. (Spearman 732–33; Connell 1249) In many companies, including Grand Union and Colonial, final site selections must be approved by senior company officials. (B. Thomas 1495–97; Connell 1249–50; CX 589 [Wood] at 75; CX 576 [Kennedy] at 23; *see generally* CX 92A-E through CX 169; CX 391A-G through CX 399; CX 633A-E through CX 639A-D) Factors considered in the selection of sites include: present population growth; accessibility to customers, *e.g.*, parking, entrance, exits and traffic patterns; and competitors. (Walters 1399–1400; C. Thomas 1301; B. Thomas 1495–96; *see generally* CX 92A-E through CX 169; CX 391A-G through CX 399; CX 633A-E through CX 639A-D)

A supermarket company attempting to enter a new market must compete with the established market factors for the best new store sites. (Marion 1964) Often a newcomer is at a disadvantage in acquisition of new sites because developers prefer to lease to established market leaders. (Posey 1642–43; Spearman 746, 847–50; Byrd 1574–50) "Developers are anxious to get proven traffic achievers and that is usually established firms in the market, particularly those with large market shares." (Parker 2231; *see also* Posey 1643; Stewart 629; Spearman 744–45) Among the established supermarkets in an SMSA, the larger supermarket companies such as Winn-Dixie, Colonial, and Safeway are preferred tenants over local independents or smaller chains. (Walters 1425–27; Gooding 1138–41; Woodberry 1771; Byrd 1547–50; B. Thomas 1516–17) Other tenants, *e.g.*, drugstores, may not accept leases in a strip shopping center which does not have a major supermarket chain as a tenant. (Gooding 1140)

Established supermarket factors will often build a new store in an area of anticipated population growth before there is enough population to make the store profitable, for the purpose of foreclosing the entry of new competition. (Stewart 671–73; Spearman 855–57; Posey 1643–45) In order to build ahead of sales, a company must be able to withstand losses [49] until the population grows. A company the size of Grand Union can afford to give a store three years in which to become profitable. (CX 589 [Wood] at 49–52; C. Thomas 1363–66; CX 102; CX 106B) Smaller supermarket companies need stores in areas of sufficient population to make stores profitable at the time they are opened or shortly thereafter. (Walters 1399)

60. To effectively enter a new SMSA, a supermarket company must advertise to establish an image and achieve name recognition in the marketing area. (B. Thomas 1482) Dr. Parker stated:

> When a firm goes into a new market, the first thing it has to do is to persuade customers to come into their store. This means changing shopping habits, so you are disadvantaged relative to the firm that already has the customers coming into their store.
>
> So you have to go out and sell your image, promote yourself.

(Parker 2229; *see also* Posey 1641; Cheek 1590; Stewart 559; Roehm 2786–87, 2810; Isaacs 2569–70)

A major supermarket chain entering a new SMSA may have some carry-over name recognition from people moving from one area of the country to another. (CX 589 [Wood] at 252–53) Similarly, a large chain in a nearby marketing area may also have gained some name recognition in a new SMSA due to the wider geographic coverage provided by television or by a major metropolitan newspaper in the nearby market. (B. Thomas 1483) Small supermarket companies frequently are not known beyond their local markets and would have little name recognition when attempting to enter a new SMSA. (Byrd 1552–53, 1560–61)

61. The major advertising media used by supermarkets include newspapers, radio, and television. (Stewart 504–06; B. Thomas 1481–84) Major chains, such as Colonial, Winn-Dixie and A & P, often utilize all these media. (Stewart 504–06; B. Thomas 1481–84; Connell 1222–24) Smaller firms, particularly local independents, tend to select either the print medium or the broadcast. (Connell 1231–36; Cheek 1588–89; Gooding 1134–37)

Advertising costs are higher in large marketing areas and are a significant barrier to entry into a large SMSA. (CX 586 [Tarrant] at 62–62; CX 589 [Wood] at 69–70; B. Thomas 1481; Gooding 1135–36; Connell 1264; Spearman 761; CX 574 [Goulding] at 115–116) Multistore entry spreads advertising costs over several stores. (Parker 2229 –30; C. Thomas 1331–34, 1341; Walters 1424–25; Cheek 1588–89; CX 574 [Goulding] at 116; [50] CX 586 [Tarrant] at 61–62; RPF 444) Small supermarket companies often cannot afford to match the larger chains in terms of amount or types of advertising. (Connell 1231–36; Cheek 1588–89; Gooding 1136) The advertising costs associated with entry into a new marketing area may be one reason a small regional chain will not attempt to enter a major metropolitan area. (Woodberry 1733; *see also* Spearman 761, 877)

Heavy advertising to establish an image in a new SMSA requires a substantial outlay of capital. (Walters 1424–25) Advertising costs comprise a higher percentage of sales when a firm enters a new marketing area (C. Thomas 1343), and a supermarket firm may need as much money to advertise a few stores as to advertise many stores. (CX 588 [Wood] at 68; RPF 444) James Wood, Chief Executive Officer of Grand Union, admitted that advertising costs in Grand Union's expansion areas of Baltimore and the West Coast of Florida were 4% of sales compared to 1.5% of sales in Grand Union's established trading areas. (CX 589 [Wood] at 80–82; *see also* Connell 1264)

62. A supermarket chain has greater profits in markets where it is a market leader. (Stewart 631–32; F. 82; CX 252Z39) Therefore, established firms, concerned about the entry into the market of new competitors, take steps to protect their positions against encroachment by new entrants. (Spearman 758, 803–04; Walters 1388) Once a new competitor has selected a store site, the established supermarket firms will analyze their own stores which are closest to the new entrant's site to determine what action should be taken to maintain their established position. (Stewart 644) They will also analyze the operating style and services expected of the new entrant. (Spearman 803–04; Posey 1650) The established firms might choose to remodel or expand their old stores, or start building replacement stores sooner than otherwise planned. (Stewart 671–73; Posey 1647–49; C. Thomas 1349–50; Parker 2235)

Another technique used by supermarket competitors before a new store opens is to build up the business of their nearby stores by increased advertising and special promotions. (C. Thomas 1349; B. Thomas 1488; Spearman 755, 791; Stewart 642–44; Parket 2240–41) These activities may begin shortly after construction of the new store begins (B. Thomas 1488), or as late as six to eight weeks before a new store's opening. (Spearman 878; C. Thomas 1350)

The opening of new stores by a new entrant can lead to a general lowering of prices within the marketing area as well as price specials. (Gooding 1161; Posey 1647–49; Spearman 803–04; Parker 2240) Either the new entrant (C. Thomas 1349; Posey 1649; Cheek 1576) or the established firms (Gregerson 331–32; CX 586 [Tarrant] at 62) may lower their prices. **[51]**

An established market leader had the ability to cross-subsidize by using sales and profits from other stores to fight aggressively by zone pricing in areas where the new entrant is opening a store. (Marion 1965–66; Parker 2241–42; *see also* Gregerson 331–32; C. Thomas 1327; Solomon 1024–26; B. Thomas 1489–99; Gooding 1141–44; Stewart 643) These special price zones will be found only near the new competitor's store and will offer lower prices than those found in the market leader's other stores within the SMSA. (Gregerson 331–32; Gooding 1141–44) If the new competitor is an independent with only one store in the area, it may not be able to operate profitably in the face of zone pricing. (Gregerson 331; Gooding 1142)

A large chain is more likely to enter a new SMSA by planning to open several stores within a relatively short period of time. For example, Winn-Dixie opened three stores within two years in Norfolk. (Walters 1437; Connell 1246; CX 630A-L) If the new entrant is a national chain, it has the resources to cross-subsidize its new stores with profits from other marketing areas. (Parker 2243; Marion 1965–66; Stewart 676) Thus, it may not be economically feasible, even for established market leaders, to defend by price zoning against a large supermarket chain which enters the market with several stores and strong financial backing.

63. To open a new 25,000 to 30,000 square foot supermarket in 1979 and 1980, a company would expect to spend a minimum of $300,000 to equip the store (a maximum of $700,000 was quoted) and a minimum of $250,000 to stock the store. (Spearman 746; B. Thomas 1481; Walters 1435; Connell 1250; CX 348) The minimum quoted for equipment costs is unlikely to include such recent technical innovations as price-scanning equipment, which costs approximately $100,000 to $120,000 for eight check-out stands. (Walters 1435) Rental costs for the store are not included in the costs of equipment or fixturing. (Walters 1435–36)

Other expenses for opening a new store include training new employees and supplying additional management supervision. (B. Thomas 1487; CX 589 [Wood] at 71) Managerial problems and expenses may be greater when a company is entering a new area, because this requires that management personnel be transferred to the new area. (Walters 1425) For example, in fiscal 1976–77, Grand Union spent $289,097 for employee moving expenses. (CX 7Z562)

Finding sufficient management personnel to permit expansion may be particularly difficult for the small, independent operator, because in these businesses the owners themselves often comprise management. (Walters 1409–10) Grand Union has its own corporate management training program. (CX 7Z560–Z566) Grand Union's training costs for 1976–1977 was $157,000. (CX 7Z562) **[52]**

64. Another factor in entry into a new market is trucking and warehouse costs. (Parker 2231–32; CX 589 [Wood] at 71). Most major

supermarket companies, including Grand Union and Colonial, have their own centralized warehouses and distribution centers. Entry into market areas is limited by the effective shipping distance for maximizing profitable shipping of goods. Multi-store entry may be advantageous to support transportation and delivery costs. (B. Thomas 1485)

65. Mr. Kennedy, the author of the Southeast and Southwest Studies for Grand Union, was asked his opinion on the acquisition of a regional "toehold" outside Atlanta as an entry vehicle into Atlanta. He testified:

I would say there would be a very extensive investment and very long pull before there would be a return that would be satisfactory.

I think the negatives associated with entering the Atlanta market, without any base whatsoever, in finding locations and establishing a nucleus, would be very debilitating as far as the bottom line. It would require extensive investment and reinvestment to support any growth of scale that would be material.

(CX 576 [Kennedy] at 63)

66. Respondents disagree with complaint counsel's differentiation between single-store and multi-store entry. (RPF 160) Their expert, Dr. Curhan, testified that it would be no more difficult to enter a given area with six or ten stores than with one. (Curhan 2888) Kroger, Albertson's and Winn-Dixie, among others, have recently entered on a multi-store basis in areas of the Southeast. (CX 2G, K, Q; C. Thomas 1316, 1333–40; B. Thomas 1474–75)

Warehouse Groceries opened its first store in approximately 1970 and by December 1979 operated 13 stores. (Gregerson 303–08) Bi-Lo, started by Frank Outlaw, who was formerly with Winn-Dixie, began with two stores in the early 1960's and had roughly 100 stores by December 1979. (Spearman 760, 930) Mr. Ogletree started with one store in Atlanta, had five by 1979 and was the seventh-ranked competitor in the Atlanta SMSA by 1977. (Spearment 868, 916) Robert Ingle left Colonial in the early 1960's to operate his father's store and now has 70 stores. (Spearman 936; Woodberry 1725) He opened his first store in 1963, his second in 1965, a third in 1967, and 13 stores in 1979. (Woodberry 1717–18)

Mr. Gooding testified that he began in 1960 by purchasing three small stores and now has four large stores with total sales in excess of $40 million (Gooding 1115), and has **[53]** the highest "dollar-per-square foot" sales in Orlando. (Gooding 1117) Another witness, testifying about Ukrop's, which is the third-ranking firm in Richmond, said: "I think they started out with one or two stores and grew from there." (Connell 1229) Farm Fresh, which had three stores in 1966, operated 17 stores in January of 1980. (Walters 1396–97; *see also* Byrd 1539–43)

One independent, Carroll W. Cheek of Great Scott of Florida, entered Florida by opening six stores in 1979. (Cheek 1585).

67. Respondents question whether multi-store entry is either necessary or desirable to insure a competitive market and whether only firms that are "factors" in the market are recognized by their competitors. (RPF 166) They note that, in each major city in the Southeast, including all of the alleged relevant markets except Atlanta, at least one and usually more than one of the "leading" firms in the market are those operating only one or two stores. (RX 32) According to respondents' economic expert:

> [E]ntry to the point where you are large enough at least to be remarked and noted, but not, I hasten to say, where you can necessarily have any market power, that you can do this with one or two stores in a given market or what's called a market unless it is as big as Atlanta . . . .

(Adelman 3209)

Entry with a single store can have an impact on competition even in a large city such as Atlanta. When Warehouse Groceries opened in Atlanta "[t]hat triggered a response out of all proportion to anything we have experienced anywhere else." (Gregerson 352; *see also* Solomon 1026) The response was limited to the area surrounding the single Warehouse Groceries store. (F. 84)

Dr. Curhan testified that:

> We can't tell whether six independents would be keener competitors because of their personal managerial savvy or whether the chain would be better. It could be the reverse.

(Curhan 2891–92)

## VIII. GRAND UNION'S INTERESTS AND INCENTIVES IN THE ACQUISITION OF COLONIAL

### A. *Objective Evidence of Grand Union's Interest and Incentives*

**[54]** 68. By 1974, the "Cavenham people, [*i.e.,* James Wood] felt very strongly that Grand Union's real talent was in operating supermarkets, and they felt that the various diversification moves [Grand Union] had made were not paying off. They adopted a fairly firm policy of no further investments into diversified companies." (CX 580 [Silvers] at 47; *see also* CX 586 [Tarrant] at 43) Earl Silvers, then Administrative Vice President of Grand Union, received instructions from Mr. Wood [Grand Union President] that he should concentrate exclusively on supermarket acquisitions (CX 580 [Silvers] at 46–7), and that he should work toward disposing of Grand Union's non-supermarket operations (CX 580 [Silver] at 48; *see also* CX 576

[Kennedy] at 53, stating that the convenience stores were sold). Grand Union's other operations, including its convenience stores, had been financially unsuccessful, and the convenience store division, catalog showrooms, and, eventually, the Grand Way discount stores, were sold. (CX 81E; CX 576 [Kennedy] at 53)

This resulted in a basic change in Grand Union management policy. (CX 81E) The Supermarket Division became the focal point for all management efforts to build sales and earnings. These management efforts included both retail property developments (new developments and renovations) and acquisitions. (CX 81E, L,) Grand Union's five year plan—1977 through 1981, states:

> With the company committed to concentrate its expansion efforts in the supermarket area only, it is expected that acquisitions of food chains will be given top priority consideration. An acquisition at the right price and at the right time could well double Grand Union's earnings.

(CX 81N)

69. In 1976, Mr. Silvers assigned Roger Kennedy, then Vice President of Corporate Planning, to "review from available sources all supermarkets that had operations in the southeast, and the southeast is defined to be from the Virginia area right down through Florida." (CX 576 [Kennedy] at 45, 48) The purpose of this review was to identify supermarket chains in those areas, with an eye toward acquisition possibilities. (CX 576 [Kennedy] at 45, 52–53; CX 480 [Silvers] at 75) Mr. Kennedy was instructed to disregard privately-owned corporations that operated only a few stores and was told that the top ten or fifteen chains in the country also would present different circumstances in terms of acquisition. (CX 576 [Kennedy] at 46)

Mr. Kennedy submitted his analysis of 12 Southeastern companies which he considered acquisition possibilities, [55] to Mr. Silvers on August 18, 1976 who, in turn, forwarded it to Bowman Gray and James Wood. (CX 32C, E, F) The 12 firms included were:

1. Bi-Lo, Inc., Mauldin, South Carolina
2. Alterman Foods, Atlanta, Georgia
3. Piggly-Wiggly Southern, Vidalia, Georgia
4. Harris-Teeter, Division of Ruddick Corporation, Charlotte, North Carolina
5. Bruno's, Birmingham, Alabama
6. Food Town Stores, Salisbury, North Carolina
7. Jitney Jungle, Jackson, Mississippi
8. Ingles, Asheville, North Carolina
9. Food World, High Point, North Carolina
10. Community Cash Stores, Spartanburg, South Carolina

11. Red Food Stores, Knoxville, Tennessee
12. Lowe's Food Stores, Wilkesboro, North Carolina

(CX 32F-M)
Bowman Gray, although not a Grand Union employee, was President of Generale Occidentale, and was viewed as Sir James Goldsmith's personal representative in the United States. Sir James and Mr. Gray worked closely with Grand Union's top management. (CX 580 [Silvers] at 68–69) Mr. Silvers was reporting directly to Mr. Gray and Mr. Wood. (CX 580 [Silvers] at 67)

In his report ("Southeast Study"), Mr. Kennedy stated about the region:

> Winn-Dixie operates in this entire area and has the best earnings record nationally. Each of these chains is profitable and as a group they are higher than national averages, indicating a market area which has seemed to avoid over-storing. With population growth projected to be one of the leading areas of the country it would seem to insure further potential.

(CX 32G)

Mr. Kennedy concluded that large chains had been profitable in the Southeast. (CX 576 [Kennedy] at 59) Colonial was not included in the Southeast Study because Mr. Kennedy felt it was too large, in his opinion, ranked tenth or eleventh nationally. (CX 576 [Kennedy] at 55) Mr. Silvers' cover letter to Mr. Wood and Mr. Gray concerning the Southeast Study indicated that he planned to follow up on Alterman, one of the acquisition possibilities mentioned, as soon as Isadore Alterman returned from vacation. (CX 32C) **[56]**

70. Also during 1976, Mr. Kennedy completed a similar study of supermarket chains in the Southwest. He did not prepare reports on any other sections of the country, although California periodically came into consideration. (CX 576 [Kennedy] at 48–49)

Mr. Kennedy's study of the Southwestern United States discussed the following thirteen acquisition possibilities:

1. Cullum Cos.
2. H.E. Butt
3. Weingarten
4. Furr's Inc.
5. Shop Rite
6. Schwegmann
7. Handy-Andy
8. A.J. Bayless
9. Brookshire Food Strs.
10. Piggly-Wiggly (Red River Inc.)
11. Rice Food

12. Minyard
13. Lewis & Coker

(CX 33C) This study indicated that:

Evaluating the thirteen chains as a group indicates that performance has been much more irregular and less profitable than the South-East, U.S.A. group. There is also a much broader geographic area involved but within it more potential growth as population expands in this desirable part of the country.

* * * * * * *

Considering the foothold that would be established and opportunities for expansion, there are two profiles of chains in the group. One group would appear to be very limited in present geography while the other would appear to have the coverage desired. However, the latter group is also involved in more diverse retailing operations as well as wholesaling which would have to be considered.

(CX 33D)

71. In his deposition, Mr. Kennedy indicated that, as Director of Plans, it was his responsibility to put together the plans to enable the company to grow in areas where it did not exist. He had discussed with Mr. Silvers the desire to move into the Southeast and Southwest areas of the country because they had the greatest potential for growth in terms of both **[57]** population and economic growth. (CX 576 [Kennedy] at 49–50, 102) These areas, comprising the "Sun Belt," "got quite a bit of publicity a few years ago in many publications, particularly as the northeast began to feel the impact of industry moving out, population decrease, the decay of the cities." (CX 576 [Kennedy] at 50) Grand Union made no acquisition studies of the Northwest or Midwest (CX 580 [Silvers] at 76–77), although Grand Union did accumulate information about grocery chains in several areas. (*See* CX 29; and CX 44A-Z52; and RPF 567–579). Visits were also made to various grocery chains throughout the country by Grand Union officials (*Id.*).

72. At the Strategy Committee meeting of Cavenham Limited on April 13, 1978, Sir James Goldsmith, questioning the advisability of purchasing a chain of supermarkets located mostly in Michigan, stated that in his opinion the most profitable area of expansion for Grand Union was in the South. (CX 615A-B)

In the April 3, 1978, issue of *Supermarket News,* a report based on an interview with James Wood stated:

In about three months the shackles will be removed, and Grand Union expects to be able to move more freely down the acquisition trail, according to James Wood, President.

* * * * * * *

Grand Union is looking for two basic types of acquisitions. The first and top priority will be in areas adjacent to or near Grand Union operations, where it could consolidate or strengthen existing market share and solidify the company's position.

* * * * * * *

The other type of acquisition would be a self contained chain removed from the present Grand Union trading area such as a Kimbell.

(CX 503A-B; *see also* CX 612, which is a stipulation of the testimony of the author of the article, stating that "The Article, including the quotations, is a substantially accurate reflection of Mr. Aboff's interview with James Wood in all respects.")

Based on an April 10, 1978, interview with James Wood, the June, 1978 issue of *Chain Store Age* stated:

The 10-year-old ban on acquisitions by the Grand Union Company becomes a ghost of government-[58]regulations-past this month. The chain is now free to move. And with a vibrant cash flow thanks to Cavenham Ltd.'s control, it has the power to do what it has been itching to do.

* * * * * * *

This month acquisitions for Grand Union are just a matter of how soon and where. "The most exciting thing that can happen to Grand Union this year would be substantial growth to our sales base if we are successful in consummating acquisitions," informs chief operating officer Patrick Deo. "We are looking within our own trading area, where it would be most profitable. And, with the consent decree expiring this month, the possibility looms so much larger than ever."

Grand Union's trading area is vast, covering much of the Eastern Seaboard. But president James Wood narrowed down the possibilities: "Basically, what we would like to do is take what is in our good areas, like we did in Florida and to some extent in Washington. Ideally, we would try to fill in our territory between here [New Jersey] and Washington, Washington and Florida."

Any acquisition Grand Union makes would be in what Deo terms "growth" areas, defined as relatively suburban areas.

(CX 504B; *see also* CX 613, which is a stipulation of the testimony of the author of the article, stating that "The Article including the quotations, is a substantially accurate reflection of Mr. Machiaverna's interview with James Wood and Patrick Deo in all respects.")

73. Mr. Wood, in discussing a Grand Union/Colonial merger with Ernest F. Boyce, Colonial's Chief Executive Officer, mentioned Grand Union's reliance on the New York market for its profits, which was undesirable, due to the competitive nature of that market. (CX 588 [Wood] at 350) Mr. Wood stated at that meeting that New York had not been without a price war for twenty years and that geographic diversification would permit Grand Union to survive such problems more effectively. (CX 588 [Wood] at 418, 421)

74. Roland Franklin, a director of Cavenham Limited and Generale Orientale, whose duties included monitoring and promoting acquisitions for Grand Union and who first proposed the acquisition of Colonial to Sir James Goldsmith, acknowledged that one of the rea-

sons for the selection of Colonial was its **[59]** "geographic fit" between Grand Union's existing areas. (CX 570 [Franklin] at 120, 138–39; *see also* CX 588 [Wood] at 114–15, 322–23, 362; CX 589 [Wood] at 33–34; CX 572 [Goldsmith] at 120–21) He reported the "geographical attractions," among other factors, to Sir James. (CX 570 [Franklin] at 170)

A document called "Company Profile: Colonial Stores, Inc.," prepared for Grand Union under the direction of Stuart Tarrant, Executive Vice President for Finance and Administration, discussed the attractiveness of Colonial's geographic position:

> Headquartered in Atlanta, Georgia and trading mainly under the Colonial and Big Star names, the operations are comprised of 378 supermarkets located in seven southeast states forming part of the attractive and growth-oriented sunbelt area of the United States. The map on Exhibit 1 demonstrates the perfect fit that Colonial would make a Grand Union's sphere of operations; the combined chain would stretch down the east coast from the Canadian border to Florida without significant break.

(CX 63A–1; *see also* CX 588 [Wood] at 96–97, 100)

75. Colonial also was selected by Grand Union because of its strong market position in the Sun Belt:

> Q. * * * I realize you said it filled up the map, but is it the fact that it was in the southeast U. S., the so-called Sun Belt, a growing region. Did that make it more desirable than some other alternative?
>
> A. Yes, I am sure the—it was not in one of the difficult areas. Yes.
>
> Q. You regarded it as a growth area, potential [growth] area, in the country?
>
> A. Yes.
>
> Q. And was the fact that in many parts of that area Colonial had a strong share of the market, was that an important consideration?
>
> A. One of the factors that we looked at, certainly.

(CX 570 [Franklin] at 240–41) **[60]**

76. Prior to its acquisition of Colonial, Grand Union's principal existing markets were located along the North Atlantic seaboard. (CX 6Z11–Z13) According to Grand Union's 1977/1978 Business Plan and Budget, "although improved employment in 1976 was recorded for most states, unemployment rates ran higher than the national average of 7.7 percent in all states [where Grand Union operates] except New Hampshire, Maryland and West Virginia." (CX 7Z27, CX 19Z8) The 1978–1979 version of Grand Union's business plan reports that in 1977 unemployment rates in the New York metropolitan area, New Jersey and Puerto Rico remained higher than the national average. (CX 6J)

The financial difficulties and/or takeovers of several supermarket chains, including Bohack's bankruptcy, Food Fair's acquisition of Hill's Markets, and Pic N' Pay's (a Cleveland-based chain) merger with First National Stores (after First National sold its 15 New Jersey stores to Foodtown-Mayfair) demonstrated the intensity of competition in the Northeast. (CX 6Z50) Grand Union's top management viewed parts of the Northeast market as having reached a saturation point with regard to Grand Union stores:

> Any new store added is immediately profitable due to the company's high market penetration with advantages in advertising and minimal incremental support costs. . . . Overflooding the area with stores . . . results in creaming-off the profits in existing units and, therefore, the emphasis in this instance is on the work to existing facilities. *** Out of the 28 stores planned for the Empire Division in the next five years, 19 are replacement stores.

(CX 45C)

In comparing this situation to the potential presented in Atlanta, Mr. Silvers stated: "There does not appear to be the type of 'over-storing' condition we face in parts of Long Island, Bergen County and Connecticut for example." (CX 38Z58)

James Wood reported to Sir James Goldsmith, with respect to Grand Union's five-year development plan, that:

> In total, the development plan endeavors to find a balance of achieving additional market penetration outside economic [sic] sensitive areas, especially into those areas of known population growth, to offset the potentially stagnant sections within the existing operations of the Northeast.

(CX 45C) **[61]**

B. *Grand Union's Financial Position*

77. Between 1973 and 1977, prior to Grand Union's acquisition of Colonial, Grand Union's percentage of pre-tax profits to sales increased by over 60% from 1.13% to 1.86%, while after-tax profits on sales increased by over 80%, from .6% to 1.1%. (CX 81D) Provisions for losses in connection with Grand Union's retrenchment of its diversified operations amounted to over $19 million from 1973–77. (CX 81E)

Grand Union developed a five-year plan for the fiscal years 1977–1981, which called for the opening of 100 new stores within five years, as well as contemplating food chain acquisitions. (CX 81L, N) To finance these expansion and acquisition plans, a capital expenditures budget of $150 million was established. This budget was to be financed by funds then available, funds which would be generated internally over the five-year period, and by application of anticipated depreciation charges of approximately $20 to $25 million per year. (CX 62Z190)

In 1979, Mr. Silvers, as Vice President and Secretary of the Grand

Union Company, stated that the firm's cash position as of April 11, 1978, was approximately $100 million in temporary cash investments. He believed the firm's 1976 cash position to have been about $60 million. (CX 580 [Silvers] at 92)

According to Sir James Goldsmith:

> On the previous occasion when I was in America in March, I was told that Grand Union had $122 million in cash. Whether it was right or wrong—that is what I seem to remember—so when the people were talking about a hundred-million-dollar acquisition, I didn't worry where the money was going to come from. We could sign the check, as far as I was concerned.

(CX 572 [Goldsmith] at 134)

78. Grand Union's tender offer to Colonial was for cash, and cost Grand Union approximately $135 million. (RX 1–I; CX 67) Of this amount, $120 million came from "current cash balances, temporary cash investments, other internally generated funds and borrowings" pursuant to certain lines of credit. (RX I) Grand Union had approximately $32 million available in lines of credit, from which it did not plan to borrow more than $15 million for the acquisition. Grand Union also borrowed $15 million from its parent Cavenham (USA), which ultimately obtained its funds from Banque Occidentale pour/'industrie et le commerce, a subsidiary of Generale Occidentale. (RX 1–I, J) **[62]**

79. An acquisition cost of $135 million was not the maximum considered by Grand Union. In July of 1978, an internally generated report evaluating The Great Atlantic and Pacific Tea Company, Inc., ("A & P"), as a potential acquisition, contemplated a purchase price of $160 million to be financed by $99.8 million from available cash, $50 million from additional debt, and $10 million from additional capital contribution. (CX 35J-K)

Grand Union's cash reserves were not depleted by the acquisition of Colonial. On October 17, 1979, almost a year after the acquisition of Colonial, Roger W. Kennedy, then Treasurer of Grand Union, testified in a deposition that Grand Union presently had a Temporary Cash Investment fund of between $60,000,000 and $70,000,000. (CX 576 [Kennedy] at 96–97) Soon thereafter, Grand Union made a cash tender offer for Weingarten, a supermarket chain with stores located in Texas, Louisiana and Arkansas. Weingarten's annual sales in 1979 were $575 million. (Tr. 117, 124; Curhan 3096–98; *see also* CX 44D,R-S)

### C. *Grand Union's Management Potential*

80. Roger Kennedy stated that, in the supermarket business, a company is dependent upon people living in a marketing area to comprise local management. When an acquisition is made, the acquir-

ing company must consider what expertise is on the scene, and what management is needed to supplement them. To protect the company's interests, it would place key people in a major acquisition. (CX 576 [Kennedy] at 107) When Grand Union was acquired by Cavenham, Cavenham relocated key personnel from Great Britain to the United States, including James Wood as Grand Union's Chief Executive Officer and Stuart Tarrant as Grand Union's financial Vice President. (CX 589 [Wood] at 4–5; CX 586 [Tarrant] at 10, 17)

Grand Union emphasizes management training programs. (CX 12G) The 1978–79 Business Plan and Budget reports on Grand Union's Four Stage Management Training Program:

> It permits us to bring into the company trainees with high long-range potential who might otherwise not pursue a career in retailing. In addition to training people for store, general and department manager positions, the program helps to create and develop a pool of field supervisory and middle management candidates for internal development. This program has helped reduce unnecessary turnover.

(CX6Z341) **[63]**
At the time that report was written, 53% of Grand Union's store managers and over 62% of its grocery department managers were former management trainees. In 1977, 32 general managers, 99 grocery managers, 19 meat managers, and 32 produce managers, for a total of 182 persons received management training. (CX 6Z341) Dr. Curhan, respondents' marketing and management expert, also described the available management pool within Grand Union which it was able to draw upon for its takeover of Colonial. (Curhan 3014–15)

## IX. THE THIRTEEN MARKETS

### A. *The Atlanta, Georgia SMSA*

#### 1. Demographics and Location

81. In 1978, the Atlanta SMSA (*see* F. 38) was the eighteenth largest in the country, with an estimated population of 1,851,500. Atlanta is the largest SMSA in Georgia and one of the fastest growing SMSAs in the country. Between 1970 and 1978, its population grew from 1,595,517 to 1,851,500 approximately 16.0 percent, or 2.3 times the national average. (Bureau of the Census, *Population*)

The distances between the city of Atlanta, the heart of the SMSA, and other cities are as follows:

| | |
|---|---|
| 80 miles from | Macon, Georgia |
| 150 miles from | Augusta, Georgia |
| 114 miles from | Chattanooga, Tennessee |
| 150 miles from | Birmingham, Alabama |
| 250 miles from | Salisbury, North Carolina |

| | |
|---|---|
| 235 miles from | Charlotte, North Carolina |
| 197 miles from | Asheville, North Carolina |
| 169 miles from | Spartanburg, South Carolina |
| 142 miles from | Greenville, South Carolina |
| 180 miles from | Vidalia, Georgia (approximate) |

(Rand McNally)

2. Colonial in the SMSA

82. According to complaint counsel's survey, the share of food and grocery store sales of the top eight competitors in Atlanta in 1972 and 1977 were as follows: **[64]**

| | 1972 | | | 1977 | |
|---|---|---|---|---|---|
| Competitor | Food Store Sales (%) | Grocery Store Sales (%) | Competitor | Food Store Sales (%) | Grocery Store Sales (%) |
| Colonial | 17.2 | 17.8 | Colonial | 19.8 | 20.6 |
| Alterman | 16.7 | 17.2 | Alterman | 18.0 | 18.7 |
| A&P | 10.7 | 11.0 | Kroger | 13.1 | 13.6 |
| Winn-Dixie | 10.2 | 10.6 | Winn-Dixie | 11.5 | 12.0 |
| Kroger | 6.9 | 7.2 | A&P | 8.3 | 8.6 |
| Munford | 3.2 | 3.3 | Munford | 2.2 | 2.3 |
| Tenneco | 1.1 | 1.1 | Ogletrees | 1.2 | 1.2 |
| National Conv. "Stop n' Go" | .7 | .7 | Tenneco | .9 | .9 |

(CX 2B)

The four-firm concentration ratio for *grocery stores,* (SIC 541), as provided by Bureau of the Census, *Retail Trade,* for the Atlanta SMSA were:

| 1972 | 1977 |
|---|---|
| 54.6% | 62.9% |

The four-firm concentration ratios for supermarkets in the Atlanta SMSA were:

| 1972 | 1977 |
|---|---|
| 74.5% | 78.7% |

(F. 52, 53)

In 1978, Colonial had 62 stores in metropolitan Atlanta and 96 in the entire Atlanta Division. (CX 252Z64, Z39) A report prepared by Colonial/Grand Union management entitled "Colonial Stores Marketing Plan Fiscal 1979/80," indicated that the Atlanta Division provided a net profit of $13,287,000, or 58% of the net profits earned by Colonial, although the Division operated only 26% of Colonial's stores. (CX 252Z39) This report also indicated that the following competitors, all of whom are supermarket firms, had the following market shares in 1978: **[65]**

| | No. of Stores | % Share |
|---|---|---|
| Colonial | 62 | 24.2 |
| Alterman | 51 | 23.9 |
| Kroger | 36 | 12.4 |
| A & P | 25 | 12.3 |
| Winn-Dixie | 47 | 11.8 |
| Others | | 15.4 |

(CX 252Z64)

Between 1972 and 1977, Colonial and Alterman maintained the same respective ranks and almost equal market shares. Each nearly doubled its dollar sales over the period (CX 2B), reflecting both the growth of the marketplace and inflation. A & P, which decreased its presence from 46 to 24 stores (CX 665Z27–Z29), dropped from third to fifth rank. It was replaced by Kroger, which jumped from fifth place, more than doubling its dollar sales. (CX 2B) Munford and Tenneco, two convenience store chains, remained in the top eight. Ogletrees, a local independent, became number seven in 1977. There are many additional competitors who were not among the top eight. (CX 665A-Z63)

Colonial's five year plan (to operate from 1976 to 1980) indicated that Colonial planned to open 51 new stores and to close 14, a net increase of 37 stores in the Atlanta Division. Colonial also planned to enlarge nine stores in the Division during that period. (CX 349N)

### 3. Barriers To Entry

83. Dr. Parker testified that barriers to effective entry into the Atlanta market are very high. (Parker 2347) William Stewart, the former President of Colonial, testified that to enter into Atlanta on a *de novo* basis, he would seek 12, thirty-thousand square foot supermarket sites, located in the three central counties of the SMSA—Fulton, DeKalb and Cobb. (Stewart 577–78; *see also* Spearman 918)

Industry witnesses testified about the effect on supermarket entry of high advertising rates in Atlanta. (Gregerson 327; Solomon 1031) According to complaint counsel (CPF 318), assuming "normal" advertising costs of slightly over 1% of sales, it would take $16 million in annual sales to purchase one page weekly of the $3200 per page cost of the Atlanta *Journal/Constitution.* (CX 263) In 1977, Colonial's Atlanta Division spent $1.55 million on newspaper advertising and $895,000 on television and radio advertising. (CX 465E)

Mr. Gregerson of Warehouse Groceries indicated that he would need at the minimum four stores similar to the one he **[66]** operated, to advertise in the Atlanta *Journal/Constitution.* (Gregerson 328) Another independent operator described his newspaper advertising as being "dwarfed" by that of the supermarket chains (Solomon 1031), which also use television, radio and direct mail advertising. (C. Thomas 1319) Bi-Lo, a major regional supermarket, has not entered "in the boundary lines where they have to advertise in the [Atlanta] *Journal-Constitution.*" (Spearman 877) Mr. Woodberry of Ingles, a major regional firm headquartered in Asheville, North Carolina, would be interested in entering into Atlanta but has not considered doing so because of high rent and advertising costs, and competition for labor, and because his chain is not well-known in Atlanta. He indicated that his present Asheville warehouse could supply 50 additional stores. (Woodberry 1717, 1733)

84. Complaint counsel also cites the prevailing practice by chains of establishing single-store price zones as an inhibiting factor to expansion of independents and successful new entry in the Atlanta market. (CPF 324; *see* F. 62; Gregerson 330–332; Solomon 1025–26; C. Thomas 325–28) Supermarket chains with a number of stores in the market are in a position to put one or two stores near a new entrant in a special lower price zone while maintaining the rest of the chains' Atlanta stores at the original, higher price level. (Gregerson 331–32) These firms "can afford to lose money in one store and make it up by their profits in other stores." (Gregerson 336–37; *see also* F. 62) Mr. Gregerson of Warehouse Groceries testified that, had he foreseen the "special price zone" reaction to his entry, he would not have entered the Atlanta market "under any circumstances." (Gregerson 333–34) He stated, and a vice president of Kroger confirmed, that when Warehouse Groceries entered Atlanta, Kroger initiated a special low-price zone in two stores near his new store. (Gregerson 331–32, 336; C. Thomas 1325–28), and the Colonial store nearest his store also adjusted its prices. (Gregerson 336) According to Mr. Gregerson, in smaller towns where his store competes in a one-on-one basis, the chains do not use a special price zone—". . . they want their store to make money in that town. . .". (Gregerson 336)

85. As previously noted (F. 57), an independent, single store often appeals to a small segment of the population, *e.g.,* a particular ethnic group. The owner of So-Lo Foods explained: "As an independent grocery, you have to go with your strengths. You certainly can't compete with the chains on their level. You try to go with what you can do. . . ." (Solomon 1018–19) So-Lo features a line of Jewish, Italian, and

Spanish foods. (Solomon 1018) Since So-Lo opened its first store in Atlanta in 1972, its two attempts to branch out with more conventional stores have been unsuccessful. (Solomon 1017, 1020, 1063–64) **[67]**

86. Respondents note different factors which, they contend, make the Atlanta market attractive and easy for entry. "[I]n a market the size of Atlanta, anything can pop up." (Curhan 3001)

Mr. Solomon testified that:

> [W]e don't have mountains to climb to get to groceries here. There are no rivers, no trade barriers. We don't have to float the goods here. This is a major distribution center in the country.
>
> The taxes are as low or lower than the Boston market on real estate. The union scale is certainly lower.

(Solomon 1046)

87. In Dr. Curhan's opinion, the most likely new entrants in Atlanta would be local independents. (Curhan 3001) Mr. Isaacs, Vice President of Grand Union's [Colonial] Atlanta Division, testified that if he were to open five stores anywhere in the southeast, the Atlanta SMSA would be the most attractive place to enter, particularly DeKalb, Gwinnett and Clayton Counties. (Isaacs 2613–15) Mr. Isaacs noted several factors which contribute to Atlanta's attractiveness: it is a "good steady growth area" (Isaacs 2543); its excellent transportation; and its good population mix. (Isaacs 2621–13) He referred to the "good possibility" of entry by Safeway and Albertson's by 1985. He based his opinion on what he has heard and read about the companies, including the fact that Safeway commissioned a survey of the Atlanta market. (Isaacs 2544–46, 2618–19; Curhan 3001–02)

In 1978, Mr. Stewart perceived "[w]hichever company [that] was successful in negotiating for the purchase of all the Alterman Brothers" as the most likely entrant into Atlanta. (Stewart 600) Similarily, Mr. Spearman testified that in 1978, it had been announced that Oppenheimer was negotiating to purchase Alterman; so he perceived Oppenheimer as likely to enter Atlanta. (Spearman 758) He had heard rumors that Safeway and Lucky were also interested in entering Atlanta by acquiring Alterman. (Spearman at 759)

88. Respondents also cite the following companies as potential entrants into Atlanta (RPF 849–854):

(a) Hudson-Thompson, Inc., an independent wholesaler, serves the Atlanta market area from Montgomery, Alabama, 166 **[68]** miles away. Therefore, Stewart, King & McKenzie, also located in Montgomery, could similarly serve stores in the area. (RX 30E-G)

(b) Three of the distribution centers in Birmingham, Alabama, 150 miles from Atlanta, serve stores in the Atlanta market area: Piggly

Wiggly Alabama Distribution Co., Inc., Ragland Brothers Co., and Super-Value Stores, Inc. Therefore, three other distribution centers in Birmingham which do not presently serve Atlanta from any warehouse could also serve stores in the area: Bruno's Food Stores, Inc., Mitchell Grocery Corp., and Harvey Ragland Co., Inc. (RX 30E-G)

(c) Of the eight distribution centers in Greenville, South Carolina, 142 miles away, only Bi-Lo serves stores in the Atlanta SMSA. Excluding Associated Grocers and Winn-Dixie, which serve Atlanta from other locations, the following five companies with warehouses in Greenville may be considered potential entrants into Atlanta based upon relative proximity: Community Cash Stores, Dexter Grocery Co., Ingles, Kash & Karry Super-Super Market, and Thomas & Howard Co. (RX 30E-G)

(d) Dixie Saving Stores, Inc. Chattanooga, Tennessee, serves in Atlanta, 114 miles away. On that basis, Red Food Stores, Inc., which also has a warehouse in Chattanooga (RX 30E-G), may be considered a potential entrant into Atlanta. Red Foods, the market leader in Chattanooga, has never attempted to enter Atlanta. However, since 1980 it has had a new President, William Stewart, the former President of Colonial. If Mr. Stewart sees an opportunity for growth into Atlanta, an area with which he is intimately familiar, he may take advantage of it.

(e) K.M.C. Co., an independent wholesaler in Knoxville, Tennessee, serves stores in Atlanta, 193 miles away. Therefore, the seven other warehouses in Knoxville may also be considered potential entrants into Atlanta: Giant Food Markets, Inc., Giant Wholesale Grocery Co., H. T. Hackney Co., Oakwood Markets, Pay Cash Grocery Co., Inc. (subsidiary Scrivner, Inc.), Quality Foods, Inc., and The White Stores, Inc. (RX 30E-G)

### 4. Performance of the SMSA

89. Opinion is divided regarding the state of competition in the Atlanta SMSA. Respondents note the development of the SMSA and cite examples of new competition entering, whereas complaint counsel note the failure of many of these operations to achieve more than marginal success.

In the late 1960's Colonial began opening some new stores and converting some older stores to Big Star "discount" **[69]** stores. These were lower-priced than Colonial's traditional, service-intensive stores, and did not give trading stamps. In 1970, there were still only a few Big Star stores in Atlanta. In addition to the Colonials and the Big Stars, there were two Richway Foods "discount" food stores in 1970, which Colonial operated in conjunction with Richway Discount Department Stores, a subsidiary of Rich's of Atlanta. (Isaacs 2523–25)

Alterman, owned by the Alterman family, had traditionally operated under the name "Big Apple." In about 1970, it introduced Food Giant, a discount operation. (Isaacs 2527) A & P, Winn-Dixie, and Kroger were also in the Atlanta market in 1970. (*Id.*) In addition, there were four Treasure Island food stores, affiliated with Treasure Island "discount" Department stores, and three GEX stores, which were franchised membership stores operated by Hudson-Thompson, a wholesaler in Montgomery, Alabama. These were the first "every day low price" stores when they opened in Atlanta in the 1960's. In 1970, each Treasure Island and GEX store was doing approximately three to four times the volume of each Colonial store. (Isaacs 2526–28, 2532–33)

By 1977, all the Treasure Island and GEX stores were closed. Mr. Isaacs attributed their failure to their inability to maintain high volume once the novelty of the discount format wore off and new competitive stores began locating near them. (Isaacs 2532–33) During the 1970's Colonial continued converting most of its older stores to Big Star stores. Presently, there is only one remaining Colonial store in the Atlanta SMSA. It also built additional Richway stores, although by 1980 these were all operated as Big Stars. (Isaacs 2529–30)

Although Alterman was successful financially during this period (CX 2B), it was known in the industry that the elderly Alterman brothers were attempting to find a purchaser for their company. (Stewart 600) Alterman was acquired by Del Haize, a Belgian company, in 1979. (Spearman 927) Messrs. Stewart and Spearman expected that the acquisition would make Alterman more aggressive. (Stewart 599–600, 610; Spearman 957–58) Alterman has recently become more aggressive in their merchandising and their weekly feature pricing, according to one Grand Union official. (Isaacs 2622)

Kroger has had stores in the Atlanta area since the 1920's. (C. Thomas 1335) It embarked on a major building program in the mid-1970's and replaced many of its older, smaller stores with large, high-volume stores. Kroger was able to increase its sales and market share substantially. (F. 82; Isaacs 2531) Kroger has continued its expansion since 1977 in terms of both new store construction and competitive pricing. (Stewart 640; Gregerson 338–39) In the last three years, Kroger has built several new "super stores" replacing older stores, all with departments such as delis, bakeries and **[70]** prescription drugs. Many are in the suburbs of Atlanta, where Kroger previously had no stores. (Spearman 873–74; Curhan 2997) Kroger stores are open 24 hours a day. It is a low-price leader and has high volume throughout its stores. (Curhan 2998) Mr. Spearman testified regarding industry reaction to Kroger in Atlanta.

Everyone in the marketplace has reacted to their EDLP. That means Every Day Low Prices in the marketplace; because that's the posture that they have elected to take or stand for as they developed these stores. That means that they have less weekly features, bonus buys, roll-in items that are effective from, say, Thursday, Wednesday, until the following Wednesday. As a result of that, every chain in the market, without exception, has lowered their every-day shelf prices.

(Spearman 875; *see also* Gregerson 385)

Winn-Dixie, which has remained number four in the market, has had stores in Atlanta since the late 1950's and a warehouse in Atlanta since 1969. (B. Thomas 1474, 1478) Previously its Atlanta stores were serviced from a Winn-Dixie warehouse in Greenville, South Carolina, and later some were served from another warehouse in Montgomery, Alabama. (B. Thomas 1477) Today Winn-Dixie has 48 stores in the area, five of which were built in 1979. (Curhan 2999) Its stores, even the newer ones, are smaller than many of its competitors' stores. (Curhan 2999)

A & P, number five in the market, has undergone a substantial change in Atlanta in the last ten years. It closed 33 older stores while at the same time opening large 41,000 square feet stores. These stores have similar departments to, and are competitive with, Kroger. A & P lost market share over the decade. (F. 82) The stores' average volume is $70,000 weekly and several do as much business as $240,000 weekly. (Curhan 2998–99)

Ogletree's, the seventh-ranked competitor, with five stores in northeast Atlanta, is the major independent in the area. Mr. Ogletree began by acquiring a former Colonial store. (Spearman 868, 915) His most recent store was built in late 1979. The stores are extremely labor-intensive and give more customer service than any other store in Atlanta. (Spearman 914–15) Mr. Spearman attributed Ogletree's ability to do so economically to the fact that, unlike the chains, it is non-unionized and has lower labor rates. (Spearman 914–15) **[71]** Kroger's Group Vice President testified that Kroger reacted to a new Ogletree's store while the store was under construction; Kroger remodeled its nearby store, putting in special departments and increasing the service level. (C. Thomas 1350)

There are several Matthews Markets, which are supplied by Associated Grocers, in Atlanta. (Stewart 534) One of the Matthews Markets is located in a former Colonial store. (Stewart 639)

Mr. Solomon, an independent operator, testified that he opened So-Lo Foods, which he described as a "case-stack" or warehouse store, in a former Colonial store in late 1972. (Solomon 1017–1054) So-Lo carries basic grocery items, although not the complete variety of a chain store, meat and produce, as well as a heavy concentration of ethnic lines, including Jewish and Spanish foods. (Solomon 1018–19)

From 1974–75, Mr. Solomon also operated in a former A & P location in Marietta, which is within the Atlanta SMSA, and in 1977 and 1978, he operated a store in Doraville at a former Winn-Dixie location. As a result of problems with his wholesaler, strikes near the Marietta and Doraville stores, and the competition in the area, Mr. Solomon went into Chapter XI bankruptcy and closed those two stores. (Solomon 1020–23, 1058–63; RX 5) Since he came out of bankruptcy, he has been pleased with the volume in his remaining store. (Solomon 1080) In addition, he also wholesales foods items for several other retailers. (Solomon 1080–81)

Heathman's began as a partnership between Mr. Heathman and Fred Yardley, a Colonial real estate manager. They opened one store in the Stone Mountain area. The store, like Ogletree's, was heavily service and customer oriented and was very successful. Mr. Heathman bought out his partner and opened a second, similar store at the opposite end of town. Mr. Spearman testified that this was the wrong type of store for that neighborhood. When the store opened, it was picketed by the union and it suffered operating problems. As a result of these difficulties, one store dragged the other store down, Mr. Heathman over-extended himself and went into bankruptcy. (Spearman 916–18; Curhan 3000) His two stores are now operated by Byerly's of Minnesota. (Isaacs 2542)

Several independent companies, some operated by former Colonial store managers or which are located in former Colonial stores, have recently entered the area. For example, Way-Lo recently opened a "semi-box store" in an old Colonial location. (Spearman 868; Curhan 2999) Several one-and-two-store owners have recently banded together under the Big Buy/Thriftown name and advertise together as a group. (Isaacs 2542–43) There are now 32 Big Buy/Thriftown stores in the area. (Curhan 2999) As a group, they would be among the top eight competitors in the **[72]** Atlanta market. (*See* CX 665S-Z63.) They are supplied by Associated Grocers. (Isaacs 2542; Curhan 2999)

Mr. Gregerson testified that he began opening warehouse stores in Alabama in 1968, at a time when that type of store was almost unknown. He opened a warehouse store in Marietta within the Atlanta SMSA, in 1979. That year, he had 13 stores in Alabama and Georgia. (Gregerson 305–08, 360–64) When it first opened, the Marietta store did $400,000 in weekly sales. (Gregerson 348) The store is believed to have the largest volume of any single store in the SMSA. (Isaacs 2536) Mr. Gregerson claims to have the lowest prices in the state. (Gregerson 370)

Jewel-T box stores began operating in 1978. By the end of 1980, there was approximately 12 in the SMSA and others in the surrounding area. (Isaacs 2536)

In late 1980, Alterman began converting some of its traditional stores to warehouse stores. Colonial reacted to the conversion of the first Alterman store in its two nearby stores as it would react to any new entrant or other competitive activity. (Isaacs 2537–40)

Produce markets, which carry fresh meat and fish and other items in addition to produce, have recently become popular in Atlanta. Metro Produce, one of the new produce markets, is owned by a former Winn-Dixie district manager. He has two stores, one a former Colonial and the other a former A & P, and is building a third. (Isaacs 2536–37)

There have been several other new entrants. In 1978, Bi-Lo of Mauldin, South Carolina, opened its first store within the Atlanta SMSA in Snellville. (Isaacs 2540) A year later, Bi-Lo opened its second store in the SMSA. (Isaacs 2541) Ingles of Asheville, North Carolina, has opened three stores on the fringes of the SMSA. They are located in Winder, Calhoun, and Cornelia. (Isaacs 2541)

90. In contrast, complaint counsel, while noting the entry of Way-Lo, Jewel-T (box stores), Bi-Lo and Ingles into the Atlanta area, discount the importance of this as a market factor (CPF 333), because the large supermarket chains in Atlanta have not lowered their prices in response to these new actors in the market. (C. Thomas 1358) In addition, Bi-Lo and Ingles do not advertise in the Atlanta *Constitution/Journal,* and are not considered as operating in the Atlanta market, but, rather, are seen as being on its fringe. (Spearman 877; Woodberry 1733, 1750) The current Vice President of Colonial/Grand Union for the Atlanta Region estimates that none of the new entrants have achieved even a two percent market [73] share, despite the fact that some of them have been in operation for five years. (Isaacs 2596–99)

Complaint counsel's experts testified that, from an economic perspective, there exists a high probability that Atlanta is performing as less than a competitive market. (Parker 2348; Marion 1976–78) Mr. Gregerson described the Marietta section of Atlanta as "a creampuff" (Gregerson 520), and guessed that the firms in that market had " . . . a gentleman's agreement. I don't know why these prices would be higher than they were in other places, because the people represented had lower prices out in the country." (Gregerson 524) He noted that prior to his entry, his area in Atlanta had a higher gross margin level than that he experienced in the development of his stores in other areas, which were mostly in Alabama. (Gregerson 325) Mr. Thomas, Kroger's Vice President, testified that his Carrollton store (nearby Atlanta), was in a lower price zone than Kroger's Atlanta stores. (C. Thomas 1327–28)

Mr. Solomon concurred that prices in Atlanta were unusually high and that this was because in Atlanta:

> [Y]ou have a major distribution center in the country, a major market, that has five dominant chains controlling its volume; and then you take those five and bring it down to three, you have got Colonial Stores, with approximately 24 percent of the volume; Alterman with approximately 24 percent of the volume; and Kroger who now has 20 percent, or in that area, 18 to 20 percent; and if they—those three or five chains can sell X item for $1.09 and have nobody compete with them, why not sell it for $1.09? Why go to $1.08?
>
> * * * * * * *
>
> Here it is easy for them to take and stay at the $1.09, run their loss leaders, use other items to make up those losses, whether it be nonfood items or another item to do it; but why destroy that bubble that protects them at a level for them to make a good profit?
>
> The taxes are as low or lower than the Boston market on real estate. The union scale is certainly lower. Why are these prices so high? It's only because there's nobody to make them go lower.

(Solomon 1044–46) **[74]**

### 5. Grand Union as a Potential Entrant

91. In 1975, Earl Silvers did a preliminary study of Alterman in Atlanta (F. 69), spending a day in that city and conducting a price study of that market. (CX 580 [Silver] at 63, 78) On August 21, 1975, he wrote a memorandum to Mr. Wood, describing his impressions of the Atlanta market:

> My impression of the Atlanta market, based on a one day inspection trip August 19, is that competition is not as aggressive as in most of our operating areas:
>
> 1. There does not appear to be the type of 'over-storing' condition we face in parts of Long Island, Bergen County and Connecticut for example.
> 2. I saw no unusually strong operations such as Giant, Shop-Rite or Pathmark. In comparison with Phoenix and Southern California with Alpha Beta, Lucky, Ralphs, and Fazio, the Atlanta supermarkets appear quite average.
>
> I obtained a representative list of retail prices which I have compared with Grand Union.

(CX 38Z58)
In a separate cover memorandum to Bowman Gray, Mr. Silvers reported that "competition is not as aggressive in the Atlanta area as in most of the areas where we operate." (CX 36Z80) Mr. Silvers returned to Atlanta again in 1976 at James Wood's request, for additional studies and negotiations for Alterman. (CX 580 [Silver] at 100; CX 37I)

Grand Union considered other regional chains as entry vehicles into Atlanta. In the Southeast Study, Mr. Kennedy recommended the acquisition of both Bruno's and Ingles:

> Two that are most impressive in my judgment considering performance, management expertise including age, location, possible availability and potential are Bruno's and Ingles. The latter has been developed within the last 12 years. With Bruno's located in northern Alabama and Ingles in North Carolina there exists a gap between their operating area, consisting of all of northern Georgia (Atlanta market). There are expansion possibilities in all other directions for Bruno's and similarly for Ingles. (CX 32G) **[75]**

Mr. Kennedy explained in his deposition that these two chains were impressive candidates for acquisition:

> In this particular case, the two chains referred to, Bruno's and Ingles, which had limited geographic coverage, fit a pattern that in the middle but contiguous to both was this Atlanta market area, which certainly in the southeast has to be considered as probably the predominant growth area, considering the metropolitan aspects, the hub of the south, and certainly that should be a viable area to be located in. (CX 576 [Kennedy] at 60–61)

Bruno's is headquartered in Birmingham, Alabama. Joseph Bruno, its President, began with a "typical 'corner' grocery store" in 1936. The company went public in 1971, although the Bruno family owns approximately 70% of the stock. (CX 29Z100) Bruno's is non-unionized and operates three contiguous warehouses. (Curhan 2973–74) "[T]hey are a very attractive, very successful family-owned, aggressive, expansion-minded company." (Curhan 2973) Bruno's also operates a chain of drug stores. As of 1977, Bruno's had 50 grocery stores of which 27 were in Birmingham, making it one of the top four grocery store firms in Birmingham. (CX 29Z100–Z101) In 1977, Bruno's had grocery stores in Gadsden, Huntsville, Anniston, Mobile, Montgomery and Tuscaloosa, Alabama, and Chattanooga, Tennessee. Its closest store to Atlanta was in Chattanooga. (Spearman 935)

Commerce Union Bank of Nashville attempted to interest Grand Union in acquiring Bruno's in 1977. (CX 29Z89–Z90)[11] In a September 1977 memorandum analyzing Bruno's, Roger Kennedy, the Treasurer of Grand Union, made the following observations:

> 1. The size of the operation and area of concentration does not in itself offer significant additional growth possibilities. Movement into marketing areas bordering on Alabama appear to present more competitive problems and the additional costs of **[76]** distribution and supervision; all of which will have a negative effect on earnings.
>
> 2. Expansion into the large 42,000 plus square foot stores and related investment requires a critical evaluation.

[11] Mr. Wood, however, testified that he was unaware of any contact with Bruno's or anyone representing Bruno's. (CX 589 [Wood] at 190–91)

3. Present management concentrated in the Bruno family and their ages must be considered.

(CX 29Z99)

When asked whether Bruno's would have made a suitable acquisition candidate, Mr. Tarrant testified:

[T]here was nothing particularly attractive about it. I believe the price being asked was rather high.

(CX 586 [Tarrant] at 92)

One factor that made Bruno's unattractive to Mr. Tarrant was its small size. (CX 586 [Tarrant] at 113)

Bowman Gray, a director of Grand Union and Vice President of Cavenham, wrote to William J. Tyne, Jr., Vice President of Commerce Union Bank, later in September 1977 stating:

At the present time, we feel that Bruno's is too small for the major acquisition that Grand Union is looking for and, therefore, would not be interested. However, should they in turn make an acquisition which might enhance their attractiveness to us, please let me know and we will consider.

(CX 29Z87)

As late as March 1978, Bruno's was still considered as an acquisition possibility if a larger volume candidate was not available. (CX 44G)

Ingles began as a single store independent when Robert Ingle, a former Colonial employee, opened his first store in Asheville, North Carolina in 1963. He opened his second store in 1965 and his third in 1967. (Woodberry 1716–17) Thereafter, he acquired six Colonial stores in the Asheville area. (Woodberry 1717, 1745) Except for taking over some A & P stores, the balance of Ingles' growth has been through building or leasing new stores. In 1979, Ingles opened 13 stores (Woodberry 1717–18), making a total of 69 Ingles stores, with **[77]** net sales of $249 million, or an average of $30,000 in weekly sales per store. (RX 17) Ingles stores range in size from 13,000 square feet to 33,000 square feet. (Woodberry 1724–25) Ingles operates non-union stores and warehouse. (Woodberry 1722)

Ingles' dry grocery warehouse, which was built in 1977, is located at its headquarters near Asheville. (Woodberry 1725) Once Ingles completes the ongoing expansion of its warehouse, it will be able to handle 50 additional stores. (Woodberry 1727) It also uses Merchants Distributors to supply it with all perishables and one-quarter of its dry grocery requirements. (Woodberry 1726–27) Ingles has six stores in Northeast Georgia. (CX 642A-G; Woodberry 1719; F. 89)

Each time Mr. Ingle has been approached to sell the company, he has refused. (Woodberry 1757) Ingles now has an employee stock bonus plan funded by Ingles' stock. (Woodberry 1759) Many of Ingles' employees also own stock in the company as a result of an earlier private stock offering. (Woodberry 1759) Altogether, 1582 Ingles' employees are stockholders. (RX 17)

While he was employed by Colonial, Mr. Ingle reported to Mr. Spearman. When asked about the likelihood of Grand Union acquiring Ingles, Mr. Spearman testified:

> So Bob has been very successful. Bob has got great ambitions. There's a story been written on him—and I believe he intends to do it, if he lives long enough—that he was quoted that one day he will have 1,000 stores in his chain.
>
> You know, knowing Bob Ingle as I know Bob Ingle, I don't believe Bob Ingle is going to sell to anyone until his [sic] gets near that objective. I may be right or wrong. That's a personal feeling. I know Bob well.

(Spearman 936–37)

Mr. Wood testified he was unfamiliar with Ingles and had never had any contact with the company with regard to acquisition. (CX 589 [Wood] at 186) Mr. Kennedy, the author of the Southeast and Southwest Studies, was asked his opinion on the acquisition of Ingles or Bruno's as a "toehold" into Atlanta:

> I would say there would be a very extensive investment and very long pull before there would be a return that would be satisfactory. [78]
>
> I think the negatives associated with entering the Atlanta market, without any base whatsoever, in finding locations and establishing a nucleus, would be very debilitating as far as the bottom line.
>
> It would require extensive investment and reinvestment to support any growth of scale that would be material.

(CX 576 [Kennedy] at 63)

Bi-Lo is another company mentioned by complaint counsel as a potential acquisition in Atlanta. (CPF 355–356; Parker 2491, 2494) Bi-Lo was founded in 1961 by Frank Outlaw, a former Winn-Dixie employee, who began by acquiring two Winn-Dixie stores in Greenville. At the time of his death he had opened almost 100 stores and built a warehouse in Mauldin, South Carolina. (Spearman 760–71; Curhan 2968–69)

After Mr. Outlaw's death, Grand Union, among many other companies, was offered the opportunity in 1976 to acquire Bi-Lo through a broker. Mr. Silvers testified: "We never got in touch with them or did any more than look at the figures, and the people from the Netherlands took them." (CX 580 [Silvers] at 127) Mr. Wood testified, "I personally never examined [Bi-Lo] nor contacted anyone there. At that stage, I wasn't particularly interested." (CX 589 [Wood] at 187) Bi-Lo was acquired by Ahold, a Dutch company, in 1977. (Curhan 2968)

In 1976, Bi-Lo, Inc., operated sixty-three supermarkets located primarily in South Carolina, North Carolina and Georgia. Bi-Lo's warehouse is located near Greenville, South Carolina in Mauldin. (CX 609S) In 1976, Bi-Lo's total sales were $367 million. In 1977, Bi-Lo operated six supermarkets in north Georgia, including one located in Snellville, Georgia, in the Atlanta SMSA. (Spearman 877) Bi-Lo had less than 1% of grocery sales in Atlanta in 1977. (CX 2C; CX 665V; *see also* F. 110)

According to complaint counsel, in 1978 Grand Union could have entered the Atlanta SMSA by acquiring the individual Atlanta stores of either A & P, Ogletree's, Heathman's, Bi-Lo, or some combination thereof. (Parker 2348; *see also* Spearman 877, 945; Stewart 534, 639) Also, Grand Union could have acquired a regional chain headquartered outside of Atlanta, as identified in its Southeast Study, and then entered Atlanta *de novo* from its location. (Parker 2349–50; *see also* CX 32G; CX 576 [Kennedy] at 62)

With regard to A & P, Dr. Curhan testified: **[79]**

> Well, in the absence of more specific knowledge, I can't comment with a great deal of conviction. But if by that it was meant to acquire some of the smaller A & P stores then I can't imagine that relationship.
>
> Why they would want to sell [the] 41,000 foot stores doing 180 to $240,000 apiece, I can't imagine that, either. I doubt that A & P could have made an arrangement with Grand Union to enter that market.

(Curhan 3000–01)

Grand Union in its Southeast Study identified 12 southeastern regional firms of which six have warehouses within shipping distance of Atlanta. Grand Union presently ships over 250 miles to its Florida West Coast supermarkets from its Hialeah warehouse. (CX 574 [Goulding] at 53; CX 589 [Wood] at 66, 108; RPF 274, 275) These chains are:

| | | |
|---|---|---|
| Bruno's | Birmingham, Alabama | 150 miles |
| Red Foods | Chattanooga, Tennessee | 114 miles |
| Harris-Teeter | Charlotte, North Carolina | 235 miles |
| Ingles | Asheville, North Carolina | 197 miles |
| Bi-Lo | Greenville, South Carolina | 142 miles |
| Piggly Wiggly Southern | Vidalia, Georgia | 180 miles |

(CX 32A-S; Rand McNally)

Red Foods is located 114 miles from Atlanta. While it would also be feasible to reach Atlanta from its warehouse in Chattanooga, there is no evidence that Grand Union would have caused it to expand to Atlanta. As Dr. Curhan testified:

> So I can't see that Grand Union, even if by a stretch of the imagination they had decided to buy Red Food for Chattanooga's sake, whether they then would have used that to go into Atlanta, I think that's the scary part of that. I can't see that part of it.

(Curhan 2970)

Piggly Wiggly and Community Cash are similar small chains. Piggly Wiggly (unrelated to Piggly Wiggly of North Carolina) operates sixty-five stores from its headquarters in Vidalia, Georgia. (*Progressive Grocer's Marketing Guidebook*, p. 208 In 1977, it had six stores in Augusta and thirteen in Macon. (CX 2D, L, CX 665Z82–Z83,Z295) The rest of its stores **[80]** are in more rural locations. Dr. Curhan described this company as a mismatch for Grand Union. (Curhan 2972) A discussion of Community Cash is contained at (F. 184, *infra*).

92. A precedent of *de novo* entry into Atlanta by a supermarket chain building new stores from an established warehouse base is that of Winn-Dixie. Winn-Dixie operated warehouses in Greenville, South Carolina and Montgomery, Alabama. (B. Thomas 1477) Greenville and Montgomery are respectively 142 and 166 miles from Atlanta. (Rand McNally) In the 1960's, Winn-Dixie built stores out of its Greenville and Montgomery warehouses toward and into Atlanta, until in 1969 Winn-Dixie build a warehouse in Atlanta. (B. Thomas 1478) When the Atlanta warehouse was opened, it assumed the supply functions of a number of stores previously supplied by the Greenville and Montgomery warehouses. (B. Thomas 1479)

### 6. Grand Union as a Perceived Potential Entrant

93. Charles Thomas, Kroger's Group Vice President, testified that prior to June 1978, he did not perceive Grand Union as likely to enter Atlanta. (C. Thomas 1374, 1375) When asked whether in 1978 he perceived Grand Union as likely to enter Atlanta, Bert Thomas, the President of Winn-Dixie, answered "no way." (B. Thomas 1513)

None of the Colonial management who testified perceived Grand Union as likely to enter Atlanta. Mr. Stewart, the former President of Colonial, Mr. Isaacs, Vice President for the Atlanta Division, and Mr. Spearman, Regional Vice President, never perceived Grand Union as likely to enter Atlanta *de novo*. Stewart 640–41; Isaacs 2583; Spearman 875–76) Mr. Spearman had once heard rumors that Grand Union was interested in acquiring Alterman (Spearman at 759), but he never perceived Grand Union as likely to enter Atlanta in any way other than if it had acquired Alterman. (Spearman 876)

7. Changes in Colonial's Atlanta Operations Since The Acquisition

94. Grand Union officials testified about changes in Colonial's Atlanta operations, and some "basic improvements" which have been made. (RPF 869) Since the acquisition, additional capital is now available for new stores as well as older store remodelings (Isaacs 2586), and Grand Union has increased Colonial's new store expansion program in Atlanta. (Isaacs 2601) All new stores will have departments which will assist Colonial in competing against Kroger, in particular. (Spearman 872) Grand Union has also allowed the Atlanta Division to close unprofitable stores, something prior management had been unwilling to do. (Isaacs 2587) **[81]**

Formerly there were only two price zones for the entire Atlanta Division—one for all the Big Stars and one for the remaining Colonial stores. Since the acquisition, and Grand Union's introduction of pricing departments throughout Colonial, there are now ten price zones for the area. (Spearman 870–71) Mr. Spearman testified that the price zones have allowed Colonial to be more price competitive, particularly as against Kroger. (Spearman 811) Mr. Solomon testified that a large number of price zones in a given area is an indication that the marketplace is competitive. (Solomon 1025–26)

Grand Union has lowered gross profit margins on dry groceries, meat and produce because it has "[gone] after more sales [and become] more aggressive in gaining additional sales in existing stores." (Isaacs 2589) It has instituted more aggressive shelf prices and lower-priced advertised features (Isaacs 2587–88); increased the variety of products offered in the stores in reaction to the variety Kroger now offers (Spearman 872–73); and more than doubled the volume of general merchandise to over 6% of total store sales. (Spearman 872–73; Isaacs 2588, 2621) Increasing the emphasis on general merchandise, which carries a higher gross profit margin than groceries, allowed Grand Union to lower grocery prices while remaining profitable, and is popular with shoppers. (Isaacs 2588)

Grand Union has increased the wage scale of management in the Atlanta Division, particularly at the level of store managers and co-managers, who under Colonial were not compensated commensurate with managers of competing stores. Through improved compensation, Grand Union has been able to improve the quality of management, particularly at the store level. (Isaacs 2586)

Mr. Gregerson testified about the changes he has noticed in Colonial's Big Star stores in Atlanta since the acquisition:

A. I believe them to be more vigorous in their advertising and maybe in their store operations.

Q. What do you mean by "more vigorous in their operation"?

A. I think their ad items are probably hotter priced . . . They'd have a little lower prices in their ads than we would have had before.

Q. What do you mean by store operations? [82]

A. More exciting.

(Gregerson 378)

Atlanta was Colonial's most profitable division prior to its acquisition by Grand Union. (F. 82)

## B. *The Augusta, Georgia SMSA*

### 1. Demographics and Location

95. In 1978, the Augusta SMSA (*see* F. 39) was the 127th largest in the country. Between 1970 and 1978, the population of the SMSA grew from 275,789 to 290,900, an increase of 5.5%. (Bureau of the Census, *Population*)

Augusta is within trucking distance of the following cities:

| | |
|---|---|
| 150 miles from | Atlanta, Georgia |
| 169 miles from | Asheville, North Carolina |
| 229 miles from | High Point, North Carolina |
| 154 miles from | Charlotte, North Carolina |
| 114 miles from | Spartanburg, South Carolina |
| 210 miles from | Salisbury, North Carolina |

(Rand McNally)

### 2. Colonial in the SMSA

96. According to complaint counsel's survey, the shares of food and grocery store sales of the top eight competitors in Augusta in 1972 and 1977 were as follows:

| | 1972 | | | 1977 | |
|---|---|---|---|---|---|
| Competitor | Food Store Sales (%) | Grocery Store Sales (%) | Competitor | Food Store Sales (%) | Grocery Store Sales (%) |
| Winn-Dixie | 15.0 | 15.2 | Winn-Dixie | 14.7 | 15.0 |
| Colonial | 13.3 | 13.6 | Colonial | 12.6 | 12.8 |
| Bi-Lo | 10.1 | 10.3 | Bi-Lo | 11.7 | 11.9 |
| Piggly Wiggly Southern | 8.9 | 9.0 | Piggly Wiggly Southern | 11.4 | 11.6 |
| A & P | 8.5 | 8.7 | Kroger | 8.2 | 8.4 |
| Food Fair | 4.0 | 4.0 | A & P | 4.4 | 4.4 |
| Kroger | 3.4 | 3.5 | Southland | 2.4 | 2.5 |
| Southland | 2.4 | 2.4 | Food Fair | 1.5 | 1.5 |

(CX 2D) [83]

The four-firm concentration ratios for grocery stores, (SIC 541), as provided by the Bureau of the Census, *Retail Trade,* are as follows:

| 1972 | 1977 |
|---|---|
| 47.2% | 55.2% |

The four-firm concentration ratios for supermarkets, as provided by Bureau of the Census, Retail Trade, are as follows:

| 1972 | 1977 |
|---|---|
| 68.4% | 73.7% |

(F. 52, 53)

Colonial operated twelve supermarkets in the Augusta SMSA at the time of the acquisition. (Admissions 28; CX 260L) Bi-Lo, which increased from two to five stores, and Piggly Wiggly, which went from four to six stores, increased their market shares. (CX 665Z65, Z82, Z83) In 1978 Piggly Wiggly reported opening a seventh store. (CX 665Z83) A & P went from nine to three stores (CX 665Z71); its market share was halved. Kroger increased its market share. In 1977, there were also three Harris-Teeter stores which opened in November and December of that year. (CX 665Z73)

Mr. Addison, current Vice President of the Carolina Region said of Colonial in Augusta:

> . . .We had good locations and kept our facilities up in that particular market. We had little change in store management and we have done quite well in that particular area . . . . But over the years we have been more aggressive with our programming and storekeeping and keeping our facilities up in that market. It has been a good market for us.

(Addison 2676–77)

In its 1977 report on the six major markets in the Columbia Division, Colonial announced that "In view of existing [84] comparatively strong image and share of the market, priority should be given to protecting the Augusta market." (CX 447B)

Colonial's 1979 new store development program, prepared before the acquisition, targeted the August SMSA for the opening of five new stores in the period between 1979 and 1983. (CX 359D) Two of these new supermarkets were to open in late 1979, and were each expected to have sales in excess of $110,000 per week. (CX 359A)

3. Barriers to Entry

97. Mr. Stewart, former President of Colonial and a Colonial/Grand Union Vice President, testified that it would take six 30,000 square

foot supermarkets to effectively enter the Augusta SMSA. (Stewart 586)

Dr. Parker testified that, in his opinion, there are moderate barriers to effective entry into the Augusta market (Parker 2356), and that, based on an analysis of the market structure, it is very likely that this market is performing less than competitively. (Parker 2387; *see also* Marion 1976A–78) However, there have been new entrants into the Augusta market in recent years. Bi-Lo, which has had stores in the Augusta suburbs since at least 1972, did not enter the City of Augusta until after 1975. (Stewart 641; CX 66Z65) Harris-Teeter opened its first three Augusta stores in late 1977. (CX 665Z73)

4. Performance of the SMSA

98. Mr. Addison, Colonial Regional Vice President for Augusta, described the marketplace:

> Augusta is a little different from the rest of South Carolina due to the influence of the Atlanta-based Kroger stores and the A & Ps out of Atlanta. The wage rates paid in the Augusta market are higher than they are in the rest of South Carolina, which over the years apparently has led to a little bit higher margin in that area. Those margins until recently—back in September we lowered our margins due to the growth of Kroger and their strength in that market. We lowered our margins there so they are about equal to the rest of the Division, but we were carrying [85] a little higher margins in that area, primarily due to the labor contracts out of the Atlanta market. We are influenced by it.

(Addison 2676–77)

There have been several changes in the list of competitors in the Augusta market in recent years. At one time A & P and Colonial were the only chain stores in Augusta. (Spearman 764–65) A & P, which had decreased its presence to only three stores by 1977 (CX 665Z71), had only one store left in 1979. (Spearman 765) Food Fair (Pantry Pride) had been in Augusta for many years. It had dropped to eighth-ranked competitor in 1977, and has since withdrawn from Augusta entirely. (Spearman 885)

Kroger has been in Augusta for a long time, but it recently upgraded its stores to large, new "super stores." (Addison 2687) It constructed six new stores between 1974 and 1979. (C. Thomas 1339; Spearman 764) Kroger serves and supervises its Augusta stores from Atlanta. Since 1979, Kroger has become more aggressive in its pricing (Addison 2687), and its market share in Augusta is increasing. (Spearman 764; Addison 2676, 2686; F. 96) As a result of Kroger's competition, Colonial reduced its margins on dry groceries 1–1/4% in September 1980 to better compete with Kroger. (Addison 2685–87)

Mr. Spearman, describing the market in Augusta, testified that:

> To say the least, even if it was a settled market, with the approaches that Kroger is taking, which is part of the Atlanta merchandising concept in Augusta. . . . It is a very competitive market. You have Piggly Wiggly Southern in the Augusta market; and that's probably one of the first areas that they have reached outside of these little sleepy Georgia towns, because of some 285,000 population in Augusta today. So it is very competitive.

(Spearman 886; *see* Stewart 645; Isaacs 2562–64)

In response to the question whether he considered Augusta a competitive market, Mr. Addison testified: **[86]**

> Extremely so. As I mentioned, we just lowered our margins there and we have gained a little market share since that time in volume, but we are actually making less money now than we were before due to that lower structure, and I think it's getting more competitive almost on a weekly basis.

(Addison 2680)

### 5. Grand Union as a Potential Entrant

99. Complaint counsel considers each of the twelve acquisition candidates listed in the Southeast Study (F. 69) as a potential means of entry into any market within 250 miles of its warehouse. (CPF 397) Grand Union presently serves expansion stores on the West Coast of Florida from its Hialeah warehouse at distances of over 250 miles. (CX 574 [Goulding] at 53; CX 589 [Wood] at 66, 108; RPF 274, 275) Seven of the 12 firms identified in the Southeast Study have warehouses within 250 miles of Augusta. They are Harris-Teeter, Bi-Lo, Alterman, Food World, Food Town, Community Cash and Piggly Wiggly Southern. (CX 32E; Rand McNally)

Complaint counsel contend that although small regional chains may not be able to expand from their warehouse bases into other markets, Grand Union, with its greater financial resources (CX 576 [Kennedy] at 61; Woodberry 1751), would be in a better position to do so if it made this sort of acquisition.

Respondents state that, except for Alterman, they had no interest in acquiring any of the companies listed by complaint counsel as possible toeholds. (RPF 900–904) Dr. Curhan testified that Ingles and Alterman could enter the Augusta market without the aid of Grand Union. (Curhan 3007) Alterman had stores in Augusta until it withdrew from the market in the 1960's. (Curhan 3007)

### 6. Other Potential Entrants

100. Kroger, which has five new stores in Augusta, has three additional stores planned. (Addison 2679) Winn-Dixie, which opened two new stores since 1979, continues to look for store sites. (Addison 2679) As Mr. Addison testified: "We are expanding, so I think everybody is.

It's a growing market. Industry is high in that area, so I think it will continue to expand." (Addison 2679) Similarly, Dr. Curhan testified: "[T]he most important factors in Augusta would have been the [87] expansion of the new entrants, namely Bi-Lo, Harris-Teeter and also the expansion of Kroger. . . ." (Curhan 3007–08)

Dr. Parker perceived of Ingles and Alterman as potential entrants. (Parker 2357) Mr. Addison perceived Food Town as likely to enter Augusta. He based his opinion on the fact that Food Town has stores in a number of cities in South Carolina, including Columbia, which is approximately 60 miles from Augusta. (Addison 2679)

7. Grand Union as a Perceived Potential Entrant

101. Neither Bert Thomas, President of Winn-Dixie, nor Charles Thomas, Group Vice President of Kroger, perceived Grand Union as a potential entrant. (B. Thomas 1513; C. Thomas 1374–75) Mr. Spearman, a native of Augusta, never perceived Grand Union as likely to enter the area. (Spearman 885–86) Neither Mr. Stewart, Colonial's former President, nor Mr. Isaacs, Colonial's Vice-President for Augusta from 1973–76, ever perceived Grand Union as an entrant into Augusta. (Stewart 645; Isaacs 2584)

8. Changes in Colonial's Augusta Operations Since the Acquisition

102. Mr. Isaacs, Colonial's Vice President for Augusta from 1973–76, testified that at that time Augusta had the highest sales and profits of any area in Colonial's Columbia Division. During his tenure, however, Colonial's market share declined as a result of expansions by Kroger, Piggly Wiggly, Bi-Lo and new entrants. (Isaacs 2562; *see also* F. 96) "Augusta at the time was known to be a fairly good growth area, so everyone was expanding with new stores or replacement stores." (Isaacs 2652) Mr. Addison, Colonial's Regional Vice-President for Augusta, also testified about the Colonial stores in the area:

> Basically those stores over the years have been better maintained than the other stores in the Columbia Division. . . . We had good [88] locations and kept our facilities up in that particular market. We had little change in store management and we have done quite well in that particular area.
>
> * * * * * * *
>
> But over the years we have been more aggressive with our programming and storekeeping and keeping our facilities up in that market. It has been a good market for us.

(Addison 2676, 77)

Mr. Addison described the changes in Augusta since Grand Union's acquisition:

> We have recently, within the last 18 months, redone every store, merchandised, up-

graded, and painted all the stores in that market, with the exception of one in Clearwater which we plan to do in 1981. We also opened two stores this year, one in North Augusta in February and one this past September. So we have opened two new stores there. These are large stores with bakery-delis. . . . [B]oth of them are 28,000 [square feet].

(Addison 2677)

### C. *The Macon, Georgia SMSA and the Greenville, South Carolina Subdivision*

#### 1. Demographics and Location

##### (a) *Macon, Georgia*

103. In 1978, the Macon SMSA (*see* F. 44) was the 148th largest SMSA in the country. Between 1970 and 1978, its population grew from 226,782 to 243,100, or 7.2%. (Bureau of the Census *Population*)

Macon is located in central Georgia:

| | |
|---|---|
| 80 miles from | Atlanta, Georgia |
| 241 miles from | Asheville, North Carolina |
| 221 miles from | Birmingham, Alabama **[89]** |
| 183 miles from | Greenville, South Carolina |
| 100 miles from | Vidalia, Georgia |

(Rand McNally)

104. According to complaint counsel's survey, the shares of food and grocery store sales of the top eight competitors in Macon in 1972 and 1977 were as follows:

| | 1972 | | | 1977 | |
|---|---|---|---|---|---|
| Competitor | Food Store Sales (%) | Grocery Store Sales (%) | Competitor | Food Store Sales (%) | Grocery Store Sales (%) |
| Piggly Wiggly | 24.7 | 25.4 | Piggly Wiggly | 33.6 | 34.7 |
| Winn-Dixie | 12.0 | 12.3 | Colonial | 8.9 | 9.1 |
| Colonial | 5.9 | 6.1 | Winn-Dixie | 8.6 | 8.9 |
| A & P | 3.5 | 3.6 | Kroger | 7.1 | 7.3 |
| Munford | 3.4 | 3.5 | Alterman | 3.1 | 3.2 |
| Alterman | 3.4 | 3.5 | Munford | 2.1 | 2.2 |
| Kroger | 3.2 | 3.3 | Giant Discount | 1.4 | 1.5 |
| Bateman | 3.0 | 3.1 | Bateman | 1.2 | 1.3 |

(CX 2L)

Piggly Wiggly is clearly the market leader in Macon. In 1972 it had nine stores which accounted for one-quarter of all food sales. By 1977 it had thirteen stores and a market share of one-third. Colonial between 1972 and 1977 had a three percent increase in market share; Kroger, which had two stores in 1972 and was ranked seventh, built a third store, increased its sales four-fold and more than doubled its market share. A & P, with five stores in 1972, had withdrawn from the area entirely by 1977. (CX 665Z287) Munford, which runs 26 Majik convenience stores (CX 665Z293), remained in the top eight along with Bateman, a local independent. There are seven Southland (7-11) and seven Tenneco Oil convenience stores in Macon. (CX 665Z297,Z299)

The four-firm concentration ratios for grocery stores, (SIC 541), as provided by Bureau of the Census, *Retail Trade,* were as follows:

| 1972 | 1977 |
|---|---|
| 50.3% | 67.4% |

(F. 52)

The four-firm concentration ratios for supermarkets, as provided by Bureau of the Census, *Retail Trade,* were as follows: **[90]**

| 1972 | 1977 |
|---|---|
| 79.1% | 81.8% |

(F. 52, 53)

(b) *Greenville, South Carolina Subdivision*

105. Complaint counsel has divided the Greenville/Spartanburg SMSA into a Greenville subdivision and a Spartanburg subdivision. (F. 42) The Greenville, subdivision consists of Greenville and Pickens Counties. Between 1970 and 1978, the population of the Greenville subdivision increased from 299,730 to 344,300, or 14.9%, twice the national average. (Bureau of the Census, *Population*)

The city of Greenville is located in northwest South Carolina:

| | |
|---|---|
| 131 miles from | Wilkesboro, North Carolina |
| 142 miles from | Atlanta, Georgia |
| 216 miles from | Chattanooga, Tennessee |
| 96 miles from | Charlotte, North Carolina |
| 170 miles from | High Point, North Carolina |
| 140 miles from | Salisbury, North Carolina |
| 58 miles from | Asheville, North Carolina |

106. According to complaint counsel's survey, the shares of food and grocery store sales of the top eight competitors in Greenville in 1972 and 1977 were as follows:

| | 1972 | | | 1977 | |
|---|---|---|---|---|---|
| Competitor | Food Store Sales (%) | Grocery Store Sales (%) | Competitor | Food Store Sales (%) | Grocery Store Sales (%) |
| Winn-Dixie | 26.8 | 27.5 | Bi-Lo | 32.2 | 32.6 |
| Bi-Lo | 26.0 | 26.7 | Winn-Dixie | 23.4 | 23.7 |
| Kash & Karry | 8.8 | 9.1 | Ingles | 10.6 | 10.8 |
| A & P | 4.9 | 5.0 | Community Cash | 5.2 | 5.3 |
| Colonial | 3.5 | 3.6 | Kash & Karry | 4.3 | 4.3 |
| Community Cash | 1.8 | 1.8 | Colonial | 2.3 | 2.3 |
| Food Fair | 1.7 | 1.7 | Southland | .9 | 1.0 |
| Munford | 1.0 | 1.1 | Duckworth Foods | .5 | .5 |

(CX 2J)

Winn-Dixie was number one in 1972 and had 21 stores. By 1977, it had opened one more store, but had dropped into second place behind Bi-Lo, which had 20 stores in 1977, five more than it had in 1972. (CX 665Z217, Z182) Between them, Bi-[91]Lo and Winn-Dixie accounted for over fifty percent of all food store sales. Kash & Karry, a single store independent, lost market share between 1972 and 1977. In 1977, Ingles, which entered the market in 1972, was number three with ten stores. (CX 665Z199) Community Cash opened five more stores (CX 665Z184), and more than doubled its market share between 1972 and 1977. A & P, number four in 1972, had no stores left in the market in 1977. (CX 665Z195) Colonial's market share dropped from 3.5 in 1972 to 2.3 in 1977. Food Fair, with one store in 1972, withdrew from the market by 1977. (CX 665Z188)

The four-firm concentration ratios for grocery stores, (SIC 541), are as follows:

| 1972 | 1977 |
|---|---|
| 68.3% | 72.3% |

The four-firm concentration ratios for supermarkets are:

| 1972 | 1977 |
|---|---|
| (Not available) | 94.3% |

(F. 52, 53)

2. Colonial in the Macon SMSA and the Greenville Subdivision

(a) *Macon, Georgia SMSA*

107. In 1977, Colonial had five supermarkets in the Macon SMSA

(Admissions 50), and was ranked second in market share for both supermarkets and grocery store sales. (CX 2L; CX 664A; Admissions 49) Colonial increased its market share by one-third between 1972 and 1977. (F. 104)

Mr. Spearman testified that in 1978 Colonial was committed to the Macon market and was considering additional locations there. (Spearman 763–64) Of the ten stores Colonial considered closing as part of its 1979/80 program for the Southern division, none were in this SMSA. Four new Colonial stores were planned for Macon during the period from 1980–83, none of which was to replace an existing store. (CX 358C)

(b) *Greenville, South Carolina Subdivision*

108. In 1977, Colonial operated four stores in Greenville County and one in Pickens County (CX 331K), and was scheduled to open one new store in 1978 and another in 1979. (CX 351Z1–Z2) One new store with a bakery and deli did open in 1978. Mr. Spearman called it a "complete supermarket". (Spearman 771– **[92]**72) In 1977 Colonial was the sixth largest competitor in this market, with a market share of 2.3%. (F. 105)

Subsequent to the purchase of Colonial by Grand Union, new management closed all Colonial operations in the Greenville subdivision. However, the vice president of the Carolina Region said that they would be looking at the Greenville market "to go back in and re-enter at some point in time, I would say within the next five years." (Addison 2665–67)

3. Barriers to Entry

109. Mr. Stewart testified that serving Macon would require three stores. (Stewart 586) To enter the Greenville/Spartanburg SMSA *de novo,* he would go to Greenville first because it has a separate newspaper. Serving Greenville, in his opinion, would take four stores. (Stewart 586)

Dr. Parker testified that there are substantial barriers to effective entry into the Macon SMSA and the Greenville subdivision. (Parker 2352, 2340) Respondents note (RPF 774) Dr. Parker's testimony that Ingles' entry into Spartanburg might indicate entry barriers are not as high as he would expect based on the concentration ratio. (Parker 2345) Since Ingles entered Greenville at the same time (Woodberry 1732, 1746), and Greenville has an even higher concentration ratio than Spartanburg, respondents believe that this testimony may be equally applicable to the Greenville market.

### 4. Performance of the Macon SMSA and the Greenville Subdivision

#### (a) *Greenville*

110. Based on his analysis of the structure of the Greenville market, Dr. Parker testified that it is very likely it is performing less than competitively. (Parker 2340)

Ingles entered Greenville and Spartanburg in 1971/1972. By 1980, Ingles had ten stores in Greenville and four in Spartanburg. (Woodberry 1732, 1746) In 1977, Ingles was ranked third in Greenville. (F. 105)

Bi-Lo, number one in the Greenville-Spartanburg SMSA and in Greenville (CX 2H, J), but number two in Spartanburg (CX 2I), is headquartered in Mauldin, eight miles outside of Greenville. Mr. Isaacs described its growth:

> [I]t started in Greenville, buying some older stores and getting started. And then as they did well, they had a very low-price image, as they made money, they [93] opened up bigger, newer stores. So they had quite a spectrum from a very small, very old store, to some new modern stores.
>
> Bi-Lo was, of course, like Winn-Dixie, nonunion. Bi-Lo had something that I felt was an inducement to many people in that area to trade with them, and that was the service meat department. At that time they were opening nothing except stores where they had the butchers behind the counter serving, no self-service meats. Everything was on a service basis. In later years, they are opening some stores with self-service now, but at that time everything was service. It was quite an asset to them, in my opinion.

(Isaacs 2570–71)

When Food Fair withdrew from Greenville subsequent to 1975, Bi-Lo acquired the store and it is operated as a Bi-Lo today. (Spearman 898–99; Curhan 2993)

Winn-Dixie, number two in the SMSA and in Greenville, has had stores in the area since 1955, when it acquired Dixie Home stores of Greenville. (B. Thomas 1493) It has a warehouse and a division headquarters in Greenville. (Isaacs 2570)

Although Community Cash was listed as having one store in Greenville County in 1972 (*see* CX 665Z184), it really entered the Greenville area subsequent to 1976, by acquiring five A & P stores when A & P withdrew its conventional stores in Greenville. (Woodberry 1746–47; Curhan 2992) Notwithstanding its success in Spartanburg (Spearman 900), Community Cash is not doing as well in Greenville. (Curhan 2992)

Kash & Karry is a successful local one-store independent in Greenville. In 1960, the one store was doing $200,000 in weekly sales. (Spearman 768) Kash & Karry has lost market share since Ingles and Community Cash entered the area in the 1970's. (CX 2J)

A & P formerly had traditional stores in Greenville which were closed around 1976. (Isaacs 2572; Spearman 897–98) In their place the first two A & P Family Marts in the country were built in Greenville (Woodberry 1746), where they are a major factor. (Woodberry 1746; Curhan 2992) In response a [94] question about whether the two stores seem to be doing well, Mr. Woodberry testified: "One of their Greenville stores is doing a tremendous business. Both of them are doing well, apparently. They certainly have put a crimp in our business when they are open." (Woodberry 1749; *see* Curhan 2992)

(b) *Macon*

111. According to the Bureau of the Census, Macon had a population increase of only 9,100 people between 1972 and 1977. Dr. Parker testified that "Macon is not that attractive. It's a slow-growth market." (Parker 2334; Curhan 3002) Mr. Stewart and Mr. Spearman described it as a competitive area for retail food stores. (Stewart 645; Spearman 887) Respondents cite the local commissary as a major factor increasing the competitiveness of this market (RPF 916) because this commissary did almost the same volume of business as Colonial and Winn-Dixie in this market. (Curhan 3006) Respondents also contend that, despite the increasing margin by which Piggly Wiggly has led this market (CX 2L), there have been many changes in the Macon SMSA.

A & P has closed all its older stores in the area since 1975 and recently re-entered with one Family Mart "super store" in the Macon suburb of Warner Robins, 10 miles from Macon proper in Houston County, which is within the Macon SMSA. (Spearman 887) By 1978, the Family Mart had an estimated market share of 5%. (Spearman 762) Kroger, which serves and supervises Macon out of its Atlanta Division, has become extremely aggressive in Macon as it has in Atlanta (Spearman 762–63), and continues to gain market share. (*See* CX 2L; F. 104) Its three Macon stores have all been built since 1973. (C. Thomas 1339) Jewel entered Macon with one of its Jewel-T box stores in December 1979. (Curhan 3002)

5. Potential Entrants into the Macon SMSA and the Greenville Subdivision

(a) *Macon*

112. Respondents cite several firms with potential to enter or expand into the Macon SMSA. (RPF 922–929) The Kroger stores in Macon are part of the Atlanta Division of that company and respondents expect that Kroger's aggressive policies implemented in Atlanta

(F. 89), in terms of building of new stores and pricing (Spearman 763), will be further implemented in Macon.

Respondents' posit that A & P, which closed all seven of its traditional stores in Macon by 1977, will open some of the Family Mart "super stores" of the type it opened in Warner Robins. (Spearman 887) Alterman closed one of its two Macon stores in September of 1979, but has another store under [95] construction in Macon. (RX 40) Jewel-T opened its first store in Macon in 1979 (Curhan 3002), and respondents contend that its pattern of growth in other areas of the Southeast make it likely that it will open additional stores in Macon. The store that Alterman closed in 1979 is now run by a local independent. (RX 40) Timberlake Grocery Company, a wholesaler serving independents, is located in Macon. (RX 30F)

Bi-Lo has been moving in the direction of Macon and has stores within 30 miles. (Curhan 3004) Mr. Roehm considered Bi-Lo a potential entrant. (Roehm 2741–42) Since Bi-Lo's warehouse is 184 miles from Macon and it already has stores fairly close to Macon, it has the capability to serve the area and could enter if it believed that there were opportunities for it there. (Curhan 3004–05)

Any distribution center in Atlanta not already serving Macon would be able to do so. (Adelman 3241–46) This would include Associated Grocers, Fox Industries, J. L. Lester & Sons Wholesale Grocers, Inc., and Southland Grocery Co. (RX 30G) Other distribution centers in Alabama, Tennessee and South Carolina are also within "striking" distance of Macon. (RX 30G)

(b) *Greenville*

113. Food Town was perceived as a potential entrant into Greenville by Messrs. Woodberry and Stewart. (Woodberry 1747; Stewart 652) Mr. Stewart perceived Food Town as a likely entrant into Greenville because it is expanding in Spartanburg and has moved into Columbia and other areas in that direction, "so that seems to fit into the pattern." (Stewart 652)

Dr. Curhan agreed with Dr. Parker (Parker 2342–43, 2346) that Harris-Teeter is a potential entrant into Greenville. Industry witnesses also perceived Harris-Teeter as an entrant into Greenville. (Stewart 652; Spearman 899, 902). It is an expansion-oriented firm and has its warehouse in Charlotte, only 92 miles away. (Curhan 2995)

A & P may expand in Greenville, based on its success with its two Family Marts. (F. 110)

Respondents cite Kroger as a "logical potential entrant into this area" (RPF 791), although Mr. Thomas of Kroger refused to answer questions on this point. (C. Thomas 1334) Kroger is a recent entrant into several cities in the Carolinas (C. Thomas 1334–38), and has plans to build a new warehouse between Charlotte and Columbia to serve these stores. (C. Thomas 1310) Kroger has a warehouse in Atlanta (C. Thomas 1308), 142 miles away. (F. 105) Dr. Parker perceived Kroger as a potential entrant (Parker 2342, 2346), as did Dr. Curhan. (Curhan 2995) Mr. Spearman and Mr. Woodberry concurred. (Spearman 899, 902; Woodberry 1747, 1748–49) **[96]**

Respondents also note that there are a number of companies within "striking distance" of the area which may be considered potential entrants. Associated Grocers and Fox Industries serve the Greenville Market Area from Atlanta, 142 miles away. In addition to Kroger, the following companies with warehouses located in the Atlanta Market Area as defined by *Progressive Grocer,* do not already serve stores in Greenville/Spartanburg but could presumably serve stores in this area:

Alterman
J.L. Lester & Sons Wholesale Grocers, Inc.
Southland Grocery Co. (Division Fleming Co.'s, Inc.)
Timberlake Grocery Co.

(RX 30N-P)
Piggly Wiggly Carolina Co. in Charleston serves the Greenville Market Area. Therefore, Wetterau Food Services, which also has a distribution center in Charleston, could serve the area. (RX 30N-P)

K.M.C. Co. serves stores in the area from Knoxville, Tennessee, 174 miles away. There are seven other food distribution centers in Knoxville which could similarly serve Greenville/Spartanburg. These are:

Giant Food Markets, Inc.
Giant Wholesale Grocery Co.
The H.T. Hackney Co.
Oakwood Markets
Pay Cash Grocery Co., Inc.
Quality Foods, Inc.
The White Stores, Inc.

(RX 30N-P)

6. Grand Union as a Perceived Potential Entrant

(a) *Macon*

114. The President of Winn-Dixie and the Group Vice President of Kroger both testified that they did not perceive Grand Union as likely to enter Macon. (B. Thomas 1513; C. Thomas 1374–75) Mr. Stewart did not perceive Grand Union as likely to enter Macon by building or leasing new stores or by acquisition, unless Grand Union had ac-

quired Alterman, which operated in Macon. (Stewart 645–46) Similarly, Mr. Spearman testified that only by buying Alterman would any company enter Macon by acquisition and he did not perceive Grand Union as likely to enter Macon. (Spearman 887, 926–27) **[97]**

(b) *Greenville*

115. No trade witness perceived Grand Union as likely to enter the SMSA. (B. Thomas 1512; Woodberry 1747–48) None of the Colonial witnesses perceived Grand Union as a likely entrant. (Stewart 652–53; Isaacs 2584; Spearman 899, 902)

7. Grand Union as a Potential Entrant

116. Complaint counsel contend that any of the twelve acquisition candidates listed in the Southeast Study may have served as a potential means of entry into any market within 250 miles of its warehouse. (CPF 397) As discussed in connection with the Atlanta SMSA (F. 91), Grand Union's Mr. Kennedy viewed Bruno's and Ingles as possible means of entry into North Georgia including Atlanta. According to the Southeast Study, the two "merger possibilities which were 'most impressive' were Bruno's and Ingles. With Bruno's located in Northern Alabama and Ingles in North Carolina, there exists a gap in their operating area consisting of all of North Georgia. There are expansion possibilities in all other directions for Bruno's and similarly for Ingles." (CX 32G) Both markets, Macon and Greenville, are within shipping distance of either Asheville, North Carolina or Birmingham, Alabama, making the acquisition of Ingles and Bruno's a possible means of entry into these markets. [Ingles entered the Greenville market in 1971 and by 1980 had ten stores in Greenville. (Woodberry 1732, 1746) Bruno's is not within shipping distance of Greenville—Birmingham, Alabama is almost 290 miles from Greenville. (RX 30G; Rand McNally) Ingles in Asheville is 241 miles from Macon. (Rand McNally)]

Eight of the twelve firms identified in the Southeast Study have warehouses within shipping distance of Macon. They are Harris-Teeter, Ingles, Bi-Lo, Community Cash, Bruno's, Piggly Wiggly Southern, Red Foods, and Alterman. (CX 32E; Rand McNally) Of these chains, Harris-Teeter, Ingles, Bi-Lo, Community Cash, Bruno's and Red Foods have no supermarkets in the Macon SMSA. (CX 665Z278–Z303) Alterman has a small market share in Macon. (CX 2L)

Nine of these companies have warehouses within shipping distance of Greenville. They are Lowes, Harris-Teeter, Alterman, Red Foods, Food Town, Food World, Community Cash, Bi-Lo and Ingles. (CX 32E; Rand McNally) Lowes, Harris-Teeter, Alterman, Red Foods and Food World do not operate in Greenville. (CX 665Z181–Z220)

Other major supermarket chains pursue a policy of acquisition and expansion. B.L. Thomas, President of Winn-Dixie, explained that company's expansion throughout the southeast as the "acquisition of a nucleus and then new store [98] expansion." (B. Thomas 1493) Grand Union has expanded by the acquisition of warehouses and supporting stores and then locating stores in new marketing areas served from that warehouse. This is illustrated in Grand Union's Florida operations. (CX 580 [Silvers] at 24–63; F. 150; F. 145–149)

Respondents argue that:

> The record in this case is devoid of *any* evidence that Grand Union would have ever entered Macon by any means. Given the testimony that Macon was not an attractive area, an opinion with which complaint counsel's expert was in total agreement (Parker 2354), and the recent new entries and expansions in the area, there is no reason to think there will be any new entrants into Macon in the reasonably foreseeable [sic] future, let alone Grand Union.

(RPF 932; respondents' emphasis)

Respondents disclaim complaint counsel's contention that Grand Union would make a toehold acquisition of Alterman, Bi-Lo or Red Food and would have expanded into Macon between 1983 and 1988. (Parker 2354–55, 2494) Respondents claim that these companies were not considered for this purpose (*see* F. 91, where these companies are discussed in connection with the Atlanta market). [Alterman had a small market share in Macon in 1972 and 1977. (CX 2L)]

Dr. Parker predicted that Grand Union would have entered Greenville within five to ten years (Parker 2341) by acquiring Food Town or Alterman. (Parker 2465) Food Town was acquired by Del Haize, a Belgium company, in 1977, and thus may have been unavailable for acquisition in 1978. (Curhan 2965–66; Addison 2649)

8. Colonial Acquisition as a Toehold

117. Respondents argue that Colonial's market shares in Macon and Greenville SMSAs were so small that Grand Union's acquisition of Colonial must be considered a legal toehold. (RPF 436–38; 802–09)

As of 1974, Colonial had four stores in Greenville, one store in the suburb of Easley and two in Spartanburg. It closed the two Spartanburg stores that year. (Isaacs 2568) Prior to the tender offer, the four Greenville and one Easley stores were still open, as well as a new store in Spartanburg, [99] which had opened in 1978. There were no plans to build any additional stores in the area at the time. (Spearman 771) A 1977 Colonial document noted: "Have never really penetrated this big market. Need to find 'handle' before spending more on additional facilities." (CX 447B) Grand Union has closed all six stores and withdrawn from the area. (Spearman 836)

Mr. Isaacs was Colonial's Vice President for the area from 1973–1976. He testified that the four Greenville stores had been good stores at one time. However, by the early 1970's, they were in need of remodeling and updating. Although he had recommended that the stores undergo major renovations, top management never authorized this plan. (Isaacs 2568–69) By 1977, Colonial's market share had dropped to only 2.3%. (CX 2J) Its market share in 1978 was probably even lower. (Stewart 651) Dr. Parker agreed that Colonial was not a strong factor in Greenville. (Parker 2343).

Colonial opened a new store in Easley, eight or nine miles outside of Greenville, shortly after Mr. Isaacs became vice president in 1973. From the day it opened until it was closed in 1979 by Grand Union, the store was never profitable. Mr. Isaacs testified:

> The Easley store was located in a new shopping center directly across the street from a very good volume Bi-Lo store in a shopping center. Also in that same shopping center was a good volume Winn-Dixie store. . . . It never did get off the ground saleswise. As a result, it did nothing but lose money for us.
>
> * * * * * * *
>
> We had the two stores, our immediate competition directly across the street, were very good. And there was really no reason, I guess, for a customer to change their shopping habits.

(Isaacs 2569, 2570)
Although Mr. Isaacs suggested that Colonial either spend the money necessary to gain sales or close the store, prior management failed to follow either course. (Isaacs 2569–70)

Colonial's sales in Macon have deteriorated over time, from being number one in the mid-1960s to its position today. Mr. Roehm, Colonial Vice President, testified as to why Colonial's market share eroded: **[100]**

> I think it would be a combination of poor operations, poor merchandising, and a failure to upgrade facilities. And when I relinquished the responsibility for Macon in July 1979, we only had one modern supermarket out of the five in the Macon-Warner Robins market.
>
> * * * * * * *
>
> The four stores we had in Macon were almost in a cluster. We did not have stores on the east side of Macon, which was a growth area, nor did we have any in the northwest quadrant of Macon, which is the residential growth area of Macon.

(Roehm 2739–40)
According to complaint counsel's survey, Colonial's share of food and grocery sales was below 10% in 1972 and 1977. Its market share today is lower than it was in 1977. (Spearman 762) At the time of the acquisition, all five Colonial stores were losing money. Grand Union

has closed three of the four older stores. It has kept the newer store open and remodeled one of the older stores which serves a small local neighborhood. (Roehm 2741; Curhan 3003)

## The Virginia Markets

### D. *The Richmond, Virginia SMSA*

#### 1. Demographics and Location

118. In 1978, the Richmond SMSA (F. 51) was the 64th largest SMSA in the country, and the second largest SMSA in Virginia. Between 1970 and 1978 the population of the Richmond SMSA increased from 547,542 to 611,700, or 11.7%. (Bureau of the Census, *Population*)

The city of Richmond is located in the center of the state:

| | |
|---|---|
| 105 miles from | Washington, D.C. |
| 75 miles from | Newport News, Virginia |
| 93 miles from | Norfolk, Virginia |
| 142 miles from | Baltimore, Maryland |
| 151 miles from | Raleigh, North Carolina **[101]** |
| 166 miles from | Roanoke, Virginia |
| 190 miles from | Greensboro, North Carolina |

(Rand McNally)

#### 2. Colonial in the SMSA

119. According to complaint counsel's survey, the shares of food and grocery store sales of the top eight competitors in Richmond in 1972 and 1977 were as follows:

| 1972 | | | 1977 | | |
|---|---|---|---|---|---|
| Competitor | Food Store Sales (%) | Grocery Store Sales (%) | Competitor | Food Store Sales (%) | Grocery Store Sales (%) |
| Safeway | 21.2 | 21.9 | Safeway | 21.1 | 21.7 |
| A & P | 9.4 | 9.7 | A & P | .7 | 13.0 |
| Colonial | 7.5 | 7.7 | Ukrop's | 11.6 | 11.9 |
| Food Fair | 6.4 | 6.6 | Colonial | 6.4 | 6.5 |
| Ukrop's | 5.8 | 6.0 | Southland | 6.3 | 6.5 |
| Rosso & Mastracco | 5.3 | 5.5 | Food Fair | 4.6 | 4.7 |
| Southland | 4.2 | 4.3 | Giant Food | 4.3 | 4.5 |
| Giant Food | 4.1 | 4.2 | Rosso & Mastracco | 3.0 | 3.1 |

(CX 2S)

Between 1972 and 1977, Safeway and A & P remained first and second ranked, respectively. A & P increased its share by more than 25%, while Colonial's market share decreased. Ukrop's, a local independent, doubled its market share during the five-year period. Southland, which operated 87 stores (7–11s) in 1977 (CX 665Z506), rose from seventh to fifth position, and its market share was virtually identical to Colonial's.

Other factors in this market not counted in the top eight Richmond competitors include:

| 1972 | | | 1977 | | |
|---|---|---|---|---|---|
| Competitor | Number of Stores | Food Store Sales $000s | Competitor | Number of Stores | Food Store Sales $000s |
| Farm Fresh | 3 | 10,319 | Siegel's | 5 | 11,748 |
| Siegel's | 4 | 7,479 | Memco (Lucky's) | 2 | 8,904 |
| Luchard's | 5 | 4,484 | Farm Fresh | 2 | 8,418 |
| Food Town | 3 | 4,369 | Chuck's | 3 | 8,189 [102] |
| Chuck's | 3 | 3,399 | Luckhard's | 5 | 7,558 |
| Harvey's | 1 | 2,200 | Food Town | 3 | 7,326 |
| | | | Winn-Dixie* | 2 | 3,567 |
| | | | Harvey's | 1 | 2,850 |

* 1978.

(CX 665Z475–Z528)

The four-firm concentration ratios for grocery stores, (SIC 541), were:

| 1972 | 1977 |
|---|---|
| 45.2% | 53.2% |

The four-firm concentration ratios for supermarkets were:

| 1972 | 1977 |
|---|---|
| 58.0 | 68.7 |

120. In 1977, Colonial had nine supermarkets in the Richmond SMSA. (Admissions 67) Its future plan was to increase its market share in Richmond and move north to the Fredericksburg metropolitan area. (Stewart 563–67) Colonial had approved the hiring of a Richmond-based real estate agent to locate sites in Richmond and in Charlottesville, Virginia. (Stewart 563–64; CX 356F) By the time Mr. Stewart left Colonial's Richmond organization, four new sites were "tied down and underway" with two more "signed," a total of six new stores for the Richmond area. (Stewart 564) Colonial was also planning to remodel an existing store and establish two new stores in Charlottesville, and was working with a Charlottesville developer

who was also working in Fredericksburg and was aware of Colonial's interest in Fredericksburg. (Stewart 564–65)

In addition, Colonial's management hoped to open a subwarehouse in the Richmond area in the five years following 1978. (Stewart 562–67) This sub-warehouse would contain direct-shipped, fast-moving grocery-type items (Stewart 562), and would ". . . put [Colonial] in an excellent position not only to serve the Richmond market, but to serve the Charlottesville, Fredericksburg, any other development that we developed in the area that the Judge so rightfully calls Northern Virginia." (Stewart 566; *see also* CX 374A-Z67)

3. Barriers to Entry

121. Mr. Stewart indicated that six 30,000 square foot stores would be necessary to profitably enter the Richmond market (Stewart 576–79), and he stated that these six stores **[103]** should be in Richmond, Henrico, and Chesterfield counties. (Stewart 579) Other industry members operating in the Richmond area estimated that a new store of 30,000 square feet would cost $700,000 to $800,000 to equip. Inventory would cost between $300,000 and $1 million. (Connell 1250; Walters 1435)

Most of the major chains in the Richmond area place a full page advertisement on Sundays and two full pages on Wednesday evenings and Thursday mornings. (Connell 1226) Radio and television advertising costs increase the cost of entry into metropolitan areas such as the Richmond SMSA. (Connell 1263–64) Advertising costs are normally allocated to the stores served by the particular medium. (CX 267A-D; Connell 1264)

4. Performance of the SMSA

122. Giant Food was ranked seventh in Richmond in 1977. It formerly had four stores in Richmond serviced out of its Landover, Maryland warehouse. It has closed one of these stores, described as a "show place." (Isaacs 2558) Mr. Isaacs testified that it is rumored in the trade that Giant continues to do poorly in Richmond and is interested in selling its remaining three stores and withdrawing from the market. (Isaacs 2558; Curhan 2910) Giant Open Air, an independent, had two large stores in Richmond but recently closed one of them. (Connell 1251; Curhan 2910) Kings of Lynchburg, Virginia, which operates primarily stores in rural areas, entered the Richmond market with two stores in the 1970s but only has one store remaining. (Connell 1250–51) Lucky Stores of California entered in 1973 with its Memco discount operation by acquiring two stores from Farm Fresh. (Connell 1251; Curhan 291) Richfood supplies Lucky's stores in Richmond and in the Baltimore-Washington area. (Walters 1419) Lucky has not ex-

panded beyond its original two locations. (Connell 1251) Winn-Dixie entered Richmond from its distribution center in Raleigh and had three stores in the Richmond SMSA by 1980. (Connell 1232, 1250; B. Thomas 1474–75; Stewart 525; CX 630G-J)

5. Potential Entrants and Expanders

123. Winn-Dixie entered Richmond with one store in approximately 1971 (B. Thomas 1474–75), and had three stores by 1980. (F 122) Trade witnesses and respondents look to Winn-Dixie as an increasing factor in this market. (Connell 1232; Curhan 2918; RPF 409)

A Farm Fresh executive testified that he considers Richmond a good growth area for that company and predicts that this growth will occur once Farm Fresh completes its expansion program in Tidewater. (Walters 1442–43) Farm Fresh had three stores in the SMSA in 1972 but only two stores in 1977, and suffered a sales decline during the period. (F. 119) **[104]**

Respondents postulate that one of several independent operators or chains may acquire Giant's Richmond stores which are rumored to be for sale (F. 122), and use them to enter this market. (RPF 412) This would be aided by the existence of Richfood, the local cooperative wholesaler. (Walters 1417–21)

Kroger has a warehouse in Roanoke, Virginia, 166 miles from Richmond, and has expanded from Roanoke as far as Charlottesville, 65 miles from Richmond. (Curhan 2916; C. Thomas 1332–40) It has some possible name recognition in this market by virtue of the fact that it operates in contiguous areas. (Curhan 2917) Dr. Parker identified Kroger as a likely potential entrant into this area. (Parker 2306)

Respondents cite fifteen companies presently situated within a 200 mile "striking distance" of Richmond. (RPF 415) Malone & Hyde serves stores in the Richmond Market Area (as defined by *Progressive Grocer*) from a distribution center in Salem, in the Roanoke/Lynchburg area. (RX 30Z–11) In addition to Malone & Hyde and Kroger, the following chain store warehouses and independent wholesalers are also located in the Roanoke/Lynchburg area, but are not presently serving Richmond:

Deskins Supermarkets
Mick-or-Mack Stores, Inc.
Piggly Wiggly Mid-Mountain, Inc.
Virginia Foods of Bluefield
Virginia Foods, Inc.
J.D. Wyatt & Co., Inc.

(RX30Z11)

Similarly, Winn-Dixie serves Richmond out of Raleigh, 151 miles away. Richfood does the reverse, and serves stores in Raleigh from Richmond. (Walters 1418) There are two other distribution centers in Raleigh which do not presently serve Richmond:

J.T. Davenport & Son, Inc.
Thomas & Howard Co.

(RX 30Z-11)
Giant Food and Pantry Pride (Food Fair) serve Richmond from the Baltimore Market Area as defined by *Progressive Grocer.* Giant's warehouse is in Landover; Pantry Pride's in Baltimore. (RX 30Z10)

6. Grand Union as a Perceived Potential Entrant

124. Thomas Connell, who has been with A & P in Richmond for 11 years and is Director of Merchandising for its **[105]** Richmond division, testified that he did not perceive Grand Union, or any other company, as likely to enter Richmond. (Connell 1271, 1277) Similarly, Eugene Walters, President of Farm Fresh, did not perceive Grand Union, or any other specific company, as likely to enter Richmond, although he testified that "nothing really surprises me" in the area of potential entrants. (Walters 1452–53)

James Rowe, Colonial's Vice President and Secretary at the time of the acquisition, has been in the industry since 1946. (CX 607 [Rowe] at 5) As to companies he thought were likely to enter Richmond, Mr. Rowe stated: "I think most of them [are] there that I'm aware of." (CX 607 [Rowe] at 41) Mr. Rowe further stated he did not expect Grand Union to enter Richmond. (CX 607 [Rowe] at 42) Henry Addison, presently Colonial/Grand Union's Regional Vice President for the Carolinas, was the Area Manager of Stores Operations in Richmond from late 1970 through early 1972. (Addison 2638) He had not perceived Grand Union as likely to enter Richmond. (Addison 2683) Joseph Isaacs, a Grand Union official and formerly Vice President of Colonial's Norfolk Division (which includes Richmond) from 1976–77, never perceived Grand Union as likely to enter Richmond. (Isaacs 2584)

William Stewart testified that he did perceive Grand Union as a potential entrant into Richmond (Stewart 594) based on Grand Union's existing locations to the north of Richmond; his knowledge of Grand Union's desire to expand into Charlottesville and Grand Union's plans for expansion, as elaborated by James Wood. (Stewart 593)

7. Grand Union as a Potential Entrant

125. Complaint counsel argue that Grand Union "has had an historical interest in and incentives to enter the Richmond, Newport News/Hampton and Norfolk/Virginia Beach SMSAs, and by 1978 it had the financial and managerial capabilities to do so." (CPF 463) Complaint counsel finds the location of Grand Union's Landover warehouse, 116 miles from Richmond (Rand McNally), a significant factor in the contention that Grand Union's natural expansion would have brought the company into Richmond by 1983, and probably by 1981. (Parker 2304) Giant Food serves its Richmond stores from a Landover, Maryland warehouse. (F. 123)

Prior to the acquisition of Grand Union by Cavenham, Grand Union had considered expansion into Richmond, Norfolk, Newport News and cities and towns where Colonial had stores. (Complaint Counsel Phys. Ex. A; CX 580 [Silvers] 49–55; CX 143A-B) These expansions were originally contemplated as part of a joint venture with Dart Drugs to open Super Darts, a combination drug and grocery store. (CX 580 [Silvers] 49–55) Negotiations with Dart Drug were eventually unsuccessful, although not before a site study of Richmond had been performed. (CX 312A-M; **[106]** *see also* CX 89) Grand Union management was committed at this time in Baltimore. (CX 84W)

In 1976, Grand Union considered entering the three Virginia SMSAs, including Richmond, by acquiring Giant Open Air Markets, a chain headquartered in Norfolk, Virginia. (CX 2M, N, S) However, Mr. Silver did not recommend this acquisition to Mr. Wood because of potential FTC objections and because of its "mix" of stores, manufacturing, and wholesaling, and its size. (CX 30)

Respondents deny that Grand Union's proximity to the Richmond SMSA made it a likely entrant and cite several factors which, they allege, made entrance into Richmond within any reasonable or measurable period of time unlikely. One factor was the failure of the Washington Division of Grand Union to produce a satisfactory rate of return compared to Grand Union's other divisions. (CX 580 [Silvers] at 104) In addition, there are still many sections of the metropolitan Washington area where there is either no Grand Union store or only a one-store entry. Respondents argue that "common sense" dictates that Grand Union would complete its penetration of the affluent Washington market, so very close to its Landover warehouse, before it expands 100 miles to the south to Richmond. (RPF 430)

Another factor cited by respondents is the failure of Grand Union to follow through on expansion plans regarding Charlottesville and Culpepper, Virginia. In January 1974, Grand Union reviewed a store site in Charlottesville, 65 miles northwest of Richmond, which had been approved by prior management. The unequivocal decision was: "Turn down. Area cannot support present distribution and supervision." (CX 143A) In 1974 and again in 1975, Grand Union also reviewed a site for a large family center Grand Union in Culpepper, 35 miles southwest of its southernmost Virginia store in Fredericksburg and 75 miles northwest of Richmond. The site also had been approved in 1972 by prior management. During both reconsiderations, Grand Union's Real Estate Committee recommended cancelling plans "due to limited potential." (CX 126A, CX 131A)

The Grand Union Five Year Development Plan for 1976–81 specifically set forth the Company's expansion plans: "In regard to a new market entry, present plans focus upon the West Coast of Florida, the Baltimore area, and the South Jersey (Trenton) area, as well as such areas as Bucks County. Pennsylvania; Hunterton County, New Jersey; Grafton County, New Hampshire and Steuben County, New York (Central Division)." (CX 80Z21)

The Washington Division's five-year development plan for 1975–1979 listed 13 stores to open in Maryland during the plan period. (CX 80Z55) No stores were planned for anywhere in [107] Virginia. Another category of "additional possibilities for new store development" was also given. None of the 11 stores on that list was any closer to Richmond and Tidewater than were Grand Union's existing stores.

Grand Union's Business Plan for 1978/79 states: "The Budget for 1978/79 had been developed on the basis that there will be no change in the existing operations. Sales growth will be concentrated within the Supermarket Divisions, particularly in the State of Florida; moderate growth is planned in other supermarket areas." (CX 6N)

A third factor cited by respondents is Grand Union's commitment to the Baltimore market. Baltimore, along with Trenton and the West Coast of Florida, was one of the three expansion areas planned by Grand Union management prior to the Cavenham acquisition and continued under Cavenham. Grand Union entered the Baltimore area from the Landover warehouse in 1973/74 with stores in Timonium, Glen Burnie and Pasadena. (CX 8Z53, CX 592N) This area is approximately 25 miles from Landover. At the time of the Colonial acquisition a fourth store in Overlea was under construction. (CX 595M) This number was substantially below plan.

In 1975, when Grand Union had three stores open in Baltimore, it had anticipated an opening total of 13 stores by 1980—two in 1976/77, three in 1977/78, two in 1978/79, one in 1979/80 and two in 1980/81. (CX 80Z27) One reason development was slower than anticipated was state restrictions on construction because of inadequate sewage facilities. (CX 79Z–114) A Grand Union Development Plan commented: "Nevertheless this state has always been among the top 10 growth areas in the country and as such it is still remains a most favorable target for us as a natural expansion of the Washington Division." (CX 79Z114)

Expansion into Baltimore did not proceed as anticipated for Grand Union. (CX 589 [Wood] at 65–66) In 1976, Grand Union estimated its share of the Baltimore market at 0.8% (CX 301A), compared to 22% for A & P, 18% for Pantry Pride and 15% for Giant. (CX 6Z55) Therefore, respondents contend (RPF 441), managerial resources of the Landover Division were occupied with trying to make the Baltimore stores profitable. Under these circumstances, an entirely new, simultaneous expansion within the Washington Division to Richmond, 150 miles away in the opposite direction from Baltimore, would have been extremely unlikely. (*See* Curhan 2907–08.)

Advertising costs were another factor respondents argue made expansion to Richmond unlikely. Grand Union advertised regularly in both major Washington newspapers, which are among the most expensive in the country. The newspapers provide advertising coverage for a large area which includes many **[108]** communities. Grand Union is paying empty advertising dollars since, in many areas under the umbrella of those newspapers, Grand Union does not have stores. As reflected in its business plans, Grand Union would plan to exploit those opportunities for expansion and filling in before looking afar for "opportunities." (Curhan 2913–14; CX 6Z35, Z266–Z267; CX 7Z50, Z501, Z513–Z514; CX 8Z208–Z214, Z517, Z523)

A final factor cited by respondents is that the labor force in Grand Union's stores served by the Landover warehouse is unionized. In 1977, Grand Union's average hourly pay rate for the Landover Division was $1.50 per hour *greater* than in its second most expensive division, the Jersey Division. The difference between them was expected to increase in 1978 with Washington projected at $8.22 per hour compared to $6.65 for Jersey. (CX 6Z63) Many of the grocery stores in Richmond are non-union, *e.g.*, Ukrop's, Farm Fresh, Food Town, Giant Open Air, Pantry Pride, Siegel's and Chuck's. (Connell 1272) Winn-Dixie, Richmond's most recent entrant, is not unionized. (B. Thomas 510) Grand Union would have suffered a 2%–3% disadvantage in operating costs compared to them. In addition to lower costs, not being unionized gives a company greater flexibility in utilization of its labor force. (Connell 1273–74) Mr. Connell of A & P, which is unionized, commented that the cost saving could, among other things, "be used for additional profit" or be "a merchandising tool to maintain lower prices." (Connell 1274)

Union wage rates in the Washington, D.C. area are higher than the prevailing rates for union contracts originating in Richmond. (Curhan 2911–12) Dr. Curhan speculated that this may, in part, explain the inability of Giant of Washington to achieve success in Richmond. (Curhan 2912; *see* F. 122)

However, the three largest competitors in the Richmond SMSA are unionized—Safeway, A & P, and Colonial. Also, A & P has a different union contrast for its Washington, D.C. and Richmond operations. (Connell 1258–59, 1272; CX 2S)

### 8. Alternative Means of Entry

126. Complaint counsel suggests that the greater growth rate of the Richmond and other Virginia SMSAs, as compared to that of Baltimore, made it likely that, barring the acquisition of Colonial, Grand Union would have sought to enter these lucrative markets in the near future. (Parker 2298, 2304, 2311–12, 2317–18; CPF 481) Grand Union could have expanded out from its Washington base of operations as did Giant, Safeway and Food Fair. (Parker 2310–11; Stewart 527) Of the six largest Washington, D.C. supermarket firms, only Grand Union did not operate in Richmond. (Parker 2298) Prior to the Colonial acquisition, Grand Union sought store sites in Fredericksburg (CX 220, 221, 222) and Warrenton, Virginia (CX 206A-B, 208, 209) which are not part of the Washington metropolitan area. **[109]**

Complaint counsel lists several other chains which would have been acquisition possibilities had Grand Union not wanted to enter this market *de novo.* (CPF 484 and 485) Giant Open Air, which operated in all three Virginia SMSAs was one possibility. This company had a 3.0% market share in Richmond in 1977. (CX 2S) Complaint counsel contends Giant Open Air's manufacturing and wholesaling operations could have been sold, as was done in the case of Colonial's non-retailing facilities. (Stewart 495–502, 612) Ukrop's had an 11.9% market share in Richmond in 1977. (CX 2S) Complaint counsel state that with Grand Union's financial resources, it could have expanded from the base provided by either of these chains. (CPF 484, 485)

### 9. Changes in Colonial's Richmond Operations Since the Acquisition

127. Dr. Parker testified that, in his opinion, Grand Union's *de novo* entrance into this market would have helped to deconcentrate the market. (Parker 2304–05, 2311–14, 2318–20) He stated that the acquisition of Colonial did not lessen competition in the market at that instant, however:

> [T]he way an economist would look at the problem, they would say did it effect the likely present value of the future noncompetitive higher prices or poor performance measured in terms of profit. And I think the answer is clearly that it did increase the present value of future noncompetitive returns at that point in time.

(Parker 2308–09)

Colonial's former Vice President for Richmond testified that through the 1970's Colonial did poorly in Richmond. Although it had once been a profitable area for Colonial, management had failed to invest in Richmond by building new stores or modernizing and renovating existing stores. Mr. Isaacs, who served as manager of the Norfolk Division [including Richmond] in 1976–77 testified: "[W]e were not competitive from the standpoint of store facilities, good locations. Most of our stores were pretty much up in age from 10 to 15 years old and really not competitive facility-wise, or prime location-wise with many of our competitors." (Isaacs 2555; *see also,* Addison 268)

Mr. Isaacs and the real estate manager spent considerable time looking for new sites, but Colonial corporate management did not authorize new stores for Richmond. Other **[110]** than emergency equipment, Colonial made no renovations, enlargements or improvements to the Richmond stores. (Isaacs 2556–57) The last Colonial store to open in the Richmond SMSA was in 1972; a replacement store opened in Petersburg in 1974. (CX 330C) From 1976 through 1978, all but two of the Richmond stores (including Petersburg) made a negative contribution each year. (CX 253C-D) The Colonial stores remained at a physical disadvantage compared with other stores serving Richmond. (Curhan 2915) However, as Mr. Stewart testified (Stewart 563–64), Colonial had "very optomistic plans for Richmond, and in 1978, had sites and plans for six new stores."

Respondents point to the following changes made to Colonial's Richmond operations which they view as beneficial to that market: (i) the regionalization of the Richmond stores and the Norfolk Division with Grand Union's Landover Division, which will provide better management supervision of the stores; (ii) closing several of the old, money-losing stores which had no profit potential (Curhan 2915); and (iii) the addition of a real estate person located in Richmond who works exclusively in the area to find sites for new stores. (Stewart 563–64; RPF 452)

10. Colonial as a Toehold Acquisition

128. Respondents argue that under Commission precedent, an acquisition of a firm with less than 10% market share by a potential entrant into that market is a "toehold" acquisition which is legal under the antitrust laws and which may, in fact, result in procompetitive effects. Colonial's market share and rank in Richmond dropped between 1972 and 1977; its share of grocery stores sales was only 6.5% in 1977. (F. 119)

## E. *The Newport News/Hampton, Virginia SMSA*

### 1. Demographics and Location

129. In 1978, the Newport News/Hampton SMSA (F. 45) was the 105th largest in the country. Between 1970 and 1978, the population of this SMSA grew from 333,140 to 361,400, or approximately 8.5%. (Bureau of the Census, *Population*)

The city of Newport News, the heart of the SMSA, is located on a peninsula surrounded by the James River, Hampton Roads Bay, and the Chesapeake Bay:

| | |
|---|---|
| 22 miles from | Norfolk, Virginia |
| 75 miles from | Richmond, Virginia |
| 172 miles from | Washington, D.C. |
| 241 miles from | Roanoke, Virginia |
| 209 miles from | Baltimore, Maryland |
| 234 miles from | Greensboro, North Carolina |
| 175 miles from | Raleigh, North Carolina |

(Rand McNally) [111]

130. Market shares for the top firms in the SMSA, as revealed by complaint counsel's market survey, were:

| | 1972 | | | 1977 | |
|---|---|---|---|---|---|
| Competitor | Food Store Sales (%) | Grocery Store Sales (%) | Competitor | Food Store Sales (%) | Grocery Store Sales (%) |
| Colonial | 15.1 | 16.1 | Colonial | 15.3 | 16.0 |
| Food Fair | 14.3 | 15.3 | Food Fair | 10.9 | 11.5 |
| A & P | 13.2 | 14.1 | Farm Fresh | 10.3 | 10.8 |
| Rich's | 9.7 | 10.4 | A & P | 9.8 | 10.3 |
| Southland | 7.8 | 8.3 | Southland | 9.2 | 9.7 |
| Rosso & Mastracco | 5.8 | 6.1 | Safeway | 7.8 | 8.2 |
| Bonnie Be Lo | 3.4 | 3.6 | Rich's | 5.0 | 5.2 |
| Farm Fresh | 3.3 | 3.6 | Rosso & Mastracco | 4.7 | 4.9 |

(CX2M)

Between 1972 and 1977, concentration ratios of the top four firms decreased approximately 7 percent. Colonial and Food Fair (Pantry Pride) remained numbers one and two, respectively, between 1972 and 1977. Food Fair's market share dropped by approximately one-third, although it still had six stores. (CX 665Z324) By 1977, Farm Fresh, which had been eighth in 1972, was third. A & P, number three in 1972 with 11 stores in the SMSA, had four fewer stores in 1977 (CX 665Z326), and had dropped to fourth. Rich's, number four in 1972 with

13 stores, dropped to seventh with one fewer store. (CX 665Z334) Although Southland's rank as number five stayed the same, its absolute share of market increased. Southland had 47 stores (7–11's) in the SMSA in 1972 and 63 in 1977. (CX 665Z340) Safeway, which did not have stores in the area in 1972, was sixth in 1977. Farm Fresh's growth and Safeway's market entry had the effect of deconcentrating the market.

Four-firm concentration ratios for grocery stores, (SIC 541), were:

| 1972 | 1977 |
|---|---|
| 56.7% | 49.1% |

Four-firm concentration ratios for supermarkets were:

| 1972 | 1977 |
|---|---|
| 70.8% | 65.6% |

(F. 562, 53) **[112]**

2. Colonial in the SMSA

131. In 1977, Colonial, operating 15 supermarkets (Admissions 54), was ranked first in both supermarket and grocery store sales in the Newport News/Hampton SMSA with 22.4% and 16.0% market shares, respectively. (CX 664A; CX 2M; Admissions 53) The Colonial Norfolk Division Capital Expenditures Status Report of August 1978 indicated that Colonial planned two new supermarkets for this SMSA (CX 343B), one of which was a replacement store. (CX 356D) Two new supermarkets and one replacement store were planned for 1979. (CX 356F)

3. Barriers to Entry

132. Mr. Stewart testified that profitable entry into this SMSA would require six stores of 30,000 square feet each. (Stewart 576, 582)

Newport News is served by the *Daily Press* and *Times Herald* newspapers. Most Newport News competitors advertise on Sunday and Wednesday evenings and Thursday mornings. (Connell, 1226–27, 1233)

Winn-Dixie entered the SMSA about 1970 or 1971. (Connell 1254; CX 630I) Safeway is the only other competitor to have entered in the past ten years, having entered with several stores. (Connell 1254–55; Stewart 658) Dr. Parker testified that this market has moderately high barriers to entry. (Parker 2309)

4. Performance of the SMSA.

133. Complaint counsel attribute the drop in concentration in this SMSA between 1972 and 1977 to the drop in market share for Rich's, from 10.4% of grocery store sales to 5.2% (CX 2M), due in part, to the death of its founder. (Walters 1409–09) In addition, concentration was decreased by the entrance of Safeway into this market, which had accrued an 8.2% market share by 1977. (F. 130)

Dr. Parker testified that this SMSA is concentrated and is performing less than competitively. (Parker 2309; *see also* Marion 1976–78)

There are three commissaries in the Newport News area. According to public records, in fiscal 1978 (including three months of calendar 1977), the commissaries did the following annual sales volume: **[113]**

| Commissary | Sales Volume ($Million) |
|---|---|
| Fort Eustis | $ 14.1 |
| Fort Monroe | 6.6 |
| Langley Air Force Base | 20.9 |
| Total | $ 41.6 |

The commissary sales of $41.6 million was approximately 15% of food sales in the Newport News market as defined by complaint counsel. Respondents argue that failure to consider the commissaries in the Newport News area distorts the true market picture in this SMSA. (RPF 458)[12]

Industry witnesses testified that the commissaries were a major factor in Tidewater. Mr. Isaacs, Colonial's former Vice President for Tidewater, described the competition provided by the commissaries:

> Because of the large amount of business that the commissaries did, large amount of military personnel, it was necessary that we compete with them. And maybe we couldn't compete right down the line as far as price, but we could as far as location of our stores, convenience, better variety than the commissaries could carry, service in our stores. The commissaries really didn't have that much in the service aspect. We competed many ways. Store hours. Commissaries were very limited in their store hours. So we attempted to go after as much of the commissary business as we could get.

(Isaacs 2553)

Mr. Stewart also testified about the commissaries in Tidewater: **[114]**

> We tried to [compete with the commissary]. We certainly had to compete with them for volume. There was no way we could compete with them on price; but certainly

[12] The relationship of commissary share of market to other food store sales remains stable when commissary sales are adjusted by (i) deflating sales volume by 5% to account for inflation in the nine months of 1978 included in the military fiscal year, (ii) inflating sales to account for the lower commissary price structure (the numerator), and then (iii) aggregating commissary sales with the sales of the other competitors (the denominator). (*See* Curhan 3026–30, 3166–69.)

grocery items or produce items or meat items that were bought at the commissary took the potential away from us or any other competitor selling that item.

(Stewart 526)

He also noted that Colonial had run price-checks on commissaries. (Stewart 650) Similarly, Mr. Walters testified that Farm Fresh "certainly look[s] at the commissaries as a competitor. . . ." (Walters 1405)

Respondents cite the growth of Farm Fresh as an important factor in perceiving the true state of the market in this SMSA. (RPF 462–468) Eugene Walters, President of Farm Fresh (corporate name Commonwealth Foods), testified that Farm Fresh began doing business in 1957. It had three stores in 1966 when he joined the firm, one each in Norfolk, Newport News and Richmond. (Walters 1396) Today Farm Fresh has 17 stores. Two of the stores are in Richmond, five in Newport News and ten are in Norfolk. (Walters 1397–1400)

Farm Fresh is the fastest growing competitor in both Norfolk and Newport News. (Stewart 659) It was not in the top eight in Norfolk in 1972. By 1977, it ranked fifth with a 10% market share. (CX 2N) In 1980, Mr. Walters estimated Farm Fresh's market share in Norfolk at 13%. (Walters 1428) In Newport News, it went from eighth to third ranked between 1972 and 1977. Mr. Stewart described Farm Fresh as "very aggressive, well managed, non union, highly competitive." (Stewart 659) Mr. Isaacs, Colonial's Vice President for Tidewater in 1976/77 also described Farm Fresh as:

probably the most aggressive [competitor] from the standpoint of new store development, remodeled existing stores, probably much more aggressive from a merchandising-advertising standpoint. (Isaacs 2552)

In addition to Farm Fresh, there are other independents in the top eight in Newport News. Rich's [unrelated to the wholesaler Richfood], number seven in 1977, had 12 stores in the Newport News/Hampton SMSA counties of York, Hampton City, Newport News City and Gloucester. (Walters 1407–08; CX 665Z344) It was founded by Mr. Rich after World War II and was successful. After Mr. Rich's death, the company was sold to Rosso & Mastracco (Giant Open Air). (Walters 1408–09; Connell 1255–56) Rocco & Mastracco, which is headquartered in Norfolk, **[115]** has had one large Giant Open Air store in Newport News since the early 1970's. (CX 665Z338) It was number three in Norfolk and number eight in Newport News in 1977. (CX 2M, N)

Bonnie Be-Lo Markets is a regional chain served by Richfood. (Stewart 527) It had 33 stores in 1972 and 37 in 1977, of which three were in Newport News. (CX 665Z305) Although it was in the top eight in Norfolk in 1977 and in Newport News in 1972 (*see* CX 2M, N), by 1977, with the growth of Farm Fresh and Safeway, it was no longer in the top eight in Newport News.

Lou Smith, another independent operator, had one store in Gloucester in a former Colonial location, which is within the Newport News SMSA, since before 1972. (CX 665Z328; Stewart 656) A second store was recently built in Newport News. (Connell 1255) Lou Smith is served by Richfood. (Stewart 527)

Complaint counsel's survey discloses the presence of other independents in Newport News. These include Rip's Food Stores with two stores (CX 665Z307); Nick's Discount Markets with five stores (CX 665Z309); and Bon Supermarkets, Burnetts Supermarket and Camco Supermarket, with one store each. (CX 665Z313, Z317, Z319)

In 1980, Winn-Dixie had three stores open in the Newport News/Williamsburg/Suffolk area. (Walters 1422–23)

5. Grand Union as a Perceived Potential Tidewater Entrant

134. None of the trade witnesses who testified in this case perceived Grand Union as a likely potential entrant into the "Tidewater" region *i.e.,* the Newport News/Hampton SMSA and the Norfolk/Virginia Beach SMSA. (Connell 1271; Isaacs 2584; Stewart 656) Mr. Walters did not perceive Grand Union as a likely Tidewater entrant but did note that nothing surprises him in that area. (Walters 1453)

6. Grand Union as a Likely Potential Tidewater Entrant

135. Complaint counsel stresses the proximity of this region to Grand Union's Washington Division operations as an indication that Grand Union was a likely potential entrant. (CPF 464–467)

In August of 1978, Grand Union operated a supermarket in Harrisonburg and one in Fredericksburg, Virginia, and one in Glen Burnie, Maryland. (Complaint Counsel Phys. Exh. B) At the same time Colonial operated stores in Charlottesville, Virginia (52 miles from Harrisonburg), Richmond, Virginia (57 miles from Fredericksburg), and Cambridge, Maryland (67 miles from Glen Burnie). (Complaint Counsel Phys. Exh. B; Rand McNally) In **[116]** 1978, all Grand Union stores in Maryland and Virginia were served by Grand Union's warehouse in Landover, Maryland. (Admissions 83) Landover is 150 miles from Harrisonburg and 59 miles from Fredericksburg (Admissions 85); Newport News is 124 miles from Fredericksburg and 183 miles from Landover (Rand McNally); Norfolk is 141 miles from Fredericksburg and 200 miles from Landover. (Admissions 85; Rand McNally)

The joint venture considered with Dart Drugs was primarily concerned with opening stores in Tidewater. (CX 89) On July 21, 1972, Floyd Dean, Grand Union's real estate manager, filed a report regarding his inspection trip of Norfolk and Newport News with a Dart Drug official. Two sites in Newport News and three in Norfolk were recommended for consideration. (CX 87A-E; *see also* CX 148–152; CX 53) This report set a goal of twelve to fifteen stores. (CX 87D) After negotiations with Dart proved not to be fruitful (CX 580 [Silvers] at 51–52), Mr. Dean continued to recommend that Grand Union open stores in the Tidewater area, and he filed a report on October 10, 1972, outlining seven other potential sites for Grand Union stores. (CX 83A-D; CX 90A-B)

Thereafter, Grand Union corresponded with developers in shopping centers in Norfolk and Newport News discussing in detail particular sites, plans and lease requirements. (CX 227A-B; CX 229A-B; CX 230A-B; *see also* CX 88) These site investigations culminated in a document entitled "Grand Union Company Proposed Expansion Program Tidewater, Virginia" dated December 18, 1972, which analyzed sites, competition (including Colonial stores), and demographic information. (CX 84A-V) Attached to this document is a memorandum to Mr. Dean stating:

> I do not believe we should go into the Tidewater market at this time. With the commitment we have in Baltimore there is not sufficient manpower to handle two new areas at the same time since both would be multiple store operations.
>
> * * * * * * *
>
> The survey work was well performed and with updating, will still be useful in the future.
>
> It may be that we are missing a current surge of new commercial and good site availability but considering the moves we are making in Baltimore and the distance involved, it is my opinion that we should not enter into leases in Tidewater at this time. (CX 84W)

Mr. Dean forwarded this Proposed Expansion Program, with attachments on certain sites, to Mr. O'Connell, Grand Union's real estate vice president, on January 25, 1973. (CX 86; CX 148A-B; CX 149; CX 150A-B; CX 151; CX 152A-B; CX 153) **[117]**

In 1976, Grand Union considered the acquisition of Giant Open Air Markets, a chain which had stores in all three Virginia SMSAs. Earl Silvers recommended that this not be pursued despite the fact that "the proposal has appeal because a successful Norfolk operation should fit in with and help our Washington Division." (CX 30) The reasons for not pursuing the acquisition were stated to be the "mix" of stores, manufacturing, and wholesaling, and its size. (CX 30)

Respondents contend that the reasons applicable to their argument about why Grand Union was unlikely to enter the Richmond SMSA are even truer with respect to the possibility of Grand Union's entering Tidewater. The fact that this area is yet 50 miles further away from Landover, puts entry here "at the very fringes of 'striking distance'." (RPF 498) In addition, the fact that Grand Union's Landover operations are unionized was another factor that weighed against Grand Union entering these SMSAs where only Colonial, A & P, and Safeway are unionized. (Curhan 2883) Boulevard, Earles, Farm Fresh, Giant Open Air, Lou Smith, Pantry Pride, Value Fair, and Winn-Dixie (Connell 1272–73) are not unionized, which results in a 2–3% labor cost advantage. (Curhan 2853) Colonial, A & P, and Safeway are successful operators in this market.

Dr. Curhan testified that Winn-Dixie's recent entry into Tidewater made it less likely that Grand Union would follow, because this "preempt[ed] opportunities that Grand Union otherwise would have had." (Curhan 2925–26) However, in 1978 Grand Union would have had the same opportunity for store sites as did Winn-Dixie.

7. Other Expanders and Potential Entrants into Tidewater

136. Respondents cite Winn-Dixie as the most obvious expander into Newport News. (RPF 480)

Mr. Walters testified that Farm Fresh will be opening at least two to three new stores per year for the next five years. (Walters 1442) When asked whether he perceived any new entrants entering his operating area within the next five years, Mr. Walters testified:

> I would say that any major east or southeast operator would evaluate our market and decide whether or not they wanted to come in. So that's not quite all inclusive, but progressive growth companies would certainly be something wrong with them if they weren't studying, evaluating our market and deciding whether they want to come in.

(Walters 1454–55) [118]

Dr. Curhan mentioned Kroger as a potential entrant into the Tidewater market (Curhan 2926), although Kroger's Group Vice President testified Kroger had no plans to enter Tidewater. (C. Thomas 1333) Dr. Parker conceded that Lucky might be a potential entrant "but not as likely as Grand Union." (Parker 2312–13) Dr. Curhan agreed. (Curhan 2926) Lucky, with two stores in Richmond (Curhan 2926), is in the process of entering the Raleigh market. (Walters 1419)

Dr. Parker testified that Giant was a potential entrant into Newport News:

> Giant had been in that market—yes, it had been in that market. I think that this would have facilitated its re-entry. I think that Giant had been expanding to Baltimore, and I think that like Grand Union, it would have, that the slowdown in growth of that market could have drawn its attention to expanding in a more growth—higher-growth area. I think it was already in Richmond, I think, it would have soon attempted to enter Newport News.

(Parker 2312)
Dr. Curhan disagreed, because of the problems Giant was experiencing in Richmond. (Curhan 2926; F. 122)

In addition to these companies, there are two independent wholesalers in Raleigh, North Carolina, which is less than 200 miles from Tidewater, which could serve the area as Winn-Dixie does from Raleigh. They are J.T. Davenport & Son, Inc., and Thomas & Howard Co. (RX 30X) Both are within the Raleigh Market Area as defined by *Progressive Grocer,* although Thomas & Howard is in Rocky Mount, approximately 45 miles closer to Tidewater, and J.T. Davenport is in Sanford, 30 miles farther south. Pantry Pride (Food Fair) serves Tidewater from the Baltimore Market Area as defined by *Progressive Grocer,* which is 219 miles from Tidewater (RX 30W), somewhat in excess of typical "striking distance."

8. Alternative Means of Entry into Tidewater

137. Complaint counsel alleges that, although Grand Union passed up the opportunity to enter Tidewater because of the company's commitment to its Baltimore operations, the attractiveness of the Tidewater growth rate as compared with that of Baltimore would probably have led to the entry of Grand Union into these markets in the near future. (Parker 2298, 2304, 2311–12, 2286; CX 564) In addition to *de novo* entry, **[119]** purchase of a smaller chain, *e.g.,* Giant Open Air, Ukrop's, or Farm Fresh, would have afforded Grand Union a less anticompetitive way to enter the market.

F. *The Norfolk/Virginia Beach, Virginia SMSA*

1. Demographics and Location

138. In 1978, the Norfolk/Virginia Beach SMSA (F. 46) was the 48th largest SMSA in the country. Excluding the cities and towns in northern Virginia which are part of the Washington, D.C. SMSA, the Norfolk/Virginia Beach SMSA is the largest in the state. Population of the SMSA increased from 732,600 in 1970 to 800,100 in 1978, an increase of 9.2%. (Bureau of the Census, *Population*)

The Norfolk/Virginia Beach SMSA is bordered on the east and north by the Atlantic Ocean, the Chesapeake Bay, and the Hampton Roads Bay:

| | |
|---|---|
| 22 miles from | Newport News, Virginia |
| 93 miles from | Richmond, Virginia |
| 246 miles from | Roanoke, Virginia |
| 189 miles from | Washington, D.C. |
| 225 miles from | Baltimore, Maryland |
| 169 miles from | Raleigh, North Carolina |
| 228 miles from | Greensboro, North Carolina |

(Rand McNally)

According to complaint counsel's survey, the shares of food and grocery store sales of the top eight competitors in the SMSA area in 1972 and 1977 were as follows:

| 1972 | | | 1977 | | |
|---|---|---|---|---|---|
| Competitor | Food Store Sales (%) | Grocery Store Sales (%) | Competitor | Food Store Sales (%) | Grocery Store Sales (%) |
| Colonial | 15.0 | 15.7 | Colonial | 17.2 | 17.8 |
| Rosso & Mastracco | 12.7 | 13.3 | A & P | 11.2 | 11.6 |
| Bonnie Be-Lo | 10.8 | 11.3 | Rosso & Mastracco | 11.0 | 11.4 |
| A & P | 10.1 | 10.6 | Bonnie Be-Lo | 10.3 | 10.7 |
| Southland | 7.2 | 7.6 | Farm Fresh | 9.7 | 10.1 |
| Food Fair | 6.5 | 6.8 | Southland | 8.8 | 9.1 |
| Valu Fair | 5.0 | 5.2 | Food Fair | 5.7 | 5.9 |
| Great Bridge "Earles" | 4.3 | 4.5 | Safeway | 5.0 | 5.1 |

(CX 2N) [120]

Colonial remained first ranked in 1972 and 1977, and increased its market share by 2%. A & P with 14 stores in 1972, increased its presence by one store (CX 665Z357), and rose from fourth to second rank. Bonnie Be-Lo, number three in 1972 with 28 stores (CX 665Z345), had approximately the same market share in 1977. Southland dropped from fifth to sixth ranked and was replaced by Farm Fresh with eight stores. Farm Fresh had five stores in 1972 (CX 665Z347), but was not among the top eight in that year. Food Fair, although it increased its presence from seven to nine stores (CX 665Z353), dropped in market share. Safeway, which was not in the area in 1972, was number eight in 1977.

Four-firm concentration ratios for grocery stores, (SIC 541), were:

| 1972 | 1977 |
|---|---|
| 48.7% | 53.1% |

Four-firm concentration ratios for supermarkets were:

| 1972 | 1977 |
|---|---|
| 60.5% | 62.8% |

(F. 52, 53)

2. Colonial in the SMSA

139. In 1977, Colonial was ranked first in both supermarket and grocery store sales in the SMSA, with 23.1% and 17.8% market shares, respectively. (CX 664B, CX 2N; Admissions 57) Colonial operated 31 supermarkets in the SMSA in 1977 (Admissions 58), and the Norfolk Division Headquarters of Colonial is located in the SMSA. (Stewart 490) According to a Colonial/Grand Union report, the Norfolk Division operated 61 stores, or 16.7% of Colonial's total of supermarkets as of March 31, 1979, but supplied 29.9% of the company's profits. (CX 252Z39)

Colonial's Capital Expenditures Status Report, dated August 12, 1978, indicated that during 1978, expenditures were made for six new stores, three enlargements, and one remodeling for the Norfolk/Virginia Beach SMSA. (CX 343C) The 1979 Norfolk Division Capital Budget projected four new supermarkets and three remodelings for this SMSA during that year. (CX 356F-G)

3. Barriers to Entry

140. Mr. Stewart testified that in order to profitably enter the Norfolk/Virginia Beach SMSA *de novo,* he would advise **[121]** opening six supermarkets of 30,000 square feet each. (Stewart 576, 582) Mr. B. Thomas of Winn-Dixie, the SMSA's most recent entrant, testified that a multiple entry of three stores is necessary to support the daily delivery cost of perishables to these stores from the Winn-Dixie warehouse in Raleigh. (B. Thomas 1475, 1485)

Grand Union's report on this area for the purpose of its joint venture with Dart Drug concluded that initial entry into Norfolk would be with five stores, with a goal of expansion from that base. (CX 87D) After negotiations with Dart Drug were ended and Grand Union considered entering this SMSA alone, the Proposed Expansion Program indicated that five stores would be opened within 18–24 months. (CX 90A-B; CX 84C; CX 148A, CX 150A, CX 87C) In 1972, Grand Union contemplated 33,000 square foot stores in the SMSA. (CX 90A) Presently, a 30,000 square foot store in this area would cost between $700–800,000 to equip; inventory costs would be between $300,000 and $1 million. (Connell 1250; Walters 1435)

Most of the major competitors in the SMSA buy one-page newspaper advertisements on Sunday and two-page ads in the Wednesday, Thursday combination papers. (Connell 1226, 1234–35)

Dr. Parker testified that this SMSA had moderate to high entry barriers. (Parker 2317)

### 4. Performance of the SMSA

141. In the last ten years, Safeway and Winn-Dixie have entered this SMSA. (Stewart 658–59; Connell 1254) Each of these companies opened several stores within a short period of time. (Connell 1254) Safeway, which entered the Norfolk area in approximately 1971, had 5.1% share of the grocery market in 1977. (CX 2N; F. 138)

Complaint counsel's expert witness, Dr. Parker, testified that, in his opinion, this market remains moderately concentrated and is likely performing less than competitively. (Parker 2317)

Respondents argue that the concentration figures fail to take into account the commissaries which respondents cite as a competitive factor in this market. (RPF 516) According to public records, in fiscal 1978 (including three months of calendar 1977), the four Norfolk commissaries did the following sales volume:

| Commissary | Sales Volume ($Millions) |
|---|---|
| Portsmouth Naval Shipyard | $ 10.6 |
| Norfolk Naval Base | 16.6 [122] |
| Oceana Naval Station | 14.1 |
| Little Creek Naval Amphibian | 26.1 |
| Total | $ 67.7 |

The Norfolk commissaries ranked second in the Norfolk SMSA 1977 in terms of dollar sales. (*See* CX 2N.)

In addition to the top eight competitors, Be-Lo, Earles, and Valu Fair are independents operating in the market. (Connell 1238)

### 5. Alternative Means of Entry

142. It is complaint counsel's contention that, had Grand Union not acquired Colonial, Grand Union would still have sought to enter this SMSA and the other two Virginia SMSAs in the near future. (*See* F. 135.) Giant Open Air Market, with an 11.4% grocery market share in Norfolk in 1977, is a chain that Grand Union might have purchased, according to complaint counsel. (*See* F. 135.) In addition, Ukrop's and Farm Fresh were acquisition possibilities. Complaint counsel contends Grand Union could have acquired Ukrop's in Richmond, and expanded it into the Tidewater area. Grand Union, according to complaint counsel, could have acquired Farm Fresh and expanded its Richmond operation, as well as used it as a vehicle to expand into the Raleigh and Durham markets. (CPF 485)

Possible expanders and potential entrants in the Norfolk/Virginia Beach SMSA, Grand Union as a perceived potential entrant, and Grand Union as a likely potential entrant, are discussed at F. 134–137.

## The Florida Markets

### G. *The Florida Markets in General*

143. As of July 1, 1978, Florida had a population of approximately 8,594,000, an increase of 1,803,000 or 26.5% from the state's population in April, 1970. Only four states had a population percentage growth rate higher than Florida: Nevada, Alaska, Arizona, and Wyoming. In terms of absolute growth, only California and Texas had larger increases, although the percentage growth rate of each was smaller than that of Florida. (Bureau of the Census, *Population*)

### H. *Colonial in the Florida Markets*

144. Prior to 1972, Colonial rented warehouse space in Thomasville, Georgia to serve eleven Colonial stores in Jacksonville, three in Tallahassee, two in Gainesville, and one **[123]** each in Lake City and Ocala. In addition, the Jacksonville Division (now called the Southern Division) served three stores in Alabama and thirty-five stores in southern Georgia. (CX 33H)

In the fall of 1973, a new Thomasville warehouse was completed, with substantial excess capacity built to accommodate growth planned in north and central Florida. (CX 619C; CX 317B; CX 607 [Rowe] at 13–14) By June 1978, this new warehouse was serving 65–70 stores and could serve twice its capacity without significant additional capital investment. (Stewart 494) At the time of the merger, the Thomasville warehouse was the newest and most up-to-date and probably Colonial's most efficient operation. (CX 574 [Goulding] at 52)

In 1972, Colonial acquired eight K-Mart supermarkets on the West Coast of Florida in the Tampa-St. Petersburg area as a toehold into central Florida (CX 318C), but Colonial found that some of these facilities were not suitable. (Stewart 556–57) Colonial decided to sell those stores to Grand Union (*see* F. 9), and re-enter the West Coast of Florida with a "far more competitive complete store." (Stewart 556–57) Colonial hoped to act on this re-entry plan "five years or so down the road." (Stewart 558; *see also* Spearman 815–16) Colonial planned to expand throughout Florida in a line across the state at approximately Sarasota, including areas to the north; *e.g.,* Tampa, St. Petersburg, and Orlando. (Spearman 815; Stewart 559–61; Complaint Counsel Phys. Ex. A) After re-entering Florida, Colonial planned to build a subwarehouse in central Florida, in or near Orlando (Stewart 561–62), having utilized such subwarehouses in the past. (Stewart 565)

Colonial's interest in this area was due to the fact that Orlando was the most rapid growing area in Florida. (Spearman 816; CX 416) Colonial operated two stores in Orlando. (Admissions 61) Colonial took steps to prepare for expansion into Central Florida and the West

Coast of Florida by improving its market share in Jacksonville and Tallahassee while simultaneously planning new stores toward central Florida. (CX 393A-I; CX 394A; CX 395-AH; CX 400A-F; CX 427–29; CX 438–44; CX 2K; *see also* Stewart 554–55) Colonial's five-year plan for the Southern Division included the following new stores in Florida: Panama City, Tallahassee (2), Jacksonville (1979); Green Cove Springs,[13] Tallahassee (1980); Jacksonville, Tallahassee (1981); Jacksonville, Ft. Walton (2), Panama City, Live Oak, Perry, Gainesville (1982); Jacksonville, Ocala, Gainesville (1983). (CX 358C) Colonial eventually built two [124] stores in the Orange Park section of Jacksonville, rather than the one planned. (CX 349T, X, V, CX 330Q) Two store closings in Jacksonville, one in Tallahassee, two in Orlando, and one in Daytona Beach were planned from the period between 1979 and 1983. These were all of older facilities. (CX 358C)

Colonial had determined that the lack of success of the K-Mart acquisition was due to lack of penetration, and the company's new policy was that even smaller areas have at least two stores. (Roehm 2727; *see also* Spearman 806–08) Therefore, future expansion in Florida called for Colonial to penetrate a market with a number of stores. (CX 358C; Admissions 38, 46, 61; CX 394A)

Colonial was also planning to expand its market share in the Daytona Beach area and was reviewing potential site locations. (CX 437–439; CX 443) St. Augustine was another city located between Jacksonville and Orlando, selected as a site for Colonial expansion. (Spearman 817–18; Complaint Counsel Phys. Ex. A) Mr. Stewart stressed the importance of re-entering the Tampa-St. Petersburg area of Florida with large stores offering full-service, and the necessity of six to eight prime locations. (Stewart 560–61) Discussions of this re-entry program among top Colonial management continued while Colonial was in the process of selling the eight Big Star Stores to Grand Union. (Stewart 558; *see* F. 9)

### I. *Grand Union in Florida*

#### 1. Florida East Coast Stores

145. In 1957, Grand Union entered the Miami market as a supermarket operator by acquiring B. Thrifty, a small local competitor. It increased its market share by *de novo* expansion, and by the acquisition of two independent firms, Tanner and Stevens, around 1960. These acquisitions included at least one warehouse. (CX 580 [Silvers] at 29–31; CX 574 [Goulding] at 107–08) Mr. Silvers explained Grand Union's motivation behind its entry into Florida as its desire to expand into a high-growth area from its traditional base of operations.

[13] Green Cove Springs is in the Jacksonville SMSA. (Roehm 2782)

(CX 580 [Silvers] at 153) Grand Union has operated stores on the lower East Coast of Florida in the Miami area since the 1950's. (CX 580 [Silvers] at 145) Grand Union has also been building stores on Florida's East Coast as far north as Vero Beach, Florida. (CX 246Z248)

In 1978, there were 45 Grand Union Stores on the East Coast. Grand Union estimated its share of sales for the counties served by the Florida East Coast Division at 7.2% in 1977/78. (CX 6Z120) Grand Union's Business Plan and Budget for 1978/79 described the competition on the East Coast: **[125]**

> Grand Union contends directly with three major chains in the Florida East market, all of whom maintain consistent pricing awareness and discipline, adept sales programming and promotion, and maintain relatively high standards of store operation. Foremost are Publix and Winn Dixie, who, while radically different in approach, hold approximately equal market shares of 26 percent, and 27 percent respectively . . . . The third competitor, Pantry Pride, with seventy-three stores, holds approximately eighteen percent market share . . . . During the past year [1977], Publix opened four new stores . . . Winn Dixie also opened four . . . . Pantry Pride opened one . . . . during the same period the Florida East Coast Division opened three new stores and renovated eight.

(CX 595Z53Z54)

As a group, the East Coast stores have not achieved consistent profitability. In fiscal 1977, they produced a small profit contribution, but failed to achieve by 10% the sales which had been budgeted. The shortfall was attributed to:

> . . . the area's continued depressed economic condition and aggressive competitive activity. . . . The [East Coast stores'] inability to generate and sustain an acceptable sales base, the continually competitive pressure on margin, the need for expanded media usage, and no significant offsetting variances in expenses, has caused the less than budgeted contribution.

(CX 7Z65)

They had been budgeted to contribute $1.5 million in fiscal 1978. Because of a sales shortfall of $10 million, they made a negative contribution instead. (CX 6Z50, Z54) Grand Union attributed its disappointing sales "to the continued dominance and leadership of the two major market factors, Publix and Winn-Dixie." (CX 6Z54) For fiscal 1979, Grand Union projected another negative contribution from the East Coast stores. (CX 6Z131)

### 2. Florida West Coast Stores

146. Shortly after its entrance into Miami, Grand Union opened its first stores on the West Coast of Florida via Eastern Shopping Centers ("Eastern"), a company owned one-third by Grand Union and two-

thirds by Grand Union stockholders. (CX 580 [Silvers] at 146) It was planned that Eastern would build shopping centers on both coasts. Grand Union would open a store in each center, and Eastern would rent the remaining space to [126] third parties. By 1959, there was one shopping center in Bradenton, five in the Fort Lauderdale/Palm Beach area, and several others under construction. Due to large losses from the project, Grand Union sold to Publix in 1959 all stores and leases other than those in Miami. (CX 580 [Silvers] at 147)

In the early 1960's, Grand Union attempted to re-enter the West Coast with "Grand Way" stores. There was one Grand Way in Orlando. Other Grand Way stores were on the West Coast of Florida. (CX 589 [Wood] at 88–89) This venture was also unsuccessful and all the Grand Ways were closed by the early 1970's. (CX 580 [Silvers] at 148; CX 574 [Goulding] at 108–09; CX 14E; CX 17F) In 1976, Grand Union reorganized its Florida operations and formed a West Coast Division with a separate real estate department to accelerate its expansion in that area. (CX 12F-G) In 1976, Grand Union began its expansion up the West Coast of Florida by opening three new stores and adding to two existing stores in Naples and Bradenton. (CX 71K) Since then much of Grand Union's internal expansion has been in its Florida market, particularly the West Coast of Florida. For instance, in its fiscal year 1977, Grand Union planned to build 20 new stores for its entire operations, including replacement stores. Of those 20 stores, two were planned for the East Coast of Florida and six for the West Coast of Florida. (CX 6Z26) Grand Union's 1978/79 business plan summarized its expansion program as follows: "Sales growth will be concentrated within the Supermarket Divisions, particularly in the State of Florida; moderate growth is planned in other supermarket areas." (CX 6N)

On July 6, 1978, Grand Union acquired eight Big Star stores on the West Coast of Florida from Colonial. (F. 9) These were the K-Mart stores that Colonial had bought from Allied in 1972. (Roehm 2711–12; RX 1L; CX 318C) Grand Union bought these stores because they "needed stores very badly in the west coast of Florida" to reduce their cost structure. (CX 589 [Wood] at 37) The company was simultaneously seeking additional sites. (CX 92–95) After it acquired the eight Big Star stores, Grand Union had 19 stores on the West Coast of Florida. (CX 589 [Wood] at 94–95) Grand Union's original five-year expansion plan for the West Coast had envisioned 20 stores in five years. (CX 589 [Wood] at 94; CX 71)

As a result of its expansion efforts, Grand Union had 12 modern 28,000 square foot stores on the West Coast of Florida by 1979. (CX 580 [Silvers] at 149; CX 246X; CX 246Z2; CX 574 [Goulding] at 61) These stores averaged $100,000 in sales per week. (CX 589 [Wood] 110, 41–42) Grand Union planned to open four new stores in fiscal year 1979 on the West Coast of Florida. (CX 574 [Goulding] at 95)

147. Grand Union's warehouses in use today are the main Hialeah warehouse, which has been occupied by Grand Union since 1960, and is 160,000 square feet, and the annex, occupied since **[127]** 1964, which is 61,000 square feet. Grand Union built a perishables warehouse and a frozen foods warehouse which opened in 1973, prior to the Cavanham acquisition. (CX 9Z366; CX 589 [Wood] at 100–01) It was planned at the time the warehouse was opened in 1973 that the store development in Florida would justify its size. Because Grand Union never achieved the volume originally anticipated, the perishables warehouse was losing money, operating at one-fourth of capacity and was a drain on the profitability of the East Coast stores. (CX 589 [Wood] at 100–01)

Malone & Hyde entered Florida in approximately 1975 by acquiring Hill Brothers' warehouse facilities in Miami. It began planning a new distribution center and acquired an option on land adjacent to Grand Union's perishables warehouse. (CX 574 [Goulding at 130) Grand Union had held, but later relinquished, its option on that property. (CX 589 [Wood] at 103, 104–05)

In November 1978, Grand Union sold the perishables warehouse to Malone & Hyde and negotiated an arrangement with Malone & Hyde for the supply of perishables. (CX 574 [Goulding] at 130–31)[14] Grand Union's warehouse and the perishables warehouse are literally neighbors. Malone & Hyde stocks Grand Union's private label produce, meats and dairy products. (CX 280B) Malone & Hyde acts as a drayer for the purchase of Grand Union's meat and produce requirements, *i.e.,* someone who performs the function of operating a warehouse and transporting the goods to the stores for a fee. Grand Union buyers continue to select the products and negotiate prices. In the case of dairy products, however, Malone & Hyde acts as a typical wholesaler and performs the entire purchasing function. Respondents state that Grand Union is dissatisfied with Malone & Hyde's performance as a dairy products wholesaler. (Curhan 2946–47; CX 574 [Goulding] at 84; CX 280)

148. The West Coast stores were all supplied out of Grand Union's warehouse located in Hialeah, approximately 220 miles from the city of Orlando and 305 miles from New Port Richey (the location of Grand Union's most distant store on the West Coast). In 1978 Grand Union operated 11 stores on the West Coast of Florida that were between 208 and 305 miles from its Hialeah warehouse. Grand Union's West Coast stores average more than 209 miles away from its Hialeah warehouse,

[14] Malone & Hyde has since built a dry grocery warehouse adjacent to the perishables warehouse. Malone & Hyde supplies many independents throughout Florida. (*See* CX 574 [Goulding] at 54.)

further than the [128] distance between stores and warehouses in other Grand Union divisions. (CX 574 [Goulding] at 53) Industry witnesses consider this further than the maximum efficient shipping distance. (B. Thomas 1473; Spearman 862; Stewart 554; *see also* Adelman 3393)

The cost of servicing stores between 200 and 300 miles away and the service levels at those stores are not very satisfactory. (CX 589 [Wood] at 116; CX 574 [Goulding] at 89) The cost of serving the West Coast stores was projected to be twice as high as that of serving the East Coast stores, and this gap was expected to increase. (CX 71Z13, Z61) Complaint counsel cites Grand Union's commitment to expansion on the West Coast of Florida, the distance from Hialeah, and the fact that the Hialeah warehouse is near capacity and cannot be expanded (CX 574 [Goulding] at 59–60; CX 586 [Tarrant] at 32), as factors which militate Grand Union's building of a new Florida warehouse or turning to a wholesaler. (CPF 666–67)

Grand Union's 1978/79 budget and business plan noted that "with as much of the growth in Florida being on the west coast, we decided against a consolidation of the two grocery warehouses as had been planned." (CX 6Z288) When Grand Union decided not to expand its Hialeah warehouse, it gave up an option on land adjacent to that facility. (CX 589 [Wood] at 102–06; CX 574 [Goulding] at 130) The energy crisis of 1973 was one reason behind that decision. Because of the probable future cost of trucking, supplying West Coast operations from Hialeah would be too expensive. (CX 589 [Wood] at 103–04) Mr. Goulding expected a warehouse to be built in the Orlando area. (CX 574 [Goulding] at 70) Mr. Posey estimated that Grand Union could support a warehouse with 20–30 stores of the type Grand Union was building in Tampa-St. Petersburg. (Posey 1663) Grand Union officials believed that 35–40 stores would be needed to support a warehouse. (CX 574 [Goulding] at 62; CX 586 [Tarrant] at 153–54) Using Publix as an example (CX 611A-D), complaint counsel speculates that Grand Union would have built a subwarehouse for fast-moving items or dry groceries before that time. (CPF 673; CX 586 [Tarrant] at 156; Parker 2361A)

Respondents dispute complaint counsel's assertion that Grand Union would have built a warehouse in central Florida to serve its existing West Coast stores and to allow entry into the Florida SMSAs of Jacksonville, Orlando and Gainesville, labeling this assertion "without basis" and "pure speculation." (RPF 273) Grand Union has not built a warehouse since it was acquired by Cavenham in 1973. (CX 589 [Wood] at 107) Dr. Curhan testified that, although the practical range for serving stores from a warehouse is generally about 200 miles (Spearman 862; B. Thomas 1473; Curhan 2939; Stewart 554), companies will serve stores 100 miles beyond that distance because this may be cheaper and, therefore, more profitable, than making a large capital investment in a new warehouse. [129] (Curhan 3172–73) According to respondents, less than ten of Grand Union's West Coast stores are even beyond a 200 mile radius from Hialeah. (RPF 275) Mr. Wood testified that it is as economical to serve the stores on the lower West Coast up as far as Naples or Venice as it is to serve the East Coast stores. (CX 589 [Wood] at 66, 84–86) He also testified that the Hialeah warehouse remains viable when shipping over longer distances because of its low overhead and high tonnage. (CX 589 [Wood] at 108)

Mr. Goulding explained that distribution to even the northern parts of the West Coast from Hialeah is profitable because:

> The perishable products at present are supplied by a wholesaler who has other distribution, I presume, in the area, so we are shipping just grocery products. We have given up some of the luxury of distribution . . .
>
> We also have a fairly—an economical outside lease arrangement for our trucking fleet out of Hialeah, and we have a relatively, compared to the balance of the country, low-average hourly rate for drivers at the warehouse—the drivers primarily—and trip rates, which is you pay X-number of dollars per trip as opposed to an hourly rate.
>
> We are also using on the Northern most distribution areas—Port Richey, Saint Petersburg—piggyback, which is putting the truck on a rail car and shipping it by train and then picking it up with a tractor and shuttling it to the store. So we have, you know, forced ourselves into the necessary economy to make it work.

(CX 574 [Goulding] at 54)
Mr. Tarrant described the warehouse as "a nice cheap little facility, old, cheap. Supermarket chains make money out of cheap facilities like that." (CX 586 [Tarrant] at 158)

Respondents claim that Grand Union management has considered the options of leasing or subleasing more space in Hialeah, building more warehouse space in Hialeah, locating a warehouse elsewhere in Florida, and using a wholesaler. Only the option of building more warehouse space in Hialeah has received serious attention. (RPF 278, 279; CX 79Z30; CX 80Z94)

Respondents point out that Grand Union's option on land near its Hialeah warehouse was eventually released. No other [130] sites in central Florida or on the West Coast of Florida were considered. (CX 589 [Wood] at 103, 104–05; CX 9Z371) Mr. Tarrant testified that, even with the addition of the Colonial stores in Jacksonville and Tallahassee:

> We are unlikely to build a major new warehouse. It's very, very unlikely. It's a big

resource. It's been the death knell of so many chains already, and I can't see a major development in that direction . . . . Definitely not in the next couple of years.

(CX 586 [Tarrant] at 158)

149. Grand Union also considered using a wholesaler to service its West Coast stores. (CX 574 [Goulding] at 55–58) Despite the potential problems involved in such a move (cost, variety of products, ability to carry chain's private brands—CX 589 [Wood] at 110–111), Grand Union has been in contact with virtually every wholesaler in central Florida. (CX 574 [Goulding] at 55–58; Foy 1796–97) One wholesaler did serve Grand Union's West Coast stores when the Hialeah warehouse was unavailable. (Foy 1793–94)

Respondents deny that Grand Union would have used a wholesaler to enter the three Florida SMSAs. (RPF 283–299) In Grand Union's entire corporate history, the only time it ever used a non-captive wholesaler for dry groceries involved the acquisition of four or five stores in New Hampshire. (CX 580 [Silvers] at 32–34)

The President of Winn-Dixie testified that, with one exception involving serving one outlying store for a short period after the sale of a Winn-Dixie warehouse and stores in Albuquerque, New Mexico, his company has never used a wholesaler, has no intention of using one, and would not enter a new area beyond reach of an existing Winn-Dixie warehouse. (B. Thomas 1514–15)

Some chains regularly use wholesalers, but according to Dr. Curhan, in these cases the chain is generally "married" to the wholesaler, and the warehouse is "dedicated" to the chain. Grand Union's reliance on a broad selection of private label products (CX 10H) would necessitate a wholesaler's dedication of a "slot," *i.e.*, a position within reach of a "selector" where all the given items are stocked, for each size of each Grand Union item. This would require the services of a wholesaler with significant excess capacity. (Curhan 2945–49; RPF 287)

Although Mr. Foy of Certified Grocers, a wholesaler in Ocala mentioned by Dr. Parker as a possibility for Grand Union **[131]** (Parker, 2360), testified that his company could serve Grand Union stores (Foy 1790), he did express some reservations about the detrimental effects which might be suffered by the independents already served by Certified. (Foy 1917–19) Certified would probably be unwilling to serve Grand Union on a short term basis, *e.g.*, one to two years. (Foy 1820–21)

Grand Union's 1976 study compared the costs of servicing the 22 planned stores, by department, from Grand Union's warehouses with three independent wholesalers: Certified, Affiliated, and Keefe. For groceries it concluded that Grand Union's warehouse was the most economical alternative (CX 71Z46), and referred to the following disadvantages of using a wholesaler:

- Private label merchandise would have to be shipped either on the perishable trucks or by distribution every two to three weeks.
- The sales programming would be complicated in that additional time would be needed because of review of outside suppliers' allowances and deals. These could be different than our deals and costs.
- It would entail the maintenance of another price zone separate from the present system where all zones are together on one print-out.
- Promotional allowances would be off invoice rather than separate.

* * * * * * *

- Unless our volume was sufficent, they would not carry private label. This could be handled by shipping a trailer load between stores every one - two or three weeks, depending on volume.
- Programming would be separate based on offers available through the wholesaler.
- Loss of cash discount (1½ on grocery sales)
- Promotion allowances would be about 10% less than presently earned.
- In-stock position would be controlled by the wholesaler.
- If we shipped dairy and frozen food from the wholesaler, the cost of shipping other perishables from our warehouse would increase **[132]**
- Bakery would be only national brands or can be shipped with meat or produce.

(CX 71Z–46, 48)

Grand Union's study, described above, was made in 1976. Grand Union had contacts with wholesalers in 1977 and 1978, indicating that the studies did not rule out use of wholesalers. (CX 590; CX643C; Foy 1796)

Respondents acknowledge that Grand Union management has had conversations with wholesalers regarding servicing its existing stores in Florida, but according to Mr. Wood, "frankly we couldn't get the sort of service that we needed in terms of the production." (CX 589 [Wood] at 110) Grand Union approached Certified in late 1977, but Certified was unable to serve Grand Union at the time. A year later, Mr. Foy made an overture to Grand Union, but Grand Union had no interest then. (Foy 1795–96) Grand Union also contacted Super Foods of Orlando. Mr. Twyman, Chairman and Chief Executive Officer of Super Foods, responded that Super Foods was not then equipped to handle even the limited number of Grand Union stores on the West Coast. If, in the future, Grand Union were interested in using Super Foods for all its Florida stores, Super Foods would have to enlarge its facilities to Grand Union's specifications, and Grand Union would be required to make a long-term commitment to Super Foods. (CX 574 [Goulding] at 84–86)

Certified Grocers served Grand Union's stores for a short period of time when Grand Union's Hialeah warehouse was having problems. Grand Union's store managers were happy with the service, which was superior to that provided by Grand Union. (Foy 1790–94) The record also indicates that wholesalers can provide suitable variety. (Foy 1790; CX 71Z49) Albertson's which operates large supermarkets, is supplied by a wholesaler. (CX 643A)

### J. *The Jacksonville, Florida SMSA*

#### 1. Demographics and Location

150. The Jacksonville SMSA (F. 43) was the fourth largest in the state and the 56th largest in the country. As of July 1, 1978, the Jacksonville SMSA had an approximate population of 701,500, an increase of 79,600, or 12.8% over that of April 1, 1970, nearly twice the national average. (Bureau of the Census, Population)

Jacksonville is located in Northeast Florida on the St. Johns River and is the following distance from other Florida and Georgia cities: **[133]**

| | |
|---|---|
| 167 miles from | Thomasville, Georgia |
| 72 miles from | Gainesville, Florida |
| 348 miles from | Miami, Florida |
| 100 miles from | Ocala, Florida |
| 139 miles from | Orlando, Florida |
| 360 miles from | Pensacola, Florida |
| 264 miles from | Panama City, Florida |
| 166 miles from | Tallahassee, Florida |
| 194 miles from | Tampa, Florida |
| 281 miles from | West Palm Beach, Florida |

(Rand McNally)

151. According to complaint counsel's survey, the shares of food and grocery store sales of the top eight competitors in Jacksonville in 1972 and 1977 were as follows:

| | 1972 | | | 1977 | |
|---|---|---|---|---|---|
| Competitor | Food Store Sales (%) | Grocery Store Sales (%) | Competitor | Food Store Sales (%) | Grocery Store Sales (%) |
| Winn-Dixie | 23.3 | 25.0 | Winn-Dixie | 23.2 | 24.7 |
| Food Fair | 20.2 | 21.6 | Food Fair | 15.9 | 17.0 |
| A & P | 6.7 | 7.1 | Publix | 14.4 | 15.4 |
| Publix | 6.1 | 6.6 | Colonial | 6.0 | 6.4 |
| Colonial | 5.4 | 5.8 | A & P | 4.1 | 4.3 |
| Daylight Grocery | 4.1 | 4.4 | Albertson's | 3.7 | 4.0 |
| Munford | 3.1 | 3.4 | Daylight Grocery | 3.1 | 3.3 |
| Southland | 2.9 | 3.1 | Huntley Jiffy | 2.9 | 3.1 |

(CX 2K)

Winn-Dixie, operating over thirty stores (CX 665Z271–Z277), maintained a share of approximately one-quarter of food sales in Jacksonville. Food Fair retained its second place spot, despite a drop in market share of five percentage points. A & P with 17 stores and ranked number three in 1972, had eight stores and was ranked fifth in 1977. (CX 665Z236) Publix rose to number three from number four and more than doubled its market share over the five-year period. Colonial was number five in 1972 and number four in 1977, gaining a small increase in market share. Daylight Grocery, number six in 1972 was number seven in 1977, replaced in the higher position by Albertson's. Munford and Southland, both convenience store chains, dropped from the top eight in 1977. Huntley Jiffy, with 65 convenience stores in this SMSA (CX 665Z238), became number eight in 1977. **[134]**

Four-firm concentration ratios for grocery stores, (SIC 541), were:

| 1972 | 1977 |
|---|---|
| 56.2% | 64.8% |

Four-firm concentration ratios for supermarkets were:

| 1972 | 1977 |
|---|---|
| 82.5% | 82.1% |

(F. 52, 53)

Convenience stores, both chain and independent, independent supermarkets, warehouse, and box stores not listed in CX 2K, but operating in Jacksonville, are as follows:

| | 1972 | | 1977 | |
|---|---|---|---|---|
| | Number of Stores | Volume ($000's) | Number of Stores | Volume ($000's) |
| Southland | 59 | 8,654 | 53 | 13,318 |
| Lil' Champ | 13 | 1,293 | 61 | 12,075 |
| Munford | 84 | 9,489 | 78 | 10,652 |
| Pic n' Save | 3 | 4,517 | 3 | 7,314 |
| Zippy Mart | 13 | 2,321 | 25 | 5,001 |
| Premier Meats | 2 | 2,208 | 1 | 1,714 |
| Banner Food Store (Sunrise Enterprises) | 1 | 693 | 1 | 1,070 |

(CX 665Z221–Z277)

2. Colonial in the SMSA

152. In 1977, Colonial was ranked fourth in both supermarket and grocery store sales in the Jacksonville market with shares of 8.4% and 6.4%, respectively. (CX 664; CX 2K; Admission 45) Colonial operated 13 supermarkets in this SMSA in that year. (Admission 46) The 1979 five-year plan developed for Jacksonville by Colonial management included plans for one new store in this SMSA every year from 1979–1983. (CX 358C) As of December, 1979, Colonial's market share in Jacksonville had increased to approximately 9–11%. (Spearman, 904–05)

In a 1980 report prepared by Colonial/Grand Union management, the market shares and major competitors (all supermarket companies) for Jacksonville were identified as follows: [135]

| Competitor | No. Stores | Market Share (%) |
|---|---|---|
| Colonial | 13 | 11 |
| A&P | 6 | 7 |
| Pantry Pride | 17 | 22 |
| Publix | 11 | 14 |
| Winn-Dixie | 33 | 24 |

(CX 252Z70)

It is respondents' contention that, according to complaint counsel's survey, Colonial's share of grocery store sales in 1977, at 6.4%, was so small that the acquisition by Grand Union of Colonial's Jacksonville stores represented a legal toehold. (RPF 379–388)

Colonial began its operations in Jacksonville in 1957 with its acquisition of Jack's Meats (Roehm 2726) and, according to respondents, Colonial management had never been able to derive a profit from the Jacksonville stores. (Roehm 2726) Colonial's internal records show the Jacksonville stores' net profits (losses) for the years 1971–77 as follows:

| Year Ending Dec. 30 | Number of Stores | Losses |
|---|---|---|
| 1971 | 13 | (418,994) |
| 1972 | 11 | (353,246) |
| 1973 | 11 | ( 98,295) |
| 1974 | 11 | (126,018) |
| 1975 | 11 | (708,730) |
| 1976 | 11 | (383,719) |
| 1977 | 11 | (846,076) |
| | Total | $(2,935,078) |

(CX 333B, D., F, M)

Similarly, internal records show that the Jacksonville stores had losses each year from 1960–1969 inclusive, aggregating $1,140,209. (CX 364D)

Dr. Curhan testified that the stores were not modernized and the merchandise was not priced competively. (Curhan 2953) Mr. Roehm stated that, but for the acquisition, Colonial management would likely have been forced to retrench or withdraw from Jacksonville. (Roehm 2727–28)

A Colonial document of 1970 described the eleven stores Colonial operated in this SMSA at that time as "hardly a factor in the market." (CX 364H) It stated that **[136]** Colonial "operate[s] relatively small stores with low sales per square foot and all the inherent problems that go with low volume." (CX 364H) This document further stated:

> To sum up, Colonial certainly has a third-class position in the Jacksonville market. Its history is certainly undistinguished. But, Jacksonville is not what you would call a tough market, in the larger sense. With a program of store development, good merchandising plan and stronger operations, Colonial Stores can grow into a major factor in this market. Not only are Winn-Dixie and A & P very vulnerable, there is at least 10 to 12 percent share of market now going to independent operators that should go to chain stores. This along [sic] is worth over $300,000 a week.

(CX 364I)
The report concluded that Colonial should convert all its stores to Big Star stores, as well as other merchandising measures, to improve sales. (CX 364L-N) Later that year, Mr. Spearman went to Jacksonville on a special assignment to implement the merchandising plan which had been developed to improve store sales. (Spearman 720) The program was not a success. (Spearman 904)

3. Barriers to Entry into Florida and the Jacksonville SMSA

153. Throughout much of Florida, Winn-Dixie and Publix are the dominant supermarket chains. This is true in the three Florida SMSAs at issue in this case. (CX 2G, K, O) Florida developers generally look to these firms first, because it is felt that they draw more people to a shopping center. (Posey 1642–43; Spearman 744–766)

Some independents have experienced difficulty expanding into adjacent Florida markets. For example, Tampa Wholesale was unable to effectively break into nearby Orlando from its strong market position in Tampa. (Posey 1629, 1656, 1659; Foy 1799) U-Save a major firm in Tampa, has not been able to enter adjoining Pinellas County (St. Petersburg). (Posey 1656)

Dr. Parker testified that, in his opinion, barriers to entry are high in the Jacksonville SMSA. (Parker 2366)

Mr. Stewart stated that, to enter Jacksonville and become a factor, a firm would need four to six stores of 30,000 square feet each. (Stewart 589) Publix and Albertson's entered the Jacksonville market with four large stores over several years. (CX 343C, 611A-B) [137]

Carol Cheek, a successful independent operator, considered entering the Jacksonville market by acquiring three A & P stores, but decided against this. One reason for this decision was that Mr. Cheek believed seven stores were necessary to afford the required amount of advertising. (Cheek 1590, 1596)

Mr. Stewart testified that even established Florida firms with existing name recognition must enter Jacksonville with four large stores to afford effective advertising. He cited Publix as a firm that entered with two stores and had difficulty serving Jacksonville, despite the fact that this company is a household name in Florida. (Stewart 589)

4. Performance of the Florida Market and the Jacksonville SMSA

154. Dr. Parker testified that, in his opinion, the three Florida markets are performing less than competitively. (Parker 2359, 2362, 2366; *see also* Marion, 1976A–78) The market leaders, in this case Publix and Winn-Dixie, set price policies and the other firms follow. (Stewart 632–33; Spearman 728–29, 800–01)

Mr. Foy of Certified Grocers, Inc., described the pricing structure in Florida, stating that when he ". . . first came to Florida and started to look around, that there was unquestionably in my mind the idea brought out very firmly that Publix and Winn-Dixie were holding a price umbrella over all food prices. Everybody else was living within that umbrella. Up to it in most instances, I was quite surprised." (Foy 1800)

Winn-Dixie has been Jacksonville's dominant firm (Roehm 2785; CX 364H), and it has had higher prices than all of the other leading supermarket firms. (Roehm 2785–86) Winn-Dixie has not initiated a broad lowering of prices in Jacksonville. It offers lower service level and has smaller and less efficient stores. (Roehm 2786–87, 2809–10; CX 364H-I)

There are few independents in all of Florida. (Cheek 1585; Foy 1826; CX 436A) Independent grocery store firms have had difficulty growing in Jacksonville. (Spearman 955–56; Foy 1826–27)

Mr. Gooding stated that non-market leaders do not initiate broad price cuts because they fear retaliation by Winn-Dixie and Publix. (Gooding 1122–23) He testified that he was coerced into raising the price of milk by an employee unidentified of a supermarket chain. (Gooding 1162–63)

Complaint counsel cites evidence that Winn-Dixie built stores in areas which could not provide the business, merely to pre-empt competitors. (CPF 645; Posey 1643–45; Stewart 671–73; [138] CX 638B)

This is a strategy that may be used by a dominant firm to preserve its market share. (Posey 1643; CX 643B)

Respondents argue that CX 2K overstates the concentration ratios in this market because it fails to take into account the commissaries serving Jacksonville and understates the significance of convenience stores. (RPF 341) Sales of the three commissaries operating in Jacksonville during fiscal 1978 (which included three months of calendar 1977) were as follows:

| Name | Amount ($Millions) |
|---|---|
| Cecil Field Naval Air Station | 4.5 |
| Jacksonville Naval Air Station | 14.6 |
| Mayport Naval Station | 6.9 |

(*See* Curhan 2943, 3006.)
The combined sales of $26 million would rank commissaries fifth in 1977 in terms of sales in Jacksonville, replacing A & P. Mr. Roehm testified that, in order to compete with Jacksonville commissaries, Colonial keeps its prices on bread, milk, and other staples competitive and tries to offer a higher level of service. (Roehm 2732)

Mr. Roehm also testified that Jacksonville was the most competitive area within the Thomasville Division (Roehm 2736), and that when he came to the Division in 1978, food prices were lower in Jacksonville than in Orlando (Roehm 2728), a situation he attributed to the fact that Publix, a market leader in both cities, was unable to give away S&H Green Stamps in Jacksonville because Winn-Dixie had the franchise. Therefore, Publix competed in Jacksonville by decreasing prices. (Roehm 2729)

In regard to Winn-Dixie's success in Jacksonville, Mr. Roehm testified:

> It's sheer numbers. They have 35 stores in that SMSA, more than twice as many as any other competitor. It is a convenience factor, if nothing else. Just like convenience stores take a substantial portion of food dollars away from us and other operators, Winn-Dixie does the same thing. They are glorified convenience stores in those cases. . . . There are some people who just aren't price-conscious consumers. Our research has indicated that for a long time. There's a lot of people who just shop purely for convenience or other reasons. We conducted a survey recently in Jacksonville and happened to get some Winn-Dixie customers and got the responses "My mother always shopped at Winn-Dixie, and I have always shopped [139] at Winn-Dixie." So they have never been any place else.

(Roehm 2809–10)

Pantry Pride, number two market factor, has been the low-price leader in Jacksonville since the 1960's when Food Fair converted its Jacksonville stores to its discount Pantry Pride format. (Roehm 2730–

31) Although the stores are in generally poor condition as a result of Food Fair's financial difficulties, the Jacksonville division remains a good one for Food Fair. (Curhan 2942–43)

Publix, which is now ranked third, first attempted to enter Jacksonville simultaneously with entry into Miami in the late 1950's. It did not have sufficient manpower or money to enter both markets at the same time, and it decided to concentrate on Miami and withdraw from Jacksonville. (CX 611A; [Stipulated testimony of J. Blanton, President of Publix]) Publix began re-entering Jacksonville in 1971. It has eight 34,600 square foot stores in Duval County. (CX 611 [Blanton] A-B) Its share of food store sales has increased since 1977. (Roehm 2784) It is Publix's policy to carry an unusually large variety of grocery items, more than any of its major competitors, including Grand Union. (CX 611D) [Stipulated testimony of J. Blanton, President of Publix])

Albertson's entered Jacksonville with two stores in approximately 1975. (Roehm 2730) It opened two more stores in 1978. (Roehm 2730) Mr. Roehm estimated its market share had increased to 6 or 7% by 1980. (Roehm 2785)

A & P has closed its Jacksonville warehouse and many of its Jacksonville stores. It has not withdrawn from the area entirely and still has five stores in Jacksonville. (Spearman 904; Roehm 2733)

Jewel opened its first two Jewel T box stores in Jacksonville during 1977. (CX 665Z242) By the end of 1979 it had 15 box stores operating in the area. (Curhan 2954) Colonial has reacted to these stores by adding generic products to enable it to compete price-wise on staple items. (Roehm 2731)

Jacksonville also has several multi-store independents which operate conventional supermarkets: Daylight Stores, Banner Food Stores, C&C Markets and Big Ten. [15] Daylight, **[140]** which is in the top eight, does very well in certain areas. (Roehm 2731) It operates four supermarkets and 19 convenience stores. (CX 665Z228; CX 665Z223) Banner Foods operates one store and has leased one of the smaller Colonial stores which Grand Union has closed. (Spearman 956; CX 665Z224) There are also Pic n' Save stores in Jacksonville. Two of the Pic n' Save stores are complete supermarkets with standard departments. The others, which are part of drug/general merchandise stores, carry a modified line of dry grocery items as part of their standard merchandising program. (Roehm 2731–32)

Respondents contend that Jacksonville has an extremely high ratio of convenience store sales to all other grocery store sales. (RPF 353; Curhan 2837–38), which, they argue, makes it "obvious that many

[15] Apparently neither C&C Markets nor Big Ten was surveyed by complaint counsel. C&C operates "superettes." (*See* CX 665Z221–Z277; Spearman 785)

consumers in Jacksonville regularly choose convenience over price." (RPF 353; *see also* Roehm 2809–10)

5. Grand Union as a Perceived Potential Entrant

155. Bert Thomas, President of Winn-Dixie, which has both its corporate headquarters and a division headquarters in Jacksonville, never perceived Grand Union as a likely entrant into Jacksonville. (B. Thomas 1513) Mr. Roehm, a Grand Union official, concurred. (Roehm 2743–44)

Mr. Stewart testified that in June 1978, he perceived A & P Family Mart as the most likely potential entrant into Jacksonville because, he said, A & P had withdrawn some of its conventional stores from Jacksonville and had begun opening Family Marts in Northern Florida. (Stewart 598) He also testified that he perceived "possibly Grand Union [but] I think A & P would have been a quicker likely entry into the market." (Stewart 5988)

Mr. Spearman testified that in 1978 he perceived Grand Union and Albertson's as likely entrants into Jacksonville. (Spearman 788) However, he testified that the only basis for his perception regarding Grand Union was "because at that particular time, their entry into the West Coast and they were moving up the West Coast of Florida." (Spearman 788) He knew that Albertson's was looking for sites in Jacksonville at the time (Spearman 788), but had never heard any rumors or had any basis to believe that Grand Union had looked for sites there. (Spearman 907–08) In fact, Albertson's was already in the **[141]** marketplace in 1978. (CX 2K) Mr. Spearman testified that Colonial never took any competitive action based on his perceptions regarding Grand Union. (Spearman 907) No Colonial document prepared prior to the tender offer suggests that Grand Union was perceived by Colonial as a potential competitor.

6. Grand Union as a Potential Entrant

156. Complaint counsel points out that, because Grand Union might be expected to build a warehouse in central Florida within the next five years (F. 148), Grand Union would have strong incentive to expand rapidly in the three Florida SMSAs, including Jacksonville. (CPF 676) Grand Union is the only major factor in the Miami market which is not operating in Jacksonville. (Parker 2367)

Respondents dispute the idea that Grand Union was a likely potential entrant into Jacksonville. They find it "inconceivable" that Grand Union would attempt to enter three new areas in Florida (the three Florida SMSAs) within the five-year time span predicted by Dr. Parker. (Parker 2368; Curhan 2931–32; F. 145, 146) Respondents contend this is especially true because of Grand Union's difficulties in the

West Coast of Florida and its unprofitable East Coast operations. (CX 6Z50–Z54,Z136; CX 7Z252) In addition, they argue, respondents' supervision of the stores would create serious problems because of the remoteness of Jacksonville from Grand Union's existing operations. (Curhan 2950–51) Grand Union prepared a "Study, Florida West Coast Development Plan, 1976–1980." (CX 71) This study mentions stores to be opened on the West Coast of Florida; there is no mention of Orlando, Gainesville, or Jacksonville. Business plans prepared in 1978 make no mention of stores to be opened in these SMSAs. (CX 6Z133–Z134, Z266)

The fact that Grand Union is unionized is another suggested reason that it would have been unlikely to enter Jacksonville. Only A & P, Food Fair (Pantry Pride) and Colonial are unionized in Jacksonville. (Roehm 2732) None of the three did particularly well in the 1970's vis-a-vis their nonunionized competitors. (CX 2K) Were Grand Union to have opened stores in Jacksonville, they would probably have been unionized, and would suffer a cost disadvantage of 2–3%. (Curhan 2944)

Respondents are skeptical of the suggestion that Grand Union would enter this area by purchasing A & P stores, because these are similar to the older type of Colonial stores that Grand Union has been closing. (RPF 378; Curhan 3138–39)

7. Alternative Means of Entry

157. Complaint counsel contends Grand Union could have built a warehouse as an alternative means of entry into Jacksonville. (F. 148) Grand Union has been utilizing a **[142]** wholesaler, Malone & Hyde, to supply its Florida stores with perishables; *i.e.*, produce, meats and dairy products. (F. 147) In addition, several wholesalers Grand Union has contacted now service stores in Jacksonville. (Foy 1781; F. 149) Super Food Services Albertson's and A & P stores in Jacksonville. (CX 643A-C) Publix and Albertson's have entered Jacksonville by *de novo* expansion in the last ten years. (CX 611A-D; CX 643A-C; CX 665Z222–Z223; Parker 2245–46; Roehm 2730) Three A & P Stores and a warehouse were available in Jacksonville in 1978. (CX 432; CX 643A; Cheek 1589–90, 1619) Respondents dispute the contention that A & P is a realistic entry alternative. (*See* F. 156.)

8. Other Potential Expanders and Potential Entrants

158. Publix re-entered the Jacksonville area within the last ten years. (CX 611 [Stipulated testimony of J. Blanton, President of Publix]) It began opening stores in Duval County, within which the City of Jacksonville is located, in 1971 and had eight stores by 1978. (*Id.* at B) Publix has done well in terms of market share in the short period

since its re-entry (15.4% of grocery store sales in 1977). (*See* CX 2K.) It is expanding its Jacksonville warehouse (CX 611C [Stipulated testimony of J. Blanton]) and is likely also to expand its number of stores.

Jewel, a 1977 entrant into Jacksonville, had 15 box stores by 1979. (Curhan 2954) Dr. Curhan testified that Jewel can be expected to expand. (Curhan 2954)

Albertson's, a recent entrant into Florida—about 1975, now has four combination stores in Jacksonville. (CX 665Z222–Z223; Roehm 2730) Respondents note that Jacksonville, unlike Orlando and other parts of Florida, is not a particularly prosperous area. (RPF 364) It is a "blue collar," working-class town with a lower average income than other areas of the state. (Roehm 2733; Curhan 2943; *see also* F. 154) In 1970, a Colonial document described Jacksonville as follows:

> [A] "cheap" market. Low-end merchandise moves well. The average wage is lower than many major cities. . . . They are not nearly so brand conscious as they are penny conscious.

(CX 364I)
Chain food store operators generally prefer to open stores in affluent areas (Curhan 2914), which is an indication that Jacksonville may experience less chain store entry than other parts of Florida. Nevertheless, when asked whom he perceived as likely to enter Jacksonville, Mr. Roehm testified: **[143]**

> Well, of course, in a market the size of Jacksonville anybody could have entered it at any given time if they'd had the commitment with one or more stores. The possibility always existed again, you know, that anybody could have entered. A lot of people would like to be in the Sun Belt, particularly in a growth state like Florida.

(Roehm 2733)

Great Scott of Florida is cited by respondents as a potential entrant into Jacksonville. Mr. Cheek, President of Great Scott, testified that he has considered entering Jacksonville as well as Orlando. He prepared a written market survey of Jacksonville in the Fall of 1978, did an aerial survey and considered purchasing three A & P stores. (Cheek 1589–90, 1619) However, he believed that he required six or seven stores in Jacksonville for his type of advertising program. (Cheek 1596) He remains a potential entrant. Messrs. Stewart and Roehm perceive Lucky as a potential entrant into Jacksonville through Kash'N Karry. The basis of both their perceptions was the article regarding Lucky's expansion plans which appeared in *Supermarket News.* (Stewart 655; Roehm 2734) Mr. Stewart also thinks A & P Family Mart is a potential entrant. (Stewart 598) Mr. Roehm named Kroger as likely to enter Jacksonville. (Roehm 2734) Kroger has long been rumored to be interested in Florida. (Curhan 2954) Since the date of Mr. Roehm's testimony, Kroger has opened an experimental mini-combo drug/supermarket in Melbourne, Florida. (RX 39)

Respondents contend Piggly Wiggly Southern of Vidalia, Georgia, which already serves stores in the Georgia portion of the Jacksonville Market Area as defined by *Progressive Grocer* (*see* Curhan 3162–63; RX 30R-T), is within "striking distance" of the Jacksonville SMSA and may be considered a potential entrant. (Curhan 2953) T. J. Morris of Savannah, Georgia, serves stores in the Jacksonville Market Area, 147 miles away. (RX 30R-T) Similarly, David's Market, Food Town Super Markets, Inc. and M & M Super Markets, Inc., all with warehouses in Savannah, are within "striking distance" of Jacksonville. (RX 30T) Therefore, in addition to Lucky's, Kash'N Karry, B & B Cash Grocery Stores and E. J. Keefe Co., Inc., both of which have warehouses in Tampa, may be considered potential entrants into Jacksonville. (RX 30T)

### 9. Changes in Colonial's Jacksonville Operations Since the Acquisition

159. Dr. Parker testified that Grand Union would likely have entered the Jacksonville market on a scale significant enough to become a factor in this market (Parker 2271), and, therefore, Grand Union's acquisition of Colonial substantially lessened competition in Jacksonville because entry by **[144]** alternative means would have made Grand Union a new factor in the market and would have had a deconcentrating effect. (Parker 2368–69)

Respondents view Grand Union's acquisition of Colonial's Jacksonville operations as beneficial to that market. (RPF 383–88) When Mr. Roehm joined the Thomasville Division prior to the tender offer, Jacksonville was the only significant metropolitan market in which the Division had stores. Although the attitude of the Division was that in order to continue operating, it would have to increase sales and decrease losses in Jacksonville, Colonial had developed no plan for doing so. (Roehm 2728) At the time, Colonial had 12 stores in Jacksonville, of which only two were in the middle income, growth areas. (Roehm 2730) Except for two stores in Orange Park and one in Fernandina Beach, the other nine were all older stores which had never been renovated. (Roehm 2726) Although the stores were in generally average locations, they were not physically as attractive as those of the competition and did not offer the amenities which many consumers demand today such as delis, bakeries and expanded lines of general merchandise. (Roehm 2728)

The two stores in Orange Park were three miles apart and, according to Mr. Roehm, too close together, in an area too small for two stores. (Roehm 2727; Spearman 906) Grand Union has since closed one store, and the remaining Orange Park store is doing well. (Roehm 2727; Spearman 906) Since the acquisition by Grand Union the Jacksonville stores have shown an increase in sales volume, although they have still not achieved profitability. Mr. Spearman attributed the improvement in volume to increased advertising, particularly use of television, the aggressiveness of new management, and management's willingness to invest today for growth tomorrow. (Spearman 905–07)

Four of the twelve Colonial stores in this SMSA have been closed (Roehm 2735), and Grand Union is seeking new sites in Jacksonville. (Roehm 2736) The stores are receiving increased supervision because Grand Union has created a new position of a superintendent of stores resident in Jacksonville, as well as having two Jacksonville district managers. (Spearman 906)

In 1980, Grand Union completely renovated and reopened two stores, and installed deli/bakeries, at a cost in excess of $2 million. (Roehm 2734) Grand Union ceased giving trading stamps in 1980. The stores are now more price competitive. Grand Union has lowered margins to enable them to be competitive with Publix and Pantry Pride. (Roehm 2735) The stores now carry a greatly expanded general merchandise section. (Roehm 2736) In addition to helping the stores compete in terms of product variety, particularly as against Publix (*see* CX 611D **[145]** [stipulated testimony of J. Blanton, President of Publix]), it allows Colonial to be more price competitive than before on grocery items. (Roehm 2736)

### K. *The Orlando, Florida SMSA*

#### 1. Demographics and Locations

160. As of July 1, 1978, the Orlando SMSA (F. 47) had an estimated population of 609,900, up from 453, 270, or 34.6%, from April 1, 1970, an increase 4.5 times the national average. Orlando was the 65th largest SMSA in the country and the fifth largest in Florida. (Bureau of the Census, *Population*)

Orlando is located in central Florida. The center of the Orlando SMSA is located approximately 228 miles from Miami, connected by interstate highway. (Rand McNally) The distances from Orlando tc other Florida and Georgia cities are:

| | |
|---|---|
| 72 miles from | Ocala, Florida |
| 139 miles from | Jacksonville, Florida |
| 245 miles from | Tallahassee, Florida |

| | |
|---|---|
| 82 miles from | Tampa, Florida |
| 109 miles from | Gainesville, Florida |
| 104 miles from | St. Petersburg, Florida |
| 164 miles from | West Palm Beach, Florida |
| 250 miles from | Thomasville, Georgia |

(Rand McNally)

161. According to complaint counsel's survey, the shares of food and grocery store sales of the top eight competitors in Orlando in 1972 and 1977 were as follows:

**1972**

| Competitor | Food Store Sales (%) | Grocery Store Sales (%) |
|---|---|---|
| Winn-Dixie | 22.9 | 24.3 |
| Publix | 20.0 | 21.2 |
| Food Fair | 14.2 | 15.1 |
| Fairway Markets | 7.1 | 7.5 |
| Southland | 5.5 | 5.9 |
| A & P | 3.2 | 3.4 |
| Goodings | 2.1 | 2.2 |
| Munford | 1.6 | 1.7 |

**1977**

| Competitor | Food Store Sales (%) | Grocery Store Sales (%) |
|---|---|---|
| Winn-Dixie | 21.1 | 22.2 |
| Publix | 20.3 | 21.4 |
| Food Fair | 8.2 | 8.6 |
| Albertson's | 8.2 | 8.6 |
| Southland | 4.9 | 5.1 |
| A & P | 2.9 | 3.0 |
| Goodings | 2.6 | 2.8 |
| Shop n' Go | 1.7 | 1.8 |

(CX 2-0) [146]

The four-firm concentration ratio, in terms of grocery stores sales, declined by approximately 8 percent between 1972 and 1977. (CX 20) Colonial was not among the top eight firms in either of these years. (CX 665Z337-Z422) Winn-Dixie had 27 stores in 1977. (CX 665Z416) Publix went from 14 to 20 stores during the five-year period. (CX 665Z407) Food Fair's market share declined by almost 50% between 1972 and 1977. Its 1977 market share was only a fraction of a percent higher than fourth ranked Albertson's, which entered Orlando in 1975. A & P remained sixth-ranked, although its absolute share declined. Goodings, a local independent, remained the seventh-ranked competitor. There are two convenience store chains in the top eight—Southland and Shop n' Go. (CX 665Z391, Z409) The following convenience stores were also in business in Orlando in 1977:

| Name | Number of Stores |
|---|---|
| ajik Market | 31 |
| il Champs | 20 |
| enneco Oil | 18 |
| 'l General | 11 |
| arm Store Foods | 1 |

X 665Z395, Z397, Z402, Z405, Z414)

Four-firm concentration ratios for grocery stores, (SIC 541), were:

| 1972 | 1977 |
|---|---|
| 65.7% | 60.1% |

Four-firm concentration ratios for supermarkets were:

| 1972 | 1977 |
|---|---|
| 83.5% | 79.5% |

(F. 52, 53)

2. Colonial in the SMSA

162. In 1977, Colonial had a small market share in Orlando and operated only two stores. (Admissions 61) Despite losses in Orlando, Mr. Boyce, Colonial's Chairman and Chief Executive Officer, was committed to this market. (Spearman 799, 807; *see also* F. 144) Some of Colonial's competitors believed that Colonial maintained these two Orlando stores until it started an expansion program. (Gooding 1163–64) Orlando's status as a high-growth area made it a prime expansion target **[147]** due to the potential availability of sites. (CX 589 [Wood] at 93–94; Roehm 2795) Colonial planned to close its old Orlando stores in 1983, if the stores could not be sold before that date. (CX 358C)

3. Barriers to Entry

163. Dr. Parker testified that, in his opinion, barriers to effective entry into Orlando are significant. (Parker 2358–59) To maximize advertising expenditures and other advantages that correspond to size, a supermarket firm would seek to enter with four to twelve locations to effectively compete. (Spearman 802–03; Stewart 588; CX 607 [Rowe] at 30–31; Posey 1652; Gooding 1149–50; Roehm 2717) Development preference for Publix and Winn-Dixie makes acquisition of good store sites more difficult, particularly for independent operators. (Gooding 1139) This may result in an independent's need to purchase land and hold it until an area can support a store (Gooding 1139; Cheek 1584), which limits an independent's ability to expand. (Posey 1656–57)

4. Performance of the SMSA

164. Dr. Parker testified that, based on his analysis of the structure of this market, it is very likely that it is performing less than competitively. (Parker 2359)

Some Orlando competitors stated that the Orlando market is characterized by price leadership and that neither Publix nor Winn-Dixie