IN THE MATTER OF

COCA-COLA BOTTLING COMPANY OF NEW YORK, INC.

DISMISSAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket 8992. Complaint, Sept. 10, 1974 — Final Order, Jan. 23, 1979

This order dismisses a complaint issued against a New York City producer and marketer of various products, including soft drinks and wine, for alleged violations of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The Commission, in dismissing the complaint, held that evidence failed to establish that the firm's merger with Franzia Bros. Winery would substantially lessen competition.

Appearances

For the Commission: *Joseph S. Brownman, John F. Stephens, Jr., Charles G. Brown* and *Elizabeth M. Brown.*

For the respondent: *Christopher Crowley, Arthur F. Golden, Michael Mills* and *Susan K. Jackson, Davis, Polk & Wardwell,* New York City.

COMPLAINT

The Federal Trade Commission having reason to believe that Coca-Cola Bottling Company of New York, Inc. (hereafter New York Coca-Cola), a corporation and the respondent herein, has violated the provisions of Section 7 of the amended Clayton Act (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) by its acquisition of Franzia Brothers Winery (hereafter Franzia), hereby issues this complaint stating its charges as follows.

I. ACQUIRING COMPANY

PARAGRAPH 1. Respondent New York Coca-Cola is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 425 East 34th St., New York, New York.

PAR. 2. New York Coca-Cola is a major industrial corporation engaged in three lines of business: (i) the production and sale of soft drinks, (ii) the production and sale of wines, and (iii) the manufacture and marketing of picnic chests, beverage coolers and extruded plastic sheet. New York Coca-Cola sales doubled during the last five years. Net sales for its fiscal years ending December 31 were:

$211,584,000 in 1972; $189,698,000 in 1971; $141,549,000 in 1970; $117,730,000 in 1969; and $103,421,000 in 1968.

PAR. 3. New York Coca-Cola is engaged primarily in the production and marketing of Coca-Cola, Fresca, Tab, Sprite and Fanta flavors in bottles, cans and bulk containers. In 1970 and 1971 New York Coca-Cola further expanded its line of soft drinks when it obtained franchises from Dr. Pepper Company to produce and market bottled and canned Dr. Pepper [2] and Sugar Free Dr. Pepper. In 1972 New York Coca-Cola acquired the Igloo Corporation which manufactures and markets on a national basis picnic chests, beverage coolers and extruded thermoplastic sheet.

PAR. 4. New York Coca-Cola entered the wine industry with its acquisition of Mogen David Wine Corporation (hereafter Mogen David) in 1970. Recently, New York Coca-Cola expanded its wine business with the acquisition of Tribuno Wines, Inc. (hereafter Tribuno) in 1973. With these acquisitions New York Coca-Cola became one of the leading producers of wine in the United States. The wine products of both of these wholly-owned subsidiaries are marketed throughout the United States. The Franzia acquisition represents the third such acquisition in the wine industry by New York Coca-Cola.

PAR. 5. New York Coca-Cola is the fifth largest producer of wine in the country. In 1972 Mogen David and Tribuno accounted for 3.9 percent of wine sales in the United States and 4.6 percent of the sales of domestically produced wine in the United States. 1972 was an excellent year for Mogen David. The company enjoyed a sales growth of 32 percent, far outstripping the wine industry's 10 percent average growth. Mogen David has begun marketing three new products, Cold Bear, Mogen David Concord, and MD 20 20, each of which have sold over one million cases in their second year of distribution. This represents a sales level attained by only a handful of brands in the American wine industry.

PAR. 6. As a result of its Tribuno acquisition, New York Coca-Cola is the largest producer of vermouth in the United States. Tribuno holds a 12.3 percent share of the total vermouth market, and its share of domestically produced vermouth is 24 percent. Thus, Tribuno ranks first among all domestic sellers of vermouth and second among all producers of vermouth.

PAR. 7. Advertising in various media is relied upon extensively by New York Coca-Cola in the marketing of soft drinks, wine, picnic chests and beverage coolers. New York Coca-Cola has the third largest advertising budget in the wine industry.

PAR. 8. In 1972 Mogen David wines and Tribuno vermouths were

marketed nationally through over 300 independent distributors. In addition Mogen David has a staff of over 45 salesmen. New York Coca-Cola has begun to consolidate Tribuno with Mogen David distribution in order to strengthen its market position. [3]

PAR. 9. At all times relevant herein, New York Coca-Cola sold and shipped its products in interstate commerce and engaged in "commerce" within the meaning of Section 7 of the amended Clayton Act and Section 5 of the Federal Trade Commission Act.

II. ACQUIRED COMPANY

PAR. 10. Franzia is a corporation organized and existing under the laws of the State of California, with its principal place of business located at 1700 East Highway 120, Ripon, California.

PAR. 11. Franzia is now and for many years has been engaged in the production, distribution and sale of wines of all types including table wines, sparkling wines, dessert wines and vermouth.

PAR. 12. Franzia is one of the principal producers of generic table wines in the United States. Ranking eighth among all wine producers in 1972, Franzia accounted for approximately 3 percent of wine products produced and sold in the United States and 2.4 percent of all wine products sold in the United States. Franzia has been experiencing a strong growth trend with dollar sales increasing from approximately $8 million in 1968 to approximately $29 million for its fiscal year ending July 31, 1973. Franzia's assets exceed $20 million. In its fiscal year ending July 31, 1973, Franzia's sales in gallons and dollars increased 32 percent and 38 percent, respectively, over the previous year. The rate of growth for Franzia for the past three years was substantially greater than that recorded by the wine industry as a whole. Franzia has relied primarily on price competition in expanding its sales, maintaining a low level of advertising expenditures.

PAR. 13. Franzia distributes its wine directly to retail outlets in California and through independent distributors in 40 other states and the District of Columbia. In addition to Franzia's own products, Franzia distributes wine products for Gibson Wine Company, Charles Krug and Robert Mondavi.

PAR. 14. At all times relevant herein Franzia sold and shipped its products in interstate commerce and engaged in "commerce" within the meaning of Section 7 of the amended Clayton Act and Section 5 of the Federal Trade Commission Act. [4]

III. Acquisition

Par. 15. On December 14, 1973, New York Coca-Cola finalized its acquisition of Franzia. The transaction was cast as an acquisition of the assets of Franzia by a New York Coca-Cola subsidiary in exchange for common stock of New York Coca-Cola in such manner as to qualify as a tax-free reorganization.

IV. Trade and Commerce

Par. 16. The United States wine industry is in the midst of a period of exceptional growth as reflected by a dramatic increase in sales and consumption. Between 1967 and 1972 sales of wine products have increased from approximately 203 million gallons to 337 million gallons, representing an increase of more than 65 percent. During that period per capita consumption has increased from 1.0 gallons to 1.6 gallons, representing an increase of approximately 60 percent. According to reliable forecasts an estimated 650 million gallons will be distributed in 1980.

Par. 17. Unlike sales of other sweet wines (over 14 percent alcohol) which have declined, sales of vermouths have increased.

Par. 18. The wine industry is marked by increasing concentration. E & J Gallo Winery and United Vintners are the two largest wineries in the U.S. The largest four firms accounted for approximately 55 percent of all wine products sold in the United States in 1972. This represents an increase of 7 percent over the 1968 four firm concentration ratio of 48 percent The ten largest wineries accounted for approximately 70 percent of the wine sold in the United States. The remainder is shared among over 300 wineries.

Par. 19. Over the past ten years there has been a noticeable trend toward mergers and acquisitions involving wine producers.

Par. 20. There are major barriers to entry to any firm wishing to make a significant entrance into the wine business. The high cost of advertising presents a barrier to any winery wishing to sell on a national or even regional basis. Consumer appeal, created by advertising, is an important element in the marketing of wine products. Obtaining the services of independent wholesale distributors continues to be an important requirement for the successful marketing of wine products on a national, regional, and state level. The number of such distributors is closely regulated by state laws. [5]

V. Effect of Merger

Par. 21. The effect of the acquisition of Franzia by New York Coca-

Cola may be substantially to lessen competition or to tend to create a monopoly in the production, distribution and/or sale of wine products in the United States, in violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 18, 45, in the following ways, among others:

a. Substantial actual and potential competition between Franzia and New York Coca-Cola will be eliminated, prevented or lessened;

b. Franzia will be eliminated as a substantial independent factor in the production, distribution and sale of wine;

c. Independent distributors and sales representatives of Franzia products have been or may be, and potential independent distributors and sales representatives may be foreclosed from a high volume, fast moving account.

d. Concentration in the wine industry will be increased to the detriment of actual as well as potential competition;

e. An acceleration of the trend toward mergers and acquisitions will be encouraged and may contribute to further increases in concentration in the wine industry;

f. Barriers to entry into the production, distribution and sale of wine will be increased;

g. Franzia will no longer be able to adhere to its policy of price competition to expand sales and prices will be increased. [6]

PAR. 22. The merger of Franzia into New York Coca-Cola, in Paragraph 15, constitutes a violation of Section 7 of the Clayton Act, as amended, and an unfair method of competition and an unfair act and practice in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 18, 45.

INITIAL DECISION BY LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE

JUNE 26, 1978

I. HISTORY OF THE PROCEEDING

The Commission issued its complaint in this case on September 10, 1974. The complaint challenges the acquisition of Franzia Brothers Winery ("Franzia") by the Coca-Cola Bottling Company of New York ("Coke-New York") as a violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

The complaint alleges that Franzia is one of the principal producers of generic table wines in the United States, and that its acquisition by Coke-New York, which had previously acquired two

other wine producers, Mogen [2] David Wine Corporation ("Mogen David") and Tribuno Wines Inc. ("Tribuno"), may substantially lessen competition or tend to create a monopoly in the production, distribution and/or sale of wine products in the United States. The alleged effects of the acquisition are that:

a. Substantial actual and potential competition between Franzia and Coke-New York will be eliminated, prevented or lessened;

b. Franzia will be eliminated as a substantial independent factor in the production, distribution and sale of wine;

c. Independent distributors and sales representatives of Franzia products have been or may be, and potential independent distributors and sales representatives may be foreclosed from a high volume, fast moving account.

d. Concentration in the wine industry will be increased to the detriment of actual as well as potential competition;

e. An acceleration of the trend toward mergers and acquisitions will be encouraged and may contribute to further increases in concentration in the wine industry;

f. Barriers to entry into the production, distribution and sale of wine will be increased;

g. Franzia will no longer be able to adhere to its policy of price competition to expand sales and prices will be increased.

Coke-New York denied that its acquisition of Franzia would have the alleged effects. Several prehearing conferences were held in this case and the parties engaged in extensive discovery, including the issuance of subpoenas to many wine producers. The parties filed exhibit and witness lists and submitted trial briefs. [3]

Complaint counsel's case began on November 7, 1977 and concluded on December 16, 1977. Coke-New York's defense began on January 16, 1978 and concluded on January 27, 1978. Complaint counsel presented rebuttal evidence on February 27, 1978.

Complaint counsel called the following witnesses:

John W. Anderson	Sonoma Vineyards President
Robert H. Arnold	California Wine Association Vice President-Marketing
Saul Ben-Zeev	Creative Research Associates President
J. Kenneth Borders	Franzia Brothers Winery Former National Sales Coordinator

Arthur A. Ciocca	Franzia Brothers Winery President
Frederick DePompei	Pompei Winery, Inc. President
Angelo Fantozzi	Fantozzi & Trucco Company, Inc., Owner
John G. Franzia, Jr.	Bronco Wine Company Vice President-Production
Joseph S. Franzia	Bronco Wine Company Vice President-Sales
Ernest C. Haas	East-Side Winery General Manager
Robert Ivie	Guild Wineries and Distilleries, President
Marvin B. Jones	Gibson Wine Company General Manager
David Painter	Federal Trade Commission Staff Accountant
[4]Mario Perelli-Minetti	California Wine Association Vice President-Marketing
Meyer H. Robinson	Monarch Wine Company Secretary-Treasurer and General Manager
Marvin Sands	Canandaigua Wine Company President
Robert Setrakian	California Growers Winery, Inc., President
John E. Simon	Bardenheier's Wine Cellars Director of Marketing
William J. Sullivan	The Coca-Cola Bottling Company of New York, Inc. Executive Vice President
Fred E. Weibel	Weibel, Inc. President

Coke-New York called the following witnesses:

Michael A. Bernstein	Mt. Veeder Winery & Vineyards, Owner and General Manager

Harold Binstein	Gold Standards Liquors President
Michael T. Gelven	Big D Liquors Owner
Louis P. Martini	Louis M. Martini, Inc. President
Edmund A. Mirassou	Mirassou Vineyards Co-Owner
John Pearson	C & C Distributing Company Owner
Gary P. Raden	G. Raden & Sons Owner
Jack Robinson	Argonaut Liquors Co-Owner
[5]August Sebastiani	Sebastiani Vineyards President
Terry C. Whitney	Franzia Brothers Winery Former President

The record was closed on March 20, 1978 and the parties, who were given a two-week extension of time to do so, filed their proposed findings of fact and conclusions of law on May 2, 1978. Replies were filed on May 16, 1978. Oral argument on the proposed findings was held on May 22, 1978. At my request, the Commission granted me an extension of time to July 3, 1978 to file this initial decision.

This decision is based on the transcript of testimony and exhibits received in evidence, and the proposed findings of fact and replies filed by the parties. I have adopted several findings proposed by complaint counsel and counsel for Coke-New York verbatim. Others have been adopted in substance. All other findings are rejected either because they are not supported by the record or because they are irrelevant.

II. Findings of Fact

A. Coke-New York's Business

1. Coke-New York is primarily a bottler and distributor of various carbonated soft drinks, including Coca-Cola, Fresca, Tab, Sprite, and Fanta flavors under franchise from the Coca-Cola Company; Dr. Pepper and Sugar Free Dr. Pepper under franchise from Dr. Pepper Company; and, Welch's Grape Soda under franchise from Welch's Foods, Inc. (CX 12Z3-5; Tr. 1101).[1] Approximately [6] two-thirds of its sales and earnings are derived from its soft drink business (CX 5C).

2. Coke-New York is a corporation organized, existing and doing business under and by virtue of the laws of Delaware (Ans., ¶ 1) and its home office and principal place of business is located at 411 Hackensack Ave., Hackensack, New Jersey (CX 12A). It first began bottling Coca-Cola in 1910 and is now the largest soft drink bottling company in the United States (Tr. 1101-02).

3. Coke-New York is also engaged in the manufacture of picnic chests, beverage coolers and extruded plastic sheet, the operation of the Delta Queen Steamboat Company (through the Igloo Corporation which was acquired in 1972) and the production and sale of wine (CX 12Z2; Tr. 1099). Its net sales for the fiscal year ending December 1972 were $211,584,000, and they were $189,698,000 in 1971 and $141,549,000 in 1970 (Ans., ¶ 2).

B. Coke-New York's Wine Acquisitions

4. Until 1970, Coke-New York was engaged only in the business of bottling and distributing carbonated soft drinks (CX 12Z2). The company's opportunities for growth in that business were strictly limited by the boundaries of its franchised territories. Thus Coke-New York was faced with the choice of growing by acquisition or not growing at all. In early 1969, therefore, the company decided to investigate acquisitions outside the soft drink business (Tr. 1103). As a result of this decision, Coke-New York acquired Mogen David in 1970, Vermouth Industries of America, Inc. in February 1973 (whose name was changed to Tribuno Wines, Inc.), and Franzia in December 1973 (CX's 5B, 12Z2-3, 6; Tr. 1117).

(1) Mogen David

[1] The following abbreviations are used in this decision:

CX	- Commission Exhibit
RX	- Respondent's Exhibit
Tr.	- Transcript of testimony
Cplt.	- Complaint
Ans.	- Answer
CPF	- Complaint counsel's proposed findings
RPF	- Respondent's proposed findings
CRF	- Complaint counsel's reply to respondent's proposed findings
RRF	- Respondent's reply to complaint counsel's proposed findings

5. Mogen David was Coke-New York's first venture outside the soft drink business. In 1970 it was approached by an investment banking firm and was told that Mogen David was for sale (Tr. 1103). Coke-New York retained two consultants to investigate Mogen David (Tr. 1103-07). [7]

6. In October 1970, Booz-Allen & Hamilton ("Booz-Allen") recommended the acquisition of Mogen David as a "logical first step" in the wine industry:

The acquisition of Mogen David would be a logical first step for Coca-Cola of New York in positioning itself as a major competitor in the wine industry. Mogen David is the tenth largest firm in the industry and its Concord product line and sweetened wine image should continue to provide steady sales growth and generate attractive after-tax income. The apparent absence of sales problems and financial troubles would permit Coca-Cola of New York to become familiar with the wine industry while earning a reasonable return on its investment (CX 19Z20-21).

7. Both Booz-Allen and Louis Gomberg, a wine industry consultant, recognized the advantages of Mogen David's national reputation and sales force.

Because of Mogen David's national reputation and product acceptance, existing distributors and retailers would be more likely to handle additional brands and/or products marketed through the firm's sales force as illustrated by the successful entry of MD Double 20 (CX 19Z21) . . . .

. . .the advantages of good sister lines are many - and obvious. Not the least would be more effective use of shipping, distribution and warehousing facilities. Another, improved selling efforts thanks to a larger and stronger sales force. And third, the sales leverage that comes with a demand brand or item.

Because Mogen David itself is a demand item, it in turn could help to move other merchandise in related lines, as well as be helped by some of the other demand items. [8]

Mogen David's present distribution system is among the better setups in the wine industry, exceeded only by Gallo and United Vintners, and pretty much on a par with Taylor and Almaden. It is now served by some of the best wine wholesalers in the country, yet there is room for further improvement in certain markets. One or more other good lines definitely could help in this area (CX 18Z37).

Coke-New York acquired Mogen David in November 1970 (Ans., ¶ 4; CX 55A) by paying $16,750,000 in cash (CX 3R).

(2) Tribuno

8. In February 1973, Coke-New York acquired manufacturing and distribution rights for Tribuno Vermouth from Vermouth Industries of America, Inc., subsequently known as Tribuno Wines, Inc. Distribution of Tribuno Vermouth had previously been handled by Twenty-One Brands, Inc. (CX 5B; Tr. 1116-21; Ans., ¶ 4). Tribuno

Vermouth was then the largest vermouth producer in the United States (CX 11Z7). At the time of the acquisition, Coke-New York ranked fifth in the wine industry (CX's 991, 992).

9. Tribuno Vermouth is produced by Franzia (Tr. 1811–12) and distributed by Mogen David to distributors located throughout the United States (CX's 71B–Z7, 764H; Tr. 1120, 1127).

10. Tribuno Wines, Inc. was acquired by Coke-New York in an exchange of 712,497 shares of Coke-New York common stock. The distribution rights to Tribuno's products were acquired from Foremost-McKesson, the parent of Twenty-One Brands, Inc. for 62,500 shares (CX 11Z1).

(3) Franzia

11. In late 1971 or early 1972, Coke-New York's management concluded that California table wines were "one of the outstanding growth opportunities" and began to look for an attractive acquisition in this business (Tr. 1129–32, 1139, 1182–84). One reason for this search was the belief that Mogen David's business in sweetened and kosher wines was not growing (CX 18H; [9] Tr. 1133). In fact, despite the great increase in wine sales during the past 10 years, its sales of sweet kosher wines have actually declined (RX's 378J, 501).

12. An internal memorandum explains Coke-New York's reasons for seeking the acquisition of a California wine producer.

The most important reason for Franzia is to enter the growing table wine market and use the quality California premium and generic lines to move across the country market by market to augment the Mogen David universe first and then to complete full national coverage of this line. The obvious reasons for this are to get as much volume into the open states and as many listings in the control states for maximum leverage (CX 680C).

* * * * * * *

The nature of selling through distributors and/or direct in California can reap great benefit for the existing Mogen David lines. It should be possible to use the existing direct sales force to quickly move into the regular Mogen David line, and 20/20 line, the Bear line, and the Jug line. The volume of beverage wine on the West Coast is far greater than we have seen in the balance of the country. Information received indicates that the Gallo and Italian Swiss beverage lines are doing tremendous volumes in major markets within the state of California (CX 680D).

13. In December 1973, Coke-New York acquired Franzia for approximately $40 million worth of Coke-New York stock (Ans., ¶ 15; Tr.1150). At the time of the acquisition, Mogen David was the nation's fourth largest winery, and Franzia ranked seventh. Together, Franzia, Mogen David, and Tribuno made Coke-New York the

third largest wine producer in the United States in 1973 (CX's 991, 992, 996). At the time of the acquisition, Franzia sold and shipped its wine to customers in 41 states and the District of Columbia (CX 12Z14). **[10]**

14. Franzia is a corporation organized and existing under the laws of the State of California, with its principal place of business located at 1700 East Highway 120, Ripon, California (Ans., ¶ 10).

C. Wine Production and Distribution

(1) Wine

15. Wine is a drink made from the fermented juice of a fruit, usually a grape, although any fruit that contains sugar can be fermented, and if it is fermented, it becomes wine. Fermentation is the chemical change in fruit juice which changes its sugar into alcohol. The sweeter the juice which is fermented, the higher the potential alcohol content of the wine produced. A wine that is bone dry is a wine that has had all of the residual sugar fermented out (Tr. 31–37, 264, 279).

16. Over 90 percent of all wine produced in the nation comes from grapes. Some other fruits which are used to produce wine are peaches, cherries, blackberries and apples (RX 374, pp. 43–45; Tr. 487).

(2) Types Of Wine

17. There are hundreds of different wines sold in the United States (Tr. 325–26, 1339) and, between one year and another, even the same types of wine show significant differences (Tr. 2182–84). The federal government defines wine according to alcohol content for tax purposes. Under this system of classification there are five wine categories:

Still wine with 14 percent or less alcohol ("table wine")

Still wine with over 14 percent and not exceeding 21 percent alcohol ("dessert wine")

Still wine with over 21 percent and not exceeding 24 percent alcohol

Champagne and other sparkling wine

Artificially carbonated wine

(26 U.S.C. § 6041 (b); RX's 378A–Z12, 380A–S; Tr. 561–64)

[11] 18. Table wines (less than 14 percent alcohol) are generally consumed with meals (Tr. 33–34). Dessert wines (over 14 percent

alcohol) are generally, but not necessarily, sweet to the taste (Tr. 232), and although table wines are generally thought of as "dry," some, such as rosé, are sweet to the taste (Tr. 32–33); in fact, some dessert wines are actually drier than table wines (Tr. 34).

19. Sparkling wines are standard table wines which have undergone fermentation by the addition of sugar or grape concentrate. This fermentation produces carbon dioxide which remains in the bottle under pressure and which is the cause of effervescence when the bottle is uncorked (Tr. 39, 561).

20. A separate category of wines is "special natural," that is, herb wines which contain natural flavoring components and non-grape sugar (Tr. 279–80, 561, 596).

21. Wines may also be classified according to the grape from which they are produced. "Varietal" wines, by law, must be made from 51 percent or more of the grape variety whose name they bear. Some varietals are made from 100 percent of the grape variety whose name they bear (Tr. 44–45). Concord wine, which is made from 51 percent or more of the Concord grape is, therefore, a varietal wine (Tr. 471). Varietal wines are considered to have more distinctive characteristics than other wines (Tr. 270).

22. Generic wines are blends of different types of grapes, and are often named after European wine regions. Some generic wines are Burgundy, Chablis, Sauterne (CX's 17H, 19J, 24F, 80B; Tr. 213).

23. Some varietal wines are very distinctive. Louis M. Martini produces a high sugar and low alcohol wine called Moscato Amabile which he believes is different from most other wines (Tr. 2189–90). Canandaigua produces a Scuppernong wine from South Carolina with a sweet, sherry-nutty taste (Tr. 1352–53). Muscatel, produced from the muscat grape, has a sweet, distinct fruity and flowery taste (Tr. 494, 584, 599, 1353–54). Zinfandel has a distinctive berry taste [12] (Tr. 59, 598). Gewurztraminer has a spicy taste (Tr. 2978). Concord wine, such as Mogen David Concord, has a very distinctive, "foxy" or grapy taste (CX 964K; Tr. 297, 1320).

24. So-called "pop" wines have enjoyed a recent vogue. These wines (such as Gallo's Thunderbird) made with flavorings (wines made from fruit and berries are not pop wines), may have small quantities of carbon dioxide added to them, have varied alcohol content, and are intended for the young adult market (CX 52Z118–22; Tr. 37, 234–35, 503–04, 595). Often these wines are heavily advertised and promoted as beverage wines, to be consumed other than with meals (CX 52Z118–22; Tr. 546).

25. Kosher wines are prepared under rabbinical supervision and must meet certain standards of cleanliness (CX 18Z22; Tr. 52, 1349,

1423). Otherwise, they are identical to non-kosher wine, both in chemical analysis and taste (Tr. 1349-51, 1423). Vermouth, an aperitif wine, is a blend of neutral white wine and an extract of herbs and botanicals. The extract gives vermouth its distinctive flavor and aroma. Vermouth may be drunk straight or used as a mix in such drinks as a manhattan (CX's 33L, 91R; Tr. 4).

26. Wines are also classified by producers according to their retail price. The industry generally recognizes three price categories: premium and popular priced (Tr. 64) and, in between these, a so-called "mid-premium" (CX 18Z10).

27. Premium wines are priced higher than the popular priced wines. Normally, premium wines come with corks in the bottle and contain expensive labels with art work and high quality paper. Premium wines are usually of a higher quality than popular priced wines (Tr. 341). Premium wines produced in California normally come from grapes grown in its North Coast counties, which include Alameda, Napa, Sonona, and Mendocino (Tr. 38). Eastern wineries such as Taylor, Widner and Gold Seal also produce premium wines (CX 18Z19). The major sources of premium wines are California, New York, France, Portugal, Italy, Germany and Spain (CX 27I).

28. Popular priced wines are sold by such firms as Gallo, United Vintners (Heublein), Franzia, Guild, California Growers, Bear Mountain, East-Side Winery, California Wine Association and Canandaigua (Tr. 64). [13]

29. Mid-premium wines are varietal wines produced from grapes often grown in the San Joaquin Valley. Both producers that specialize in popular priced wines and producers that specialize in premium wines make mid-premiums. Popular price oriented companies that also produce these wines include Gallo, Franzia, California Growers, Guild and California Wine Association. Premium oriented companies that produce mid-premium wines include Almaden, Inglenook, Beringer (with its Los Hermanos brand), Sebastiani (jug[2] wines), Charles Krug (its C. K. Brand) (Tr. 65). Mogen David's wines have been classified as "mid-premium" because of the price range in which they fall (CX 18Z10).

(3) Wine Production, Grape Supply and Land Use

30. Approximately 90 percent of all wine consumed in the United States is domestically produced and about 99 percent of all domestically produced wine is made from grapes (CX 973, p. 42).

31. Wine is produced in the United States from grapes belonging

[2] The term jug wine refers to wines which are bottled in half gallon or gallon sizes, and there is a trend to better quality wines being bottled in these sizes (Tr. 62).

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to two families, the vitis labrusca, which is the native American grapevine and the vitis vinifera, the European grapevine (Tr. 46–47, 278–79, 1345–46).

32. The labrusca family of grapes–of which the Concord grape is a member (42 F. R. 30, 517 (1972)) –is grown mostly in the Northeastern United States, and in particular, in New York, Michigan and Pennsylvania. Grapes from the vinifera family are grown in California, France, Italy and Germany. Although some New York State wineries are experimenting with the vinifera grape, the labrusca grape is more practical in that area because it tolerates colder weather than the vinifera grape (Tr. 1345–46).

33. Hybrid grapes are also grown in the United States, primarily in New York and Michigan. These so-called French-American hybrids are crosses between [14] vinifera and labrusca grapes and represent an effort to produce better quality table wines in cold climates (CX 964K; Tr. 1345–56, 1383–84). Mogen David uses both California vinifera and eastern labrusca grapes and concentrate in the production of its wines (CX's 716Z19, 1041B–C).

34. Wines are produced in every state in the nation (CX 1004F, G, I; Tr. 1370–71); however, California dominates the industry, with some 85 percent of domestic wine output. New York accounts for approximately 8.4 percent of domestic production. Other wine producing states of some significance are Illinois, New Jersey, Virginia, Michigan, Ohio, Washington, Georgia, Arkansas, South Carolina, Missouri, Oregon and Florida (CX 972J).

35. The principal California wineries are E & J Gallo Winery, United Vintners (Heublein), Franzia (Coke-New York), Almaden (National Distillers), Christian Brothers, California Wine Association and Guild Wineries and Distillers (CX 991A). The principal New York wineries are Taylor Wine Company, Monarch Wine Company, Canandaigua Wine Company, Gold Seal Vineyards and Widmer's Wine Cellars (CX 991A; Tr. 1371).

36. Wine producers may grow their own grapes, but they are not limited to that source of supply. Many producers offer bulk wine–that is, wine sold by one winery to another, generally shipped in tank trucks or tank cars (Tr. 331). Producers of popular priced wines are undoubtedly the major customers for bulk wines; however, premium producers may also use them. Sebastiani, a producer of premium wines, converted from bulk sales of premium wines to bottle production beginning in the 1950's (Tr. 2284), as did Mirassou in 1966 (Tr. 2028–30).

37. While most wine makers do not produce every kind of wine, and some specialize in the production of a limited group of wines,

"Wine making is basically a batch process and most of the equipment (crushers, presses, tanks, barrels, pumps and filters) can be used interchangeably no matter what the specific wine type" (CX 27W). Thus, most large wineries can produce any type of wine, even kosher wine, if the grapes are available (Tr. 50, 336, 599, 1423). However, there are legal restraints which prevent the production of certain wines in California. [15]

38. California law prohibits the use of sugar in the production of grape table wines. While California wine producers may add sugar to non-grape wines, sparkling wines, special natural wines,[3] vermouth and formula wines (Calif. Dept. of Health Regs., Tit. 17, Art. 14, §§ 17000–17010 (CX 7888–E, S); Tr. 31, 279–80, 491), California law would prohibit the production of the principal Mogen David products since they are ameliorated by the addition of water and cane sugar (CX's 18Z17, 893A-D; 27 C.F.R. 240.13).

39. The supply of popularly priced wines is tied in to a great extent with grape agriculture. The supply of grapes is controlled primarily by the weather during each crop year and, secondarily, by farmers' plantings; because of this, grape supplies have varied widely over the years (Tr. 251–52).

40. It is impossible for most wineries to escape this cycle for many only own a portion of the vineyards from which their grapes come (RX 27Z5; Tr. 251). Although juice oversupplies might be stored as grape concentrate as complaint counsel contend (see Tr. 29–30), it is apparent that this does not materially alter the relationship between grape oversupply or shortage and wine prices. It is still true that when the grape crop is long, there will be low prices for grapes and for wine (RX's 27E, 194K-L; Tr. 1801, 1252). When the crop is short, there will be competition for grapes and higher prices for grapes and wine (Tr. 387, 1801).

41. If past history is any guide, wine producers will always be faced with periodic gluts and shortages of grapes, with resulting periodic drops and rises in the wine prices (Tr. 122, 251, 573, 2146).

42. When the grape crop is short, as it was in 1972, prices rise sharply (CX 12Z13–14; RX's 27H, 194K-L; Tr. 1252, 1801). The demand for red wine that year exceeded the supply (Tr. 387). Today, the reverse is true; white wine is in tremendous demand [16] and short supply (Tr. 2310) and red grapes and red wine are now cheap (Tr. 2042).

43. In 1973 the crop was very large but inventories were so low that grape prices were bid up and inventory costs were very high

[3] Wine made pursuant to a formula from a base of natural wine, mixed with such things as herbs, spices, fruit juices, sugar, and caramel coloring (27 C.F.R. 240.440).

(RX 378Z11; Tr. 1801). By 1974, the heavy grape plantings of the late 1960's and early 1970's began to yield ever-larger crops (Tr. 898, 1801-02, 2041), with the result that "everybody got killed because there was a glut on the market" (Tr. 1252).

44. Although not all agricultural land is suitable for the production of wine grapes, there is no evidence in the record which would permit an accurate appraisal of the amount of land available in the United States for the planting of grapes which are used in the production of popular or mid-premium wines. The most that can be said is that there appears to be a shortage of land on which premium-wine grapes can be grown (CX's 3H, 24Z5, 27K; Tr. 2310-11, 2178-79),[4] although even this conclusion is tentative, for one small producer of premium wines indicated that he could increase production tenfold by building a facility in the Napa Valley, and expressed no concern over finding the necessary grapes (Tr. 1903-04).

45. The supply of grapes for popularly priced wines is, at this time, more than adequate for producers' needs. Mr. John Franzia of Bronco, a major new entrant, testified that he could buy enough grapes to double his already significant production (Tr. 637). [17]

(4) Advertising of Wine

46. In 1969, the 10 leading wine companies accounted for 63 percent of all wine advertising expenditures. These companies spent 87 percent of all wine advertising money for spot television, 51 percent for network television, 48 percent for newspapers and 43 percent on magazines (CX 19L-M).

47. Several wine companies increased their advertising between 1970 and 1974. Gallo's (the nation's largest wine producer) advertising went from $5.4 million in fiscal 1970 to $10.1 million in fiscal 1974, an increase of 86.5 percent (RX 126A-B). Almaden's advertising expenditures increased 165 percent (RX 36), Canandaigua's increased 203 percent (RX's 62, 66), Guild's increased 146 percent (RX 192A), and Sebastiani's increased 152 percent (RX 351). When Mr. John Anderson took over Sonoma Vineyards, he increased media advertising expenditures from approximately $60,000 to $800,000 (Tr. 1752-53).

48. In 1973, Mogen David had the third largest advertising budget in the wine industry, and it has been among the four or five largest wine advertisers since the early 1950's (CX's 18Z50, 52Z15,

[4] Complaint counsel make much of the fact that it takes from three to five years from planting before grapevines can produce grapes suitable for winemaking (CPF, p. 27) but this would be significant only if there were evidence that at present, or in the foreseeable future, actual or potential wine producers cannot obtain, or will not be able to obtain enough grapes from existing producing vineyards to meet the demand for their products. There is no evidence of this.

Z72). Before its acquisition by Coke-New York, Franzia did not advertise extensively. Its total media advertising in 1973 was $298,691 (CX 716Z15). Since then, Franzia's advertising has increased. In 1975, its planned advertising expenditures were over $1 million (CX 550J).

49. It is not surprising that the wine companies which do advertise believe that it increases their sales (CX's 163B, 782I; Tr. 112-13, 565, 1501) and helps to obtain distributors since they are more likely to take on a wine brand which is heavily advertised (CX's 52Z74, 130B, 136, 337A-B, 405B, 423, 544E; Tr. 437, 566, 645, 1318). Advertising also helps to obtain shelf space in retail stores (CX's 235, 482, 659B; Tr. 1326, 1495). Indeed, advertising by the large wine companies is regarded by industry members as benefitting all wine producers (Tr. 285-86, 505, 1025). Brand identification and distinctive packaging are also considered important contributors to success in marketing wine (CX's 18Z58, 27Z34, 549A-C; Tr. 112, 288-90, 363, 443, 567-68, 1038, 1329-30, 1800, 2055-56, 2311-12, 2176).

50. While it is true that advertising is an important contributor to the successful marketing of wines, there have been several instances where producers [18] have marketed their wines without extensive advertising, and there have been times when well-planned, adequately funded advertising campaigns have failed in their purpose. Thus, it cannot be said that advertising is essential to a wine producer's success. Many other factors, such as quality, price, and reputation are as important as advertising.

51. Several wineries, selling at all price levels from the highest to the lowest, have competed successfully and enjoyed growth with little or no expenditures on advertising. In 1971, California Growers Winery sold virtually no branded case goods (Tr. 362). In 1973, it was not large enough to be included on a list of the 63 largest sellers of wine, the smallest of which sold only 2,998 gallons (CX 991A-B). By 1977, however, the winery sold 600,000 cases of branded products (Tr. 342). California Growers has advertised to consumers only once (spending $1,000 over a three-month period for radio in Puerto Rico), and has never spent more than $15,000 per year in advertising to the trade (Tr. 340, 382-83, 394).

52. California Growers cannot presently afford to advertise more extensively because margins in popularly priced wine are too low (Tr. 346, 384, 388), but Mr. Setrakian, its president, was not sure that he would advertise even if he had the resources to do so, for:

> I can show you as many cases of wineries that have advertised that have gone into bankruptcy as those that haven't advertised that are doing very well. . . . (Tr. 346).

53. East-Side Winery, a small farmers' cooperative, does not advertising but nonetheless sells all the wine it can make (Tr. 248). Gibson Wine Company sold more than 2 million gallons of branded goods and about the same amount of private label in 1976 (Tr. 482, 485). Its sales have nearly doubled since 1973, and had increased more than 105 percent in the six years before that (CX 991A; Tr. 482, 485), yet general manager Marvin Jones testified that Gibson does little advertising and such expenditures for fiscal 1974, the most recent [19] year on record, were less than $40,000, approximately one cent per gallon (RX 161; Tr. 509).

54. Guild, one of the largest wine producers in the country, increased its sales from $13 million to $40.9 million from 1970 to 1974, yet never spent more than $585,000 per year in advertising. Advertising expenses averaged less than 1.2 percent of sales in that period (RX 192A–B). Bronco, a new entrant in the popularly priced end of the wine business, has achieved sales of more than one million cases in three years with no advertising (RX's 50, 51, 52; Tr. 622, 668–69).

55. At the middle price level of wines, advertising is not necessarily a prerequisite to success. Louis Martini, a maker of premium Napa Valley varietal wines, spends less than $10,000 per year on advertising and has no intention of doing any more in the future (Tr. 2161). His long-established company has been profitable in every year and sells in every state except Kansas (Tr. 2146, 2172). In 1977, Martini sold approximately 320,000 cases of wine, about 60 percent more than in 1973 (Tr. 2146, 2178). C. Mondavi & Sons, selling under the Charles Krug and C. K. Mondavi labels, had sales in 1974 of $13.4 million, with an advertising and promotion budget of $79,132, or 0.6 percent of sales (RX's 89E, 90D).

56. Sonoma Vineyards, which does do substantial advertising, has had great success in some markets in which it has done no advertising. In Chicago, for example, sales of 50,000 cases per year–15 percent of Sonoma's nationwide total—have been reached without any advertising but with aggressive pricing and great effort from a single salesman (Tr. 1762–63). Sonoma's president, Mr. John Anderson, was in the advertising business for seven years and worked for sophisticated marketing companies like Norton Simon, Inc. before going to Sonoma (Tr. 1736–37). Even with that background, Mr. Anderson views advertising as only one among many elements (including price, packaging, and manpower) in Sonoma's marketing plans (Tr. 1750–53).

57. After many years in the bulk premium wine business, Mirassou Vineyards entered the branded case goods business for the

first time in 1966 with no consumer franchise (although it did sell some bottled goods from its winery) (Tr. 2029-30). In 1977, sales [20] were 285,000 cases, up 73 percent in the last year alone (Tr. 2033). While the company can afford to advertise, it has never spent more than $6,000 on advertising in a year and has no intention of advertising more substantially in the future (Tr. 2033).

58. Sebastiani Vineyards, perhaps the fastest-growing winery in the United States (Finding 315), has also done very well with little advertising (Tr. 2286). From 1970 to 1974, the years in which Sebastiani's sales "exploded and went off into space," advertising expenditures averaged about $55,000 per year (RX 350; Tr. 2285). Nonetheless, in that time, sales went from 709,000 gallons to 1.2 million gallons (RX 350). By the end of 1977, Sebastiani's sales had reached approximately 5.2 million gallons, an increase of 636 percent in seven years[5] (RX's 350, 351; Tr. 2286).

59. There are several reasons why advertising is not as important in the wine industry as in others. Sebastiani has a tasting room, as do many other wineries, which attracts between 140,000 and 180,000 visitors each year (Tr. 2290), and the impact of actually tasting wines on the decision to purchase them and favorable comments from wine writers is obviously enormous (Sebastiani: "[T]he public relations has done much more for us than advertising") (Tr. 2302).

60. The interest of the general public in wines is evident from the number of publications which report on wineries-and this is all free publicity for the wineries and their wine. Mr. Sebastiani realizes this and invites wine writers to tastings of his wines (and his wife's famous food) (Tr. 2293-95). [21]

> You get people in your house with good food, good wine: It is a nice setting. The wine tastes better, their impression of you is better. . . . So, the wine writers have been invaluable. . .in building the brand. (Tr. 2294).

61. Small wineries like Mt. Veeder Winery also benefit from wine writers. Mt. Veeder has received attention in Gourmet Magazine, Robert Finigian's Private Guide to Wine, New West, Horizon, Westchester, Vintage, Wine World, and even Women's Wear Daily (RX 427A-I; Tr. 1892-1901). Mt. Veeder's only publicity has been through the wine writers, who have made possible the winery's annual sell-out and its steadily lengthening customer waiting list (Tr. 1880, 1888-89, 1902). None of this publicity was sought or paid for by Mt. Veeder; in at least one instance, Mr. Bernstein, its owner, never even met the writer (Tr. 1901).

[5] Sebastiani spent approximately $450,000 on newspaper and magazine advertising in 1977, more than double what had been spent in prior years (Tr. 2312-13). This spending level, however, followed rather than caused Sebastiani's nearly 400 percent growth from 1970 to 1976 (RX 350; Tr. 2286).

62. Like other wineries at both the popularly priced and premium levels, Sebastiani enters its wines in various contests, judgings, and fairs (Tr. 42, 2295). Gold medals, silver medals, and other awards in these competitions are widely publicized. "It helps immensely if you enter a wine competition and it wins some top award and some wine writer picks it up, you can see the sales zoom on it." (Tr. 2295). For example, Mr. Michael Gelven (owner of a liquor store) sought out Giumarra's popularly priced Cabernet Rouge for his store when he learned it had won a medal at the Los Angeles County Fair. Consumers are often aware of medal winners and ask for them (Tr. 2211). Mr. Gelven has sold California Growers Setrakian brand cream sherry, an unadvertised mid-to-low-priced product, on the strength of its medals (Tr. 2237).

63. Together with the growing number of wine writers and publications, publicity from these awards provides a readily available and free alternative or adjunct to advertising and is a significant source of information for the trade and for consumers about new [22] wines and new wineries (Tr. 382, 1333,[6] 1892-1901, 2049, 2076, 2098, 2211, 2237, 2302). As Mr. Gelven's Guimarra episode demonstrates, such publicity is not limited to wines in any particular price category.

64. Just as advertising may not be a prerequisite to success, it may not guarantee success. Mogen David's product Cold Bear was described by Robert Arnold of California Wine Association as a product "[t]hat had a lot of advertising and then an overnight failure." (Tr. 456). Mogen David's Jug had a similar fate, described by a salesman as "impact - then death," and the company was unable to get its advertised new brand Fanfaron out of test markets (CX's 389, 980K; Tr. 1220). Gallo's multi-million dollar campaign for its valley varietals has not made those products a success (Tr. 930-31). Manischewitz's effort to promote its Manischewitz Light wines, with the largest introductory advertising budget in the company's history, has also, in the opinion of some industry members, been unsuccessful (CX 989; Tr. 1222, 2117-18, 2230-31). As long ago as 1952, California Wine Association hired "one of the best" advertising agencies and "spent $400,000 in Los Angeles, at one crack" "[I]t didn't work." For a five-year period ending in 1958, CWA spent more money on brandy advertising in Wisconsin than "all the other domestic brands combined." The result: a sales decline of more than 30 percent (Tr. 157).

[6] One distributor testified that although small wineries might not be able to assist him in making retail contacts and this might hurt its sales "it might work the other way too as far as that part goes. In other words, if it is an exceedingly good product or it is written up in the journals. I mean, you don't need other incentives for somebody to buy it."

65. It is obvious that wine industry members have different opinions about the advertising of their products. Furthermore, even those companies which do advertise more than others do not rely on it as much as members of other industries. In respondent's words, "this is not an advertising-intensive business" (RPF, p. 197). [23]

66. Gallo's advertising expenditures averaged 4 percent of sales from 1970 to 1974 and some of its lower priced brands which sold in the millions of gallons (Carlo Rossi and Paisano) were not advertised at all (RX's 126, 127, 415). Almaden, described as a heavy advertiser (Tr. 346–47), never spent more than 2.1 percent for advertising, and averaged less than 1.8 percent from 1970–74. Its advertising budget averaged $750,000 per year during this time (RX's 36, 361A-G, 362A-G, 363A-K). Canandaigua Wine Company spent some 2 percent of sales on advertising in 1974, mostly on its specialty item, Richard's Wild Irish Rose (RX's 59L, 66A-C). Even the industry's largest advertiser, Gallo, does not spend anywhere near as much for advertising as do leaders in other industries. For example, Gallo's advertising budget for 1974 was half the increase in The Coca-Cola Company's (of Atlanta) advertising budget from 1975 to 1976 (RX's 3I, 126A).

(5) Wine Prices

67. Although the popularity of a particular brand might insulate some wine producers from price competition for a time,[7] there is little doubt that producers of popularly priced wines must compete vigorously if they are to maintain sales. This is especially true for private label business which is intensely price competitive (Tr. 140).

68. The branded business is almost as competitive as the unbranded. Mr. Perelli-Minetti of CWA stated that Bronco (a sizeable new entrant), had "taken their brands" and "priced them at the bottom of the market" by taking advantage of the recent wine glut and buying wine at "20, 30, 40 per cent of cost." According to him, they "raped the industry" (Tr. 144–45). Another witness said "[T]here is no way [he] can meet their prices" (Tr. 1581). Mr. Weibel described Bronco as [24] "the worst" (Tr. 306). Bronco, which does not advertise, relied on price to obtain substantial sales in its first year of existence (Finding 308).

69. Mr. Haas, of East-Side Winery, stated that popularly priced wines are very price competitive, produce low margins and are becoming even more competitive because of the nature of the supplies available for sale (Tr. 245). Mr. Weibel agreed that price is

[7] In his opening argument, Coke-New York's counsel stated that "Franzia regularly has to price its products 10, 20, 30 cents below Gallo because Gallo does have a brand franchise" (Tr. 19).

the key competitive factor in popularly priced wines (Tr. 307), and other industry members agree that in this portion of the business price competition is vigorous (Tr. 335, 470,[8] 509, 559, 2145). This has led to low winery profits (Tr. 399-400, 1208-17, 1756, 1791, 2062, 2190).

70. In Denver, the red wine glut of the mid-1970's drove the consumer price of Cribari gallons to $2.19, far below the regular price of $3.29 to $3.79 and even below the normal promotion price of just under $3.00. Franzia's Denver distributor was forced to respond in order to protect his sales. He did so by cutting regular prices to retailers, running promotions (special discount prices), and cutting his own margins (Tr. 1977). Inglenook, a premium product, owes its popularity in the Denver market to its low prices on gallons (Tr. 2127-28).

71. The Chicago market is also very price competitive at the retail, wholesale, and supplier levels (Tr. 469, 1512, 2073). Retailers are always searching for low-priced bargains, especially unadvertised wines, for the market (Tr. 2104). As a result, distributors selling popularly priced wines are pressed to keep margins low (Tr. 1512). Chicago is Sonoma Vineyards' second largest market in the United States. More than 10 percent of its wine is sold there. Sonoma's Chicago sales were developed by price competition and without any media advertising (Tr. 1754, 1762-63). [25]

72. Price competition may also be used to gain entry into a new market. Bronco entered the St. Louis market-described by Mr. John Simon of Bardenheier as a difficult city in which to obtain distribution-by offering "dirt-cheap prices." (Tr. 1581, 1583-84). Gibson Wine Company is often able to sell its wines to a distributor or chain store because it has an attractive package and "good quality at a very popular price." (Tr. 509). Giumarra Vineyards, which had some trouble obtaining distribution in the price-conscious Chicago market, was able to obtain distribution (the extent of which is not evident) in New York by selling its wine to consumers at 59¢ per bottle (RX 429; Tr. 1497), and Geyser Peak Winery's unadvertised Summit brand was taken on by a Massachusetts retailer because it was priced lower and had a little higher quality than its advertised competitors, Almaden and Paul Masson (Tr. 2219-20).

73. Price invasions are common in the Denver market, where the established popularly priced wines are challenged about every six months by a new wine using primarily price to enter the market (Tr.

[8] Q. When we were talking the other morning, we were talking about the price competition at the branded lower end, you said it's always a rat race at the bottom. Is that an accurate characterization?

A. That is accurate.

1971). C & C Vineyards is often in and out of the market "with a promotion or a low price." (Tr. 2135). Price is so prime a consideration to Mr. Jack Robinson of Argonaut Liquors, Denver's and Colorado's second-largest retailer, that he has purchased low-priced wines without even knowing the name of the winery that makes them (Tr. 2135). Under competitive pressure of that kind, suppliers must keep their prices low; distributors and retailers will spurn them if they are overpriced (Tr. 1993, 2112).

74. As noted above, private label sales, which account for about one-third of Franzia's business are even more price competitive than branded sales (CX 290D; Tr. 246, 385). Private label is sold almost completely on price alone (CX's 550F-G, 559A-B; Tr. 246, 386, 900). Price differences of a nickel or a dime on a case of wine (less than a penny per bottle) shift business from one supplier to another:

> There are times we have been five and ten cents higher and the pressure is tremendous and we don't want to lose the business we have. (Tr. 141). **[26]**

75. CWA supplies private label wine to the A & P chain and has done so for some years; A & P is CWA's largest private label account (Tr. 170). After a managment change at A & P, "all of [CWA's] friends in the industry that were in the private label business went after A & P as hard as they could." (Tr. 143). Despite customer loyalty they had built up over 10 years, CWA held the business–after a change in management and a year's vacillation by A & P–only by offering the right price (Tr. 142–43). Even so, because lower prices can always be offered, CWA sees Franzia "as a continued threat to [its] retention of that business." (Tr. 175). For CWA, margins on private label wine are "narrow or less than narrow, in the red" and CWA would like to get out of that part of the business (Tr. 141–42). Guild, because of the difference in margin between branded and private label, "decided [it] would prefer to have as little involvement in the private label business as possible. . . ." (Tr. 546–47).

76. Some imported wines may also exert downward price pressure on domestically produced popular wines. New entrants are constantly appearing. For example, during the trial of this case, G. Raden & Sons, a small Seattle distributor-importer, was in the process of introducing a line of popularly priced Italian table wines. Mr. Raden decided to import the wines because he perceived a "dollar quality factor" that created a new opportunity for national marketing (Tr. 1827–32). The wines are priced below $2 per fifth at retail and have already gained distribution or promises of distribution in 10 states (California, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island, Texas, Virginia, and Washington)

and in the Safeway chain in California (Tr. 1830, 1837). Mr. Raden does not intend to advertise them (Tr. 1829). Mr. Raden's importing competitors are large and many of them are subsidiaries of major distillers, but competing with them for shelf space for his new import line does not worry him "because they basically overprice their products and undersell the quality. They are basically not real astute about what they are doing" (Tr. 1831). [27]

77. Nor is Mr. Raden unique as a supplier of low-priced imports. Mr. Michael Gelven sells many low-priced imports in his two Massachusetts retail stores, on of which–an Algerian wine selling for 99¢ a fifth–he characterized as "very passable" quality with "fantastic" sales (Tr. 2223–24). "You can't buy California wine for 99 cents a bottle [in Massachusetts]." (Tr. 2224). Mr. Jack Robinson, co-owner of the second largest liquor store in Colorado, sells many extremely low-priced imports; at the time of his testimony he was having a "great sale" on Italian wine for $1.39 per bottle (Tr. 2106, 2136).

(6) Barriers to the Distribution of Wine

(a) State Regulation

78. Since wine is an alcoholic beverage, its sale is regulated to some extent by every state. In almost every state, wine producers are prohibited from selling products directly to retailers or consumers. Therefore, they must sell their products through distributors (CX 715E). Although virtually all states require the use of middlemen, some, such as New York and Ohio, apply this requirement only to wine produced outside the state. Wine producers in the state may also be wholesalers of wine (Tr. 1290–91, 1440–41). In California, wineries located there may sell directly to distributors and to consumers (Tr. 287, 1936).

79. The states have chosen two major approaches to the distribution of wine. A minority–Idaho, Iowa, Maine, Mississippi, Montana, New Hampshire, Pennsylvania, Utah, West Virginia and Wyoming–operate a state monopoly at the wholesale level. Those states are sometimes referred to as "control states." Alabama, in addition, is a control state for wine of over 14 percent alcohol and a license state for wine of 14 percent alcohol or less. Michigan is a control state for wine of over 16 percent alcohol and a license state for wine of 16 percent alcohol or less. Virginia and Washington State have dual systems, with both the state and the private sector operating concurrently. The remainder, 36 states and the District of Columbia,

license private entities for the wholesaling of wine, and are [28] known as "license states," Tit. 29, § 24, Code of Ala., in CCH, *LCLR,*[9] *Ala.* at ¶¶ 7089A-C. CCH, *LCLR, Ida.* at ¶ 1,230. CCH, *LCLR, Iowa* at ¶ 1. CCH, *LCLR, Me.* at ¶1. § 4363, Mich. Comp. Laws, in CCH, *LCLR, Mich.* at ¶ 7041. CCH, *LCLR, Miss.* at ¶ 1. CCH, *LCLR, Mont.* at ¶ 1. CCH, *LCLR, N.H.* at ¶ 1. CCH, *LCLR, Pa.* at ¶ 1. CCH, *LCLR, Utah* at ¶ 1. CCH, *LCLR, Va.* at ¶ 1. CCH, *LCLR, Wash.* at ¶ 1. CCH, *LCLR, W.V.* at ¶ 1. CCH, *LCLR, Wyo.* at ¶ 1.

80. To do business in the control states a wine producer must first obtain a listing for each label and each variety it wishes to sell. Then he may sell wine to the state, which acts as distributor (Tr. 67, 368). It is more difficult for a wine producer to obtain entry into a control state than in a license state (Tr. 67–68, 545, 1365–66) and it may be even more difficult for a new winery to obtain a listing in a control state than an established winery (Tr. 287, 368–69, 545, 1365). Mr. Setrakian of California Growers testified that in control states the historic relationship between the state board, the winery and the consumer makes the system difficult to break into. In fact, his company has been trying for years without success to get permission to sell its wines in Pennsylvania (Tr. 367–69).

81. As a result of state regulation, corrupt practices such as kickbacks or bribery to obtain distribution and retailer cooperation are fairly common in the wine industry[10] (CX 19Z16; Tr. 186–88, 196–99, 215, 287, 2254–55).

82. Many states have "at rest" laws requiring that wine purchased by a distributor actually be sent to and come to rest on his premises. Examples are the [29] States of Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois and Massachusetts. Such a requirement means that wine cannot be physically shipped from the producer to the retailer without first going to the distributor. § 48–303(c), Ark. Stat., in CCH, *LCLR, Ark.* at ¶ 7086. § 12–436, Conn. Gen. Stat., in CCH, *LCLR, Conn.* at ¶ 7024. Tit. 4, § 501, Del. Code, in CCH, *LCLR, Del.* at ¶ 7101. § 561.24, Fla. Stat., in CCH, *LCLR, Fla.* at ¶ 7193. Ga. Alcohol Reg. 560–2–6–.10, in CCH, *LCLR, Ga.* at ¶ 407.6D. Art. VI, § 7, Ill. Liquor Control Act, in CCH, *LCLR, Ill.* at ¶ 7116. Chap. 138, § 17, Mass. Gen. Laws in CCH, *LCLR, Mass.* at ¶ 7074B.

83. Some states require that a distributor buy wine only from the business entity that the producer has indicated to be the primary source for that wine. Such a law prohibits one distributor (unless he

[9] *Liquor Control Law Reporter.*

[10] The Booz-Hamilton report noted, however, that these practices should decline as the industry matures (CX 19Z16).

is the designated primary source) from selling his wine to another distributor. States with a "primary source" law include Arkansas and Colorado. § 48-305, Ark. Stat., in CCH, *LCLR, Ark.* at ¶ 7089. § 12-47-128, Colo. Rev. Stat., in CCH, *LCLR, Colo.* at ¶ 7225.

84. Many states prohibit a wine producer from owning or having any financial interest in a wine wholesaler or retailer. Examples are the States of Alabama, Arizona, Colorado, Delaware, the District of Columbia, Florida, Georgia, Illinois, Michigan (in Michigan the requirement applies only to wines of 16% alcohol or less; Michigan is a monopoly state for high alcohol wine), and Ohio. Those same states prohibit a wine retailer from owning or having any financial interest in a wine wholesale operation. § 41, Title 29, Code of Ala., in CCH, *LCLR, Ala.* at ¶¶ 7147-7153. § 4-244, Ariz. Rev. Stat., in CCH, *LCLR, Ariz.* at ¶ 7174. §§ 48-309 and 48-908, Ark. Stat., in CCH, *LCLR, Ark.* at ¶¶ 7097, 7466. § 12-47-129, Colo. Rev. Stat., in CCH, *LCLR, Colo.* at ¶ 7227. Rule 44, Regs. of Del. A.B.C. Comm., in CCH, *LCLR, Del.* at ¶ 4140. § 25-113, D.C. Code, in CCH, *LCLR, D.C.* at ¶¶ 7066-7067. §§ 561.24 and 561.42, Fla. Stat. CCH, *LCLR, Fla.* at ¶¶ 7132, 7177. Ga. Alcohol Reg. 560-2-2-.15 and 560-2-4-.02, in CCH, *LCLR, Ga.* at ¶¶ 4028E and 4051. Art. VI, §§ 3(a) and 3(e), Ill. Liquor Control Act, in CCH, *LCLR, Ill.* at ¶¶ 7110 and 7110D. § 436.31, Mich. Comp. Laws, in CCH, *LCLR, Mich.* at ¶ 7123. § 4301.24, Ohio R.C., in CCH, *LCLR, Ohio* at ¶¶ 7184, 7185. **[30]**

85. In Kentucky, the number of wholesale licenses may not exceed one for every 31 retail package liquor licenses, which themselves are limited on the basis of population figures. 804 KAR 9:020, in CCH, *LCLR, Ky.* at ¶ 4245. Since 1964 the Kentucky Department of Alcoholic Beverage Control has issued a total of four new wholesale liquor licenses, one each in 1964, 1968 and 1976 (CX 1015A).

86. Ohio prohibits the awarding of additional franchises for the same brand in the same territory, which is apparently an exclusive territory law with a grandfather clause. Ohio R.C. in *LCLR, Ohio* at ¶¶ 7005B, 7005D, 7005E. One effect of exclusive distributorships is probably higher prices to the retailer and to the consumer; dual distributorships would almost certainly cause prices to be lowered (CX 903; Tr. 1963-64, 2266-67).

87. Some states exert authority over the price charged to consumers. Alabama prohibits a distributor from changing his prices more often than once every 120 days. California has a fair trade law for alcoholic beverages (Tr. 68-69). Connecticut requires a manufacturer to post a schedule of consumer retail prices, although the retailer may sell below that price. Kentucky has a mandatory fair

trade law, which requires that wholesalers and retailers sell at a price stipulated by the vendor. The law also requires a minimum resale price, without discount: the wholesaler must mark up wine at least 20 percent, and the retailer must mark up wine at least 33 1/3 percent if less than a case and at least 10 percent if a case of more is sold. A Massachusetts law requires a wine producer to post a minimum retail price and a retailer must sell at no less than the minimum. New York requires a producer or wholesaler to maintain a minimum consumer resale price for wine. Ohio has both a minimum markup for wholesalers and retailers and a minimum retail price schedule for wine that must be followed by each wholesaler and retailer. Ala. Reg. 28, in CCH, *LCLR, Ala.* at ¶ 4100. § 30-64, Conn. Gen. Stat., in CCH, *LCLR, Conn.* at ¶ 7262. §§ 244.380 and 244.390, Ky. Rev. Stat., in CCH, *LCLR, Ky.* at ¶¶ 7513- [31]7523. Chap. 138, § 25C, in CCH, *LCLR, Mass.* at ¶¶ 7116 and 7116N. N.Y. Alcoholic Beverage Control Law, § 101bbb, in CCH, *LCLR, N.Y.* at ¶ 13187. § 4301.13, § 4301:1103(G), in CCH, *LCLR, Ohio* at ¶ 4131.

88. Other restrictions on price competition exist in those states which control or prohibit the advertising of wine. Alabama prohibits wines over 14 percent alcohol from being advertised on billboards, and prohibits displays. Georgia prohibits all advertising in newspapers, periodicals, or on signs, posters, billboards, or vehicles. Michigan prohibits advertising of any brand outside the premises of a retailer, and prohibits illuminated signs and signs of more than 22 by 28 inches of any brand inside the premises. These states do not prohibit the advertising of wine in the electronic media. Ala. Regs. 21, 22 in CCH, *LCLR, Ala.* at ¶¶ 4068-76. § 58-301, Code of Ga., in CCH, *LCLR, Ga.* at ¶ 7046. Rules 436.68 and 436.69, Mich. Liquor Regs., in CCH, *LCLR, Mich.* at ¶¶ 4121-4124.

89. Advertising the retail price of wine is prohibited in several states, including Arkansas, Delaware, Georgia and Ohio. In Arkansas, the District of Columbia and Georgia, a sign indicating price in a retail store may not be visible from outside the store. § 147, Ark. Liquor Regs., in CCH, *LCLR, Ark.* at ¶ 6449. Rule 27, Del. A.B.C. Comm. Regs., in CCH, *LCLR, Del.* at ¶ 4100. § 5.1, D.C. Regulations in CCH, *LCLR, D.C.* at ¶ 4051. § 58-301, Code of Ga., in CCH, *LCLR, Ga.* at ¶ 7046. Ga. Alcohol Regs. 560-2-8-.01, in CCH, *LCLR, Ga.* at ¶ 4085. § 4301.211, Ohio R.C. in CCH, *LCLR, Ohio* at ¶ 7172A.

90. Cooperative advertising between a retailer and a manufacturer, or between a retailer and a distributor is prohibited in Arizona, Michigan, New York and Ohio. § 4-243, Ariz. Rev. Stat., in CCH, *LCLR, Ariz.* at ¶ 7161. R 436.1319, Mich. Liquor Regs., in CCH, *LCLR, Mich.* at ¶ 5119. CCH, *LCLR, N.Y.* at ¶ 13087-08. Ohio Regs.,

Liquor Control Comm., § 4301: 1-1-44(f), in CCH, *LCLR, Ohio* at ¶ 4450.

(b) Difficulties in Obtaining Distribution

(1) *Distributors*

91. Distribution is important–even "crucial" in the words of one producer, to success in the wine [32] industry (CX 36A; Tr. 157–59, 347, 428, 548, 1555) and many wine companies have representatives who call on wholesalers to convince them to purchase their wines and to educate the wholesaler's salesmen about those wines (CX's 195A–B, 222A–B; Tr. 111–12, 300–01). Representatives of the larger wine companies reinforce their distributors' sales efforts by calling on retailers and restaurant accounts (CX's 27Z51, 138, 143, 228, 373, 377; Tr. 112, 138, 300–01, 569–70, 978).

92. Many wineries employ salesmen, an advantage which smaller wineries may not be able to afford (Tr. 364, 416–17). A study prepared for Coke-New York by Arthur D. Little reported:

> All of the larger marketers. . . employ sizeable sales forces to call on wholesale customers and also accompany wholesale salesmen on their calls to retailers. This is a major marketing expense but a necessary expense if the marketer wishes to obtain shelf space in retail stores. Small producers cannot afford this expense and as a result, they rely heavily on demand-pull. They also rely heavily on selected distribution rather than attempting to obtain wide distribution. (CX 27Z34).

The Little study also claims that large wine producers are able to "pull" products through a wholesaler by using their salesmen and advertising, something which smaller producers with a more restricted advertising budget and few or no salesmen might not be able to do (CX 27Z48–49).

93. Several industry witnesses testified that distribution is becoming more difficult because the number of distributors–or, at least "good" distributors – has declined (Tr. 219, 298, 348–49, 427, 548, 551, 1297, 1359–61, 1555). A good distributor is one who has a personal interest in the producer's brand, is able to develop resales on a volume basis, a wine division, a good credit rating, and a well-trained sales force (Tr. 93–94, 348, 430, 548, 1359, 1750). According to some witnesses, there may be no more than four or five "good" distributors, and in smaller cities there may be only one or two (Tr. 100, 430–31, 550, 1360–61, 1555). [33]

94. Difficulty in finding a distributor may also be created by exclusive distribution, *i.e.*, by a producer limiting his wine line to one distributor in a given area (Tr. 1048, 1496–97, 2008). The distributor,

in turn, will often be reluctant to take on a competing producer's line or to devote much time to it (CX 27Z48).

95. This has been the experience of some producers. California Growers finds it difficult to get into a good wholesale house where there are comparable brands (Tr. 348–59), as does CWA (Tr. 81, 128). Canandaigua finds that if a distributor is effective with one supplier's brand he is reluctant to accept and promote a competing brand (Tr. 1364), and in one instance one of Coke-New York's salesmen offered the Franzia line to a distributor who ". . .refused it out of fear of reprisal from Guild" (CX 601).

96. Producers, including Mogen David and Tribuno, also believe that having a broad line of products helps them in obtaining distribution (CX's 161, 770H–I; Tr. 214, 293, 434), and they emphasize this fact in advertisements to the trade (CX's 961, 963, 966, 971).

97. The importance to Mogen David of broadening its product line to include several new wine products was recognized in an early 1970's report:

Our objective for some time has been to move up into the position of the top three or four wine marketers. In order to have leverage with distributors to attain the third or fourth spot, it is mandatory that we enter into the volume market that the 11% wine category presents. If we can market successful products in all categories of the wine industry and develop substantial volumes, we can then create a major wine selling force in most of the urban areas in the U.S. (CX 23A–B).

98. Other difficulties which may be faced by a producer seeking expanded distribution are the tendency of distributors to favor existing producers by taking on their new products (Tr. 125–26, 1438–39, 1567) to favor large producers with a national brand (Tr. 117, [34] 217–18, 1364, 1453, 1555) and producers who promote their products (Tr. 92–93, 291–3, 373–74, 430, 645, 1362–63, 1575).

A 1972 Arthur Little study on the U.S. wine market concluded that:

. . .distribution problems favor existing suppliers over new entries. (CX 27L).

99. However, despite the perceived shortage of good distributors, and other distribution problems, several wineries have obtained distribution in recent years (RX 57A–B; Tr. 214, 248, 1363–64, 2031, 2296, 2309–10). Mirassou Vineyards, starting from no base in 1966, has acquired 150 distributors in a 10-year period (Tr. 2031). Sebastiani Vineyards, which has 290 distributors in every state except Mississippi, acquired approximately 240 of them since 1970 (Tr. 2296, 2309–10). With no active effort to do so, Bronco has been able to obtain distribution in [see *In Camera* Findings] states and [see *In Camera* Findings] (RX's 50E–G, 51E, 52E–F; Tr. 637–38). Mt.

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Veeder Winery, probably as small as any in the country, has distribution in at least eight states and could easily obtain more distribution if it produced more wine: It has a long list of would-be customers (Tr. 1901–02, 1906–07).

100. Examples of successful distribution are not limited to Coke-New York's witnesses. Although complaint counsel's witnesses testified generally about difficulties in obtaining distribution, there is no specific evidence that most wineries are unable to obtain adequate distribution in any particular trade area.[11] Many producers witnesses testified that, although they might want more, they have been able to obtain distribution. Six-year-old California Growers Winery has amassed 115 distributors for its branded products in 29 states, Puerto Rico, and the Virgin Islands (RX 57Z–B). California Wine Association, [35] despite generally declining sales, has "very much better" distribution now than it did 15 years ago (Tr. 159). Canandaigua Wine Company has 300 distributors (Tr. 1363–64). East-Side Winery, a cooperative with no advertising budget and no well-known brands, does not need more distributors because the ones it has are selling all the wine it can make, 2.5 million gallons (Tr. 214, 248). East-Side has five distributors in Wisconsin alone (Tr. 214, 222, 248). Despite the limited number of distributors there and in North Dakota and South Dakota, East-Side's general manager said, "I think that for the most part I am in houses I would like to be in. If I could not be there, there are others I would be satisfied to be associated with." (Tr. 222).

101. Weibel has about 100 distributors, in more than half the states (Tr. 286–87, 320). Gibson has distribution in 36 states (Tr. 500). Guild has 340 distributors, giving it distribution in all but six or seven states (RX 194E; Tr. 544). C. Mondavi & Sons, a small family company that does almost no advertising, had 104 distributors in 1974, covering all but five states (RX 91B–C). Concannon Vineyard, also a small family company that does almost no advertising, had 63 distributors in 1974, 26 in California and 37 in 27 other states (including six control states) (RX 92E–J).

102. Although the number of liquor-dominated distributors may have declined in some markets, available distribution for wine has not been reduced substantially. Mr. Perelli-Minetti explained that this is so because liquor distributors have been setting up wine divisions and making a real effort to go after wine volume and because "there are tiny houses springing up" and these small houses,

[11] Messrs. Simon and Perelli-Minetti did testify that they have found it difficult to find another distributor when they lost one in a market (Findings 269, 271), but this problem has not been met by other producers who may be more competitive than Bardenheier and CWA.

with relatively fewer salesmen but salesmen who concentrate on wine, may do a better job for a winery (Tr. 100-01).

103. In view of the nation's increasing interest in wine,[12] it seems inevitable that businessmen will enter into its wholesale distribution. In the State of Washington, for example, the distributor G. Raden [36] & Sons was established in 1972 and has grown to a nearly $4 million business (Tr. 1816, 1824). While a student in law school, Mr. Gary Raden obtained, for $350, a license to import and distribute wine and beer and he began doing business (Tr. 1815-16). His resources were a rented 2,000-square-foot space in the basement of a second-class hotel, one truck, between $7,000 and $10,000 in capital, and himself as the sole employee (Tr. 1817-18). In his first year, he sold between 300 and 500 cases of wine per month with total sales of less than $100,000 (Tr. 1818).

104. Two years later, having spotted what he thought was an opportunity in the expanding Washington market, Mr. Raden approached Franzia and took on a secondary Franzia brand called Yosemite Road. Franzia had not been sold in the market before (Tr. 936-37, 1819). Mr. Raden's distributorship business grew and he left law school in 1975 to devote full time to it (Tr. 1842-43). His company now sells between 16,000 and 20,000 cases of Franzia wine per month to 600 retail accounts, and also smaller amounts of Beringer, Sebastiani, Mt. Veeder Winery, and Sutter Home Winery products (Tr. 1821-22). All of the wines he sells were obtained as a result of his requests to the suppliers (Tr. 1819, 1822).

105. Today, Mr. Raden's 10,000-square-foot warehouse is too small and 37 employees, 11 trucks, and a computer are needed to operate his business (Tr. 1823-24). Although headquartered in Seattle, Mr. Raden covers the entire western part of Washington. G. Raden & Sons is and always has been profitable (Tr. 1823-24).

106. Although Franzia accounts for 60 percent to 75 percent of Raden's sales, and Mr. Raden credits Franzia with the growth of his business, he is confident that even without Franzia he could have become a substantial figure in the Washington distribution business because [37] he could have built his business with any other properly priced brand not then in the market (Tr. 1824, 1832-35).

107. Mr. Raden's success, and Franzia's, were achieved without advertising (before October 1977) and without service, support, training, or manpower from the winery (Tr. 1844-45). Instead:

> We spent a lot of time knocking on doors. Gaining distribution is not the easiest

[12] Per capita consumption in the United States has been increasing steadily over the past several years (Finding 329).

thing in the world but with a degree of persistence and a product that is good quality price-wise, you can achieve major distribution. (Tr. 1818).

108. Denver has also seen new entrants in wholesale distribution. Three new distributors of California and imported wines have recently been established: Lido, Dionysus, and Windsor (Tr. 1975). Windsor obtained the Sonoma Vineyards line when Sonoma decided to add a second distributor in the Denver market (Tr. 1994–95, 2112). An alternative to traditional wine distribution channels is also developing in Denver. One food wholesaler is presently selling wine and a second is beginning to do so (Tr. 1975). A distributor competitor of these two new entrants described their importance this way:

It is relatively early to say at this point. I think they are learning the business and it is going to take them a while to learn it, but they have got salesmen and their trucks go to the shops presently, so they are definitely a factor to be contended with. (Tr. 1975).

109. In Los Angeles, food brokers are also entering the wine distribution business (Tr. 940–41). Franzia sells 10,000 cases per month through Doug Bradshaw, a food broker there who had previously had only a token wine operation (Tr. 940–41). Use of food brokers for wine distribution may well grow, as more states are permitting supermarkets and grocery stores to sell wine (Tr. 74). Such stores, which have always been serviced by food brokers, are devoting an increasing share of shelf space to wine–perhaps as much as tenfold in some cities (Tr. 73, 396, 568, 911). [38]

110. Although several producers question their ability to sell wine, beer distributors are beginning to show interest in wine distribution[13] (CX 27Z55; RX's 194E, 245, 262, 265, 278, 279;[14] Tr. 242, 944–45) and provide an alternative (although perhaps not completely satisfactory to some producers) to traditional wine distribution.

111. Beer distributors vary in their ability to sell wine, as do all other wine distributors (Tr. 357, 549, 2217). However, there is no reason why beer distributors cannot do an adequate job of distribution for some wineries. In fact, Gibson Wine Company prefers beer distributors to liquor distributors because the fit between most beers and popularly priced wines is good, both being high-volume and low-price/low-margin products (Tr. 519, *see* 314). Mr. Louis Martini, who

[13] The Arthur Little study of six years ago noted that beer distributors' share of the wine distribution business was increasing (CX 27Z46).

[14] A Monarch wine salesman reported:

I spent two days at the state's annual beer convention. In addition to seeing several of our distributors there, I also met and spent some time with men that are only in the beer business; for the time being anyway. These are the beer distributors in the various areas, that are planning on getting into the wine business.

knows little of his company's distribution operations, nonetheless knew of at least one beer distributor that is performing well for his premium winery (Tr. 2149–50). In the view of Mr. Robert Ivie:

> There are some distributors who have beer and distilled spirits lines who are competent or good because of that. There are others that have those things that are not competent because they have them. So I don't think there is any general rule . . . . (Tr. 549).

[39] 112. Canandaigua Wine Company has used beer distributors for some of its products (Tr. 1361–62). Mr. Marvin Sands thought it "hard to generalize" about their ability, but he testified that some beer distributors have done well for its proprietary specialty products (Tr. 1361).

113. Selling a broad line of California wines, California Growers Winery has a similarly particularized view of beer distributors. Mr. Robert Setrakian said, "I think that the quality of a given beer distributor for the distribution and sale of wine is dependent on the quality of ownership of that distributing house." He cited as an example one beer distributor in northern California that distributes his Growers brand and does an excellent job; and, in contrast, a beer distributor in Chicago that on a population basis did a "lousy job" (Tr. 357).

114. From 20 percent to 25 percent of the beer distributors in Cleveland carry wine (Tr. 1296). Beverage Distributing Company, for example, carries Roma wine and Miller and Stroh's beers (Tr. 1335). Franzia's Cleveland distributor, American Vineyards, also distributes beer (Tr. 1335). In Massachusetts, beer distributors also sell wine, including such prominent brands as Almaden (Tr. 2216–17).

115. One of the major wine distributors in Denver, Mr. John Pearson's C & C Distributing, is also a major figure in beer distribution (Tr. 1966–83). Mr. Pearson bought C & C Distributing, a small distributorship, in 1972 (Tr. 1967). When he came to work, with no previous experience in distribution, the company employed one salesman and sold less than $1 million per year (Tr. 1966). Since then the business has grown roughly fourfold and now employs 10 salesmen. By volume, half of the business is beer and half wine (Tr. 2000). The same sales force sells both beer and wine, including 6,000 cases per month of Franzia (Tr. 1968, 1974).

116. Beer distributors have been and remain important to Franzia. Of Franzia's branded business, 35 percent is sold through 13 distributors: 11 of the 13 are [40] beer distributors (Tr. 936–47). Of the two others, one is now entering the beer distribution business (G. Raden & Sons), and one is a food broker (Doug Bradshaw, Los

Angeles). In addition to C & C Distributing in Denver, 10 beer distributors have developed substantial wine distribution capability with Franzia products (Tr. 936-47). Franzia's commitment to these distributors was minimal, only some training and advice (Tr. 977-78). Advertising was not promised, merchandising materials were usually no more than a few posters, and Franzia did not underwrite the distributors' costs of training (Tr. 980-83).

117. Despite the feelings of some wine producers that beer distributors might not do a good selling job, retailer witnesses said they were willing to deal with any and all distributors (Tr. 2080, 2110, 2215-16). None stated any objection to beer distributors; and one, Mr. Michael Gelven, specifically said that beer distributors are "as competent or as incompetent" as any other distributors (Tr. 2217).

118. Another alternative to traditional distribution is "clearing," the process under which a distributor, while satisfying state law, does no more than clear the wine through his warehouse, taking delivery from the supplier and transferring the wine to the retailer for a fee (Tr. 1963, 1976). Mt. Veeder Winery, for example, clears some of its wine through distributors (Tr. 1963). One distributor who testified said that he clears all kinds of wine "every month" (Tr. 1976). All of the retailers who testified said that the ease of clearing products not in general distribution enables them to obtain any product they wish to sell (assuming the winery has enough to supply them) (Tr. 2079-80, 2113-14, 2211-12).

119. Michael Gelven, a retailer in rural southeastern Massachusetts, noted that if he is successful with a product that has been cleared for him and re-orders it, the distributor may begin to carry the product in inventory for sale to other retailers (Tr. 2212). Since most wine products are already regularly available in Massachusetts from one of the 27 distributors with whom Gelven deals, only 3 percent to 5 percent of his business involves the clearing process (Tr. 2273). **[41]**

120. Clearing may also be used in private label sales. For example, Mario Perelli-Minetti testified about California Wine Association's direct courting of the A & P account, a national account,' although the wine was sold through distributors like Continental in Chicago (Tr. 121, 133-34, 170-75, 453).

121. There is a dispute between the parties as to the number of active or potential distributors available to wine producers. Complaint counsel relied on guesses by their witnesses which were not backed up by any hard evidence and which were, in some cases, inconsistent. Mr. Ivie, for example, guessed that "[t]here might be 30

or 40" distributors in Wisconsin; Mr. Ernest Haas thought there were maybe 20 (Tr. 222, 554), yet CX 1031 lists more than twice that number actually selling wine to retailers in 1976. Mr. Marvin Sands was asked how many distributors there are in an "average metropolitan area" and stated, for Cleveland, that there are one or two "good" distributors and a few others (Tr. 1360), but Mr. Fred DePompei, who is a Cleveland distributor, testified that there are between 15 and 20 active wine distributors in his city (Tr. 1334).

122. Guesses by complaint counsel's witnesses do not provide reliable evidence of the number of distributors available to wine producers. The evidence offered by Coke-New York[15] (together with rebuttal evidence by complaint counsel) is a much more reliable indicator of the availability of wholesale wine distribution in the 20 states which account for 77 percent of all wine consumption and 82 percent of all wine consumption where distribution is not a state monopoly (RX 380H). The following list of distributors shows those which are licensed and those which are actually distributing wine. Where distributors have paid substantial license fees, but there is no evidence that they are actually distributing wine, I believe it is not unreasonable to assume that they are potential distributors.

123. Arizona has 89 distributors licensed to sell wine: 65 licensed for wine, beer, and spirits, 24 licensed for wine and beer. Each has paid an application [42] fee of $50, a license issuance fee of $1,500, and an annual fee of $100 or $250 (RX's 430B, 431E–H) Twenty-three of those licensed (one for every 67,000 adults) are presently active in distributing wine (Stat. Ab. 28;[16] CX 1010).

124. California, in which the state's many wineries may themselves sell directly to retailers, has 749 distributors licensed to sell wine (RX's 432B, 433D).

125. Colorado has 18–20 active distributors selling wine to retailers (Tr. 1974, 2110). Each distributor has paid an annual license fee of $1,000 (Col. Rev. Stat. §§ 12–47–115 and 123). Mr. Pearson of C & C Distributing in Denver, estimates that he covers 90 percent to 95 percent of the state's population (Tr. 1980).

126. Florida has 199 distributors licensed to sell wine: 46 licensed for wine, beer, and spirits, 153 licensed for wine and beer (RX 434A–B). Each has paid a substantial license fee and posted a bond for at least $1,000; 46 have paid an annual fee of $4,000 and 153 have paid an annual fee of $1,250 (Fla. Stat. § 561). Seventy-three of those licensed (one for every 84,000 adults) are presently active in distributing wine (Stat. Ab. 28; CX's 1011, 1012B).

[15] Obtained from officials supervising their state's licensing activities.

[16] U.S. Bureau of the Census, Statistical Abstract of the United States 1977.

127. Illinois has 448 distributors licensed to sell wine, beer, and spirits, each of which has paid an annual fee of $150 (RX's 435A, 436B–H). One hundred eighty-six of those licensed (one for every 42,000 adults) are presently active in distributing wine (Stat. Ab. 28; CX 1014).

128. Kentucky has 31 distributors licensed to sell wine and spirits, 25 of which are active in distributing wine, and each of which has paid an annual fee of $1,000 and posted a bond for at least $2,000 (Stipulation dated March 17, 1978; CX 1015G; RX 437A, E; Ky. Rev. Stat. § 243). Although the number of distributors in Kentucky is limited by state law, the limitation does not appear to be significant since it does no more than limit the number to one distributor for each 77,500 persons, including children (CX 1015).

129. Louisiana has 47 distributors licensed to sell wine (RX 438). [43]

130. Massachusetts has approximately 50 active distributors selling wine to retailers (Tr. 2242). Each distributor has paid a substantial annual license fee: $5,000 for those who sell wine and beer (Mass. Gen. Laws Ann. Ch. 138 § 18). In rural southeastern Massachusetts where he operates two retail stores, Michael Gelven is serviced by 27 distributors located in eastern Massachusetts (Tr. 2214–15). One of those distributors is located 70 miles from Mr. Gelven, in Lawrence, Massachusetts (Tr. 2217).

131. Michigan has 263 distributors licensed to sell wine and beer, each of which has paid an annual license fee of $300 plus $50 for each delivery truck in use (RX 439C–I). One hundred eighty-one of those licensed (one for every 34,000 adults) are active in distributing wine (Stat. Ab. 28; CX 1018).

132. New Jersey has 153 distributors licensed to sell wine, each of which has paid a substantial license fee (RX's 440A, 441E). Of these, 78 have paid an annual fee of $7,000, 56 have paid an annual fee of $1,500, and 19 have paid an annual fee of $3,000 (*Id.*).

133. New York has 202 distributors licensed to sell wine: 116 licensed for wine and spirits, 86 licensed for wine only (RX's 442T, 443B–C). Each has paid a substantial license fee: 116 have paid an annual fee of $5,000 and 86 have paid an annual fee of $625 (N.Y. Alc. Bev. Cont. Law §§ 62, 66(3), 78(1), 83(2); RX's 442T, 443B–C). One hundred seventy-nine of those licensed (one for every 72,000 adults) are presently active in distributing wine (Stat. Ab. 28; CX 1019). Second-ranked in total wine consumption, New York has seen a 63 percent increase in the number of active wine distributors in four years, from 110 in 1973 to 179 in 1977 (CX 1019; RX 380).

134. North Carolina has 61 distributors licensed to sell wine (RX 444A–Z11).

135. Ohio has 154 distributors licensed to sell wine, each of which has paid a license fee (RX's 445, 446B–C). Of these, 30 have paid an annual fee of $100 and 124 have paid an annual fee of $500 (*Id.*). In Cleveland alone, there are between 15 and 20 distributors active in distributing wine (Tr. 1334).

136. Oregon has 133 distributors licensed to sell wine, under 104 separate ownerships (CX 1021; RX 447). Each of them has paid an annual license fee of $275 and posted a bond of at least $1,000. [44]

137. Rhode Island, the nation's smallest state, has 17 distributors licensed to sell wine: 16 licensed for wine, beer, and spirits, one licensed for wine and beer (RX's 448A–B, 449B–C). Each has paid a substantial license fee: 16 have paid an annual fee of $3,000 and one has paid an annual fee of $1,250 (RX's 448A–B, 449B–C). Thirteen of those licensed (one for every 51,000 adults) are presently active in distributing wine (Stat. Ab. 28; CX 1023).

138. South Carolina has 78 distributors licensed to sell wine and beer, each of which has paid an annual license fee of $400 (S.C. Code §§ 61–9–10 and 310) (RX 450).

139. Texas has 154 distributors licensed to sell wine anywhere in the state and 64 licensed to sell wine only in the county in which they are located. Of the 154 all-state distributors, 49 are licensed for wine, beer, and spirits and have paid an annual fee of $1,250; 105 are licensed for wine and beer and have paid an annual fee of $200; the county wholesalers are licensed for wine and beer and have paid an annual fee of $50 (RX's 451R, 452). Sixty-eight of those licensed (one for every 125,000 adults) are presently active in distributing wine (Stat. Ab. 28; CX's 1025A–B, 1029).

140. Virginia has 55 distributors licensed to sell wine, each of which has paid an annual license fee of at least $450 and posted a bond of at least $5,000 (Va. Code §§ 4–25(g), 4–31(g), 4–33(b); RX 453).

141. Washington has 140 distributors licensed to sell wine, each of which has paid an annual fee of $250 (RX's 456D–E, 457B–C). Licenses are issued only to those having an actual commercial intent to enter the distribution business (Tr. 1840–41).

142. Wisconsin had 88 distributors who sold wine to retailers in 1976 (CX 1031). Of 106 firms reporting such sales, 18 were identified as wineries, leaving 88 who are distributors (CX 1030).

143. In these 20 states, some 3,195 distributors are licensed to sell wine. In 11 states, with 1,625 licensees, 904 distributors are presently active in [45] selling wines, and others are potential wine distributors. For the remaining 9 states, with 1,570 licensees, complaint

counsel did not present any evidence disputing the data provided by state officials and it must be assumed that many of them are also active in selling wine.

144. Complaint counsel argue (CRF, pp. 35–37) that these numbers are deceptive, for many distributors (for example, a girls' high school (RX 454B-F)) may not be engaged in commercial activity or, if they do, may be so small that they cannot do an adequate job. I agree with complaint counsel that "the only important consideration is the number of distributors that are commercially viable" (CRF, p. 37) but they lose sight of the fact that since they claim that there is a scarcity of "good" distributors, it was their burden to come forward with reliable evidence of that scarcity. Instead, they presented vague and contradictory estimates.

145. The importance of Coke-New York's evidence lies in the fact that, while it does not reveal precisely how many distributors of wine there are, it provides a reliable basis for two conclusions: (1) That there are many actual or potential distributors available for wine producers and (2) That complaint counsel's claim that wine producers are, or will be, faced with an inadequate distribution network has not been established.

(2) *Retailers*

146. Wine may be sold for off-premise consumption in supermarkets, package stores (liquor stores), and, in monopoly states, in state owned stores (CX 2H; Tr. 365, 368, 1501, 1569), and all wines compete with each other and with other products for shelf space in these stores (Tr. 323–24, 364, 395–96, 476, 1327, 1330, 1498, 1957, 2391). However, some states, such as Colorado, Connecticut, Florida, Georgia, Kentucky, and New York prohibit the sale of wine in stores where food is sold. §§ 12–47–116 to -117, Colo. Rev. Stat., in CCH, *LCLR, Colo.* at ¶¶ 7201–7202, § 30–20, Conn. Gen. Stat., in CCH, *LCLR, Conn.* at ¶ 7165. § 565.04, Fla. Stat., in CCH, *LCLR, Fla.* at ¶ 7278–C. Ga. Alcohol Regs. 560–2–5.02, in CCH, *LCLR, Ga.* at ¶ 4057. § 243, Ky. Rev. Stat., in CCH, *LCLR, Ky.* at ¶ 7274. § 63, N.Y. Alcoholic Beverage Control Law, in CCH, *LCLR, N.Y.* at ¶ 11611. [46]

147. There is a trend, however, among the states to permit wine sales in supermarkets (CX 2H; Tr. 73)–a trend which is opposed by package stores, the traditional source of wine[17] (Tr. 73).

148. In states where it is legal, supermarkets are significant sellers of wine, and their contribution to retail sales has increased substantially over the past 10 years (CX 2H; Tr. 1329, 1569). When a

[17] For example, package store owners have prevented passage of a law in New York which would permit supermarket package sales (tr. 73–74, 1377).

state removes restrictions on supermarket sales, wine sales increase (CX 27Z54; Tr. 74).

149. Because they have less shelf space to devote to wines than do package stores, supermarkets, according to some industry members, carry a smaller variety of wines (Tr. 117, 1330, 1500), and there is some evidence that supermarket personnel may be more interested in fast-moving, advertised wines (CX's 2H, 5Q; Tr. 118).

150. The facts recited above, do not, however, lead to the conclusion that smaller wineries have more difficulty in obtaining retail distribution than larger wineries. Perhaps supermarket personnel do favor larger, more heavily advertised wines, but their job is to satisfy customers and if a wine becomes popular for some reason other than advertising (for example, an extremely low price), it is inconceivable that they would refuse to handle it.

151. Furthermore, the number of retail outlets for wine is enormous–some 342,000 (a number which has grown by more than 20 percent since 1967 (RX's 368H-I, 460; Tr. 909)), and many of these stores–both supermarkets (because wine is more profitable than food) and traditional liquor retailers–are giving more attention and shelf space to wine (Tr. 396, 568, 911–12, 2072, 2108, 2203–04).

152. The tendency of some progressive retailers is, rather than concentrating on a few lines of wines, to offer as wide a variety as possible. Mr. Michael Gelven, the owner of two liquor stores in southeastern Massachusetts, carries the products of more than 100 wine companies, about half of them doemstic (Tr. 2201, 2206–07), because "you want to give the consumer as large a selection as you can. . . ." (Tr. 2210). [47]

153. Mr. Gelven's stores carry a great range of popularly priced wines, including Gallo, Carlo Rossi, Italian Swiss Colony, Paisano, Cribari, Roma, Vino Fino, Ambassador, M. LaMont, California Growers, Setrakian, Vino Casata, Parma, Cappella, Petri, and numerous imports (Tr. 2207–11).

154. Notwithstanding the length of this list, Mr. Gelven takes on three out of four new products offered to him (Tr. 2218–19). He may even seek wines which are not offered by distributors (Tr. 2211). Mr. Gelven searches out new products not only to widen his selection even further, but also because they may be both lower priced for the consumer and more profitable for the retailer (Tr. 2218–20).

155. Mr. Harold Binstein of Gold Standard Liquors is one of the largest retailers in Chicago, with 10 stores serving neighborhoods that are a cross-section of Chicago's diverse population (Tr. 2068–70). He aims to have the largest selection of wines in Chicago, carrying more than 1,000 brands, and he is constantly looking for new wines

(Tr. 2076). At one time or another he has "stocked just about every brand that ever came into the Chicago market." (Tr. 2070). He likes to "have something for everybody" and will ordinarily give all new products a trial in his stores (Tr. 2077-78, 2089), and he has been expanding his shelf space in order to accommodate even more wine. Recently, he opened a 60,000 square-foot store in what used to be a Sears, Roebuck & Co. branch (Tr. 2071-72).

156. At Argonaut Liquors in Denver, second largest of 12 to 15 retailers who together have about 60 percent of the Colorado alcoholic beverage business (Tr. 2106-07), Mr. Jack Robinson stocks about 100 domestic and 150 imported wine brands (Tr. 2108). He is eager to have new products to feed his expanding wine business and also is doubling the amount of available selling space by creating a wine cellar on his store's lower level (Tr. 2108, 2112-13). One of the distributors who services Argonaut Liquors described its attitude, and that of retailers in general: [48]

> If you come in with a new product and you have a presentation, they will buy it. They will at least try it and if there is some movement, they will re-order (Tr. 1970).

157. Wine purchases are to some extent impulse purchases: a wide selection and new products are thus needed to cater to and encourage such impulse buying (Tr. 366, 1454, 2085, 2124). Impulse buyers are drawn to products chiefly by the store's own merchandising-floor stackings, shelf cards, signs, personal contact, and other selling devices (Tr. 2241). Foremost among the retailer's selling devices is low price, which more than any other single factor determines not only the retailer's willingness to take on a product but also his customers' interest in buying it (Tr. 2104, 2112, 2218).

158. As discussed above, retailers seek out products not widely available in order to make their own selections more distinctive and attractive to customers.[18] Products that gain distribution first through key retailers are taken on by other stores as the consumer demand created by the first sellers spreads in the market (Tr. 2220-21). This, in turn, may spur other retailers to seek out additional new products (Tr. 2210, 2218-19).

159. While the vast selection of wines carried by Mr. Gelven is typical only of progressive liquor stores, less innovative retailers and supermarkets may also carry a wide variety of products and brands. In one witness' experience, five or six popularly priced wine brands are typical for a supermarket in the midwest (Tr. 1499-1500)

[18] The owner of Argonaut stated that he likes new competitively priced products because of their uniqueness:

> Sure, we like that kind of product because if we can build something on that, on a product that is unknown, we get customers coming back to our store. They cannot go to the next store and find it. . . .They have to come to us. . . . (Tr. 2112).

generally thought to lag behind the rest of the country in wine awareness (Tr. 1571–72). In northern California, Safeway carries 35 [49] different wine brands and other supermarkets may carry 30 (Tr. 902–03, 910–11). Even the non-progressive liquor stores carry more brands than the supermarkets (Tr. 1500).

160. Supermarkets' new interest in wine has made it possible for new wine companies to garner shelf space in them. Bronco is sold in five chains in northern California (Tr. 668–69). California Growers Winery has some chain store distribution in Puerto Rico (Tr. 394). Mirassou Vineyards is carried by seven major chains, which sought its wines, including Safeway in Virginia, California, Washington, and other states (Tr. 2038–39) and Mr. Gary Raden's brand-new line of inexpensive imported Italian varietals has been taken on by Safeway (Tr. 1827–30, 1837–39).

161. Based upon this evidence, I conclude that producers, through existing or new distributors, will be called upon in the future to provide more retail outlets with their wine and that such legal restraints on distribution as there may be will not seriously impede the producers' efforts to sell their wines,

D. Coke-New York's Wine Business

162. Mogen David produces artificially sweetened, predominently kosher specialty fruit and berry wines. These traditional sweet wines account for 40 percent of its sales (CX's 18Z16–17, 19Z1–7; Tr. 1111–14). Founded in Chicago upon the repeal of prohibition in 1933, the company maintains plants there and in Westfield, New York (CX's 12Z7, 18U; Tr. 1108, 1119). The principal markets for these wines are in Illinois, Indiana, Ohio, Michigan, Wisconsin, Florida, Texas and Pennsylvania (CX 12Z5; Tr. 440, 1170). Mogen David sells almost no wine in California and New York, the nation's two leading wine-consuming states, which together account for one-third of the nation's total wine consumption (CX 18Z72; RX 380H; Tr. 1170).

163. Mogen David also produces a specialty wine called MD 20 20 which is Concord based, artificially sweetened and is fortified with alcohol to reach 20 percent alcohol content (CX's 18Z3; 19Z6; 52Z82–83; Tr. 1111, 1114). Mogen David has also produced, at various times, other wines, many of which have been discontinued. [50]

164. Beginning several years before its acquisition by Coke-New York, Mogen David produced a small group of dry kosher wines, including dry Concord, burgundy, champagne, and sauterne (CX 18Z1; CX 19Z6; RX 484C; Tr. 1113–15, 1173). These products failed in the marketplace, however, and never produced any significant sales (Tr. 1113–15, 1172–73). In 1972, they accounted for approximately

one-half of one percent of Mogen David's sales volume (CX 56). As a result, they were dropped shortly after Mogen David was acquired by Coke-New York, before the acquisition of Franzia (CX 58; Tr. 1173).

165. In 1957, Mogen David introduced a line of wines under a new brand name, Key. The line was dropped after a three-year effort to market it failed (CX 18Y-Z, Z33). In 1969, Mogen David introduced MD 20 20, called the "[f]irst major breakaway from [the] Mogen David line" (CX 17U).

166. For a brief period in the early 1970's, Mogen David sold substantial quantities of three other specialty products, each Concord or fruit based and artificially sweetened (Tr. 1172, 1175). Those products were Cold Bear (Concord), Black Bear (blackberry), and Jug (Strawberry and apple) (Tr. 1172, 1175). Cold Bear and Black Bear, after rapid initial success, declined precipitously from a combined sales peak of 1.5 million to 2 million cases per year to less than 70,000 cases per year, with the downward trend continuing (RX's 478, 480; Tr. 126, 1172). Jug declined even more rapidly from its initial burst of 1.2 million cases to its current annual sales of less than 5,000 cases (Tr. 1172).

167. In 1975, several years after discontinuing its previous attempts to market dry wines, Mogen David tried to enter the table wine business by test marketing a dry California table wine produced by Franzia and sold under the brand name Fanfaron (Tr. 1145).[19] The test market results were unfavorable and Fanfaron, like its predecessors, was abandoned as a failure (CX 980K; Tr. 1220). Mogen David sangria also failed in the test market stage (CX 980K; Tr. 1115, 1172). [51]

168. Mogen David has recently renewed its efforts to produce and sell table wines. It has introduced three new wines called Mogen David Light Red, Light White, and Light Pink (CX 1038). These wines, which combine Mogen David wines and sugar solution with wine or grape juice supplied by Franzia, are presently being test marketed in 10 small midwestern and southern cities (Stipulation dated April 18, 1978; CX's 1038, 1040). They are described as "table wines that are lighter and less sweet than the well-known and widely tasted Mogen David Regular Line" (CX 1038).

169. The introduction of new wines has changed the pattern of Mogen David's sales. The sweet traditional kosher wine constituted some 80 percent to 90 percent of Mogen David's business when it was acquired by Coke-New York (Tr. 1114). By 1972, MD 20 20, introduced in 1968, accounted for 50 percent and its Concord wine 19

[19] According to complaint counsel, Mogen David did not try to enter the table wine business because it was already in that business with its sweet wines (CRF, p. 46). I disagree (see Findings 212-237).

percent of total gallon sales volume. The rest of its sales were in fruit and berry wines and other mostly discontinued wines (CX 12Z6). At present, therefore, it appears that some 90 percent of Mogen David's sales are in MD 20 20 and sweet Concord and berry wines.[20]

170. In addition to selling its own products, Mogen David acts as the sales agent for Tribuno vermouth (CX's 12V, 55B). Unlike many other wineries, Mogen David sells no private label wine or bulk wine, and it sells almost no wine to restaurants. Mogen David's share of total wine sold in the United States has decreased in the past several years, as have its actual sales, which declined 33 percent from 1973 to 1977 (CX 992; RX's 416, 417, 418, 425, 501).

Year	*Mogen David & Tribuno Sales (Gallons)*	*Share of Total Wine Sales*
1973	14,289,227	4.12%
1974	11,561,071	3.31%
1975	11,248,754	3.06%
1976	10,490,415	2.78%
1977	9,587,120	2.39%

171. Tribuno is engaged in the production of sweet and dry vermouths of varying alcoholic content and accounts [52] for 23 percent of sales of vermouth produced in the United States (CX 16F) and for 12 percent of all vermouth sales (CX 33F). Until its acquisition by Coke-New York, Tribuno had been a family-owned company in New Jersey bottling and blending vermouth under its trademark in its plant in New Jersey. Some vermouth was also bottled for Tribuno by A. Perelli-Minetti & Sons, Delano, California, from whom Tribuno also purchased bulk wine for its bottling plant in New Jersey. Since the acquisition, Franzia has bottled vermouth for the Tribuno label and has also sold the bulk wine for Tribuno's bottling plant in New Jersey (Tr. 1116-19).

172. Twenty-One Brands distributed Tribuno products from 1941 until its acquisition by Coke-New York (CX 33H). Upon acquiring Tribuno, Coke-New York terminated the relationship with Twenty-One Brands and the Mogen David sales force began to sell Tribuno (CX's 33L, 34, 35; Tr. 1120).

173. Franzia was formally started in 1933 by five Franzia brothers (Tr. 590), although prior to that time, dating back to 1915, the father of the founders of Franzia, Guiseppi Franzia, produced and marketed wine under the Franzia name (CX 91D).

174. In 1933, the company produced 100,000 gallons of wine (CX

[20] This estimate is based on testimony that MD 20 20 sales have been growing only a little (Tr. 1115) and Mr. Sullivan's estimate that at present 40 percent of Mogen David's sales are in traditional sweet (Concord, fruit and berry) wines (Tr. 1112).

91D). In 1962, its capacity rose to 6 million gallons, and by 1973 increased to 36 million gallons (Tr. 592). Franzia underwent a substantial pre-acquisition expansion during the period 1971 through 1973. In 1973, its capital expenditures totalled $5.4 million, and major additions to the plant, equipment and vineyards more than doubled the company's production capacity. Construction of a new $1.3 million bottling facility had previously been completed in 1972, which not only reduced unit bottling costs, but allowed for "considerable future expansion at minimum cost" (CX 5C; Tr. 597–98, 605).

175. Franzia Brothers Winery has one of the most modern wineries in the United States (Tr. 604; CX 5R). It has a storage capacity of 20.3 million gallons and bottling lines with a capacity for 17,000 cases daily (CX's 5R, 75D, 80G). The winery is situated on approximately 100 acres of land near Ripon, California. All of Franzia's wine making operations, general offices and a wine tasting room are located at the winery (CX's 80G, 12Z15). [53]

176. Franzia owns 13 grape producing vineyard properties, consisting of 1,030 acres, within a few miles of the winery. In 1972, Franzia purchased an additional 2,500 acres of undeveloped agricultural property located approximately four miles from the winery. The company also entered into 35-year leases on 2,384 acres in 1972, with 13 lessees (CX's 75D, 80G; Tr. 603).

177. In 1972, vineyards owned and operated by Franzia supplied approximately 7 percent of all grapes crushed. The balance of Franzia's annual grape requirements has been supplied by more than 200 independent growers. A large number of these growers have been selling their grapes to Franzia for many years. The vineyards purchased in 1972 were expected to begin producing grapes by 1975 (CX 12Z14).

178. Franzia produces and markets a broad line of varietal and generic still, sparkling, dessert, vermouth and pop wines (CX's 12Z13, 80C, 532; Tr. 598, 1035). At the time of the acquisition of Franzia by Coke-New York, it was producing and marketing the following wines:

Red Table Wine

Zinfandel, Burgundy, Vino Rosso, Robust Burgundy, Chianti;

White Table Wine

Chablis, Sauterne, Rhinewein, Chablis Blanc;

Rose Table Wine

Vin Rose, Grenache Rose, Pink Chablis;

Sparkling Wine

Champagne, Pink Champagne, Cold Duck, Sparkling Burgundy;

Dessert Wines

Straight Sherry, Port, Tawny Port, Pale Dry Sherry, Very Dry Sherry, Cream Sherry, Tokay, Muscatel, White Port; [54]

Vermouth

Dry Vermouth, Sweet Vermouth. (CX's 12H, Z13, 75G, 80C; Tr. 597-98).

179. Franzia never produced berry wines, although it is capable of doing so (Tr. 600), and has also experimented with specialty wines called Davance, Liberte, and Silver Hawk (Tr. 1034-35).

180. Franzia also makes and sells bulk wine to other wineries, including Gallo, Sebastiani and Sonoma Vineyards (Tr. 897), sells grape concentrate[21] to Mogen David (CX's 565A-B, 1041B; Tr. 778-79, 1150), and has purchased apple concentrate from Mogen David (CX 843).

181. From 1971 to the time of the acquisition of Franzia by respondent Coke-New York, Franzia was a profitable company (CX 12X; Tr. 1781, 1808). In 1972, the year prior to the acquisition, Franzia's sales and revenues had increased 32 percent over 1971 while earnings rose 58 percent. Sales in 1972 were $21,439,000 while earnings were $859,000 (CX 75D). By 1973 sales had increased to $28,931,000 (CX 12X). The company's assets as of June 1973 totalled $20,529,000, an increase of over $5,000,000 from 1972 (CX 12Z32). During the period 1970-1973, Franzia's California sales increased by 50 percent, while its non-California sales more than doubled (CX 886). Non-California sales rose 37 percent in 1972 alone (CX 75D).

182. On a gallonage basis, Franzia's yearly sales increased 12.8 percent in 1969; 12.1 percent in 1970, 14.5 percent in 1971; 17.9 percent in 1972 and 32.4 percent in 1973. Each increase is measured against the preceding year's sales (CX 12Z12).

183. Respondent Coke-New York was aware of Franzia's financial condition when the company was acquired. The accounting firm of Ernst & Ernst was utilized by respondent to report to them on Franzia's financial condition (Tr. 1810-11). [55]

184. Franzia's rapid growth just prior to the acquisition was

[21] Dehydrated grape juice (Tr. 29-30).

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caused by a tremendous spurt in the demand for California wines in the early 1970's and a short grape crop in 1972 (RX 378F; Tr. 1801). During this time, Franzia also experienced a capital shortage which arose from the unwillingness of three of the Franzia brothers to finance expansion (Tr. 598). Eventually, these brothers sold their 60 percent interest in Franzia to a group headed by investment banker Daniel Lufkin (Tr. 590, 597-98, 1186).

185. The quest for additional capital to finance Franzia's expansion led to a public offering of Franzia stock by the Lufkin group early in 1972 (Tr. 1807). Franzia also obtained large loans from the Wells Fargo Bank in 1971 (Tr. 1187, 1807). The additional capital—both equity and debt—was invested in expansion of the winery (CX 12Z14-15; Tr. 597-98).

186. At that time, the early 1970's, Franzia's business was growing (Tr. 1781). More capital was needed to finance the planned expansion. Franzia was, however, already fully borrowed and the banks required equity capital as a prerequisite to more additional loans (Tr. 1188, 1209, 1807). Therefore, in April 1973, Franzia attempted a second public offering of its stock. Adverse conditions in the stock market made the offering unsaleable and it was withdrawn (CX 77C; Tr. 1188, 1781).

187. The Lufkin group then contacted Coke-New York, which had expressed an interest in Franzia previously, and a sale of the Lufkin group's interest together with that of the two remaining Franzia brothers was arranged; the sale was closed on December 14, 1973 (CX 50; Tr. 1186-91). Franzia was acquired for approximately $40 million worth of Coke-New York stock (Tr. 1150).

188. When Coke-New York acquired Franzia, Franzia's large bank debt was paid off by Coke-New York and replaced by an equivalent inter-company debt (Tr. 1208-09). Franzia pays interest to Coke-New York at the prime rate, a rate lower than Franzia could otherwise obtain and lower than the "prime plus" paid by Coke-New York on the money it borrowed to pay off Franzia's debt (RX 388A-Z17; Tr. 1209). Additional funds were also advanced to Franzia by Coke-New York to finance the completion of improvements in the winery and to cover the operating [56] losses Franzia sustained beginning in 1974. Coke-New York's role as Franzia's banker brought Franzia's total debt to Coke-New York to $27.6 million as of September 30, 1976 (RX 388A).

189. For reasons which are not clear in the record, from the date of the acquisition through the end of 1977, Franzia suffered losses totaling approximately $11.6 million: $2.5 million in 1974, $4 million in 1975, $2.9 million in 1976, and $2.2 million in 1977 (RX 338; Tr.

1208). In 1975, Coke-New York concluded that Franzia would never yield an acceptable return on investment and attempted, unsuccessfully, to sell the company (Tr. 1211–15). In addition to its own efforts to sell Franzia, Coke-New York retained the investment banking firm of Blyth Eastman Dillon & Co. Inc. to attempt to find a buyer. Although working for a large contingent fee, the investment bankers were also unable to find a buyer (Tr. 1214–15). Indeed, neither Coke-New York nor the investment bankers were able to generate any bids for Franzia at any price (Tr. 1211–15).

190. In the course of these efforts to sell Franzia, discussions were held with, among others, six large companies: PepsiCo, Inc., The Coca-Cola Company, Norton Simon, Inc., Gulf & Western Industries, Inc., Continental Grain Co., and Northwest Industries, Inc. Price was never discussed with any of the six companies because none of them was sufficiently interested in Franzia even to inquire about the price[22] (Tr. 1213–14). [57]

191. Norton Simon's former acquisition manager, John Anderson, explained that Norton Simon had rejected Franzia because "it had no major established brand, and it was private label oriented." It was, he said, "a 'dog'." (Tr. 1764). The Coca-Cola Company rejected Franzia because it concluded that Franzia's business had inadequate margins and that Franzia could not be shifted from its operation into a more profitable wine business (Tr. 1214).

192. In addition to its heavy losses, Franzia has also suffered a sales decline over the past five years, both in gallons and as a percentage of total United States wine sales (CX 992; RX's 406, 418, 425, 501).

Year	*Franzia Sales (Gallons)*	*Share of Total Wine Sales*
1973	10,602,453	3.05%
1974	10,518,572	3.01%
1975	10,621,860	2.89%
1976	11,077,310	2.94%
1977	9,294,287	2.32%

193. Franzia's heavy losses have also had substantial adverse effects on Coke-New York (Tr. 1210–11). The high price paid for Franzia, combined with its poor performance in the face of competition, assures Coke-New York of an extremely large loss in the event

[22] These companies were and are interested in the wine business, notwithstanding their lack of interest in Franzia. Some were owners of or have subsequently acquired wine businesses. PepsiCo, Inc. owns Monsieur Henri Wines, Ltd. (RX 13K). The Coca-Cola Company subsequently acquired The Taylor Wine Company, Inc. (RX 3H). Norton Simon, Inc. acquired Somerset Wine Company (RX 12Z9). Northwest Industries, Inc. acquired Buckingham Corporation, the importer of Cutty Sark Scotch and wines (CX 11H, O).

of a sale of Franzia, if indeed it can be sold (Tr. 1216). This state of affairs, which Coke-New York has had to disclose to investors, has caused the company's auditors to question the value of the investment in Franzia and to qualify Coke-New York's financial statements (Tr. 1215). Dissolution of Franzia and piecemeal sale of its assets—likely to be the only practicable method of sale—are still likely to produce a huge loss for Coke-New York, which has an annual net income of only about $10 million (Tr. 1210, 1216–17). Although it is difficult to assess the precise impact of Franzia's losses on Coke-New York's stock, the fact is that it has declined substantially, from about $25 at the time of the acquisition to $3 5/8 afterwards, later creeping back up to just over $9 (Tr. 1211, 1215). [58]

E. The Relevant Markets

(1) The Relevant Geographic Market

194. The parties agree that the relevant geographic market in which the effects of Coke-New York's acquisition of Mogen David are to be measured is the United States as a whole (complaint counsel's response to interrogatories, January 9, 1975 at 2).

(2) The Relevant Product Market

195. One of the alleged effects of the challenged acquisition is the elimination of competition between Coke-New York and Franzia. Coke-New York, through Tribuno and Mogen David, did produce some wines prior to the acquisition which were similar to wines produced by Franzia, but these were a minor aspect of Coke-New York's business.

196. Complaint counsel, faced with the fact that Coke-New York and Franzia produced totally different wines prior to the acquisition, argue that these companies nevertheless competed because "wine is wine."

197. At first blush, this proposition seems unsupportable, for Tribuno, located in the eastern United States, produced only vermouth (Finding 171) and Mogen David, located in the East and Midwest was most well-known for its line of sweetened wines (Findings 162–163), whereas Franzia was a typical producer of popularly priced California table, dessert and sparkling wines (Finding 178).

198. However, complaint counsel's claims cannot be that easily dismissed, for the record reveals that the average wine drinker is willing to experiment. He does not limit his custom to a particular

wine producer or to any single type of wine, so that one can say that, despite distinct differences in color and taste, a white chablis may, when one is selecting a dinner wine, be considered along with many other red, white and rosé table wines selling at the same, and perhaps higher or lower prices. [**59**]

199. On the other hand, one cannot ignore the fact that the manhattan and martini drinker uses only vermouth when he mixes his drinks. The availability of other wines is a matter of complete indifference to him.

200. Whether there is an "all wine" market, as argued by complaint counsel, is clearly a difficult question. I have considered the following facts in testing the validity of their contention:

(a) Mogen David's Perception of Its Place in the Wine Industry

201. Complaint counsel argue that Mogen David views itself as being part of the wine industry, citing a response from Coke-New York's counsel to an FTC letter of inquiry in which it was conceded that Mogen David's Catawba, Rosé, Dry Red, dry Concord, Burgundy and Sauternes competed or attempted to compete with other producers' table wines (CX 58A-B). Complaint counsel also point to instances in which Mogen David compared its position with other wine producers, either singly (CX 564) or in the aggregate (CX's 23A-D, 24N, 748, 749).

202. Mogen David also attempted to play down its Concord wine image in an advertisement which emphasized its line of wines:

> If Mogen David makes you think of Grandma and Concord wine. . .think again! Think variety!. . .Mogen David is a full line of wines. Generics, varietals, and sparkling wines. . .In fact, Mogen David has become the sixth largest domestic producer and marketer of advertised branded wines. . .and we're still growing. . .Mogen David. . .the growth company in the wine industry (CX 971).

203. The marketing reports filed by the Mogen David field representatives, also relied upon by complaint counsel, contain information on "competitors" and show that it follows the activities of many wineries. For example, before the acquisition of Franzia, a Mogen David sales representative referred to Franzia as "competition." (CX's 306, 332, 333). [**60**]

204. Mogen David salesmen follow and report on California premium wineries (CX's 123, 143, 145, 211, 253B, 272B, 288B, 299, 310, 321, 374, 459, 477), imported wines (CX's 140, 143, 145, 154, 168, 175, 295B, 308, 424, 503) and California popular priced wines (CX's 116, 134, 135A, 136, 143, 145, 163, 168, 169A, 211, 255, 264B, 266B, 269,

296B, 306, 310, 317, 321, 333, 341B, 352C, 353B, 357B, 361, 370, 377, 382, 389, 441B, 454, 461, 466, 479).

205. Both before and since the Franzia acquisition, Mogen David has paid some attention to the prices charged by Gallo and United Vintners (CX's 266A-B, 269, 289B, 310, 454, 466, 813; RX 121).

206. Even before the Franzia acquisition, Mogen David field personnel paid some attention to the prices charged by Guild (CX 264B), Gallo Chablis Blanc (CX 266B), California wines generally (CX 299), Gallo, Christian Brothers, Paul Masson and Almaden (CX's 310, 477), Gallo table and dessert wines (CX 454), Italian Swiss table and dessert wines, Roma table and dessert wines (CX 454), and Gallo champagne (CX 466).

207. Mogen David follows the activities of other wineries. For example, the company was apparently interested in the prices of California wines after the acquisition (Tr. 808), it collected advertising expenditures figures of all firms in the industry, referred to as the "competition" (CX 544E–F; see also CX's 686A–R, 694A–Y, 692A–G) and collected consumption figures of all wine in an effort to determine its advertising budget (CX 544K; see also CX 24Z9).

208. The significance of Mogen David's tracking the activities of California or imported table wines has, however, been overemphasized by complaint counsel, for its salesmen, in some of the reports which complaint counsel cite, also discuss the activities of spirit producers (CX's 116, 123, 140, 143, 145, 168A, 175, 288, 295). Nor is it surprising that Mogen David would be interested in California wines after the acquisition of Franzia for that company's wines are similar to those wines. And, comparisons of Mogen David specialty wine prices with those of California producers prove nothing **[61]** about competition between Mogen David's kosher wines, MD 20 20 and California table wines. For example, see CX 813L which compared Mogen David's "Jug" prices with Gallo's Boone's Farm wine, neither of which are table wines. Furthermore, while Mogen David's management and employees may have believed or tried to convince others that it was a member of the table wine industry, evidence presented by other industry members indicates that this perception was not accurate insofar as Mogen David's heavily sweetened kosher wines and its other major product, the specialty wine, MD 20 20, are concerned.

(b) Consumer Perception of Mogen David Wines

209. In 1970, Creative Research Associates, Inc., at the request of Mogen David, conducted a study (CX 737A–Z85) to determine the position of Mogen David in the wine market in order to facilitate a

highly directed marketing plan for its current and future products (CX's 731B, 737I–J). The proposal for the study suggested that it should obtain information on the current user of Mogen David wine, the perceived role of Mogen David among other wines and alcoholic beverages and the overall elasticity of the Mogen David name (CX 731B). Complaint counsel claim that this study reveals consumer attitudes toward Mogen David wines and supports their claim that those wines compete with other wines.

210. In my opinion, the study cannot be used for the purpose for which it was offered, for its author agreed that it was not intended to and did not give a statistically accurate picture of wine purchasing behavior even in the four cities in which interviews were conducted (Tr. 1613). Coke-New York also points out what appear to be serious problems with the study's conclusions as to the attitudes of those who were interviewed (RRF, pp. 26–29), but since the study cannot, in any event, form a basis for any conclusion about competition between Mogen David and other wines, there is no need to analyze its methodology. The same is [62] true of the Edward H. Weiss study, whose author was not called by complaint counsel (CX 52A–Z165).[23]

211. A more reliable indicator of consumer attitudes toward Mogen David wines is, in my opinion, the testimony of wine producers and retailers who base their business decisions on their customers' desires. If their customers perceived that Mogen David wines[24] tasted like and could be used for the same purposes as other wines, one would expect that, over the years, producers would have concluded that Mogen David was a competitor. That has not happened, however.

(c) Industry Perception of Mogen David Wines

212. Some witnesses made the broad statement that all wines compete. Mr. Perelli-Minetti of CWA stated that "the consumers buy all types of alcoholic beverages, and I think we all compete with each other" (Tr. 108). [63] However, his opinion was contradicted by Mr. Robert Arnold, who is actually in charge of CWA's sales and marketing (Tr. 457–58). He said that CWA and Mogen David are not

[23] Compare *Bristol-Myers Co.*, 85 F.T.C. 741 (1975):

> The Commission has on numerous occasions considered the question of the admissibility of surveys which are obviously hearsay, and it is well settled that such surveys will be admitted for the truth of the matters asserted when it is demonstrated that they are reasonably reliable and probative. *Id.* at 743–44.

Although these studies were admitted in evidence to show the attitudes of the individuals who were surveyed, they are not "reliable and probative" with respect to the attitudes of a significant segment of the population.

[24] According to complaint counsel, the meaning of "Mogen David wines" is unclear because Mogen David produces many wines (CRF, p. 49). However, most of its wines are heavily sweetened Concord or berry wines, industry members are aware of this, and clearly were referring to these kinds of wine when they were questioned about competition with Mogen David.

competitors and that Mogen David drinkers would not be likely to drink California wines (Tr. 460-61). Furthermore, when Mr. Perelli-Minetti was asked to identify various wines with which he was familiar, being told specifically not to limit his answer to California, he did not mention Mogen David or Manischewitz (Tr. 64-66). This reveals, much more than does his general statement, the lack of significant competition between CWA's wines and Mogen David's wines.

213. Although Meyer Robinson, general manager of Manischewitz, purports to "look at the whole picture," he regards Manischewitz' traditional products' "competition as being made up of Mogen David and Carmel and Kedem, depending on the market." (Tr. 1457).

> In some markets, it is Manischewitz and all the rest combined and in some markets it depends on the market - it is Manischewitz and Mogen David. In some markets it is Manischewitz and Carmel. In others it is Manischewitz and Kedem. (Tr. 1457-58).

214. Angelo Fantozzi, who distributes CWA's wines in Chicago, professed to view all wines as generally in competition, but conceded that he pays far less attention to Mogen David's prices than he does to the prices of products "corresponding" to the ones he distributes (Tr. 1513, 1521-22). Under cross-examination, Mr. Fantozzi admitted that the day before he testified he might have said he did not follow Mogen David's prices at all (Tr. 1520-21), and I believe that his testimony on direct is, therefore, not credible.

215. Mr. John Simon of Bardenheier was "included to think that every wine is in competition with every other wine," at least, those "priced roughly in our category." (Tr. 1577). **[64]**

216. Other producers do not view Mogen David as a competitor.[25] East-Side Winery's general manager Ernest Haas testified that East-Side pays no attention to any of the Mogen David products, does not share consumers with Mogen David, and is not in competition with Mogen David.

JUDGE PARKER: Mr. Haas, are you familiar with Mogen David wine?
THE WITNESS: Yes.
JUDGE PARKER: What category does that fall into?
THE WITNESS: I—
JUDGE PARKER: (Interposing) Pop wine?
THE WITNESS: It's in a category all by itself as far as I'm concerned. Wines of that sort, the kosher wines or berry wines, they are in a category all by themselves. (Tr. 238).

217. Mr. Fred Weibel, chief executive of the winery that bears his

[25] Complaint counsel argue that Coke-New York's attorneys asked producers who their "principal" competitors were (CRF, p. 4), hinting that if the proper question had been asked, Mogen David might have been named as a "secondary" competitor. Of course, complaint counsel could have rectified this alleged deficiency on redirect.

family name, testified that neither his products nor those of Franzia compete with any Mogen David product (Tr. 308, 324-25). Mr. Setrakian, the president of California Growers Winery, said that theoretically all wines compete (and perhaps all alcoholic beverages), but that he isn't worried about the prices of somebody's Concord cream (Tr. 390-91). Gibson's general manager, Mr. Marvin Jones, stated that the people who [65] drink Gibson's conventional[26] wines do not drink Mogen David's (or Gibson's Mogen David-type) products (Tr. 523-26).

218. While Robert Ivie, president of Guild and former chairman of the California Wine Institute, believes that almost all wine producers compete keenly with each other, he does not believe that Guild's broad line of conventional California products competes with Mogen David (Tr. 581). In response to complaint counsel's question, he testified:

> I would say, to go further, I don't think that you could say that the same consumer that is going out today to buy a bottle of Cribari is one that is going to buy a bottle of Mogen David this afternoon. (Tr. 583).

Cribari is one of Guild's brands of popularly priced wines that Mr. Ivie identified as directly competitive with Franzia (Tr. 539-40, 580-81).

219. Calling Mogen David and Franzia products "as different as night and day," Joseph S. Franzia of Bronco stated unequivocally that the customers for his company are different from the customers for Mogen David products (Tr. 679-80). Nor does Sonoma Vineyards share consumers with Mogen David, although it does with Franzia (Tr. 1767-68). According to Mr. DePompei, Mogen David drinkers do not buy Franzia generic and varietal wines (Tr. 1338-39).

220. In addition to these witnesses, all of whom were called by complaint counsel, other producers of conventional wines at all price levels testified that while they share customers with each other and with Franzia, they do not share them with Mogen David (Tr. 1914-15, 2036-37). Some [66] witnesses recognized that consumers of conventional wines are likely to purchase different price wines for different occasions (such as everyday drinking and entertaining) but doubted that the diversified buying habits of conventional wine drinkers extended to Mogen David (Tr. 1767-68, 2082-83, 2116).

221. Evidence of consumer attitudes toward Mogen David was also presented by three retailers called by counsel for Coke-New York. Mr. Harold Binstein of Gold Standard Liquors operates 10

[26] Despite complaint counsel's claim that the term "conventional wine" is argumentative (CRF, p. 50), there is so much evidence of the differences between Mogen David's wines and other wines that the term is an apt description of those other wines.

stores scattered throughout the Chicago metropolitan area; Mr. Jack Robinson of Argonaut Liquors operates a single large store in Denver, serving customers from throughout Denver, the state, and the region; Mr. Michael Gelven of Big D Liquors operates two stores in rural southeastern Massachusetts (Tr. 2070–71, 2103, 2109–10, 2225–29). All three retailers, who own a total of 13 stores, had observed the buying patterns in their stores over a considerable period of time and had observed that Mogen David wines are purchased by a group of people who "are not really wine drinkers" (Tr. 2228–29), and that Mogen David drinkers and other wine drinkers "are two distinctive types of customers" (Tr. 2082–83, 2116–17).

222. Mr. Harold Gomberg, a wine consultant, stated in a report to Mogen David, that those who refuse to recognize its wines as "real" wines are "snobs" (CX 18Z11–12). This harsh appraisal is, I believe, incorrect for it is clear that most of Mogen David's wines[27] are quite different from conventional wines.

(d) Differences Between Mogen David Wines and Other Wines

223. Mr. Arnold of CWA described Mogen David as a maker of "sharply different" products with a "Concord base" and as being essentially like a "grape juice," and stated that "we are not in that business" [67] (Tr. 460–61, 473). Mr. Weibel disparaged the Mogen David product with a rather earthy word (Tr. 311), and described its taste as "foxy" (Tr. 279). Other witnesses described Mogen David wines as "considerably sweeter" than other wines and "syrupy."[28] Even the sweetest conventional wines are not comparable in taste to Mogen David wines (Tr. 522–23, 311, 2271). Mr. Haas, of East-Side Winery, concluded that Mogen David wine is "in a category all by itself as far as I'm concerned. Wines of that sort, the kosher wines or berry wines, they are in a category all by themselves" (Tr. 238).

224. One retailer stated that MD 20 20, Mogen David's biggest seller, is, like its traditional wines, different from table wines:

> . . .I class it and this is my personal classification, as in the class with the beverage type wines, the apple types, the Boone's Farm, which is a category that is basically on its way down. It was high a few years ago when the cold duck was big, in that area. It seems to have lost a lot of its appeal now. It is usually sort of an area of its own, usually young people (Tr. 2271).

[27] The exception would be the light table wines recently introduced by Mogen David (Finding 168).

[28] The Mogen David Concord wine is, in fact, very sweet. It contains 18 percent to 19 percent sugar (Tr. 523). In comparison, Gibson's sweetest California-produced wines contain 8 percent sugar, cream sherry contains approximately 6 percent to 7.5 percent sugar and dry table wines close to 0 percent sugar (Tr. 269, 523, 530).

These conclusions as to the basic difference between Mogen David wines and other wines are supported by the fact that one recent crisis in the raw material market affected Franzia (and other table wine producers) but not Mogen David, and another affected Mogen David, but not Franzia. The California wine glut of 1974 did not hurt Mogen David's prices at all (Tr. 1260–61); conversely, the sharp rise in the price of sugar in 1973 and 1974 forced Mogen David's cost and prices upward but had no impact whatever on Franzia (RX's 59E, 328Y; Tr. 1260–61). [68]

225. Industry opinion about Mogen David's wines was echoed by Mr. Louis R. Gomberg, a wine industry consultant, who wrote a report on Mogen David for Coke-New York which concluded that Mogen David "has no real competition in the markets it dominates. Perhaps. . . . because it combines distinctive taste with a distinctive brand/type name." He went on to say:

> One thing is certain: Mogen David Concord Grape Wine is unique. With only one competitor in its field (Manischewitz), the competition is somewhat remote as Manischewitz has strength in only a few markets and its sales volume is estimated at only about one half to two thirds that of Mogen David. . . . It is not really a table wine in the traditional sense, although generally so classified, nor is it an appetizer or dessert wine, although sweet enough to qualify for the latter grouping. (CX 18Z40).

Mr. Gomberg also suggested in this report that the Mogen David brand placed its wine line in a different category than other wines:

> It could very well be that Mogen David, either as a brand/type name or simply as a brand name, is inescapably identified with the image or images the name now evokes and that no amount of persuasion, no matter how well planned or heavily financed, is apt to convert non-users to users. (CX 18Z16).

226. Another indication that Mogen David is in a different business than the producers of California wines appears in the testimony of Mr. Sands, president of Canandaigua Wine Company, a New York State winery. Even though Canandaigua produces a line of table wines which are much closer to California table wines than are Mogen David's traditional wines,[29] it purchased a California [69] winery because it "wanted to get into the California wine industry." (Tr. 1374).

227. Another difference between Mogen David and most other wines is that they are produced in different areas of the country (Finding 162) and, apparently because of this Coke-New York did consider producing Mogen David products at the Franzia winery in California (Tr. 1178–79). However, when it became clear to Coke-

[29] Canandaigua produces New York State table wine, fortified wines, sweet wines and sparkling wines (Tr. 1343).

New York that its principal products c uld not legally be made in California (Finding 38), it experimented with making MD 20 20 by using grape concentrate (whose use is legal in California) instead of cane sugar as a sweetener. However, Mr. Sullivan, executive vice president of Coke-New York, testified that he vetoed putting the experimental MD 20 20 into production because the taste was off and it was not the same product (Tr. 1258).[30]

228. Mogen David was so little thought of as a competitor by the wine industry or as an acquisition candidate that Mr. Gomberg felt it necessary to explain the reasons to the management of Coke-New York:

1. Most winery acquisition interest has been focused on California properties, with little or no thought given to [70] wineries located elsewhere, except New York State, because California is the focal point of wine action in the U.S. All else is peripheral.
2. Mogen David is seldom mentioned in wine reports of any kind–consumption, travel, investment, agriculture, etc. Consequently, few ever think of it as a part of the U.S. wine industry.
3. California wine gets practically all of the U.S. wine publicity. Even the New York (Finger Lakes) area receives scant notice. Illinois, virtually nothing. To that extent, then, Mogen David doesn't exist.
4. The image of Mogen David often tends to be thought of as ethnic even though this is true only to a limited degree and then only as far as markets are concerned. The investment fraternity thus is inclined to regard Mogen David as unsuitable—for the same reason that Monarch Wine Company (Manischewitz) probably is so regarded.
5. Mogen David actually was sold not too many years ago. Some who otherwise might think of it as a candidate for acquisition therefore may subconsciously dismiss it as unavailable at this time, because of the knowledge of its earlier sale. (CX 18Z70–71)

(e) Comparison of Wine Prices

229. Since wine is so price-competitive (Findings 67–77), wine producers carefully watch their competitors' prices and take them into account when setting their prices (Tr. 250, 308, 390–92, 580–83, 1768, 2286–88). [71] These price comparisons do not, however, take Mogen David wines into account, a very convincing indication that they do not compete with most other wines.

230. Mr. Ivie, of Guild, evaluates the prices of competitors of each of its brands (Tr. 583). In naming his "pricing keys" (or competitors),

[30] According to Mr. Gomberg, Gallo and Roma also experienced the same problem (CX 18Z40–41). As to Gallo: Gallo tried to make a niche for himself in the California market with a product roughly resembling Mogen David, called *Galloette*. It too, bombed after a few years although supported by a powerful consumer-sampling campaign in the San Francisco market. Probable reason for its failure: a caramel-like off-flavor derived from the grape concentrate used for sweetening; relatively obscure on the first taste but all too unpleasantly prominent on subsequent tastes. (California regulations prohibit the use of grape wine sold as such). (CX 18Z41).

Mr. Ivie did not list Mogen David or Manischewitz (Tr. 580). East-Side Winery pays no attention to Mogen David prices (Tr. 250). Sebastiani, which sells premium wines, and watches the prices of such competitors as Mirassou, Beringer, Krug, Almaden and Paul Masson, has no idea of what the prices of Mogen David wines are (Tr. 2286-88). Other producers expressed no interest in Mogen David's prices (Tr. 308, 390-92, 1768).

231. Conversely, neither Mogen David nor Manischewitz review the prices of popularly priced California wines (Tr. 1171-72, 1467-70). Mr. Meyer Robinson, Manischewitz' general manager, stated that he would be concerned if Mogen David's wines were 25 or 50 cents a bottle cheaper than Manischewitz, but that he would not be bothered if Franzia wines sold below his wine (Tr. 1470).

232. Generally, the Mogen David-type wines sell for more than popularly priced table wines. In California, Manischewitz' prices were almost twice Franzia's-more than $1 a bottle in some cases (RX's 423, 424). Gibson Wine Company is the largest California producer of fruit and berry wines and also produces conventional wines (Tr. 521-22). Gibson treats these wine categories differently, in one advertisement calling its fruit and berry wines "old fashioned" (CX 966; see also CX's 967, 968, 969, 970). Gibson also prices its fruit and berry wines differently. They are twice the price of the conventional table wines and nearly that much higher than the conventional dessert wines (RX's 135, 136A-B, 146, 147, 148, 155, 160).

(f) Shifts in Wine Consumption

233. In the 1950's and 1960's, dessert wines were more popular than table wines. Today, the reverse is true (Tr. 52-53, 1322): "There has been a strong [72] trend away from dessert wines to dry table wines" (Tr. 366). At one time, red table wine was more popular than whi . White now enjoys more favor in the consumer's eyes than red (Tr. 387). Pop wines, which had tremendous growth in the late 1960's and early 1970's, are much less popular now (CX 27I; Tr. 53). Cold Duck, once so popular, is fading (Tr. 1553), whereas sparkling wines and champagne are finding increased sales (Tr. 53). There is some evidence that slightly sweeter table wir s, at least among less sophisticated wine drinkers, are more popular than dry table wines (Tr. 529) although this opinion is challenged by other industry members (Tr. 366).

234. These changing consumption patterns are due to the penchant of the wine drinker to sample a wide variety of wines (CX

52Z152; Tr. 55-56, 230, 503, 574-75, 600, 1370), frequently on impulse (Tr. 1453-54, 1499, 1571-72, 2124, 2241).

235. The infrequent or beginning drinker prefers wine with some sweetness rather than one that is perfectly dry (CX 27Z290; Tr. 55). The sweet wine that introduces a consumer to wine may be Mogen David (Tr. 472-73, 1407-08, 1504, 2289, 2301-02), Manischewitz (Tr. 472-73, 1407-08, 1459, 1503-04), a pop wine (Tr. 2301, 2237), Cold Duck (Tr. 237, 1553), Sangria (Tr. 1503-04), a sweet German or Italian wine (Tr. 1503-04), or other very sweet or mildly sweet wines (Tr. 1407-08). The exceptions, those who begin their wine adventure with dry wines, tend to come from an ethnic origin where dry wines are habitually consumed (Tr. 1370).

236. Consumers' wine habits reveal that one cannot view competition too narrowly. A chablis undoubtedly competes not only with other white still table wines but also with red table wines and, as far as other consumers might be concerned, at particular times, even with champagnes or other sparkling wines.

237. Shifting preferences in wine do not, however, prove that there is an "all wine" market, for one must also consider that there is an apparent trend to substitution of wines for spirits. Messrs. Perelli-Minetti, Setrakian and Sebastiani apparently perceive distilled [73] spirits and beverages as fringe competitors (Tr. 57, 390-91, 2287, 2297). The importers of Cutty Sark believe that the cross-over from scotch to wines and other spirits hurts its sales (RX 110), and pop wine drinkers of the early 1970's are thought to have shifted to beer (Tr. 1239). If one were to accept complaint counsel's argument that the obvious differences between Mogen David and conventional wines should be ignored in favor of an "all wine" market, one might, in light of the evidence of wine's apparent inroads into the liquor and beer business, just as easily ignore the obvious differences between these products and find an "all alcoholic beverage" market.

F. Market Data

(2) Coke-New York's Share of the "All Wine" Market Alleged by Complaint Counsel

238. Coke's first acquisition, Mogen David, increased its market share[31] and market rank each year for the years 1969 to 1973. It ranked ninth among wine producers in 1969, eighth in 1970, sixth in 1971, fifth in 1972 and (counting Tribuno but not counting Franzia) fourth in 1973. Its market share increased from 1.89 percent in 1969

[31] Market share data is stated in gallons and the universe includes taxable withdrawals of U.S. produced wines and imports for consumption of foreign wine (CX 991A-C).

to 2.29 percent in 1970, to 2.77 percent in 1971, to 3.49 percent in 1972, and to 4.12 percent (counting Tribuno but not counting Franzia) in 1973 (CX's 991A-C, 992, 996).

239. Franzia increased its market share each year from 1971 to 1973, and ranked sixth or seventh among wine producers each year from 1969 to 1973. In 1971, its market share was 2.38 percent; this increased to 2.68 percent in 1972 and to 3.05 percent in 1973 (CX's 991A-C, 992, 996).

240. Through its ownership of Mogen David, Coke-New York had a market share of 3.49 percent in 1972. In 1973, after acquiring Tribuno and Franzia, its market share was 7.17 percent. Without the Franzia acquisition, Coke-New York's market share would have been 4.12 percent. The difference in market share of Coke-New York with and without the Franzia acquisition was 3.05 percent in 1973 (CX 992). [74]

241. After the Franzia acquisition in 1973, Coke-New York became the third largest wine producer; without the acquisition it would have ranked foruth (CX's 991, 992). In 1973, the market shares of the top four wine producers were:

Gallo	28.38%
Heublein, Inc.	15.63%
Coke-New York	7.17%
National Distillers	4.39%
Total	55.57%

(CX 992)

242. Since 1974, the total market share of the top four wine producers has declined:

	PERCENT OF TOTAL SHIPMENTS			
COMPANY	*1977*	*1976*	*1975*	*1974*
Gallo	*	26.89%	26.95%	28.33%
Heublein/United Vintners	*	15.65%	17.46%	16.57%
Coke-New York	4.72%	5.73%	5.95%	6.35%
National Distillers/Almaden	*	5.10%	4.59%	4.52%
Total	*	53.37%	54.95%	55.77%

* Information not available.

(RX's 418B, 425, 501)

(2) Concentration in the "All Wine" Market

243. The four and eight firm concentration ratios in the wine industry for the years 1968–73 were:

	1968	*1969*	*1970*	*1971*	*1972*	*1973*[32]	*1973*[33]
Four Firm	46.93	49.81	52.70	56.21	54.31	52.52	55.57
Eight Firm	56.17	59.18	62.50	66.31	65.55	64.56	66.72

(CX 993)

[75] 244. Coke-New York's acquisition of Franzia resulted in a change of four and eight firm concentration ratios. The four firm ratio was 3.05 percent greater with the merger than without it. The eight firm ratio was 2.16 percent greater. From 1968–73 the eight firm concentration ratio (not including the acquisition) rose 8.39 percent.

245. This picture has changed in recent years. From 1974–76, the combined market share of the four largest producers dropped 2.40 percent (from 55.77 percent to 53.37 percent). Four firm concentration in 1976 was 0.67 percent higher than in 1970. The largest winery, Gallo, as well as Heublein and Coke-New York have recently been losing market share to the smaller wineries. Gallo's share of total wine sales declined from 32.66 percent in 1971 to 26.89 percent in 1976 and was lower in 1976 than it had been at any time since 1969. Heublein's sales, although not consistently declining, slipped from 17.85 percent in 1969 to 15.65 percent in 1976. From 1974 (the first post-acquisition year) to 1977, Coke-New York's share of total wine sales fell from 6.35 percent to 4.72 percent. Of the largest four firms, only the fourth (National Distillers/Almaden) increased its share of sales, rising steadily from 2.32 percent in 1968 to 5.10 percent in 1976 (CX 992; RX's 418B, 425, 501).

G. Coke-New York's Plans for Franzia and Post-Acquisition Changes in Franzia's Business

(1) Plans

246. Prior to its acquisition, Coke-New York planned to make Franzia management personnel responsible to Mogen David officials (CX's 680F-G, 718D). A preacquisition document prepared in the fall of 1973 (CX 718B) made the following recommendations:

A. Merchandise Franzia in existing markets through Mogen David as soon as possible.

B. Simultaneously test upgrade image including:

[32] Reflecting Franzia and Coke-New York as separate firms.

[33] Reflecting Franzia and Coke as a single firm.

1. Pricing-at and/or over Italian Swiss Colony and Gallo.
2. Packaging.
3. Advertising. [76]

C. Use Franzia production as source of supply for other table wine entries:

1. Tribuno.
2. Jug. (CX 681C)

247. In October of 1973, the president of Coke-New York, in a letter to the president of Franzia, discussed plans to hold "some preliminary coordination meetings regarding possible joint production and marketing efforts" by Mogen David and Franzia and foresaw "more formal planning meetings involving the management of both Mogen David and Franzia near the end of the year to work on very specific marketing and production plans for 1974" (CX 778A-B).

248. By November 20, 1973, Mogen David officials were considering establishing "dba's" for some Mogen David and Tribuno products out of Ripon, California (CX 566).

249. On December 6, 1973, Joseph S. Franzia, Franzia's national sales manager, met with Edward S. Nemo, Mogen David's national sales manager, and discussed the possible consolidation and development of the "Franzia label and the Mogen David label market by market" for the 35 non-control states and the District of Columbia (CX's 781A-E, 681B). The production potential of Franzia for Mogen David products was also discussed (CX 781A).

(2) Post-Acquisition Consolidation

250. After the acquisition of Franzia, Mogen David officials were made responsible for the selection of new Franzia distributors and its sales and shipments of wine, as well as other matters, such as the hiring of Franzia's regional managers who reported to officials of Mogen David (CX's 562, 569, 678A-C). Franzia's national sales manager reported directly to Mogen David's director of sales, and Mogen David was furnished with market planning forms completed by Franzia salesmen (CX's 654A-B, 659A-C, 854B). [77]

251. Mogen David and Coke-New York officials participated in planning pricing strategy for Franzia's wines, and Franzia arranged to have Mogen David personnel provide it with competitive pricing information (CX's 219, 653A, 838).

252. After the acquisition, Mogen David became the sales agent for Franzia wines in 14 control states (CX 60C). By June 1, 1974, Franzia and Mogen David agreed that Mogen David's sales force would be the sales agents for all Franzia products (CX 574B), and Mogen David took over "the selling and dealing with the wholesalers

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for the Franzia Brothers for all the Franzia wines." (CX 833; Tr. 707-08). Mogen David salesmen promoted Franzia wines to wholesalers and, in some instances, retailers (CX's 194, 216, 226, 235, 280A, C, 407A, 410B, 511A), and helped to place Franzia in restaurant accounts (CX's 536, 537, 538).

253. In some instances, Mogen David salesmen transferred the Franzia line from its distributors to Mogen David distributors (CX's 175A-B, 269A, 393A, 400A-B). The Franzia sales force began to distribute Mogen David wines on July 1, 1974, and the letter announcing this predicted that it would give Franzia new accounts (CX 571A). Franzia acted as sales agent for Mogen David 20 20 in February 1975 in California, opened new accounts for 20 20 and seems to have improved 20 20 sales (CX's 567, 880A, E, P-Q).

(3) Changes in Franzia's Advertising and Pricing Policies

254. Prior to its acquisition by Coke-New York, Franzia had a reputation as a company that competed largely on the basis of price (Tr. 225, 359, 565), and its advertising and promotional expenses for the five fiscal years prior to the acquisition were not substantial:

Years Ended	
April 30, 1969	$ 55,000
April 30, 1970	60,000
April 30, 1971	43,000
July 31, 1972	143,000
July 31, 1973	232,000

(CX 97)

[78] 255. Franzia media advertising increased for a few years after the acquisition. In calendar 1973, it was $298,691; for 1974 it was $174,279; and by 1975, it increased to $789,432. In 1976, advertising declined to $200,831 (CX 716Z15).

256. After the acquisition, Coke-New York repositioned the Franzia line of wines (CX's 532A-F, 549A-D, 682A-F; Tr. 790-800, 1201). This included new packaging, new wine blends, premium dessert wines and premium varietals (CX 682A-B). Coke-New York boasted that "Franzia's 'New Shape' campaign will be supported by the company's most expensive and far-reaching advertising program in its history. Spot television ads will run in 20 markets across the country at a rate translatable to $5 million on a national basis" (CX 682A).

257. Coke-New York hired a package design agency to redesign

Franzia's packaging; it also hired an advertising agency, Grey Advertising (Tr. 788–89). In March 1974, a consumer marketing department was established at Franzia for the purpose of developing new packaging, advertising, point-of-sale materials and new products (CX 574B-C).

258. The director of marketing for Mogen David recommended that an analysis be conducted to determine whether Franzia wines could be sold at higher FOB, retail list and shelf prices (CX 576A), and in July 1974, Mr. Arthur Ciocca recommended that Franzia raise its prices (CX 535A-B). Franzia's prices were in fact raised subsequent to the acquisition–"well over 10%" (CX 550G; Tr. 883–87, 1201).

(4) Franzia's Role in the Production of Mogen David Wines

259. Coke-New York planned to have Franzia produce wines for Mogen David in California. This proved to be impossible (Finding 227); however, Franzia did produce grape concentrate for Mogen David and vermouth for Tribuno as well as some pop wines that were apple and strawberry based (Tr. 778, 1811–12; CX's 565A-B, 782M), and Mogen David currently obtains blending wines, concentrates and high proof from Franzia (Tr. 1150). **[79]**

260. At one time, Franzia produced a table wine for Mogen David under the "Fanfaron" label (CX 882A), but the wine was not a success and it was discontinued (Finding 64).

261. Franzia now produces standard California red and white wine concentrate, Chenin Blanc and French Colombard wine for use in production of the new Mogen David Light wines (CX 1041B-C). California grape juice or concentrate is also used in substantial quantities in the production of Mogen David wines (CX 716Z19).

(5) Distributor Realignment

262. The term "leverage" as used in the wine industry is the threat–actual or implied–that a large supplier with a fast moving brand is able to use to force a distributor to carry the slower moving brand or lose the entire line (Tr. 434, 440–41, 449, 1507–08, 1566. See also Tr. 713, 1319, 1364).

263. Mogen David officials believed that it had "considerable volume potential and distribution leverage because of the volume of all Mogen David products" (CX 24Z4), and on other occasions, consultants or Coke-New York officials recognized the potentiality of leverage (CX's 17V, 18Z37, 559B, 680C, E-F).

264. After the acquisition, sometime in January or February

1974, Coke-New York held a meeting of Franzia's and Mogen David's regional sales officials. Mr. John Borders, at that time Franzia's coordinator for national sales, testified that:

> The purpose of the meeting was to go over all of the wholesalers, both Mogen David, Tribuno and Franzia by market to see where we could consolidate whenever possible into one wholesale distributorship (Tr. 698).

Every Franzia and Mogen David distributor was discussed, and the tendency was to suggest moving the Franzia line into the Mogen David distributor, rather than the other way around (Tr. 703). [80]

265. As of October 17, 1977, of those distributors who were then currently distributing both Mogen David and Franzia products, at least 16 were Mogen David distributors who began to distribute Franzia after the acquisition (CX's 716, 980G-H). Distributors who were added as of June 7, 1974 were located in Wisconsin, Illinois and Ohio, and totaled 27 (CX 60E). Other states were North Carolina (CX 716Z12), Virginia (CX 716Z14), South Dakota (CX 716Z13) and Missouri (CX 980G).

266. There are additional Mogen David distributors that had also taken on the Franzia line subsequent to the acquisition, but may not currently be carrying both lines. For example, in Ohio, Franzia was placed in 19 additional Mogen David houses (Tr. 856-57).

267. In some cases where Franzia was placed in a Mogen David house, its distributors were terminated. National Brands was terminated as the Franzia distributor in Miami in May or June of 1974 although, in Mr. Borders' opinion, it was an effective distributor for Franzia products (Tr. 712).

268. By June 7, 1974, Coke-New York had terminated a total of seven Franzia distributors located in Alabama, South Dakota, and Milwaukee, Hurley, Madison and Appleton, Wisconsin (CX's 60E, 74A-B, 173, 175A; see also CX's 557, 670, 671, 805; Tr. 706-07).

H. Effects of the Acquisition

(1) Consolidation of Lines

269. After Coke-New York acquired Franzia, Continental Distributing Company, which sold Mogen David, took the Franzia line (Tr. 85). Continental also distributed CWA wines (Tr. 81). After the acquisition, according to Mr. Perelli-Minetti of CWA, its sales to Continental declined so much that it had to find another Chicago distributor in May of 1977. Mr. Perelli-Minetti attributed this decline to "the pressure that had to come from. . .the Mogen David, Franzia, and Tribuno relationship" (Tr. 84-85).

270. Mr. Perelli-Minetti's conjecture is not supported by the record. Continental had contacted Franzia before the acquisition about distributing its [81] wines (Tr. 659) and it is likely that the decision to distribute Franzia was a result of its interest, not because of the acquisition. CWA's declining sales to Continental, rather than a result of pressure from Coke-New York, could just as likely have been because Continental was paying less for Franzia's wines (Tr. 146, 468). Mr. Perelli-Minetti's other claims regarding the effects of the acquisition on CWA's business in other areas of the country are so vague that they do not warrant consideration (Tr. 86–87).

271. Mr. John Simon, of Bardenheier's Wine Cellars, testified that Jule Fisher, a distributor in Belleville, Illinois, had been distributing his company's and Mogen David's wines for several years before the acquisition. In 1974 or 1975, Fisher dropped Bardenheier and took on Franzia's wines. Although Bardenheier obtained a new distributor, its sales have declined (Tr. 1559–60). However, Bardenheier still sells its wines to a distributor in Columbia, Missouri, which also carries Mogen David and Franzia wines (Tr. 1560–61).

272. Mr. Ernest Haas of East-Side Winery testified that the consolidation of Mogen David, Franzia and Tribuno into a single distributorship would affect his company's sales because the distributor would place greater emphasis on Coke-New York's wines than on weaker brands (Tr. 226–27), yet he stated on cross-examination that "so far" the acquisition has not hurt his business in any way and that it was fairly low down on his list of competitive concerns (Tr. 254).

273. Mr. Fred De Pompei, A Cleveland distributor, testified that if he carried the full Mogen David line he would certainly accept Franzia out of fear of losing the Mogen David line (Tr. 1311–12).

274. Consolidation of Mogen David and Franzia in the same distributors can be predicted, say complaint counsel, on the basis of Coke-New York's actions when Tribuno was acquired.

275. Prior to its acquisition, Coke-New York planned to sell Tribuno products through the Mogen David sales force (CX's 7G, 33L, 35). In a memo [82] submitted to the president of Mogen David after the acquisition, the Mogen David product manager (identified in CX 721B) stated:

> Some proposed changes for strengthening market conditions by consolidating the Tribuno brand with Mogen David distributors have been implemented. Additional moves to solidify other marketing areas will be considered as management evaluates further data. (CX 48B).

Subsequent to the acquisition of distribution rights from Twenty-One Brands, Coke-New York, terminated some wholesalers of Tribuno products and moved the Tribuno brand to wholesalers of Mogen David products (Tr. 1123-27). At present, of 286 Mogen David distributors, 195 (68 percent also carry Tribuno products (CX's 716z8-14, 980G-H)).

276. Nevertheless, I do not believe that Mogen David and Franzia will be consolidated in a substantial number of distributors against their will, or that Mogen David distributors will "volunteer" to take on Franzia because of fears of losing the Mogen David line.

277. First, consolidating these lines might not be best for Mogen David or for Franzia. For example, Mr. Marvin Sands of Canandaigua said that "[a] good distributor for [its] wines would actually vary with what specific wine. . .or what specific brand of wine" Canandaigua was selling in the market (Tr. 1359). In fact, of Canandaigua's 300 distributors for its popular Wild Irish Rose, only 20 to 30 carry its Bisceglia brand of California wine (Tr. 1405-06).

278. A second restraint upon consolidation of product lines is the increased protection given to the distributor by state franchise laws and the development of protective case law. Where they exist, they have weakened whatever leverage suppliers may in the past have been able to exercise (Tr. 107-08; 243). Arizona, Connecticut, Georgia, Massachusetts, Nevada, New Jersey, New Mexico, Ohio, Vermont, and Wisconsin all have statutes that, in general, forbid termination of distributors except upon a showing of good faith and good cause [83] (Ariz. Rev. Stat. §§ 44-1566 to 1567; Conn. Gen. Stat. Ann. § 30-17; Ga. Dept. Rev. Regs. § 560-8-7-.08; Mass. Ann. Laws Ch. 138 § 25E; Nev. Rev. Stat. §§ 598.290-.350; N.J. Stat. Ann. §§ 33:1-93.6 to .11; N.M. Stat. Ann. §§ 46-9-16 to 20; Ohio Rev. Code Ann. §§ 133.82-.87; Vt. Stat. Ann. Tit. 7 §§ 701-708; Wisc. Stat. Ann. §§ 135.01-.07); Kansas and Oklahoma require suppliers to sell to all distributors; in addition, Oklahoma forbids conditioning sales of one brand on acceptance of another brand (Kan. Stat. § 41-1101; Okla. Alc. Bev. Cont. Bd. Regs. Art. 3 § 1).

279. In the words of one distributor, "a supplier cannot just move his lines just because he thinks it would be nice to move them down the street" (Tr. 2007-08). Lawsuits by terminated distributors are increasingly common, are advertised on the distributor grapevine, and can be very costly to suppliers (Tr. 244-45). Personal experience led East-Side Winery's Mr. Ernest Haas to conclude that, at least in Wisconsin, "any distributor is more powerful than the supplier" (Tr. 227, 243, 257). Outside Wisconsin, he has found the situation to be the same (Haas 244-45).

280. Robert Setrakian of California Growers Winery described the reality of attempting to leverage one product into a distributor on the strength of another this way:

> I think it would depend on whether that distributor, one, needs a line of products comparable to the [offered] line, and if he does need it, and the [new]. . .line. If he didn't have it and didn't need it, I don't think anybody could make him take it on. (Tr. 372).

281. Complaint counsel's theory is refuted by specific examples of producers' failure to consolidate lines and the independence of distributors.

282. In February 1976, a 19 percent ownership position in Sonoma Vineyards was acquired by Renfield Corporation, a large importer of such well-known brands as Gordon's gin and vodka, Remy-Margin cognac, and Martini & Rossi vermouth (CX 1009V). Sonoma needed management help from an established [84] company because previous management decisions (notably, over-expansion) had put the company "under a critical financial strain." (Tr. 1740–42, 1745, 1772). Despite common ownership, however, Sonoma's small sales force does not include any former Renfield personnel. Choosing to ignore the 100-man Renfield sales force as unsuitable, Sonoma insisted that Renfield set up a separate sales division of eight people to sell only Sonoma wines. All eight Sonoma salesmen were experienced in wine sales and specially hired by Renfield under Sonoma's direction (Tr. 1760–61).

283. Renfield has a national network of about 250 distributors (Tr. 1759). However, of these 250, Sonoma has appointed only 70 to 80 to distribute its wines (Tr. 1748). Sonoma has at present about the same number of non-Renfield distributors and expects in future to add more, mainly non-Renfield, distributors (Tr. 1760–61).

284. Neither of Sonoma's distributors in Denver, for example, is a Renfield house; one is a new distributor and one is a beer distributor (Tr. 1994–95). John Anderson, the president of Sonoma, described the process as "market-by-market" appointment of whatever distributor the individual competitive situation calls for (Tr. 1748, 1769). The commercial necessity of Anderson's approach, instead of a policy of consolidation, is underscored by Renfield's previous experience with a line of imported Italian table wines marketed under the well-known Buitoni label. Those wines, sold by the Renfield sales force through the Renfield distribution network, were "a conspicuous failure in the marketplace." (Tr. 1762).

285. Hiram Walker-Gooderham & Worts Limited, distiller and importer of such major brands as Canadian Club whiskey; Ballan-

tine's scotch, Booth's gin, Courvoisier cognac, Kahlua liqueur, Frederick Wildman wines, and Jules Berman wines, uses three entirely separate distribution networks for its wine products. Comparison of distributor lists for the three Hiram Walker subsidiaries–Frederick Wildman & Sons Ltd., Jules Berman & Associates, Inc., and W.A. Taylor & Company–shows almost no common distributors (RX's 212A–F, 213A–E, 214A–J; Tr. 2331). [85]

286. Taylor Wine Company, which ranked sixth in total wine sales in 1973 (CX 991A), has two major product lines, Taylor and Great Western, distributed by two entirely separate distributor networks. Comparison of distributor lists for the two divisions shows almost no overlap (RX's 356A–Z48, 357A–Z43).

287. The two Almaden distributors with which Michael Gelven deals in Massachusetts do not carry any of the products of Almaden's $1.5 billion distillery parent, National Distillers and Chemical Corporation (RX 27C; Tr. 2216–17). MP Beverages in Lawrence, Massachusetts carries Narragansett beer and Roma and Almaden wines. Another distributor in the market carries the National Distillers liquor products (Tr. 2216–17).

288. Gibson Wine Company, which makes both conventional wines and fruit and berry wines (including Concord), often distributes those two product lines through different distributors (Tr. 514, 520) and Franzia had distributors who carried table wines but not the sparkling wines (Tr. 714).

289. Mr. John Pearson of C & C Distributing, 75 percent of whose wine sales are of Franzia products, flatly refused to take on the Mogen David product Fanfaron in the quantities Mogen David wanted because he did not think it would sell in the quantities Mogen David projected[34] (Tr. 2006–08).

290. Mr. Gary Raden, 60 percent to 75 percent of whose entire business is Franzia wine, and who credits the growth of his business to his Franzia products, carries only 15 percent to 20 percent of the Franzia product line (Tr. 1823–24). He has applied to be, and is being considered for appointment as, a Mogen David distributor, but he would not like to sell Tribuno vermouth because it is too high priced (Tr. 1825, 1847–48, 1853).

291. Mr. Perelli-Minetti of CWA testified that in some instances the best choice is exactly the opposite of consolidation: to split lines among distributors [86] in order to create competition (Tr. 127–28). From the distributor's point of view, a broad line resulting from

[34] Fanfaron was also not sold in the Mogen David house in Houston (Tr. 1220–21).

consolidation is not necessarily best, since profit margins are more important than sheer volume (Tr. 690–91).

292. Consolidation of the Mogen David and Franzia lines might also be hampered because of the fact that nearly three out of four Mogen David distributors are distributors of Gallo or United Vintners wines. Because of their sales leadership (RX 418A), the presence of these companies may foreclose smaller competing brands including Franzia from those distributors.

293. Mr. J. S. Franzia stated that a distributor "can't do justice to two masters" when one of them is Gallo or United Vintners and the other is Franzia; Gallo and Franzia as masters are "like General Motors and Hudson" (Tr. 671). Mr. Perelli-Minetti stated that he would not put California Wine Association's products—directly competitive with those of Franzia—into a Gallo house. "Not if I can help it, because we get murdered if we are in there" (Tr. 64, 114).

294. Meyer Robinson, general manager of Mogen David's chief competitor Manischewitz, asked to decide whether, if president of Franzia, he would put Franzia in a Gallo wholesaler said that he would not (Tr. 1466–67). On redirect he stated:

> MR. BROWNMAN: You indicated that you probably would not put Franzia in a Gallo house. My question is, if it were that or no distribution at all, would you put Franzia in a Gallo house?
>
> MR. ROBINSON: I couldn't see it.
>
> MR. BROWNMAN: Would you rather have no distribution or some distribution?
>
> MR. ROBINSON: I probably wouldn't have any distribution if I went into a Gallo house. (Tr. 1477).

[87] 295. Mr. Robinson went on to say that "it would be better off for them not to go into that market" rather than go into a Gallo house, even with a separate sales force (Tr. 1478). Mr. John Anderson, president of Sonoma Vineyards, also believes Franzia should not be placed in Gallo or United Vintners houses (Tr. 1769).

296. Since the competitive forces facing Manischewitz are wholly different from those facing Franzia, Mr. Robinson has no qualms about putting the Manischewitz products in a Gallo house. However, he shares a distributor with Mogen David only reluctantly and only in three instances in the United States out of a total of more than 200 Manischewitz distributors (Tr. 1452).

297. Actual events reveal that future consolidation of Mogen David and Franzia distributors is not probable. As discussed above, soon after the acquisition, Mogen David salesmen began to sell Franzia and some Mogen David distributors were given the Franzia line, a few by transfers from existing distributors and more by new appointment in previously unserviced areas (Tr. 834–35, 856).

298. The broadest single attempt to gain new distribution for Franzia by the use of Mogen David distributors occurred in Ohio during the nine months when Mogen David was responsible for sales of Franzia (CX 701B; Tr. 857). Mogen David placed Franzia in 18 or 19 of its distributors in Ohio, most of which were Gallo houses (Tr. 857). However, after initial inventory sales to the distributors, Franzia sold virtually nothing more and before it withdrew was ultimately forced to buy back much of the inventory, which had spoiled (CX's 701B, 862B; Tr. 860).

299. In New York City, the Mogen David sales force pushed Franzia out of its leading distributor in the United States, Robinson-Lloyds Ltd., and into the local Mogen David house (CX 613; Tr. 1786–87). That distributor proved totally ineffective for Franzia and New York sales fell from approximately 250,000 cases per year to almost nothing (Tr. 959–61). Franzia has since reconciled its differences with Robinson-Lloyds and today is again doing business with that company, although sales have not yet returned to their previous level (Tr. 959–61, 1793–94). [88]

300. After August 1974, because of a dispute between Mogen David's and Franzia's management over Mogen David's inability to sell Franzia wine (Tr. 717), Coke-New York decided to separate their sales organizations (CX's 554A–B, 555A–H, 560, 561A–F; RX's 103, 404A–P; Tr. 852–69, 1196–98). As of January 1, 1975, total separation was in effect, has continued to date, and according to Coke-New York's executive vice president, will be maintained in the future (Tr. 1198).

301. After reviewing the above evidence, I find that the acquisition of Franzia will probably not have any substantial adverse effect on the ability of other producers to distribute their wine, and that it will not foreclose a significant number of distributors and sales representatives of Franzia products from a "high volume, fast moving account" (Cplt., Par. 21d).

(2) Entry

302. Complaint counsel say that the wine industry is "highly capital intensive" (CX 27L, Z34; Tr. 353, 378–79, 1756, 2065, 2180, 2307), that small producers cannot spend the money which they need to grow (Tr. 378–79, 351–52, 2064), and that, with one exception such new entry as there has been since the 1960's has been at the premium level (CPF 180).

303. However, that exception—Bronco—discloses that even in this concentrated industry, it is possible for a significant new entrant to appear.

304. The day after Coke-New York completed its acquisition of Franzia, three Franzias resigned from the winery (Tr. 1184, 1192). These members of the younger generation of the Franzia family had been, respectively, vice president and director of national sales, vice president-sales, and vice president-operations (CX 723). They were the core of Franzia's management before the acquisition and are regarded as knowledgeable, competent, and aggressive about the wine business (Tr. 254, 1785).

305. The day they left Franzia, the young Franzias started a new winery. Their aim was an efficient, family-held winery that would be aggressively competitive in the [89] sale of conventional California jug wines (Tr. 606, 609). The product was to be "a high quality wine for the consumer at the lowest price possible." (Tr. 614).

306. Using less than $1 million in equity, they borrowed approximately $3 million from the Bank of America and began in June 1974 to build a winery in Ceres, California. Construction was rapid and the first bottling took place on September 30 of the same year (RX 50; Tr. 608–10, 621–28). Capacity of the new winery was one million gallons, which has since grown to 1.75 million (Tr. 612). Bronco is also the operating partner in a joint venture (with Getty Oil Company) that owns a four-million-gallon winery in Fresno, California. That winery has just recently been constructed (Tr. 620–21).

307. Taking advantage of one of the industry's periodic oversupply conditions, Bronco eased the path of entry by buying bulk wine through brokers and finishing it in its own winery (Tr. 613–14). Bronco described itself as [see *In Camera* Findings] (RX 52A). During 1974, bulk red wine sold for prices between 25 cents and the low 30's per gallon, prices at which neither Bronco nor its competitors could have made the wine (Tr. 615–16, 898–99). Bronco's sales increased to 1,350,000 cases in its first year—approximately one-third the size of 40-year-old Franzia—and the company quickly integrated its facilities (Tr. 635, 679).

308. Bronco's key to success in the marketplace was price: "[t]hey did it on price. . .there is no one selling wine as cheap as they have been in recent years. . . ." (Tr. 1583). Bronco's November 1977 prices were 99 cents per quart and $1.99 per gallon of its JFJ wines and $1.99 per fifth of champagne, price levels for branded products that are competitive with private label prices in California (Tr. 666–67). Bronco's sales have been growing steadily (Tr. 679).

309. Although sales of branded products within California account for almost all of Bronco's volume, the company has been able to obtain distribution (and subsequent sales) in numerous other states, and [see *In Camera* Findings], including: Arizona, Florida,

Oregon, Missouri, Nevada, New Jersey, New York, Texas, [90] Washington, [see *In Camera* Findings] (RX's 50E–G, 51E, 52E; Tr. 637–38). Distribution and sales outside California have been obtained despite Bronco's having made no active effort to seek them (RX 52D; Tr. 639–41, 672, 688–89). Within California, Bronco is its own wholesaler and has obtained distribution in five major supermarket chains in the northern part of the state. The company has done no advertising and plans to do none (Tr. 668–69). Although Bronco made no profits in 1974, 1975 or 1976, its owners were confident about 1977 profits (Tr. 641) and the future of the company (Tr. 673).

310. California Growers Winery, founded in 1936, was a farmers cooperative selling bulk dessert wines and bulk brandy; it did not produce any bottled wine products (Tr. 330). By 1971, the cooperative was virtually dormant and was reorganized as a corporation under new leadership (Tr. 333). Robert Setrakian, who had not previously been in the wine business (although his family was), assumed control of the company and California Growers entered the branded wine business for the first time (Tr. 330–31). Mr. Setrakian testified that California Growers was "sort of" a new entrant and that, as far as he was concerned, "March 1971 was the day that [he] was weaned into the wine industry" (Tr. 379–80).

311. Beginning in 1970 with a crush[35] of 4,000 tons of grapes and no branded sales, California Growers has grown impressively (Tr. 334, 381). The winery, with 15 million gallons of storage capacity, crushed 95,000 tons of grapes last year, which would produce 16 million gallons of wine if used entirely for dry wine (Tr. 342, 396). Sales of case goods, under the company's own brands and private labels, were between 800,000 and 1 million cases, or between 2.5 and 3 million gallons (Tr. 362, 381).

312. Although it does not advertise because it does not have the necessary capital, California Growers has gained distribution and sales for its branded [91] products in approximately 27 states, including California, Florida, Illinois, New Jersey, New York, Ohio, Texas, and in Puerto Rico (RX 57A–B; Tr. 339, 383). Sales are strongest in northern California, because much of the company's manpower is located there, Californians drink 25 percent of the wine produced in the state, and—despite the lack of advertising—one of the company's brands simply "caught on" there (Tr. 340).

[35] All the grapes crushed for winemaking in a single harvest season (Tr. 273).

313. Although Mr. Setrakian did not paint a completely rosy picture of his experiences in the wine industry,[36] he was generally optimistic about his company's future:

> I'm optimistic about the industry. We are not in the buggy whip industry, and I'm optimistic we have the wherewithal of maintaining ourselves and increasing our case goods sales at some time. We are going to get rid of all these guys[37] that should be doing what they were doing before they got in the wine business. (Tr. 400).

Regarding the possibility of the entry of other companies into the wine business, he said:

> A chimpanzee could have come into this business in 1971. It was a very romantic, highly—it had a high exposure, it was highly touted, both by the investment banking community as well as commercial banks, and if one had reasonable credentials, one could get into this industry with comparative ease. (Tr. 381). [92]

314. About 1953, Sebastiani Vineyards, which had been a supplier of bulk wine for many years, gradually began to enter the bottled wine business (Tr. 2284). Once it entered the branded business, Sebastiani's sales grew slowly until 1970 or 1971 when the last bulk wine was sold (Tr. 2285-86). At that point, sales through the company's 40 or 50 distributors were 90 percent in California (Tr. 2309-10). Slow growth ended when Sebastiani's sales "exploded" in 1971 (Tr. 2285). Sales in 1975 were double those of 1974; sales in 1976 were 38 percent greater than in 1975; sales in 1977 were 53 percent greater than in 1976 (Tr. 2286). Thus Sebastiani's sales have increased from 709,000 gallons in 1970 to approximately 5,222,000 gallons in 1977; *i.e.,* 1977 sales are more than 636 percent of what they were seven years ago (RX 350; Tr. 2286).

315. Mr. Sebastiani believes that his company's growth rate is the fastest in the industry. Its growth cannot be attributed to enormous advertising expenditures,[38] but to "a lot of hard work. . . . An honest product at a reasonable price. . .and sheer luck" (the "terrific explosion" in the interest in wine) (Tr. 2289-90, 2312-13).

316. Mirassou Vineyards started, like Sebastiani, as a producer of premium bulk wine (Tr. 2028-29). The Mirassou family has been making wine in California since 1854; until 1966, however, fewer than 1,000 cases per year of its output were put in bottles (Tr. 2029-30, 2405).

[36] We are going through what I hope the result is going to be. we are going through a growth process right now, and it's costing us a hell of a lot of money, and the competition is fierce, and the cost of production is monumental, and labor is going insane, as is the cost of energy and the cost of glass and the cost of corks, and if I ever had it to do all over again, I would probably do it anyway. (Tr. 379).

[37] Such as Pillsbury and Nestle (Tr. 353-57).

[38] Although Mr. Sebastiani spent $450-500,000 in 1977 for media advertising (Tr. 2306), it spent less than this during the early years of its growth.

317. Responding to the needs of a new generation in the Mirassou family for an expanded business, the winery began to sell wine under the Mirassou label for the first time in 1966 (Tr. 2030). Despite starting with no consumer franchise, no sales or marketing force, and no experience in the bottled goods business[39]—and [93] without any media advertising—Mirassou has grown from sales of 1,000 cases in 1966 to 165,000 cases in 1976 and 285,000 cases in 1977 (Tr. 2033, 2056).

318. This growth has been achieved by the five youngest family members themselves, who after finishing college decided that it was "time to put the Mirassou label on the market and let it be known." (Tr. 2030). The youngest generation began "pounding the pavement and beating on doors of retailers and wholesalers and getting people acquainted with [the] wine little by little. . . ." (Tr. 2030-31). The result has been, despite the lack of any training on the part of its marketing manager (Tr. 2034) and the refusal to advertise (even though the company can afford it) (Tr. 2033), that Mirassou's wines are now distributed nationally by about 150 distributors (Tr. 2031).

319. Perhaps more representative of the bulk of new entrants than the companies discussed above is Mt. Veeder Winery, which was started in 1971 by Mr. Michael Bernstein, a former FTC attorney (Tr. 1871-72). Starting with a capital investment of $126,000 for the winery and $25,000 for the original land (Tr. 1874-77, 1928-29), Mt. Veeder's sales grew to roughly 1,000 cases in 1976 and 1,450 cases in 1977, plus 900 cases of a lower priced second label (Tr. 1888-89).

320. Mt. Veeder's wines are very expensive (Tr. 1938, 1953) and its production, even at capacity (2,700 to 2,900 cases) (Tr. 1888-89) is so small that it can have no possible effect on the structure of the industry; however, its story shows that even one who is totally inexperienced can enter this industry (at a very modest level, it is true) with little capital outlay. The reason is that wine producers are cooperative with and actually encourage new entrants (Tr. 1879, 1919-20, 1957). Other reasons include the growth of interest in wine (Tr. 1910-11) and the free advertising by newspapers and magazines which seek out and publicize new wines and wineries (Tr. 1892-1901, 2212, 2293-94).

321. Although Mr. Bernstein has chosen to keep Mt. Veeder Winery small, he believes that expansion would be very easy (Tr. 1889, 1903). In its present [94] hillside location, where in his judgment vineyards produce the finest grapes, Mt. Veeder could

[39] At the time it went into the case (bottled) goods business, Mirassou's winery had an 800,000 gallon capacity and sold bulk wine to companies like Almaden, Paul Masson, Gallo, and Bear Mountain (Tr. 2052).

double its capacity (Tr. 1903, 1932). Growing tenfold would require building a facility in the Napa Valley, which he believes could readily be done (Tr. 1904).

322. Mr. Bernstein regards Inglenook as a model for even greater expansion: a very fine reputation for high quality, which Mt. Veeder has already achieved, can be used to increase demand for lower cost wines from different grape varieties (Tr. 1905–06, 1943–47). Mr. Bernstein is confident that he could finance such expansion himself and that Mt. Veeder's present distribution could be extended without any significant difficulty (Tr. 1906–07).

323. Canandaigua Wine Company's 1974 acquisition, Bisceglia Brothers, can be viewed as a new entrant in the popularly priced segment of the conventional wine business. Bisceglia had sold bulk wine before 1974, had no consumer franchise or brand recognition, and was almost insolvent (Tr. 1398). Nevertheless, Canandiagua is optimistic that Bisceglia can achieve a meaningful level of sales and be profitable (Tr. 1402–03).

324. Canandaigua, a major eastern producer of specialty products, was itself started with only a $20,000 investment about 30 years ago (Tr. 1400). Bisceglia, which Canandaigua describes as a complete major wine producing facility with 4.5 million gallons in capacity, cost Canandaigua only $1.5 million (RX 59H, N).

325. Aside from the specific examples discussed above, the total number of new entrants actually producing wine in commercial quantities in the past 11 years is hotly disputed by the parties. Coke-New York contends that yearly summary statistics published by the Treasury Department shows a "stunning growth" in the number of wineries engaged "in the business. . .of producing wine" (RPF 203). Complaint counsel counter that even if the figures are correct, they are merely numbers and do not show whether the listed wineries are in actual commercial production or, if they are, the extent of their production (CRF, p. 64). [95]

326. This is true; on the other hand, each of the wineries is producing more than 200 gallons of wine per year, since production of that amount or less for non-commercial use is completely exempt from tax and bonding requirements (26 U.S.C. 5042; 27 C.F.R. 240.540). Furthermore, each winery must hold a federal permit issued by the Bureau of Alcohol, Tobacco and Firearms of the Department of the Treasury (27 C.F.R. 1.21). Such permits are issued to a wine producer upon presentation of a surety or collateral bond of at least $1,000 and only if "by reason of his business experience, financial standing or trade connections [he] is likely to commence operations as a . . . wine producer . . . within a reasonable period

and to maintain such operations in conformity with Federal law," (27 C.F.R. 1.24, 240.120, 240.221), and a failure to engage in the commercial operations authorized by the permit for more than two years will result in proceedings to revoke it.

327. Finally, although admitted with the limitation that there be no reference to the information about specific wineries listed in it, a 1977 directory published by Wines & Vines is in relatively close agreement with the federal statistics, counting 575 commercial wineries in the United States as of December 31, 1976, nearly matching the federal figure of 585 as of September 30, 1976 (CX 986; Tr. 1393–94).

328. Thus, while the following chart does not reveal their commercial significance, it does show that there have been several new entrants into the wine industry over the past 11 years.

Fiscal Year	*Wineries*	*Increase Over Previous Year*
1977	652	67
1976	585	39
1975	546	34
1974	512	32
1973	480	32
1972	448	10
1971	438	3
1970	435	3
1969	432	4
1968	428	4
1967	424	2

(RX's 368H–I; 369F–G, 370C–D, 371F–G, 372G, 373I, 374I, 375J, 376I, 459K, 460B). **[96]**

329. There is, in my opinion, a potential for significant growth by these new entrants, for from 1967 to 1976, adult per capita consumption of wine in the United States increased from 1.738 gallons per year to 2.750 gallons (RX 380L), and it will probably increase still further in the future although perhaps not to the extent that the United States will be a wine-drinking country in the sense that European countries are (RX 52A; Tr. 231, 282–83, 470, 567, 1910–11, 2040, 2296–97). Coupled with population increases, the increase in per capita consumption has brought about an enormous growth in the amount of wine produced: the total has nearly doubled in 10 years, soaring from 203.4 million gallons in 1967 to 400.3 million gallons in 1977 (RX's 378J, 501).

330. Complaint counsel recognize the substantial increase in

wine consumption in the past 10 years but point out that it was accompanied by a substantial increase in concentration (CRF, p. 64). This is not completely true, for as of this date it cannot be said that there is any trend toward concentration in the industry (Finding 245) even though sales are continuing to climb.

331. Complaint counsel also seem to suggest that the entry of Bronco, California Growers, Sebastiani, and Mirassou as significant producers of wine prove little because their principals had prior experience in the industry. I cannot accept this argument, for they brought to the new companies (or the new products) no overwhelming advantages which they obtained from that experience. They did not rely extensively on advertising or existing distributor networks, yet they were able to enter and expand their production.

332. On the basis of the above evidence, I must conclude that barriers to entry in the wine industry are low, that they can be overcome by companies run by experienced personnel with relatively modest financial backing and that, with prudent management, these companies can become significant producers of wine. Nor have complaint counsel established that Franzia's acquisition by Coke-New York will increase these modest barriers to entry. [97]

(3) Concentration

333. Although four and eight firm concentration in the wine industry increased substantially from 1968 to 1971 (Findings 243–44), the picture from 1971 to 1976 was quite different; during this period of time, four firm concentration was only 0.67 percent higher than 1970 (Finding 245). These figures reveal that at present there is no trend toward a significant increase (or decrease) in four firm concentration in the wine industry.

(4) Trend Toward Mergers and Acquisitions

334. Complaint counsel have not proved that there is a trend toward mergers or acquisitions in the wine industry, or that the Franzia acquisition will encourage future mergers or acquisitions.[40]

(5) Elimination of Franzia As an Aggressive Competitor

335. While Coke-New York contemplated changing Franzia's competitive posture from one of high volume-low price, the attempt failed and caused a sharp drop in sales until Franzia brought its prices in line with competition (Tr. 886–92, 1200–02). Today, Franzia

[40] Complaint counsel's only reference to acquisition history in the wine industry is the challenged acquisition, Renfield's connection with Sonoma, and Canandaigua's acquisition of Bisceglia (Brief, p. 19).

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is an aggressive price competitor (Tr. 145–46, 306, 390, 467–68, 1513, 1820–21).[41]

336. Initially, Mr. Ciocca, Franzia's new marketing manager (now its president) believed that it could raise prices (Tr. 799), and under pressure from Coke-New York to increase revenues through price increases, [98] Franzia in three months in 1974 raised its California prices on gallons from $2.99 to $3.49 (Tr. 887, 1201). Sales on this single item, in a state accounting for 60 percent of Franzia's sales, fell by half, from a rate of 300,000 cases down to 150,000 cases. Despite the price increase, the net effect on revenues was negative because of the drastic decline in volume (Tr. 886–88).

337. In 1975, again in California, Franzia began a programmed series of price increases on fifths (Tr. 889–90). According to Mr. Ciocca, Franzia's president, movement of its wine through the stores "stopped" as consumers refused to accept the higher prices (Tr. 890). The chain stores reacted by saying "you have raised yourself out of business." (Tr. 891). Franzia retreated and in the autumn of 1975 cut prices back to their original level, which to some extent restored its sales (Tr. 892).

338. There is little likelihood that Franzia will repeat this attempt or that if it did, it would be any more successful than in the past, for it will always be faced with vigorous competition in popular priced wines (Findings 67–77). Unlike Coke-New York, which has a consumer franchise (Tr. 1784), and which can probably ignore lower-priced competition, Franzia must always be aware of, and meet, its competitors in terms of quality and price (see Tr. 1790); therefore, I find that the acquisition will not significantly alter Franzia's pricing policy, and that Franzia will remain as a substantial, independent factor in the wine industry.

(6) Elimination of Actual and Potential Competition Between Franzia and Coke-New York

339. Complaint counsel do not claim, as the complaint alleges, that the acquisition will eliminate potential competition between Franzia and Coke-New York, but argue that these companies competed, before the acquisition, in the "all wine" market and that the acquisition eliminated that competition. [99]

340. The record does not support that claim. With minor exceptions,[42] Coke-New York's wines did not and do not compete with

[41] Mr. Ivie of Guild Wineries disagreed with this consensus, testifying that since the acquisition Franzia has tended, within particular (unnamed) price categories, to a higher price policy (Tr. 585).

[42] Tribuno and Franzia vermouths and, perhaps, the new Mogen David light wines and Franzia table wines. The significance of this competitive overlap cannot, however, be determined on this record.

Franzia's wines (Findings 212-237), and the acquisition did not and will not eliminate substantial competition between these companies.

III. CONCLUSIONS OF LAW

A. Coke-New York's Acquisition of Franzia Was Not Horizontal

Although a few witnesses agreed that all wines compete to some extent, most, whether called by complaint counsel or Coke-New York, expressed no concern about Mogen David's activities[43] because they simply do not view it as a competitor.

Complaint counsel answer that while producer testimony and other record evidence might require a finding that well-defined submarkets exist in the wine industry,[44] these submarkets "are not a basis **[100]** for the disregard of a broader line of commerce that has economic significance." *United States* v. *Phillipsburg Nat'l Bank,* 399 U.S. 350, 360 (1970).

Coke-New York does not disagree with the concept that relevant submarkets can exist within a broader line of commerce which is also economically significant, but it argues that there is no line of commerce in the wine industry which encompasses both Mogen David's and Franzia's wines. I agree: Complaint counsel's "all wine" market is a theoretical construction which does not take into account "the realities of the market in which the merged companies operate," *General Foods Corp.,* 69 F.T.C. 380, 408 (1966), *aff'd,* 386 F.2d 936 (3d Cir. 1967), *cert. denied,* 391 U.S. 919 (1968).

Coke-New York points out that *Brown Shoe* was not the first important case which defined how the limits of a relevant product market should be determined. The principal pre-*Brown Shoe* case, *United States* v. *E. I. Du Pont de Nemours & Co.,* 351 U.S. 377 (1956) (the *Cellophane* case), stated that in determining whether products are part of the same market

> What is called for is an appraisal of the "cross-elasticity" of demand in the trade. The varying circumstances of each case determine the result. In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by

[43] With the exception, of course, of the few producers of directly competitive wines such as Manischewitz (Finding 213).

[44] *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 325 (1962):

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

consumers for the same purposes make up that part of trade or commerce, ... 351 U.S. at 394-95.

Do consumers believe that Franzia and Mogen David wines are interchangeable for the same purpose? Complaint counsel say that both are table wines, but there [101] is no reliable evidence of consumer belief that the sweet Mogen David wines with the "foxy" taste (Finding 223) are reasonable substitutes for table wines, dessert wines, or sparkling wines of the kind which Franzia produces.

Testimony by industry members provides secondhand but convincing evidence that consumers do not consider Franzia and Mogen David wines as interchangeable for the same purpose, for if this were so, surely wine producers and wine retailers would have realized this over the years and adjusted their business practices to take Mogen David wines into account.[45] Yet, while producers are concerned with the prices of many varieties of wine, they are simply not interested in the prices of Mogen David wines (Findings 229-232).

Logic also leads to the conclusion that Franzia's and Mogen David's wines do not exist in the same product market. The differences between Franzia's (and other producer's) table wines and Mogen David's wines are so pronounced (Findings 223-228) that it is inconceivable that a drinker of table wines would consider Mogen David wines a reasonable substitute for them.[46]

It is possible, of course, that young wine drinkers who initially began drinking pop wines or Mogen David traditional wines might move up to table wines (Finding 235) but this does not, I believe, indicate cross-elasticity of demand between Mogen David wines and table wines; rather, this shows that the wines are so different that they are unsuited for the same purpose, and that they are not substitutes for one another, see *du Pont, supra* at 393. [102]

Despite the evidence discussed above, complaint counsel say that "wine is wine," just as "beer is beer," *United States* v. *Jos. Schlitz Brewing Co.,* 253 F. Supp. 129 (N.D. Cal.), *aff'd per curiam,* 385 U.S. 37 (1966), and "dog food is dog food," *Liggett & Myers, Inc.* v. *FTC,* 567 F.2d 1273 (4th Cir. 1977). These cases can be distinguished from the present one. In *Schlitz,* the court could find no:

rational way of choosing a point along this price spectrum [of beer prices ranging from $.79 to $1.44 a six pack] and saying that all beer which sells above that point constitutes a line of commerce, or even a sub-market, apart from all beer which sells below that point. *Schlitz* at 145.

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[45] In other words, they would have recognized the cross-elasticity of demand between the products. *United States* v. *The Federal Co.,* 403 F. Supp. 161, 163 (W.D. Tenn. 1975).

[46] The studies which complaint counsel introduced in evidence do not, in my opinion, contradict this conclusion for they do not reveal the unfettered choices of even those who were interviewed (see Respondent's Post-Trial Reply Memorandum, pp. 27-29).

In other words, the court concluded that there must be an overall beer market since there were no clearly identifiable submarkets. Here there is no doubt that Franzia and Mogen David wines occupy separate submarkets; the question is whether they also compete in a broader market.

Liggett & Myers does not dictate the adoption of complaint counsel's "all wine" market. In this case, the Commission found the existence of an "all dog food market" because all dog foods, "including Perk's 'Economy' canned and Allen's 'premium' canned, is interchangeable for the same use-keeping dogs fed," because of the elasticity of dog food production facilities, and because of "substantial competitive confrontation among all members of the dog food industry. . . ." *Liggett & Myers, Inc.,* 87 F.T.C. 1074, 1148, 1153 (1976).

To state the obvious: Wine is different than dog food. In *Liggett & Myers,* despite distinct differences between premium and economy canned dog food, the Commission could not

believe, that were a "premium" canned dog food unavailable, that even the most loyal of "premium" users would let their dogs starve rather than use an "economy" canned dog food. . . . *Id.* at 1157.

[**103**] On this record, it can be stated with confidence that the host of a dinner party, faced with the wide variety of table wines available to him, would almost certainly not consider any of the Mogen David traditional wines suitable to be served at his table.

Complaint counsel argue, however, that one cannot simply look at present attitudes of wine drinkers, but that competition must be viewed historically just as in *United States* v. *Continental Can Co.,* 378 U.S. 441 (1964), where the Supreme Court concluded that despite their distinctive characteristics, metal and glass containers occupied the same product market because of the historic confrontation between them in which "metal has replaced glass and glass has replaced metal. . .for some important uses; both are used for other purposes; each is trying to expand its share of the market at the expense of the other; and each is attempting to preempt for itself every use for which its product is physically suitable . . . ." *Id.* at 453.[47]

Over the past years, there has been a substantial increase in the sales of dry wines and a decrease in the sales of dessert wines (Finding 233) so that it can be said that there has been broad competitive confrontation between these groups of wines. However,

[47] See also *Liggett & Myers, supra* at 1148:

. . .competition should be viewed dynamically, and measured over a sensible period of time.

there is no mutual competition between the Mogen David and Franzia-type wines. Producers of Franzia-type wines are not trying to expand their wine sales at the expense of Mogen David wines. Their competitive activity is focused elsewhere. And, despite some half hearted attempts to convince others that it was a producer of table wines (Finding 202), Mogen David did not try to compete in the table wine market with its traditional sweet wines.[48] [104]

All of the evidence discussed up to now relates to the "demand side" of the relevant market. However, "cross-elasticity of production facilities may also be an important factor in defining a product market. . . ." *Brown Shoe, supra* at 325 n. 42. A "supply side" or "supply space" analysis recognizes "the ability of modern corporations to transfer their management, manufacturing, and marketing skills to related but unidentical product markets where profit opportunities beckon." *Sterling Drug, Inc.,* 80 F.T.C. 477, 587 (1972).

Coke-New York agrees that products which may not be directly competitive may nevertheless be included in the same relevant market under the so-called "cluster" concept, see *United States* v. *Philadelphia National Bank,* 374 U.S. 321 (1963), and concedes that conventional wines occupy a "cluster" composed of producers who compete with one another by offering a broad line of products which may not be directly competitive, such as sherry, burgundy and champagne. Coke-New York argues, however, that Mogen David wines are not in the same "cluster" as the products of conventional wine producers.

I agree with this argument. Despite the great variety of products which a conventional wine producer like Franzia sells (Finding 178), only one, Gibson, produces conventional wines as well as Mogen David-Manischewitz type wines (Finding 232). Every other conventional wine producer avoids these wines, and it would be unrealistic to include them in the conventional wine "cluster." Compare *British Oxygen Co., Ltd,* 86 F.T.C. 1241, 1369 (1975):

> On appeal complaint counsel seek to bolster the ALJ's finding on the ground that inhalation anesthetic equipment is a "cluster" market. . . . But as we pointed out in *Sterling Drug, Inc.,* . . . in "those cases it was established or undisputed that resource flexibility existed or that the product groupings were sold as a full line by most firms."

Nor is there "resource flexibility" between the producers of Franzia-type wines and Mogen David-type wines since Mogen David wines cannot legally be made in California where Franzia's facilities are located (Finding [105] 38), and Mogen David would hardly try to

[48] If its traditional wines were truly competitive with dry table wines, Mogen David would have perceived no need to produce its "light" wines (Finding 168).

produce Franzia-type table wines in its plants for they could not be called "California" wines.[49] However, even if one were to conclude that Mogen David and Franzia wines occupy the same "supply space," there is no evidence of the extent of that space, see *Sterling, supra* at 596, and, consequently, no way to determine Franzia's and Mogen David's share of that space.

Complaint counsel argue that Mogen David and Franzia are competitors because they vie for distribution, *Sterling Drug, supra* at 592; *A.G. Spalding & Bros. Inc.* v. *FTC,* 301 F.2d 585, 603–04 (3d Cir. 1962); *Litton Industries, Inc.,* 82 F.T.C. 793, 998 (1973); retail outlets, *Sterling, supra* at 583; and advertising, *Continental Can, supra* at 450–51. The answer to this argument is that these facts were considered in the cited cases along with other evidence of substantial competitive confrontation. Thus, despite theoretical "competition" for distributors, or shelf space,[50] all the evidence of record leads to the conclusion that there was no "meaningful competition" between Coke-New York and Franzia before the acquisition, and that the acquisition did not, therefore, eliminate actual competition between these companies.

B. Even if the Acquisition Were Horizontal, It Would Not Substantially Lessen Competition

Although I have found that the Coke-New York Franzia merger was not horizontal, I will comment on complaint counsel's and Coke-New York's arguments on the combined market shares of the two companies. [106]

Its 1973 acquisition of Franzia made Coke-New York the nation's third largest wine producer, with 7.17 percent of a market in which the top four firms in the prior years had 55 percent and the top eight had 65 percent of the wine gallonage. Complaint counsel argue that these facts coupled with the increase, over the five years prior to the acquisition, of the four and eight firm concentration ratios by 8 and 10 percentage points makes extensive analysis of the wine market unnecessary. *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 363 (1963).

However, the marked share figures and concentration ratios are not, in my opinion, so impressive that one can ignore other facts, including post-acquisition evidence, which may lead to a conclusion contrary to that which the numbers might appear to dictate. See

[49] Canandaigua, a producer of New York State table wines which are competitive with California table wines, nevertheless bought a California winery so that it could produce California wines (Finding 226).

[50] Theoretical, because if one were to accept complaint counsel's argument, every product in a grocery store which sells wine could be considered a competitor of wine.

Sterling Drug, Inc., supra at 598; *United States* v. *International Harvester Co.,* 564 F.2d 769, 773 (7th Cir. 1977).

Despite the obvious limitations of post-acquisition evidence, it is admissible and can be considered "in exceptional circumstances," *American General Insurance Co.,* 89 F.T.C. 557, 632–33 (1977). In *Warner-Lambert Co.,* 87 F.T.C. 812 (1976), the Commission "while not suggesting that the presence of post-merger market share data is necessary in merger cases" considered it because it corroborated projections based on premerger market share data. *Id.* at 868, n. 11. See also *United Brands Co.,* 83 F.T.C. 1614, 1712–14 (1971), in which the Commission relied on post-acquisition evidence of the failure of that company to successfully brand differentiate lettuce.

Although I agree that "the force of § 7 is still in probabilities, and not in what later transpired," *Seeburg Corp.,* 75 F.T.C. 651, 665 (1969), I cannot ignore the post-acquisition evidence tendered by Coke-New York for it reveals that the trends predicted in the complaint are nowhere near as significant as complaint counsel contend.

While concentration ratios increased substantially in the four years preceding the merger, the top four increase was only 0.67 percent from 1970 to 1976 (Finding 245). This evidence (which includes both pre- and post-acquisition figures) reveals that at present there is no discernible trend toward concentration. Furthermore, the market shares of three of the top four wine producers have [107] declined over the past several years. In fact, from 1974 to 1977 Coke-New York's share of the wine market decreased from 6.35 percent to 4.72 percent (Finding 242). Nor can Franzia's losses—$11.6 million—in the past four years be ignored (Finding 189) or its presence in the private label market, which is totally price competitive (Findings 74–75); however, the most significant fact which indicates that the market share data in the record does not reflect the actual state of competition between the companies is Mogen David's absence from New York and California, the two largest wine consuming states, and, therefore, the lack of direct competitive confrontation between it and Franzia in these states[51] (Findings 162, 336). See *Warner-Lambert, supra* at 914; *United States* v. *Federal Co.,* 403 F. Supp. 161 (W.D. Tenn. 1975):

At the time of the acquisition, Federal and White Lily were less significant competitors of each other in the bakery flour market in the Southeast and in

[51] It is not inconsistent, as complaint counsel claim, to accept the parties' agreement that the relevant geographic market is nationwide and, at the same time, to recognize that Franzia and Mogen David do not compete in every geographic submarket across the United States.

plaintiff's proposed four-state area than the foregoing market share figures would indicate. *Id.* at 169.

If Mogen David and Franzia are viewed as competitors under a "cluster" or "supply side" analysis, it is important, I believe, to recognize that even in those states where both are selling their wines, they are not in direct competition for the same consumer dollar as are companies producing table wines, another fact which diminishes the significance of the market share data relied upon by complaint counsel.

Finally, the entry of an important new competitor, Bronco, and other wineries (Findings 302–318) shows that there are no substantial monetary barriers to entry in **[108]** the wine business.[52] Know-how is of course important, but it can be easily bought. Compare *United Brands Co., supra* at 1708–09.

Thus, the market share data relied upon by complaint counsel does not tell the whose picture. The acquisition did produce a company which is the third largest in the industry, but its market share has declined steadily since then, the acquired company has lost over 11 million dollars,[53] the industry is not tending toward concentration, complaint counsel make to claim that there is a trend toward acquisitions in the industry, there has been significant new entry which has apparently adversely affected the market shares of three of the top four producers, popular priced wines are competitively priced in non-control states[54] (Findings 67–77), and producers' profits are low (Finding 69). In conclusion, wine is a competitive industry, and there is no evidence that the acquisition has changed or will change this condition.

There have been horizontal mergers which were declared illegal where the market shares were close to those here (7.17 percent at the time of the acquisition, 4.72 percent as of 1977), but the merged companies in those cases operated in a different competitive environment than exists in the wine industry. **[109]**

In *United States* v. *Pabst Brewing Company,* 384 U.S. 546 (1966), Pabst, the tenth largest brewer, acquired Blatz Brewing. Although the combination controlled only 4.49 percent of the total sales of the industry nationally at the time of the acquisition, the two companies were head-to-head competitors and the beer industry was one

[52] In *Fruehauf Corp.,* CCH Trade Reg. Rep. Trans. Binder § 21,402, at 21,368 (February 22, 1978), the Commission described costs of entry into the ASBD market of up to 13 to 14.6 million dollars as moderately high. Significant entry in the wine industry has been accomplished for much less (Findings 306, 324).

[53] *United States* v. *International Harvester Co., supra* at 769, 773 (7th Cir. 1977):

> In responding to a statistical showing of concentration and in concluding that Section 7 was not violated, Judge Leighton properly considered evidence of Steiger's "weakness as a competitor."

[54] A "reliable indicator of desirable market behavior." *United States* v. *Black & Decker,* 430 F. Supp. 729, 754 (D. Md. 1976).

marked by a steep decline in the number of competitors (from 206 to 162 in four years). The Court also found high entry barriers in the beer business and a substantial increase in concentration in the market. Furthermore, the Court placed great emphasis on the fact that Pabst's market share grew in the three years following the merger. 384 U.S. at 550–51.

In *United States* v. *Von's Grocery Co.,* 384 U.S. 270 (1966), the combined market share of a union between two retail grocery chains was only 7.5 percent in the year after the acquisition. However, it was also clear that the Los Angeles retail grocery market was experiencing a severe decline in the number of independent grocery stores, which were rapidly being acquired by chain operations, and the two merging companies were growing, successful and in direct confrontation in the marketplace.

While post-acquisition evidence should be considered with care, it would be unrealistic to ignore the convincing, consistent picture which that evidence discloses in this case. On the basis of that evidence, even assuming that Mogen David and Franzia were in the same product market prior to the acquisition, I find that complaint counsel have not established that the effect of the acquisition may be to substantially lessen competition.

C. The Acquisition Viewed as a Product Extension

Coke-New York's acquisition of Franzia was not horizontal; it was, rather, a product extension acquisition, one involving the "merger of sellers of functionally closely related products which are not, however, close substitutes." *The Procter & Gamble Co.,* 63 F.T.C. 1465 (1963), *aff'd,* 386 U.S. 568 (1967). **[110]**

The Supreme Court in *Procter, supra* at 578, outlined the anticompetitive effects of product-extension mergers:

> (1) the substitution of the powerful acquiring firm for the smaller, but already dominant, firm may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing;
>
> (2) the acquisition eliminates the potential competition of the acquiring firm.

Complaint counsel have abandoned any claim that Coke-New York was a potential entrant into table, dessert and sparkling wines, so the only issue to be dealt with is the effect of the substitution of Coke-New York for Franzia.

Of major importance in a product-extension acquisition is the probability that it will permit "significant integration in the production, distribution or marketing activities of the merging

firms," including the combination of advertising and sales promotion activities. *Procter & Gamble, supra,* 63 F.T.C. 1543.

Significant integration may substantially lessen competition by entrenching an already dominant firm, *Procter & Gamble, supra* at 1568, or by upsetting the competitive balance in an industry, *General Foods Corp.,* 69 F.T.C. 380, 422-23 (1966), *aff'd,* 386 F.2d 936 (3d Cir. 1967), *cert. denied,* 391 U.S. 919 (1968), or by increasing barriers to entry, *United Brands,* 83 F.T.C. 1614, 1706 (1974).

The present acquisition has none of the features of an illegal product extension merger. Although Franzia was one of the larger wine producers prior to the acquisition, it was not the dominant firm nor did it provide any competitive balance in the industry—Gallo was, and is, the dominant firm in this industry, although its market share has declined somewhat over the past few years. [111]

Furthermore, the ability to alter market structure through massive advertising—a common theme in product extension cases[55]—is not a factor in the wine market for, while advertising can contribute to a wine producer's success, it is not essential, and has even been dispensed with by some successful wineries (Findings 50-63). See *United States* v. *Crowell, Collier and Macmillan, Inc.,* 361 F. Supp. 983, 991-92 (S.D. N.Y. 1973):

> Advantage for § 7 purposes, however, means substantial competitive advantage. The ability of the smaller acquired firm to advertise at the rates enjoyed by its purchaser has been found injurious to competition only where advertising is itself a significant factor in the smaller firm's market.

Barriers to entry in the wine industry are low, they have been surmounted by new entrants in the popular priced field (Findings 302-332), and there is no convincing evidence that the Franzia acquisition will raise these barriers.[56]

Coke-New York denies that it will integrate Mogen David's and Franzia's sales forces or that it will be able to force distributors to take on all of its wine [112] products and drop those of other wine producers,[57] I agree that this possibility is remote, especially in view

[55] In *Sterling Drug, Inc.,* 80 F.T.C. 477, 540-41 (1972), the Commission was concerned with advertising to sales ratios ranging from 16 percent to 45 percent. In *General Foods Corp.,* 69 F.T.C. 380, 434 (1966), *aff'd,* 386 F.2d 936 (3d Cir. 1967), *cert. denied,* 391 U.S. 919 (1968), SOS had an advertising to sales ratio of over 15 percent. In *FTC* v. *Procter & Gamble Co.,* 386 U.S. 568, 571-72 (1967), Clorox had an advertising to sales ratio of over 9 percent in the year of the merger. In *Liggett & Myers, Inc.,* 87 F.T.C. 1074, 1117, 1174 (1976), *aff'd,* 567 F.2d 1273 (4th Cir. 1977), Alpo had an advertising to sales ratio of 10 percent.

[56] In a product extension acquisition, the key question is not so much what barriers to entry there are but "whether respondent's presence has in any way raised whatever . . . entry barriers existed prior to its acquisitions." *United Brands, supra* at 1706.

[57] While Mogen David would be expected to refrain from pressuring its distributors to take on Franzia during this litigation, if, as complaint counsel contend, Mogen David distributors feel obliged to do so even without overt coercion ("Coercion is often extremely subtle, especially economic coercion," CRF, p. 80), one would expect, over four years after the merger, that Franzia's sales would have increased substantially. They have not (Finding 192).

of its substantial recent decrease in market share (Findings 276-301). Furthermore, even assuming that many Mogen David distributors do take on Franzia's wines or that the Mogen David and Franzia sales forces are combined, this will not foreclose other wine producers from obtaining adequate distribution (Findings 91-161).

D. Conclusions

1. Coke-New York's acquisition of Franzia was not horizontal.
2. Assuming that Coke-New York's acquisition of Franzia was horizontal, complaint counsel have not proved that its effect may be substantially to lessen competition, or that it may tend to create a monopoly.
3. Coke-New York's acquisition of Franzia was a product extension, but complaint counsel have not proved that its effect may be substantially to lessen competition, or that it may tend to create a monopoly.

ORDER

It is ordered, That the complaint be, and it hereby is, dismissed.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

Complaint in this matter was issued on September 10, 1974, challenging the acquisition by Coca-Cola Bottling Company of New York, Inc. (hereinafter Coke-New York) of Franzia Bros. Winery, a producer of California table wines. Coke-New York had previously acquired the Mogen David Wine Co. in 1970 and the Tribuno Vermouth Co. in 1973. The combination of Franzia and Mogen David made Coke-New York the third largest factor in the wine industry, accounting for 7.17 percent by volume of domestically produced wine and imports for domestic consumption in 1973. By 1977, however, this figure had fallen to 4.72 percent. (I.D. 242)[1]

[2] Hearings on the complaint, which alleged a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) as well as Section 7 of the Clayton Act (15 U.S.C. 18) were held before Administrative Law Judge (ALJ) Lewis Parker, who entered an initial decision holding that the merger did not violate the law.

[1] The following abbreviations are used herein:

I.D.	- Initial Decision, Finding No.
I.D. p.	- Initial Decision, Page No.
Tr.	- Transcript of Testimony, Page No.
CX	- Complaint Counsel's Exhibit No.
RX	- Respondent's Exhibit No.

Judge Parker concluded that "all wine" did not constitute an appropriate line of commerce within which to evaluate the merger, but that even if it did, the merger had not been shown to threaten a substantial lessening of competition in that hypothetical market. Complaint counsel have appealed from both prongs of the ALJ's holding, and our disposition of this appeal follows.

RELEVANT MARKET

While complaint counsel contend that "all wine" is the relevant product market within which the effects of this merger are to be judged, respondent insists, and the ALJ agreed, that Mogen David and Franzia wines do not inhabit the same "line of commerce" within the meaning of Section 7. Respondent is apparently willing to concede that there exists a "wine market" of sorts, consisting of a cluster of products among which fall dry table wines and sweeter dessert and aperitif wines, but it argues that Mogen David cannot fairly be included within any such market that might be defined. Instead, it is claimed, Mogen David occupies its own "quiet corner of the alcoholic beverage business" in which it competes with Manischewitz and a few other berry wines for the patronage of people who "are not really wine drinkers" (Respondent's Answer Brief, pp. 2, 10; Tr. 2229).

On the surface, this proposition appears implausible. After all, Mogen David is called "wine"; is thought by those who produce and advertise it to be wine and to compete with many other wines; is distributed by the same class of specialized vendors who distribute other wines; occupies shelf space in retail liquor stores along with other wines; is counted among "wine" sales in industry statistics; contains 12 percent alcohol; is made from the crushed and fermented fruit of the vine; and, if consumed in sufficient quantities will (we presume) produce a state of intoxication roughly equal to that induced by the best or worst offerings of California or France. Why, then, is this wine different from all other wines? [3]

In respondent's view, the answer to our question lies in Mogen David's high added sugar content, which makes it considerably sweeter than all but the competing products of Manischewitz and a few others. This assures, in respondent's view, that Mogen David will be consumed by an entirely different and separate class of customers from those who purchase Franzia or other table wines. Respondent does not go quite so far as to suggest that the sophisticated dinner party host(ess) would sooner abandon his or her guests to an evening of unremittingly sober contemplation of each other's conversation than ply them with Mogen David, but it is certainly the thrust of

respondent's argument that in the unlikely event that a Franzia drinker were to be confronted with that frightful possibility, he or she would as readily turn for relief to beer or whiskey as to Mogen David.[2] In other words, it is alleged, the cross-elasticity of demand between Mogen David and Franzia (or similar wines) is zero, a point made in not so many words by several hardly disinterested fanciers of California table wines who testified that neither they nor any true oenophilist would drink Mogen David if it were being given away, (Tr. 461, 915, 1089), or, even (according to one witness) if he were paid one dollar a glass to drink it (Tr. 462).

Following up on this point, respondent's counsel have gleefully elicited from the witnesses in this case any number of fervent denunciations of Mogen David's claim to occupy the same market as California table wines. Thus, as one witness observed, "[t]hey make grape alcohol that has sugar and water added. We make wine." (Tr. 915) In the view of another, Mogen David's MD 2020 is "a harsh, syrupy tasting, heavy alcohol, raspy, difficult to even smell, let alone get over your palate, type product." (Tr. 1008) And, of course, there is the gentleman who, badgered by counsel for his evaluation of the taste of "eastern grapes" responded with that "rather earthy" characterization that Judge Parker apparently considered too earthy even [4] for the calloused sensibilities of the antitrust bar.[3] (Tr. 311, I.D. 223; *see also* Tr. 1914–15, 2044, 2117, 2160).

While these descriptions of Mogen David, elicited by its own counsel, might, in a sense transcending this litigation, be considered "admissions against interest," we are reluctant to accept them at face value. Those who consume this product may number among them few members of the wine-drinking elite, but it seems apparent that Mogen David is consumed for general light, medium, or heavy duty libationary purposes by a wide spectrum of Americans whose dollars are capable of exerting quite as much influence in the market for wine as anyone else's.

Although many of Mogen David's products are kosher, and, therefore, suitable for celebrations of the Jewish religion, it is quite clear from the record that only a minority, and perhaps a small minority of the purchasers of Mogen David (and Manischewitz) are Jewish. This was the purport of testimony from several sources (*e.g.*, Tr. 1328, 1437, CX 52–Z–144–45) and respondent introduced no

[2] Indeed, respondent goes farther: "Mogen David drinkers don't drink wine. The wine drinker surely doesn't drink Mogen David. It is not a question of price or anything else. If you are a regular drinker of California wines, you would not switch to Mogen David if they paid a half dollar a glass to drink it. You would rather go to Coca-Cola." (Tr. 15) While this admission on the part of counsel for Coca-Cola Bottling Co. does raise the interesting possibility of other relevant markets within which the acquisition might have been tested, complaint counsel have not chosen to pursue them.

[3] This Commission will not abridge the protections of scatological privilege either. (But it rhymes with "sissy.")

evidence to contradict it. Indeed, Mogen David seeks patronage well beyond the Jewish community (I.D. pp. 59-61) and Mogen David reports that its best sales season is, as it is for other wines, the fourth quarter of the year (CX 52-Z-18; cf. Tr. 1464). Thus, even assuming that Jewish purchasers of Mogen David drink it solely for religious reasons,[4] a proposition that itself seems unlikely, it is nevertheless clear that the bulk of Mogen David is consumed for the same set of reasons that motivate the consumption of all other wines.

Respondent contends, nevertheless, that those who drink Mogen David are an altogether different group from those who drink California table wines, and that the latter are unlikely to purchase Mogen David [unless, perhaps, as one witness explained, "they are bringing it home to their old mother or aunt or somebody like that." (Tr. 2083)]. Noting that, as their taste matures, wine drinkers typically develop [5] a preference for drier, less sweet wines, respondent suggests that the disparity in sweetness between Mogen David and the cluster of products produced by Franzia is so great that at any particular point in an individual's drinking career, he or she is unlikely to alternate between wines of the two companies. Mogen David, then, is at best for the youthful drinker, aged 18-21 or 10-15 (depending upon whether one reads the statute books or the newspapers) whose transition to the role of mature tippler is eased by the sugar in Mogen David but who, upon achieving that status, quickly renounces the medium that made it all possible. (Tr. 1327, 1374, 1407-08, 1446, 1458-9, 1504, 2301). Mogen David, it is suggested, is also of special appeal to lower income minority groups (Tr. 1574, 1852, 1981) as well as to older Americans of all races and creeds who have never "dried up."[5] (Tr. 1982, 2083, 2116)

One large retailer described the non-Jewish purchasers of Mogen David as being

> . . .either black, poor black, poor Spanish or Puerto Rican or else they are older people. A lot of times old ladies will come in and say they have been at the doctor and have an artery problem and the doctor recommended drinking a little bit of wine everyday and ordinarily, they don't drink wine, they want something. . . (Tr. 2102)

Following up on the testimony, respondent suggests that the reason for Mogen David's recent precipitous loss of market share lies in the fact that its customers are "just getting older and not drinking any more, dying." (Oral Argument Transcript, p. 51)

[4] There is no suggestion in the record that Mogen David would find any substantial use as a sacramental wine in the Christian religion, and, in fact, its high sugar content apparently renders it unsuitable for rites of the Catholic church. (Tr. 1329).

[5] "Drying up" (not to be confused with its opposite, "drying out") is the process whereby wine drinkers gradually shift from sweet to dry wines. (Tr. 2289)

While this orgy of casual empiricism may point in the direction of truth, it does not negate the existence of significant areas of competitive confrontation between Mogen David and a variety of other wines. Youthful drinkers, for example, do not make the transition from sweet to dry wines with the same abruptness and finality as they progress, for example, from elementary school to junior high. Rather, there is a period during which experimentation [6] occurs, different wines are tried, and brands are alternated. Many witnesses, including some who expressly denied that Mogen David competed with Franzia or other California wines, acknowledged that all wines (sometimes expressly mentioning Mogen David) compete for the patronage of the fledgling drinker. (*e.g.,* Tr. 1092, 1327, 1504–08, 2301, I.D. 235).[6]

Moreover, other evidence of record, in particular marketing studies commissioned by Mogen David to assist it in selling its products suggests that (1) Mogen David is considered by those who use it to be suitable for consumption at mealtimes, and (2) some of those who consume Mogen David also enjoy and consume a variety of other sweet and dry wine products. Thus, Mogen David's surveyor, who contacted a sample of 420 wine drinkers in four cities, reported that 84 percent of those 150 who claimed to "prefer" Mogen David; 77 percent of those 144 who simply "used" Mogen David; and 70 percent of those 126 who "know but don't use" Mogen David considered it suitable for consumption with a meal. (CX 737 X). Asked to state the time they most commonly served sweet wine, 49 percent of Mogen David preferrers responded that it would be at dinnertime, while another 27 percent said they would be most likely to serve it equally at dinnertime or after or before the meal. (CX 737 X). When asked as to their preferences in wine taste, 27 percent of the Mogen David "preferrers" indicated that they preferred dry wines, while 46 percent preferred sweet wines. 43 percent of the Mogen David "users" in the sample preferred dry wines, compared to 37 percent preferring sweet wines. (CX 737 W). Finally, the study revealed that when choosing an alternative to Mogen David, 11 percent of the Mogen David preferrers would turn to Italian Swiss Colony and 16 percent to Gallo, while 33 percent would turn to Manischewitz. (CS 737 Z–80). Among the Mogen David preferrers,

[6] In a move aimed at the youth market, Mogen David developed Cold Bear, a non-kosher pop wine. (CX 17 V ff.) Like other pop wines, this product met some initial success but later fizzled. (I.D. 166) Of more sustained significance has been MD 20 20 (modestly subtitled "The wine of the century"), also non-kosher, and "targeted initially to ethnic market" where there had been "inactive competition" and "no recent new product activity" (CX 17 U). MD 20 20 has been a highly successful product (Tr. 1008), and appears to have particular appeal to black consumers, (Tr. 1981) and to young consumers. (Tr. 2271) By 1972 it accounted for 50 percent of Mogen David's sales (I.D. 169).

Gallo was rated the first or second alternative by 33 percent and Italian Swiss Colony by 24 percent. (CX 737 Z-81). [7]

Although respondent attacks this survey as being unsuitable for the use to which complaint counsel seek to put it, and not projectible to the population at large, we believe that the survey results are plainly probative of points at issue in this litigation. It is true, as its author conceded, that the survey is not projectible, and we, therefore, would not rely on the particular percentages cited above as being accurate for the entire all-wine or Mogen David drinking population. Nevertheless, the survey does represent by far the most systematic canvass of consumer attitudes available in the record. While these results are not projectible to any entire population, they surely reflect the attitudes of a significant segment of such population. No stronger claim than this could possibly be made for the contrary, anecdotal evidence cited by respondent. Thus, it may be that the three wine retailers who testified in this case have rarely if ever seen a Mogen David buyer approach the cash register with anything but Mogen David in their cart, but the "testimony" of hundreds of consumers reflected in the survey does suggest that such occurrences, aberrant as they may seem, may not be uncommon. Similarly, though the wine industry executives who testified at these hearings might find it an appalling breach of good taste, it nonetheless seems plain that large numbers of Mogen David drinkers consider the product to be a quite suitable accompaniment to a meal. Indeed, it is hard to imagine how else Mogen David could have sold up to 14 million gallons of its wines yearly (I.D. 170) if their use was so limited as many of the witnesses appear to believe.

Given the foregoing testimonial evidence of competitive confrontation between Mogen David and other brands for patronage of the new drinker, and given more modest survey evidence suggesting some competition with other non-kosher wines for patronage of the general drinker, we think that the record demonstrates at least some significant competitive overlap or interchangeability of end use between Mogen David and other wines. To be sure, significant competitive confrontation between Mogen David and many other wines at the other end of the sweetness spectrum is probably minimal. But Mogen David is not unique in this respect. Many of the witnesses who testified in this proceeding that their companies' products do not compete with Mogen David, also excluded from the realm of their competition a wide range of other wines that clearly belong in any sensibly defined "wine [8] market." Thus, one witness even doubted that red wine competed with white (Tr. 2171), but more generally, industry members saw the bulk of their competition as

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coming from similar type wines within a narrow price range. Asked to describe his product's competitive interface with Gallo, one manufacturer of premium wines responded:

I prefer to think of Gallo as the wine they drink everyday. At least I hope to think of Gallo as the wine people drink everyday and people might buy ours to drink on Sundays. (Tr. 2181)

In the words of another:

The average dry wine consumer, and I would lump basically all the dry wines would tend to float from say, maybe a low priced level as a general rule to a little bit higher level as a special occasion or weekend type thing. (Tr. 2228; *See also* Tr. 2036).

These industry members appear to view wines in different price categories as being in some measure *complements* rather than substitutes for each other, and in some measure they no doubt are, just as a wine like Mogen David might be consumed by the same person but for a different purpose than would a drier wine. All this, however, illustrates only that the wine market does not consist of altogether homogeneous products. Many wines may be both substitutes and complements for each other,[7] and as between many market members, cross-elasticity of demand may be slight. The products in the alleged market, however, can be arrayed along a set of continua, most significantly price and sweetness, and while Mogen David plainly falls at the far end of the latter continuum, we see no clear reason why it should be excluded from that continuum altogether, given clear interchangeability of end use with some products nearer the center, cf. *United States* v. *Jos. Schlitz Brewing Co.,* 253 F. Supp. 129, 145 (N.D. Cal.), *aff'd. per curiam,* 385 U.S. 37 (1966). [9]

While evidence of interchangeability of end use may be the most important determinant of the existence of a market, cf. *United States* v. *E. I. du Pont de Nemours & Co.,* 351 U.S. 377, 394–5 (1956), it is not the only one, *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 325 (1962). Supply side flexibility is also an important factor, *Brown Shoe Co.* v. *United States, supra,* 370 U.S. at 325, n. 42, and in this regard the law judge observed that most of the equipment used for making wine "can be used interchangeably no matter what the specific wine

[7] As a further example, consider table wines consumed with dinner, and sweeter dessert or aperitif wines consumed after or before a meal. The compleat dinner party host(ess) may consider it imperative to stock all three, but the couple without guests may find that a few drinks before dinner coupled with the prospect of a few with dessert obviates the need to open a new bottle with the meal. Alternatively, the sight of a fine bottle of burgundy breathing on the dinner table may deter the consumption of aperitifs (or then again, it may not.)

type. Thus, most large wineries can produce any type of wine, even kosher wine, if the grapes are available." (I.D. 37)[8] While California law would preclude Franzia from adding sugar to a wine, (I.D. 38), it and other California producers could make very sweet wines by use of grape concentrate. And Mogen David's facilities could certainly be used (as they have been before) for manufacturing dry table wines of the sort made by California or New York wineries.[9] It does not denigrate the significance of this supply side flexibility to point out that Mogen David has had little success with its line of dry wines. Under other circumstances (*e.g.*, a decline in the number of competing brands) it might fare better, and have greater incentive to try, unless, of course, it should happen to own a competing seller of such wines. One possible effect of any merger involving companies with interchangeable manufacturing facilities is that it will stifle the incentive for product innovation by those firms in the best position to provide it. [**10**]

For the foregoing reasons, we believe that "all wines" might appropriately be designated as a market within which the effects of this merger may be tested. To be sure, the question is, as Judge Parker recognized, a close one, and were we disposed to reach a different conclusion with regard to the second issue in this case, the probable effects of the merger, we might well remand with respect to the question of market definition, perhaps for brief further consideration by the ALJ of the validity of the marketing studies that he appears largely to have discounted. For present purposes, however, we shall simply vacate the ALJ's conclusion that no market exists and assume *arguendo* that all wine is an appropriate market within which to judge the effects of the merger.

COMPETITIVE EFFECTS OF THE MERGER

In proceeding from there to measure those effects, however, the character of the market selected cannot be ignored. The principles governing antitrust market definition are designed to satisfy the necessity to make difficult judgments in an area of unavoidably imperfect knowledge, and markets so designated cannot always (nor need they, as a matter of law) satisfy the purist's desire that every product within them possess a high and statistically demonstrable

[8] This commonality of production facilities is further intensified by a commonality of distribution facilities. "Wine products" are distributed by wine distributors. While beer distributors or others can sometimes perform the job, it seems clear that distributors with specialized capabilities for handling all wines are preferable. This gives a further advantage to the manufacturer of one wine seeking to switch production to a different wine.

[9] We do not understand the law judge's surmise that Mogen David would not dare to produce "Franzia type" wines because they could not be called "California" wines. (I.D. p. 105). Surely the outer boundaries of competition in this industry are not so confined as to exclude products made east of the Rockies (or east of the Atlantic Ocean) from the same broad market as California wines.

degree of cross-elasticity of demand with every other. But by the same token, this cannot be an excuse for ignoring entirely what may be the peculiar characteristics of the market that has been chosen to test a merger, and assuming that because it is properly deemed a "market" it has all the characteristics of more fully integrated lines of commerce. As we noted in *RSR Corp.*, 88 F.T.C. 800 (1976), *aff'd*, No. 77-1413 (9th Cir., Jan. 8, 1979), a case in which there was much to argue against designation of any particular geographic market:

What this suggests is not that it is impossible to designate an appropriate 'section of the country' for purposes of antitrust scrutiny but rather simply that designation of an appropriate market does not end the analysis and divest the Commission of an obligation to keep in mind the multifaceted character of the market in its analysis of anticompetitive effects." 88 F.T.C. at 886.

[11] The same is true with respect to product markets. While a merger that created a company with a market share equal to that present here might well tend substantially to lessen competition in many markets, the record generated in this case does not give us cause to fear such an effect from the combination of Franzia and Mogen David in the sale of all wines.

As complaint counsel recognize, the relatively small market shares of the two merging firms in this case are hardly sufficient, standing alone, to give rise to a presumption of anticompetitive effects, as in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 363 (1963). In the year of the merger, the consolidated market share of the parties was 7.17 percent on a gallonage basis. (I.D. 241)[10] The year of the merger marked the beginning of a precipitous decline in Coke-New York's wine fortunes. By 1977 its market share had fallen to 4.72 percent (I.D. 242), with the slide due in part to losses by Franzia but most significantly as the result of a steady erosion of Mogen David's sales, from over 14 million gallons in 1972 to only slightly more than 9.5 million by 1977. (I.D. 170) While we are mindful that post-acquisition evidence, including declines in market share, should be viewed with a jaundiced eye where it is within the power of the respondent to manipulate, *United Brands Co.*, 83 F.T.C. 1614, 1703 (1974), it is also clear that the series of calamities that has befallen Mogen David-Franzia since their merger (*e.g.*, I.D. 170, 189-93, 336-337) amounts to something considerably more than the "reasonable cynic" could ascribe to a desire to avoid an adjudication of liability in this litigation. In considering the combined market

[10] Coke-New York argues that this figure would be lower if dollar share of the market were considered, because Franzia sells at the low end of the wine price range while Mogen David is at best in the middle. We believe that both figures are of interest, and of relevance, but it is certainly not inappropriate to assign liability on the basis of gallonage.

shares of the parties, then, the 7.17 percent figure clearly overstates the case, although we would ordinarily look to the year of merger figure as the best estimate of combined market share.

In an effort to go beyond the relatively low market shares, complaint counsel have additionally argued that industry concentration is high and that the combination of [12] Mogen David-Franzia is likely to achieve certain marketplace advantages attributable only to size, rather than to competitive vigor.

With respect to industry concentration, it is assuredly high, due principally to the large market shares of the top two firms. Four firm concentration prior to the merger was 55 percent and eight firm concentration was 65 percent and these figures had been increasing before the merger occurred. (I.D. 243) High concentration may facilitate the occurrence of interdependent anticompetitive conduct, and accordingly, even small increases in highly concentrated markets must be viewed with great disfavor. *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 365, n.42; *Stanley Works* v. *FTC,* 469 F.2d 498, 504 (2d Cir. 1972), *cert. denied,* 412 U.S. 928 (1973). Such a concern in this instance, however, is mitigated by the fact that the particular merging companies are ones as to which there exists little overlap of end use between the products they manufacture, and accordingly, the likelihood that this merger will increase opportunities for interdependent behavior on the selling side appears remote. Given their disparity of product offerings neither Mogen David nor Franzia seems likely to forfeit significant independence of action because of joinder with the other. This situation contrasts sharply with those in *United States* v. *Aluminum Co. of America,* 377 U.S. 271 (1964), and *Stanley Works* v. *FTC, supra,* both of which involved mergers of very small firms with leading firms in highly concentrated industries. In both of these cases, the mergers under challenge involved the presumptive loss of a fairly direct competitor of the industry leaders. In a concentrated industry, even the loss of such a small competitor is to be prevented. Here, however, we cannot conclude that either Franzia or Mogen David has been "lost" to the industry in any practical sense, because the extremely disparate nature of their product lines ensures that it is in Coke-New York's long term economic interest that both continue to compete vigorously in the sale of the line of products in which each specializes.[11]

[13] Complaint counsel have also pointed to the possibility that by

[11] This is, of course, the promise that is held out by the respondent in most merger cases, and ordinarily we would give it little credence. This case is different from most other cases, however, in that the merging parties, though perhaps assimilable within the same market, are the most diverse imaginable participants in that market, with little actual or likely market overlap.

virtue of its combination with Mogen David, Franzia will be "leveraged" into Mogen David distribution outlets to which it might not otherwise have been able to obtain access. There is record evidence to suggest that, at some level at least, a wine company's size is a determinant of the quality of distribution it is able to achieve. There is no doubt from the record that in many instances, the talent or market clout of wine distributors is critical to the competitive success of particular brands. To be sure, this is not always so. Where a brand is well known, perhaps as the result of nationwide advertising, it may be of relatively little significance who is chosen to distribute it, and all distributors will be eager to do so. (Tr. 1057) In other instances, however, it is clearly the distributor who is responsible for the success of a brand. (Tr. 257) In competing for distribution, size can be an advantage. A distributor may prefer to handle the line of a large company because it affords a readily available "mix" of complementary products (Tr. 1039, 1862), or, a distributor may feel compelled to handle the less desirable products of a larger company in order to be assured of being able to handle its more popular brands. (Tr. 950) The result of these tendencies, combined with an alleged preference for exclusivity in distribution (Tr. 1057), it is suggested, is an arrangement in which the biggest or best wine manufacturer preempts the most desired distributor in an area, the second largest obtains the second-best, and so forth. (Tr. 9–10, 117.)

Applying these observations to the instant merger, complaint counsel argue that it raises the substantial possibility that Franzia wines will be leveraged into the Houses of Mogen David, with distributors who might otherwise prefer to distribute competing brands of California table wines being compelled — or at least feeling compelled — to distribute Franzia in order to maintain their standing vis-a-vis Mogen David. While this phenomenon, if shown to exist in substantial degree, would be a cause for substantial concern, we find the record evidence on the point to be inconclusive.

Mogen David-Franzia clearly runs a very distant third (if not, by now, fourth) to the industry leaders, Gallo and United Vintners. (I.D. 241–42) While the ability to use leverage in the fashion feared by complaint counsel may be significant with respect to companies with larger market shares, it appears to be considerably less with respect to a [14] company of the size and with the product mix of Coke-New York. One reflection of this is the fact that a large fraction of Mogen David's distributors also distribute Gallo (Tr. 950), an arrangement that appears to work well for all parties because of the minimal overlap between the two lines. However, Gallo distributors are

unlikely to be eager to add Franzia to their line, or if they do add it, they are unlikely to do an energetic job of promoting it because of its substantial overlap with Gallo. This, in turn, suggests that the only likely casualty of consolidation in such houses will be Franzia. (I.D. 292–98)

Because of difficulties and lack of success experienced in consolidation, Coke-New York re-separated the sales organizations of Mogen David and Franzia. (I.D. 300) While such a post-complaint occurrence, readily within the control of respondent, is no grounds to presume that further efforts at consolidation may not be made after the merger, we do not find substantial record evidence to fear that this will produce anticompetitive effects. Consolidation *per se* is not a competitive evil; only where it results in the exclusion or downplaying of a competing brand by a distributor who would have preferred to distribute or emphasize that competing brand may there be cause for complaint.[12] Although there was some record testimony to the effect that this merger had resulted in the exclusion of a competitor of Franzia from a Mogen David distributor in one instance (I.D. 269), the judge discounted its credibility (I.D. 270), and there was other testimony to indicate that it is unlikely to be a major concern. (I.D. 276 ff.)

On balance we find the record evidence insufficient to sustain a finding that this merger may substantially lessen competition by virtue of any possible adverse effects upon the access of manufacturers to distributional outlets.

The other allegedly anticompetitive effect of the merger to which complaint counsel point to make their case is Coke-New York's effort to reposition Franzia in the [15] marketplace by changing its image: new labels, bottles that "women would be happy to have on their dinner table" (Tr. 883) and, of course, new (and higher) prices. That this effort was met by a chilly market response — dramatically diminished purchases and huge losses for Franzia — is little consolation to complaint counsel. They note that the mere attempt betrays a sinister purpose behind the merger and one that may yet be given effect if the merger challenge is turned back.

The allegation of wrongdoing here is similar to that made in *United Brands, supra,* wherein respondent acquired lettuce-growing land with the intent to market more expensive, brand-differentiated lettuce. While any wine company might on its own, and presumably without legal consequence, attempt to reposition its products,

[12] Alternatively, consolidation may restrain trade by depriving distributors of desired and necessary sources of supply, leading to a decline in the number of distributional outlets. Again, there is little record evidence to indicate that this is a likely effect of the merger.

illegality is premised here, as in *United Brands,* on the fact that the feared effect is threatened as the result of a merger, which bestowed upon Franzia a management disposed to a different philosophy of marketing, and possessed of resources sufficient to give at least limited expression to that philosophy.

Although we cannot agree that the wine industry presents quite the rosy picture of competitive health that respondent suggests[13], we do agree with respondent and Judge Parker that the record presents insufficient basis to conclude that Franzia will, as a result of this merger, be [16] able with impunity to sell old wine in new bottles at a higher price. Were this not so, a more difficult question would be presented, because the practice is plainly not *per se* illegal, and short of entrenchment or attempted monopolization (neither of which seems possible here given Franzia's small size and Coke-New York's limited resources) it is not clear what sort of potential conduct by way of repositioning in the wake of a merger should be grounds for concern. In the circumstances before us, however, this is a question we need not consider.

We find that the record fails to show by a preponderance of the evidence that the instant merger may substantially lessen competition in any line of commerce. Accordingly, an order of dismissal is appended.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of complaint counsel from the initial decision and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying opinion, the Commission has denied the appeal. Therefore,

It is ordered, That pp. 1–99 of the initial decision of the administrative law judge be adopted as the Findings of Fact of the Commission, except for Finding 65, final two sentences; Findings 210–211; Finding 237; Finding 332; and after changing in Finding 145, line 4, "two" to "one" and deleting "(1) That there are many actual or potential distributors available for wine producers and. . .". In addition, these findings and initial decision pp. 100–112 are not adopted to the extent inconsistent with the accompanying opinion.

It is further ordered, That the complaint be dismissed.

[13] In particular, we agree with complaint counsel that a distinction must be drawn between the ease of entry on a minimal basis at the premium end of the market and entry on a level at which the entrant is capable of affording meaningful competition for the industry leaders catering to the bulk of the market. See *Fruehauf Corp.*, Dkt. 8972, slip op. p.25 (Feb. 22, 1978) [91 F.T.C. at 233], *appeal pending,* No. 78–4053 (2d Cir.) While it may be that anyone with an acre of land, a bathtub, and clean feet can make wine, profitable entry on a scale sufficient to provide meaningful competition for the industry leaders appears to be a considerably more difficult proposition, the dimensions of which are not entirely clear from the record. It is entry of the latter sort with which we must be principally concerned in evaluating the state of competition in an industry.