so I bought it to get it out of there. He wouldn't let me put up a sign or he wouldn't let me display any in the front, and I couldn't understand what he was trying to do to me.

6. *Stuart Coleman.*

Stuart Coleman, of Brownwood, Texas, testified (Tr. 1843–1860) that he has been a beer distributor for twelve years; that he started with Budweiser and then went to Jax in 1962 when he ceased distributing Budweiser; that he ceased distributing Jax in 1971; that he started distributing Coors in January 1966; that his territory consists of Brown, Comanche, Coleman, McCulloch, Mills, Llano and Burnet Counties, Texas; that he paid nothing for his distributorship; that he is familiar with the policy brochure of the Adolph Coors Company (RX 1047) and conducts his distributorship basically in conjunction with that policy manual; that he has draft manuals, sales manuals, newsletters sent out each month, and recycling bulletins from the Coors Company and has meetings with the Coors sales representatives from time to time; that he has a written contract with Coors in which his territory is specified; that since 1966 shortages of Coors beer in various packages are common in his distributorship; that he would not have contracted with the Adolph Coors Company had he not known it was their policy to have only one distributorship in a given area "On account of the investment that we make in our distributorships and our warehouses and our trucks and stuff" (Tr. 1847); that in the Brownwood area he competes with large national brands such as Schlitz and Budweiser; that he sets his sales prices to the retailer; that he discusses his sales prices from time to time with members of the Coors Company but makes the final decision as to what those prices are; that he discusses the retail prices with the retailers because he wants them to make a fair markup on their product, but the retailers set their own prices and the decision they make is theirs (Tr. 1849); that he would like to have all exclusive draft accounts, but he has just one exclusive. He stated (Tr. 1849–1850): "We maintain our beer on a different pressure with the CO_2 gas and it creates quite a problem whenever you have splits because the retailer, if he doesn't have two gas setups, we just can't do any good at all with them because we draw on a higher pressure than the biggest part of the other breweries;" That he has never been joined by any agents of the Adolph Coors Company in threatening retailers so far as the retail prices are concerned; that he has never threatened retailers on pricing by using as the threat the

fact that he wouldn't deliver any beer to them; that he has never been threatened by any agency of the Adolph Coors Company in conjunction with his territorial limitations; that he has never been threatened or coerced or intimidated in any way by an agent of the Adolph Coors Company on any subject; that he is familiar with his contract with the Coors Company and knows about its termination provisions, stating "It has no effect on me" (Tr. 1851); that he knows Mr. Letcher and did business with him in Mr. Letcher's Brownwood store until "he started footballing my beer and what I mean by footballing it, shoving it around and and putting other beer signs in front of my spaces in the cold box and stuff, and I have had quite a few problems with Mr. Letcher" (Tr.1852); that he cut Mr. Letcher off of beer in June of 1966 "On account of him footballing me around and I asked him to stop, and he didn't, and he started out then by advertising my beer below what I was selling it to him for" (Tr. 1852); that he didn't service Mr. Letcher again, but serviced his expartner who bought him out in October or November of 1971; that he would never do business with Mr. Letcher again and made that statement to the brewery; that the Schlitz distributor also cut him off three years ago, stating, "Judge, at that time I understand that that was the time Schlitz was in a shortage of beer and Mr. Letcher wanted more than his equal share and he got in an argument with the Schlitz distributor and the boy just quit servicing him" (Tr. 1853); that he was president three years ago of the Texas Wholesale Beer Distributors, and is still a director. On cross-examination, he testified that his investment in his distributorship is about a hundred and sixty thousand dollar, and it is profitable; that Budweiser had a promotion last month giving discounts to their retailers on quantity buying, but it had no effect on his sales; that he has never made a promotional sale of that sort with Coors beer; that Budweiser frequently has such promotions, for example, in 1971, "I'm going to say four times, and they would last anywhere from thirty to sixty days" for each promotion, sometimes on bottles and sometimes on cans; that he has twenty-nine percent of the market for Coors beer in his area; that Schlitz is the leader in this area with thirty-eight percent of the market and Budweiser is behind Coors; for what little he sells, draft beer is profitable; and that he has one exclusive account and six splits. On redirect examination, as to competition, in the categories of "easy, tough or relatively tough," he testified that both Budweiser and Schlitz were "tough" (Tr.

1859); that there were 139 licensed retailers in his area and he serves all of them; that there are thirteen draft accounts in his area and he has seven of them (Tr. 1859–1860).

7. *John A. Boersma.*

John A. Boersma, of Blackwell, Oklahoma, testified (Tr. 1860–1876) that he is a wholesale beer distributor and has been in that business since 1946; that he really grew up in the business since his father was in it before him; that, at the time they began handling Coors beer in 1956, his father and he were in a father and son partnership in their business, but his father is no longer active in the business; that he has a 22-year old son who is now a fulltime member of his operation and his company has been a family company ever since its inception; that, prior to 1956, they handled Country Club beer and Muhlbach beer, which both are out of the market now; they also handle Schlitz beer now; that his territory covers Kay, Noble, Payne, Osage and Pawnee Counties in Oklahoma, actually about a four and a half county area; that they did not pay anything for their distributorship; that he is familiar with the policy manual (RX 1047) and it is their guide in the operation of their Coors distributorship; that he also receives letters and a regular monthly distributor bulletin from Coors, and they have a draft beer manual and an advertising manual, and have regular visits with their Coors sales representative concerning the operation of their Coors distributorship; that he has a written contract with Adolph Coors Company in which there is a specified territory which is his responsibility; that in the last few years there has been a regular occurrence of shortage in certain packages of Coors beer; that he would not have contracted with the Adolph Coors Company had he not known it was their general policy to have only one distributor in a given area because "I don't believe you could justify the investment that you would place in a distributorship. I don't believe you could compete with competitive brands" (Tr. 1864); that they compete with three different wholesalers who sell Stagg, Budweiser, Miller's, Falstaff and Busch beer and he characterized this competition as "aggressive" (Tr. 1864); that he discusses his wholesale prices to retailers with various people within his organization but he sets the wholesale prices; that the retailers set their own prices and sometimes he counsels them; that he has forty-three draft accounts, two being split; that he services three hundred ten retail accounts; that draft beer is a very vul-

nerable item as to quality control and in this connection he testified (Tr. 1866):

> Well, draft beer must be strictly refrigerated. Draft beer must be dispensed under idea[l] sanitary conditions. Draft beer requires far more equipment to dispense in a retail account than just selling packaged beer. This equipment must be properly maintained. The equipment must be in proper order to actually dispense quality draft beer.

He testified that he had never joined with any agent of the Adolph Coors Company in threatening any retailer in any way concerning his prices; that he had never threatened any retailer in conjunction with the agents of the Adolph Coors Company as to any phase of his operation concerning his supply of beer that he would receive; that he has never been threatened by the Adolph Coors Company with termination of his distributorship by virtue of selling outside of his territory; that he has never been threatened or coerced or intimidated by any agent of the Adolph Coors Company in any manner; that he is familiar with his contract with the Coors Company and, as to the five and thirty day provisions in that contract, he stated, "I feel this is really no problem, or no concern" (Tr. 1867); that, to be a good Coors distributor, "I feel primarily that we need to market Coors beer in a quality manner to provide quality services for our retailers; to follow the items, the philosophies in the Coors policy manual, and this is what we do" (Tr. 1867); that general compliance with the general statement contained in the policy manual (RX 1047–A) is the key to being a good Coors distributor and he agrees with that type of policy; that his territory especially is in what is commonly referred to as the "bible belt" with very strong Baptist and Methodist activities, and he stated, "This puts the beer business in a little tougher position as far as proving yourself as an upstanding business operation" (Tr. 1869); that he is a member of the Presbyterian Church and has served on the board of deacons and trustees and is now on the board of trustees; that he has twice been a director on the board of directors of the Oklahoma Malt Beverage Association. On cross-examination, he testified that the original investment made by his father and himself in their distributorship in 1955 was somewhere in the neighborhood of $70,000 including warehouse facilities (Tr. 1870); now his investment in his distributorship is in the neighborhood of $400,000, and is a profitable business; that he still sells Schlitz beer which is approximately ten percent of their total volume; that, at the time of the forming of their partnership, they handled Country

Club and Muhlbach beer, which companies no longer exist, and they handled Lone Star beer in the past; that he thought his Coors distributorship holds somewhere around sixty-five percent of the beer sales in his market area, which would not take into consideration their sales of Schlitz; that Budweiser is his closest competitor in terms of market area, with approximately ten percent of the market, but it could be greater then that; that, if he no longer distributed Coors beer, he didn't believe he would be able to use his facilities to distribute other beer and that, if Coors terminated his contract, he would be out of business (Tr. 1873); that Coors "is the finest quality beer" and, he stated, "I think the quality product and the quality procedures have a total to do with the sale of Coors beer" (Tr. 1873); and that, with regard to any price increase he might make, his best guess would be that it would have a detrimental effect on his sales.

8. *Vincent J. Domenico.*

Vincent J. Domenico, of Lakewood, Colorado, testified (Tr. 1876–1892) that he has been a Coors beer distributor for fifteen years; that his territory is part of Jefferson County, Colorado; that, upon graduation from college, he was a liquor salesman in Denver, Colorado, but, learning there was an opening with Adolph Coors Company, he applied and was approved by Coors; that he started with Coors in the beer business in Morrison, Colorado, which is also in Jefferson County; that in 1971, his organization sold 55,000 barrels of Coors beer; that he did not pay anything for his Coors distributorship; that he has familiarized himself with the Coors policy manual, RX 1047, and uses that policy manual in the general overall conduct of his business; that he would not have contracted with the Adolph Coors Company had he not known it was their general policy to have only one distributor in a given area because "we've got too much money tied up" (Tr. 1882); his biggest competitor is Budweiser, then probably Schlitz and then Miller's (Tr. 1882); their distributors have exclusive territories; that he decides his prices to the retailers; that the retailers set their own prices although he makes suggestions to them and sometimes the retailers abide by his suggestions and sometimes they do not; that he services 257 accounts, of which 90 are draft accounts; that he has splits out of those 90 draft accounts; with regard to his policy regarding splits, he testified (Tr. 1883):

We have a policy regrading splits, that if we are split, we don't like to

be taken advantage of. We like to have our product be taken care of in the manner in which we—which we explain to the retailer. Let's take as an example that we are split with Budweiser. If we have Coors and Budweiser in here, and if as an example you come in as a consumer and ask for a glass of beer, the average owner is so advised that, "We have two. We have Coors and Budweiser." And if you say you want Coors, you get a glass of Coors, and in a Coors glass. And, if you like Budweiser, you get a glass of Bud in a Budweiser glass.

He testified that the care of draft beer does present problems in the cleanliness of it, the temperature, the refrigeration, the age, and the rotation (Tr. 1884); that he has never joined with any agents of the Adolph Coors Company in threatening retailers so far as their pricing structures were concerned; that he has never threatened a retailer in any manner or used as a threat the fact that he might not deliver him beer or do this in conjunction with agents of Adolph Coors Company (Tr. 1884); that he has never been threatened by the Coors Company in any way because of the territorial limitations in his contract; and that the Coors Company has never threatened him in any way because he had too many splits in his territory (Tr. 1884). He stated that the Coors Company has never threatened him because he sold to a central warehouser in Colorado; that the laws of the State of Colorado are such that central warehousing is not permitted (Tr. 1885); that he has never been threatened or coerced or intimidated in any manner by any agent of the Adolph Coors Company (Tr. 1885); that he is familiar with his contract generally and knows that it contains certain termination provisions, but such provisions do not affect his operation in any way (Tr. 1885); that he conducts his business along the lines of the general statement in the Coors policy manual, RX 1047, and believes that it is very important in the success of his business to do so (Tr. 1886).

On cross-examination, the witness stated that he only sells Coors beer in his distributorship (Tr. 1888); that his initial investment in the distributorship was probably thirty thousand dollars (Tr. 1889); that his investment now in 1972 is probably six hundred thousand dollars, and his distributorship is profitable (Tr. 1889); but he has not been approached by any other brewers; that Coors beer is the best in quality and that this quality relates to the sales of Coors beer; that of his ninety draft accounts, ten are splits; and that his Coors distributorship has about sixty percent of the total beer market in his market area, with Budweiser his closest competitor (Tr. 1892).

9. *George J. Maloof.*

George J. Maloof, whose company is Joe G. Maloof and Company, Albuquerque, New Mexico, testified (Tr. 1893–1910) that he has been in the wholesale beer business for thirty-five years; that he is now 48 years of age and was in the business before he graduated from college; that it has been a family company for many years and distributes all over the State of New Mexico; that his company is the only Coors distributor in the State of New Mexico (Tr. 1894); that he did not pay anything for his Coors distributorship; that he is familiar with the general policy manual of Coors; that recently he has been short of Coors beer quite often; that this shortage has continued from time to time for a number of years; that he would not have contracted with the Coors Company had he not known it was their general policy to have only one distributor in a given territory; in this connection, he stated (Tr. 1897):

> Well, I wouldn't have any control over my business. And I think that one of the important things in the beer business is to be able to protect quality of product. And I think that's one of the assets of being an exclusive distributor, is that you can protect the quality of the product that you sell.

He stated that their two major competitors are Budweiser and Schlitz, with Hamms third, and Falstaff fourth (Tr. 1898); that competition is pretty keen in the beer business brand to brand; that in setting his prices, he has different prices in different markets, and freight is one of the big factors involved in setting prices; that also, "I try to use a policy of having a fair profit because I know to operate my business properly I've got to have a fair profit, and I base my market so that I can have a fair profit and have a good operation" (Tr. 1898); that he sets the prices for his company (Tr. 1898); that he has ten warehouses located throughout New Mexico; that the retail prices are set by the retailer; that there is a very wide range of prices in New Mexico; that he has never joined with any agents of the Adolph Coors Company in threatening retailers with prices in any way, nor has he by himself threatened any; nor has Coors Company by itself threatened any; that he has never threatened any retailer in conjunction with the Adolph Coors Company so far as withholding deliveries from them if they didn't do certain things on prices, and that he has never threatened them himself; that he has never seen anybody from the Coors Company do it; that he has never been threatened by the Adolph Coors Company if he didn't stay within the State of New Mexico in selling beer; that they strive to have

exclusive draft accounts because "we think we can have better quality control with an exclusive draft account," but they do have split accounts (Tr. 1900); that the Maloof organization serves in the neighborhood of 1400 retail accounts in New Mexico and they have "roughly around 300" draft accounts with about 45 or 50 splits in the state (Tr. 1900–1901); that the Coors Company has never threatened him in any way so far as his split accounts are concerned; that no agent or employee of the Coors Company has ever threatened or coerced or intimidated him in any way, shape or form (Tr. 1901); that he is familiar with his contract with the Coors Company and that it contains some termination provisions, stating "I think they can terminate us in thirty days," but that doesn' bother him in his company "not as long as I do a good job" (Tr. 1901); that his family first started with the Coors Company in 1938, and that his two sisters and two brothers and he all participate in the distributorship (Tr. 1902); that there are pricing variations all over the State of New Mexico at both the wholesale and retail levels (Tr. 1902); that he handles Pabst Blue Ribbon and Burgermeister beers in a separate company that they have; that they just bought twenty-five refrigeration units, at $2500 apiece, to refrigerate twenty-five trucks (Tr. 1903); that they also handle certain liquors; that he does have territorial restrictions imposed upon him by the other beers that he handles in New Mexico, and he is restricted to the State of New Mexico (Tr. 1903); that he knows Jack Bradshaw, who owns a bar and package store in Albuquerque and has been in business for about four years, handling "all of our packages, bottles and cans and also draft" as well as Budweiser (Tr. 1904); that he has never told Mr. Bradshaw that he couldn't handle Budweiser there; that there is a lot of price cutting going on in the New Mexico beer market with the price cuttings advertised freely in the newspapers (Tr. 1905). On cross-examination, the witness stated that his company is incorporated in the State of New Mexico and not licensed to do business in any other state; that his business is profitable; that he has other beers, Pabst and Burgermeister, in his distributorship at the present time which he handles "in a company that I have that sells the liquor along with the beer" and is separate from his company that sells Coors beer (Tr. 1906); that he does not share any equipment with Coors, or facilities for these other beers; that Coors accounts for about forty percent of the beer market in New Mexico, their closest competitor in percentage being Budweiser with about twenty percent, Schlitz would

be third with about eighteen percent, and Hamms would be fourth with about six or seven percent (Tr. 1907) ; that several brewers have approached him in the last five years to handle their beer but he preferred not to name them (Tr. 1907–1908) ; that he told these brewers that "I was very satisfied in just handling the beers I have now" (Tr. 1908) ; and that he believes Coors is a good quality beer.

10. *William Lee Scott.*

William Lee Scott, whose residence and business is in Boise, Idaho, testified (Tr. 1910–1923 J) that he has been a Coors beer distributor for the past four and a half years when he bought out an existing Coors distributor; his territory is the bulk of southwestern Idaho, to the Oregon border, and midway in the state in an eleven-county area (Tr. 1911) ; that he paid nothing for his distributorship to the Coors Company; that he is familiar with the Coors policy brochure, RX 1047, and conducts his distributorship in compliance therewith; that his other sources of material concerning his operation of his distributorship are the advertising manuals and draft manuals from Coors, talking with merchandising, advertising, sales representatives, representations from the draft and legislative departments, and meetings from time to time with the other distributors (Tr. 1912) ; that he has a written contract with Coors in which his territory is specified (Tr. 1913) ; and that he has been short of Coors beer almost all the time he has been a Coors distributor. He stated that he would not have contracted with the Adolph Coors Company if he had not known it was their general policy to have only one distributor in a given territory because "we have a very difficult time competing with other brands of beer as it is, and if we had to compete with another Coors wholesaler in my territory, it would just make it an intolerable situation" (Tr. 1915) ; that he competes in his territory with the Olympia Brewing Company, Anheuser-Busch Company, Schlitz, Rainier Brewing Company out of the coast, the Blitz-Weinhard Company out of Portland, Miller Brewing Company and a number of other small retail breweries (Tr. 1915–1916) ; that competition is extremely stiff; that he discusses pricing with the brewery but sets his own prices; that the retailers set their own prices (Tr. 1916) ; that there is a great deal of discounting of beer going on in his market and the discounting is advertised; he was handed RX 537 which he stated was an ad from Skaggs Drug Stores, a drugstore chain operating in Boise, adver-

tising Coors twelve-ounce cans, which appeared on May 24, 1970 in the Statesman newspaper in Boise (Tr. 1917–1918); he testified regarding RX 538 that this was an ad in the Statesman newspaper by Skaggs Sports Center advertising Coors beer for ninety-nine cents and couldn't recall the exact time, but stated that it could be in October of 1970 (Tr. 1918); that he services approximately 600 accounts in his territory, of which 200 are total draft accounts; that 95 draft accounts are Coors out of the 600, and there are five split accounts of the 95 draft accounts; that he doesn't like split draft accounts; with regard to the five split accounts, these are all pizza parlors and he started with them about four and a half years ago with his first split account and has actually increased them since that time (Tr. 1921); that he has never joined with any agents of the Adolph Coors Company in threatening retailers concerning their prices, nor has he done so himself; that he has never seen anybody from the Coors Company do so; that he has never threatened retailers on pricing nor has he ever threatened retailers on pricing with the threat that he wouldn't deliver any beer to them, nor has he done that with any agents of the Coors Company; that no agent of the Coors Company has ever threatened him on the basis of the territorial restriction in his distribution contract (Tr. 1922); that no agent of the Coors Company has ever threatened him with regard to his attitude toward split accounts; that he has never been threatened or coerced or "shoved around" or intimidated in any way by anybody connected with the Adolph Coors Company (Tr. 1922); that he is familiar with his contract with the Coors Company and with the five and thirty day termination provision but does not place any particular effect upon that (Tr. 1922); that, in order to be a good Coors distributor, he stated (Tr. 1922): "I think to be a good Coors distributor, a good beer distributor for any brand of beer for that matter, you have to do the best job possible and in light of good business practices and principles, and this is what we try to do." He stated that he was a wholesale distributor for the Olympia Brewing Company when he became a Coors distributor in 1967 (Tr. 1923); that he was actively selling Olympia beer when he applied for the Coors distributorship and the Coors Company agents he applied to knew he was the Olympia distributor and discussed it with him and how he would operate his organization with having both brands of beer (Tr. 1923); that the Coors people did not tell him that he had to get rid of Olympia and he continued selling Olympia beer for three years after he started

selling Coors (Tr. 1923 A). On cross-examination, the witness testified that he had acquired his Coors distributorship in June 1967 and paid approximately $250,000 for it; that the thirty day termination clause in his contract does not bother him (Tr. 1923 D); that his dollar sales in 1971 were somewhere in the vicinity of two million five hundred thousand dollars (Tr. 1923 D); that he could not testify as to his net profit in 1971; that he sold his Olympia beer distributorship two years ago; that the sales between Olympia and Coors were approximately fifty-fifty, Coors having a very slight edge over Olympia at the time he sold the Olympia distributorship; that Olympia specified his territory and he found that to be the case with all the beer distributors so far as the brands they represented when he was president of the Idaho Beer Wholesalers Association (Tr. 1923 I); that he sold Olympia because it was very difficult to run two operations and he felt it was an opportune time to get the largest profit out of the operation, and that it was his own choice, that he had no problem with either brewery (Tr. 1923 I).

11. *Joseph Stemach.*

Joseph Stemach testified (Tr. 1923 J–1923 X) that he is from Eureka, California, two hundred eighty miles north of San Francisco; that he is vice president and general manager of D&H Distributors of Eureka, California; that they obtained the Falstaff line in July of 1956; that one year later, they obtained the Coors line; that they distribute Coors beer in Humboldt, Del Norte and a small part of Trinity Counties; that he has a written contract with Coors in which his territory is specified (Tr. 1923 L); that he did not pay anything for the Coors distributorship; that he has not had sufficient quantities of Coors to fill the retail demand in his area for the last four or five years because the brewery could not supply them; that they would not have contracted with the Coors Company had they not known it was Coors' general policy to have only one distributor in a given area because they would not have invested their money along with one or two other distributors in the same market, and a big factor is quality control, rotation of the beer, and "a matter of servicing the smaller accounts * * * if there are two or three distributors in the market, everybody would be going for the larger accounts and things of that nature" (Tr. 1923 M); that he competes with other brands of beer sold in his territory, namely, Olympia, Hamms, Budweiser and Burgermeister, but being the only Coors distributor in that area enables him to better compete with these big

national brands (Tr. 1923 M); his company sets the prices to retailers; the retail prices are set by the retailers, with no fixed pattern in his market, and in some outlying areas the prices are somewhat higher; that he has never been threatened or coerced or intimidated by any member of the Coors organization (Tr. 1923 O); that he is familiar with the five and thirty day provision for termination in his contract and that does not bother him (Tr. 1923 O); that he is familiar with the general policy statement, RX 1047, and complies with the general statement found in pages 1047–E, F and G thereof because it is necessary for the orderly conduct of his distributing business (Tr. 1923 O); that they handle Olympia in the Rosaia house, and at Crescent City they handle Olympia, Coors, Miller's and Country Club, and a line of wines; that no member of the Coors organization has ever told him that he had to get rid of those other brands; that they have both written and oral contracts with the other breweries for those other brands and in all of them his territories are specified and he is limited to those territories (Tr. 1923 P); that they have a wide range of prices at the retail level in his market, and the previous week, for a six-pack of twelve ounce cans, the lowest price at the retail level was a dollar twenty-nine going as high as a dollar seventy-five in the outlying areas, with all the prices somewhere in between these two levels. On cross-examination, he testified that D&H Distributors distribute Coors, Miller's and various lines of liquors; that the refrigerated portion of the warehouse is strictly for Coors; that the liquor and Miller's do not need refrigeration; that other brewers have asked him to distribute their beer but he told them he was happy with what he had since the market is a small market and there is no place for other beers in his particular house and he didn't feel he needed additional beers (Tr. 1923 T); with regard to the price of a dollar seventy-five in outlying areas, he stated (Tr. 1923 T): "Well, we live in mountainous country and we have quite a number of long-mile hauls and some of the small outlying areas who work more or less on a seasonal basis feel they need more money to show them a profit because three or four months out of the year, they are down" (Tr. 1923 T); that the retail price range in the town areas is generally a dollar twenty-nine and it is pretty well sold at that price; and that he sells Coors draft beer to taverns and has forty-two draft accounts, six of them being splits.

12. *Ray Clymer, Jr.*

Ray Clymer, Jr., of Wichita Falls, Texas, testified (Tr. 1926–

1968) that he was a wholesale beer distributor in eleven counties in northern Texas; that he became a Falstaff distributor in 1959 and in 1966, he became a Coors distributor; that he did not pay anyone for the right to handle Coors beer; that he is familiar with their policy manuals; that he has contact with Coors' sales representatives who call on him every six or seven weeks; that on occasion, he attends distributors' meetings; that he has a written contract with Coors which specifies his territory; that recently he has not had sufficient quotas of beer to take care of the territory requirements; that he has experienced shortage difficulties on a number of occasions since he became a Coors distributor; that he would not have contracted with the Adolph Coors Company if he had not known it was their policy to have only one distributor in a given area; that Budweiser, Schlitz, Falstaff, Lone Star, Jax and Pearl are substantial competitors in his territory, and competition is "pretty tough" in his area; that he sets his sales prices to the retailers after counseling with Coors' representatives, his supervisor and his personnel in his organization (Tr. 1934); that the retailers set their own prices; that he services approximately 350 accounts in his territory, 75 of them being draft accounts, with 25 exclusive Coors accounts and 50 split draft accounts (Tr. 1935); and that his policy regarding exclusive draft accounts is that he likes to have an account that serves Coors beer and not serve any other brand. Mr. Clymer further testified that he has never threatened any retailers in his territory concerning their prices (Tr. 1938); that no Coors agent has ever threatened him in any way concerning the territorial limits of his contract or his split accounts (Tr. 1938); that when he went into the beer business in 1959, he distributed the products of Falstaff and Miller Brewing Companies in Grayson County, Texas (approximately 130 miles due east of Wichita Falls) originally and then later he purchased the Flastaff distributorship in Wichita Falls, Texas; that, when he took on Coors in 1966, he also had Falstaff and Miller's in Grayson County, Texas, and in Wichita and Archer County, Texas, he had Falstaff (Tr. 1939); when asked if the Coors Company made any demands upon him as to his other products that were conditional upon his becoming a Coors distributor, he replied (Tr. 1939): "Quite the contrary. They pointed out to me that it was acceptable to them for me to continue handling the other products." He stated that thereafter, he continued to handle Falstaff just one day when he was "terminated" by Falstaff because "Falstaff didn't like the idea of me

selling Coors beer" (Tr. 1940); that he had a written contract with Falstaff and was restricted in the sale of Falstaff to that territory (Tr. 1940); and that he was a director of the Wholesale Distributors of Texas for approximately nine or ten years (Tr. 1945). On cross-examination, the witness testified that he was a Falstaff distributor from 1959 through 1966 when he was terminated by Falstaff both in Grayson and in Wichita Falls; that he continued to handle Miller's for a couple of years after he started handling Coors beer, but was terminated by Miller's, which territory was only in the Grayson County area, but he had Falstaff in both areas. He testified that he would not want any other distributor from another district to sell in his area, stating (Tr. 1950): "Well, I don't want any more competition than I have. I wish they would take the Budweiser distributor out." He stated that all major distributors of beer are all limited to a territory. With regard to his statement, "Well, I don't believe I could have justified taking the action it was necessary for me to take to become a Coors distributor * * * had I not felt I would be the sole distributor in that area" (Tr. 1933), he explained (Tr. 1951):

> Well, I had the Falstaff distributorship there at that time it was the leading selling beer in our area. I had to take a calculated risk with the Falstaff distributorship and my arrangement with Falstaff Brewing Company when I took on Coors. I took a calculated risk, sir, that Falstaff might cancel my distributorship, which resulted in a severe financial loss to me. I had to take that calculated risk. I took it based upon my knowledge of the Adolph Coors Company, their relationships with their distributors, their past successes. That was a consideration in my thinking at that time. In fact, it was a pretty big consideration.

He testified that he had approximately 25 exclusive Coors accounts in his area and on occasion had one or two splits, stating (Tr. 951): " * * * under the proper circumstances we would split * * * if an account had the facilities and the mechanical equipment to assure us that our beer would be drawn under the proper conditions and if we were convinced that they would not substitute our product or abuse it in any manner, we would split with them." With regard to the mechanical equipment to take care of the different pressures of Coors, the following exchange took place (Tr. 1952):

> HEARING EXAMINER JOHNSON: Would that involve storage space?
>
> THE WITNESS: It would, yes, sir, Judge. Some of these accounts can only store two kegs at a time. If they have one Budweiser and one Coors, if the Coors runs out they are just out of business until we can get there and

deliver them again. In the meantime, that is when we run into that substitution problem where somebody orders a glass of Coors and they don't tell them they are out, they give them a glass of Budweiser or something.

The witness testified that in 1971, he had approximately 38 percent of the sales in his marketing area, with an estimate of 20 percent of the business for Schlitz, and Budweiser having approximately 24 percent (Tr. 1958); that, as far as he knew, Coors had the largest sales in his marketing area (Tr. 1958); that no one from Coors had ever threatened him in any way (Tr. 1959); that Wayne Campbell, Mel Linn and Ken Hayes have been his sales representatives since he has had Coors and they have had discussions and made suggestions and recommendations from time to time and were critical once when he first started with Coors because they found some beer that wasn't in proper rotation, but he got it corrected; when asked if he thought the criticism was justified, he replied, "I think it was the best thing that ever happened to me" (Tr. 1960); that the Coors representatives had indicated to him at times that there was room for improvement in the direction of his operation generally, but "I have never been worried about losing my distributorship since the day I started" (Tr. 1962). On redirect examination, the witness stated that in Texas certain types of distributors are licensed to operate in certain counties and that retailers also are licensed; that approximately 350 retailers are licensed in his area and he sells to nearly all of them; that he was terminated by Miller's approximately three years ago when he wasn't devoting enough attention to the sale of their product because he was mainly concerned with Coors since it represented by far the most substantial portion of his business and Miller's determined they could do better someplace else; that Coors "is the finest beer on the American market" (Tr. 1967).

13. *C. Richard Ford.*

C. Richard Ford testified (Tr. 1968–1997) that he has been a Coors distributor with his main headquarters in Oklahoma City, Oklahoma, since 1957; that his father got one of the original licenses back in 1933, and ran a small Distributing Company in 1946; that he has been an officer and director of that company since 1946 (Tr. 1969); that his organization did not pay anything for the Coors distributorship; that he runs his distributorship in compliance with the Coors policy manual; that he gets various merchandising letters, an advertising manual, a draft

manual, and visits from the Coors representative approximately twice a week concerning the operation of his distributorship; that his contract with Coors is written and specifies his territory (Tr. 1971); that his territory is approximately 17 counties, which is in the northeast corner of Oklahoma; that the major cities in his territory are Oklahoma City, Tulsa, Norman, Shawnee and Miami; that he has had a shortage of Coors beer for at least the last five or six years; that he would not have contracted with the Coors Company had he not known it was their general policy to have only one distributor in a given area because "we have a very large investment with refrigerated marketing and following the policies Adolph Coors Company feels are necessary to protect their product, there would be no way you could put that investment in and have more than one representative or more than one distributor in an area, say, like Oklahoma City, and make money" (Tr. 1972–1973); that in his territory, he competes with Budweiser, Schlitz and Stag, and they are all tough competitors and "They indulge in various practices which we do not consider good sound business practices which make it tough on us competitively" (Tr. 1973); that he, as president of Ford Distributing Company, advising with the executive vice president, Wayne Campbell, sets the sales prices to retailers; that the retailers set their own prices (Tr. 1974); that his organization prefers exclusive draft accounts because keg or draft beer is entirely different from package beer in that draft beer requires certain pressures, rotation and cleaning of draft equipment (Tr. 1976). The witness testified that of the 3,000 retail accounts in his area, there are 735 draft accounts; that he services 95 percent of the 3,000 retail accounts; that no agent of Adolph Coors Company has ever joined with him in threatening any retailer as far as his prices were concerned, nor has he ever threatened any retailer in conjunction with the Coors Company concerning his supply if he didn't adhere to certain pricing suggestions; "We don't threaten our retailers. We make friends of them" (Tr. 1979); that he has never been threatened by any agent of the Adolph Coors Company concerning the territories in which he distributes beer or concerning his draft account situation involving split versus exclusives (Tr. 1979); when asked if he had ever been threatened, coerced or intimidated by any agent of the Adolph Coors Company in any respect, he replied (Tr. 1979): "The Ford Distributing Company runs it own business. We don't allow anybody to intimidate us and nobody has ever tried." He testified that he has read his contract with the

Coors Company, but had forgotten about the termination provisions in it until Mr. Joseph of the FTC came and asked him about it; that he told Mr. Joseph that they do what they consider a good job and "As long as we do a good job, we have complete security" (Tr. 1980); that, in order to be a successful Coors distributor, "* * * I would say, this policy manual, if you follow that, if you give outstanding service, we need to keep our beer completely fresh and rotated and we need to get a hard selling and hard hitting sales team that works hard, blood, sweat and tears is the answer" (Tr. 1980); that Old King beer is the first beer his company handled, and many years ago they handled national brands, Blue Ribbon, Miller High Life and Schlitz; that he has been president and director two or three times and secretary-treasurer once of the Oklahoma Malt Beverage Association in his state (Tr. 1982); when asked to define central warehousing, he stated (Tr. 1982): "Well, that would be where an operation such as a chain grocery would have, say, 50 or 60 outlets, grocery stores, and they would ask you to drop off a month's supply of beer at their main warehouse." He testified that he marketed beer through the central warehousing system in Oklahoma up until about eight or nine years ago when he quit, testifying (Tr. 1983–1984):

Q. Why?

A. It was impractical. We went and talked to people and sold them on the idea it was hurting them for several reasons. First of all, when we deliver that to the central warehouse you lose complete control over the quality of your product. In other words, you can't rotate that product. It is in their warehouse and under their control. They can take the newest beer out and put it out in the stores and leave the old beer in there. We have had it happen until it would be six months old. In our market, when it is eight weeks old we pick it up, pour it out and pay for it ourselves. Our competition doesn't believe in this, but nevertheless we would find time and time again that these chain stores would be out of beer: They would deliver twice as much beer as was needed to Store 68 and Store 35 would have no beer. It was a chaotic condition. They would not keep it under refrigeration. Our policy is as much as possible to have total refrigeration of our package from the brewery to the consumer for quality purposes. We would drop off, say, 300 cases at the warehouse of this chain. They might get it out to their stores in the next week or two or month or two. They might over-order, which we would lose control of. Then we completely lost track of whether they rotated the beer and brought the oldest beer out first for sale or not. I would say it was just a completely impractical system to work in with our product, quality control system.

Q. You understand the responsibility for your territory lies with you, do you not?

A. Yes, sir.

Q. And you are unwilling to trust that, I assume, to anybody else?

A. That is right. I forgot to add, of course, at some of these warehouses in the summer it gets up to 70 or 80 degrees. We like to keep our warehouse at 45 degrees.

Q. You mentioned that if beer got to be eight weeks olds you dumped it and paid for it, do you recall that?

A. Yes, sir.

Q. When you say you pay for it, what do you mean?

A. This is a Ford Distributing Company policy. You have to set up some rule of thumb as to what is old beer. In our case we consider anything over eight weeks old as being old beer. We set up standards with our route salesmen. If he finds it and brings it in, we pay for it. If we find it out on his territory, he pays for it.

Q. I assume, then, that that financial responsibility is quite an encouragement to prevent that from happening, is that right?

A. Yes, sir.

On cross-examination, he said that, out of a total of 735 Coors draft accounts, they have 55 to 60 split accounts; that he doesn't like split accounts because of the confusion and the consumer getting the wrong beer; that this is the problem you have where you only have a two-keg box and you don't have any extra backup stock and they run out of one beer and just sell the other one; with regard to a strict policy of his company that at eight weeks they pick up the old beer and destroy it, they have supervisors that see that this policy is enforced (Tr. 1988); that in the last two years, for beer destroyed, he picked the figure of $300; that Coors accounts for 62 percent of the sales in the State of Oklahoma; that his closest competitor is Anheuser-Busch with a market share of maybe 20 or 25 percent in Tulsa, 15 or 16 percent in Oklahoma City, and in the three other markets, it varies between 15 and 25 percent (Tr. 1991). On redirect examination, he testified that they showed a decline in profit in the fall of 1970 as opposed to the fall of 1969 for about a three or four-month period and found that the freight raises caused increases and they seemed to be in somewhat of a price squeeze; that he took his executive vice president, Wayne Campbell, to a meeting in Golden at the end of 1970 with Harvey Gorman, the marketing director, and Mel Linn, who was in charge of his area since they have a lot of expertise and watch the distributing operations; they went back home and put in a cost index operation and set up a bonus system whereby his people got half their bonus on sales and half on how they could cut their costs and they computed it and they made bigger bonuses and the company ended up making more money that year (Tr. 1994);

that they cut thier costs by 3 percent and made more money (Tr. 1997); that he has 225 employees in his distributorship who devote 90 to 95 percent of their time to the Coors product (Tr. 1997); that distributors of other beers such as Budweiser, Schlitz, Miller's, all have restricted areas in Oklahoma.

14. *Martin H. Schinnerer.*

Martin H. Schinnerer, of Long Beach, California, testified (Tr. 1998–2016) that he is president and general manager of the California Cold Storage and Distributing Company, which has four subsidiaries, and has its general office in Long Beach, California (Tr. 1998); that his company is primarily in beer distribution and refrigerated cold storage warehousing; his company went into the beer distribution business in 1933, took on the Coors line in 1936, and has had it ever since (Tr. 1999); his company has distributed most of the other lines of beer over the years, and now distributes Coors, Olympia, Schlitz, Hamms, Colt 45 and Anheuser-Busch (Tr. 2000); that his company has a written contract with Coors in which the territory where they must operate is specified (Tr. 2002); that he would not have contracted with the Adolph Coors Company had he not known it was the general policy to have only one distributor in a given area because he feels economically it wouldn't be feasible to have two distributors in the same area (Tr. 2003); that there is a fair trade law in California that governs the consumer price, and the Coors brewery fair trades the price throughout the State of California; his company sets the prices they charge their retail accounts based on suggestions from the brewery so that the prices follow a pattern with a proper markup both for the retailer and also the wholesaler (Tr. 2004); that the only policy they have with regard to exclusive draft accounts is that they try to avoid splits, but they do have some; that for draft beer it takes a constant surveillance of the pipe cleaning, it has to be kept under the proper type of refrigeration at all times and the accounts need space under refrigeration at all times; his company does the cleaning once a week for every account, which he considers very important (Tr. 2005); that he has never joined with any member of the Coors Company in threatening, nor has he himself ever threatened, nor has he seen any member of the Coors Company threaten any retailers as far as pricing is concerned or by alleging that beer would not be delivered to them (Tr. 2006–2007); that he has never been threatened by any agent of the Coors Company con-

cerning their territorial limitations or their split accounts (Tr. 2007); and that he is familiar with central warehousing (Tr. 2007). He testfied that he had never been threatened, coerced or shoved around or intimidated or bullied in any way by any member of the Adolph Coors Company, its staff or its agents (Tr. 2008); that he is familiar with his contract with the Coors Company and its termination provisions, and that those termination provisions have had no effect on his conduct of his distributorship (Tr. 2008); that, as a beer distributor in southern California continually all this time, he has observed the Coors Company in its relationships with its distributors over the years and characterized the Coors Company's attitude toward distributors who were not performing their function well as follows (Tr. 2009):

> A. Well, my experience over the years is the Coors Company has had a lot of patience with at least some of the distributors I know of that were Coors distributors in dealing with them on matters that to me, I think, were rather important and that should be changed or should be done by that distributor.
>
> Q. Do you think there have been instances in which the Coors Company has let these things continue too long?
>
> A. I kind of personally feel there have been instances, yes, for the welfare of the other distributors in Coors.

Mr. Schinnerer stated that his organization distributes other brands of beer, and in those agreements the territories are defined in which he shall operate. He testified (Tr. 2010):

> The other contracts—let me say this. There are some brands that have no contracts at all, it is verbal. The ones that are written have the phrase in there "prime area of responsibility" and then it states—it doesn't say you have to stay inside or that it is exclusive, but it is primary responsibility. Other than that, it is pretty well worded the same.

He stated as a policy matter they do not distribute outside of their primary area of trade responsibility; that he has about 160 draft accounts in the Compton area, of which about 13 are split; that he has about 55 in the Oceanside area, of which about eight are split (Tr. 2014). He stated that, if you don't agree with Coors' suggested price, "you can adjust your prices either up or down" (Tr. 2015); that it is his company's decision if they wish to charge a price other than the Coors' suggested price, and they would notify the Coors brewery before they put the price into effect (Tr. 2016).

15. *James Edward Davies.*

James Edward Davies of Fullerton, California, sales repre-

sentative for Adolph Coors Company, testified (Tr. 2017–2055) that he had been in that department for three years in June (Tr. 2017). Mr. Davies studied psychology at the University of Colorado and has been employed by Adolph Coors for five years (Tr. 2018). He first started to work in the Hospitality Center, went into the Sales Training Program, and then called on retail accounts in the Denver area for a short time (Tr. 2019–2021). He was first transferred to a field position in southern California where he is now working from the San Fernando Valley south along the coast to San Diego taking care of ten distributorships (Tr. 2022). Mr. Davies meticulously outlined the duties in detail of a sales representative, emphasizing how he monitored the distributorships to determine whether or not they were being conducted in compliance with Coors' policy manual (RX 1047 E.F. & G; Tr. 2023–2030). Mr. Davies testified as to various forms he uses in conjunction with his work as a sales representative (Tr. 2030–2039). Mr. Davies explained CX 777 by stating that when he first went into the area he corrected the wording on territorial descriptions for various distributors (Tr. 2041). Under cross-examination by complaint counsel, Mr. Davies explained that he did not tell each distributor of his (Davies') evaluation at each visit, although he felt it was very important (Tr. 2043). He stated that pricing was never discussed in any of the marketing committee meetings he attended (Tr. 2045). He stated that communications meetings and marketing meetings were held approximately every three months (Tr. 2045). He stated that it was possible that pricing policies could have been discussed at communications meetings, although he did not recall for sure (Tr. 2046). He recalled discussing 11-ounce pricing on both the 6-pack and the loose package (Tr. 2047). No recommendations were made based upon these discussions (Tr. 2048). Upon further cross-examination, he recalled discussions of distributorships succession at communications meetings (Tr. 2051). He reported, upon cross-examination, that there had been two changes in distributors ownership in his area since he took it over a few years ago (Tr. 2053).

16. *Don L. Maurer.*

Don L. Maurer of Safford, Arizona, the present Coors distributor in that city, testified (Tr. 2055–2061) that from 1966–1970, he had been a Coors representative (Tr. 2056). In conjunction with that work, he had actually authored CX 112, CX 48 A and

B, CX 396, and CX 421. Mr. Maurer explained in detail the language contained in those reports (Tr. 2056–2061).

17. *Lesley A. Kroeger.*

Lesley A. Kroeger of Oklahoma City, Oklahoma, testified (Tr. 2061–2072) that he is now employed by the Coors Distributing Company in Fort Worth, Texas, after having recently taken a position there (Tr. 2061). He testified that from 1959–1969, he had been a sales representative for Adolph Coors Company covering portions of the States of Colorado, Utah, and Texas (Tr. 2062). He was given Commission exhibits CX 257, CX 298, CX 287, CX 253, CX 256, and CX 176. He explained in detail relevant portions of said reports (Tr. 2062–2065). Upon cross-examination, Mr. Kroeger related how Texas authorities had complained to him that Coors Beer had been found in territories outside territories of existing distributors (Tr. 2067).

18. *Donald Straub.*

Donald Straub of Pleasant Hill, California, sales representative for the Adolph Coors Company, testified (Tr. 2072–2079) that he has been with the company for 17 years (Tr. 2073). He stated that he was located in the present area in which he now lives in the State of California for a period of 12 years and calls upon the Bay area distributors around San Francisco and Oakland (Tr. 2073). He was given CX 45, CX 774, CX 490, and CX 968, and explained in detail the circumstances surrounding those reports (Tr. 2073–2076). Under cross-examination, he described in his own words what he meant by market penetration and indicated that he tried to get all packages into all accounts in a given territory (Tr. 2076).

19. *Paul Carroll.*

Paul Carroll of Oklahoma City, Oklahoma, testified (Tr. 2079–2093) that he was a present sales representative for the Adolph Coors Company in western Oklahoma, and had been employed by the company for five and one half years (Tr. 2079–2080). He was given CX 125, CX 126, CX 129, and CX 1950, and explained in narrative language the meanings of those reports that he had authored (Tr. 2080–2086). Upon cross-examination, he testified concerning how prices for the same package vary from distributor to distributor (Tr. 2087). He stated that the Ford Organization in Oklahoma City talked about prices all the time (Tr. 2091). On redirect examination, however he states that Ford never re-

quested a price increase from anybody to his knowledge (Tr. 2091).

20. *James Haden.*

James Haden of Casper, Wyoming, a sales representative for the Adolph Coors Company of ten years duration was called next (Tr. 2093–2106) by the respondent. He was given CX 107 and CX 111 and asked to explain portions of those reports in detail (Tr. 2094–2095). Mr. Haden said that as to the former, the price increase was due to the glass price hike (Tr. 2094). As to CX 111, he stated that George and Mike Maloof utilized the cost information, market conditions, and pricing philosophy and came to a mutual understanding as to what their laid-in prices would be in their various eight or nine warehouses in New Mexico and these were approved by Mr. Eke (Tr. 2095). In spite of instant cross-examination by the complaint counsel as to his participation in the setting of prices in the State of New Mexico, Mr. Haden stoutly maintained that the Maloof boys "took the information and sat with their managers. I don't know who they sat down with. I wasn't there. They determined between themselves what they would sell their product for" (Tr. 2098).

21. *George Callahan.*

George Callahan of Sacramento, California, testified (Tr. 2106–2117) that he was employed by the Adolph Coors Company, and had been for six and one half years as a sales representative (Tr. 2106). He testified that he had been a representative for the Ford Organization in Oklahoma City in 1969 (Tr. 2107). He was given CX 157 and CX 158, and asked to explain both exhibits. He detailed how the 15-ounce can prices set forth in CX 157 were caused by the increase in the size and form of a 15–16 ounce can (Tr. 2107). As far as prices are concerned that are mentioned in CX 158 that he obtained, Mr. Callahan stated that he got those prices from the local purchasing office of those particular stores in Tulsa, Oklahoma (Tr. 2108). Under cross-examination, he denied taking any suggested prices to these retailers, but instead was given these prices by the retailers themselves (Tr. 2108–2109).

22. *Richard Maxwell Burwell.*

Richard Maxwell Burwell of Yuba Linda, California, testified (Tr. 2123–2151) that he was employed by the Adolph Coors Company as a sales representative and had been in southeastern California since January 1971 (Tr. 2123). He stayed in the Hilton

Hotel in Denver during the time he testified and, when he ordered a glass of Coors draft beer, he was served Schlitz instead (Tr. 2124). Mr. Burwell explained in detail CX 6, stating that the words "Art has agreed" actually were a poor choice of words in that they had discussed prices, and Mr. Pearce had advised him what his prices were going to be (Tr. 2125). He discussed CX 12, CX 26 A-B and CX 28 A, and explained the relevant portions thereof (Tr. 2125–2129). During cross-examination by Commission counsel, the following question was asked (Tr. 2131):

Q. You were describing a general procedure in which you had suggested prices to him, he decides a price and then you report that to the brewery. Now, that is a general procedure you follow, is that what you are saying?
A. Correct.

Mr. Burwell related that some distributors use a 30-day split policy and find it effective whereas other distributors do not (Tr. 2144–2145). These policies are established by the distributor and not the brewery (Tr. 2148).

23. *Richard Whipple.*

Richard Whipple of Albuquerque, New Mexico, testified (Tr. 2152–2164) that he is employed by the Adolph Coors Company as a marketing representative and presently serves in the State of New Mexico (Tr. 2152). He explained in detail CX 406, and the allocation procedures involved during beer shortages (Tr. 2153). He explained in detail the term "retail price control" (Tr. 2154). He also testified as to the beer substitution earlier commented upon by Mr. Burwell (Tr. 2156).

24. *Ken Hayes.*

Ken Hayes of Arlington, Texas, marketing representative for the Adolph Coors Company, testified (Tr. 2165–2178) that after he had previously testified in the matter, he returned to Dallas and Fort Worth, Texas, and made a retail pricing survey (Tr. 2165). He testified as to the sampling of 277 accounts in Dallas, and 162 accounts in Fort Worth that were surveyed (Tr. 2166). The price range in Dallas was from $1.29 to $1.75 and the price range in Fort Worth was $1.09 to $1.80 for 12-ounce cans (Tr. 2166). Quart prices in Dallas during this same period ranged from 53 cents to 62 cents and in Fort Worth from 53 cents to 60 cents (Tr. 2167). Mr. Hayes testified concerning CX 684, and related why he was concerned about Mr. Tinetti's participation in meetings with other distributors where pricing was discussed (Tr. 2168). Mr. Hayes explained the relevant portions of CX 908 A-B (Tr. 2169–2170).

25. *Dr. Jack S. Wolf.*

Dr. Jack S. Wolf of Amherst, Massachusetts, was called next (Tr. 2178–2254) by the respondent as an expert in the field of marketing (Tr. 2180). Dr. Wolf testified as to extended experience in the alcohol beverage industry (Tr. 2182). He explained how the distribution of beer started after prohibition (Tr. 2184). He stated that national and regional distributors now distribute their beer through wholesalers and that there is considerable rivalry and competition between brewers and wholesalers, all of whom attempt to penetrate the market (Tr. 2185). He explained that distributors have limited territories in which they operate (Tr. 2189). He stated that "brand image" has a great deal to do with why a person prefers one brand of beer over another (Tr. 2194). He explained in detail the difficulties the respondent has as a regional brewer with its single plant operation (Tr. 2198). He described inter-brand competition as "severe" (Tr. 2199). Dr. Wolf stated that one of the reasons for territorial limitations was intensive marketing penetration and quality control (Tr. 2202). He also indicated law enforcement was an important reason for territorial restrictions on distributors (Tr. 2202). Product availability and distributors' accountability were other reasons for territorial restrictions (Tr. 2204). He stated that territorial restrictions greatly enhance competition (Tr. 2205). He described in detail the effect of the elimination of territorial restrictions upon the beer industry. Wheeling and dealing would commence, big retailers would play one wholesaler against another, trade practice violations would become widespread, small accounts would suffer, the number of brands would be reduced and after momentary price reduction after the original "blood bath," prices would rise because of an absence of competition (Tr. 2206–2209). Dr. Wolf revealed his part in RX 1079 (Tr. 2209). Under cross-examination, Dr. Wolf related that price competition is good competition when it doesn't destroy an image (Tr. 2216). He indicated that continual discounting would adversely affect a consumer's attitude toward a certain brand (Tr. 2218). Under further cross-examination, Dr. Wolf verified that certain efficiencies in the beer industry would result from vertical integration (Tr. 2225). Dr. Wolf stated that if territorial restrictions are not contained in a distributor's contract, nevertheless he understands that he would so limit his activities (Tr. 2241).

26. *Dr. John Byrten.*

Dr. John Byrten of Denver, Colorado, a research economist

employed by the University of Denver Research Institute was called (Tr. 2255–2291) as an expert in marketing and statistics (Tr. 2255). Dr. Byrten performed a market research study involving beer distribution of five Coors distributors in the greater Denver area in the later part of 1971 (Tr. 2259). He fully explained how he made the study and detailed at length what would happen if territorial restrictions on these five distributors were eliminated (Tr. 2260–2264, 2269–2272).

27. *Max D. Abbott.*

Max D. Abbott of Golden, Colorado, a divisional sales manager of the Adolph Coors Company, (Tr. 2293–2331) responsible for the States of Colorado, Utah and Wyoming, stated that he had been employed by the company for twelve and a half years (Tr. 2294). Previously to his present responsibilities, Mr. Abbott had been a sales representative and in that connection reiterated the circumstances surrounding RX 500 and RX 825 A-B (Tr. 2295–2296). He explained the differences in the seven-ounce can prices of $2.77 to $2.38 in various parts of California (Tr. 2297). He is very familiar with the overall pricing of Coors beer and stated that the prices were considerably higher in the State of Wyoming than in other areas (Tr. 2315). He stated that he could tell the difference in beers from a taste standpoint and that he had observed split draft accounts in Colorado, Utah, Wyoming and California over the past 12 years (Tr. 2317). Under cross-examination, he stated that if he and a distributor disagreed on pricing, the distributor would have to make the decision (Tr. 2318). He commented at length on the recycling program of the Adolph Coors Company and the manner in which it is operated (Tr. 2323–2326).

28. *Earl Charles Corder.*

Earl Charles Corder of Golden, Colorado is a divisional sales manager of the Adolph Coors Company (Tr. 2332–2368) with responsibilities for the States of Arizona and California (Tr. 2332–2333). Prior to that time, he was a sales representative in the State of California (Tr. 2334). He reviewed CX 835, and stated that the second sentence starting with the words "Could all agree that," meant that all the people together at the meeting had agreed that it would be a fair price (Tr. 2335). Mr. Corder stated that he knew Bill Stone, a retailer in Van Nuys, California, had been in his place of business, and that he had five light beers on draft, Coors being one of them (Tr. 2337). He testified as to the amount

of equipment Mr. Stone had in order to serve all these draft beers (Tr. 2338). He also knew Mr. Grotewold, a retailer in Phoenix, that had both Coors and Budweiser on draft (Tr. 2339). Mr. Corder also stated that he could tell the difference between Coors and other brands of beer (Tr. 2343). Mr. Corder testified concerning the Orth-Hemphill and Safford distributor terminations (Tr. 2345–2357). He also testified with regard to problems with Mr. Barrows (Tr. 2357).

29. *Melvin E. Linn.*

Melvin E. Linn of Golden, Colorado stated (Tr. 2368–2453) that he was employed by the Adolph Coors Company as a divisional sales manager. He has held this position for one year and prior to that time was sales representative. He has been with the Adolph Coors Company a little over ten years (Tr. 2369). In identifying RX 545–552, Mr. Linn spoke of his knowledge of the range in Coors beer prices in the State of Kansas (Tr. 2370–2371). Mr. Linn explained CX 227, CX 247, CX 277, CX 318, and CX 330 (Tr. 2382). He talked about his problems with Mr. Dixon in Del Rio, Texas (Tr. 2384). Mr. Linn commented at length on the wide variations of Coors advertised prices (Tr. 2387–2398). Mr. Linn stated that he can also tell the difference between Coors beer and other beer (Tr. 2400). He has seen split draft accounts in many areas (Tr. 2401). He discussed the pricing problem with Mr. Wagnon of Wichita (Tr. 2402). Mr. Linn, in detail, explained the relationship between the Coors Company and the Del Rio, Texas company (Tr. 2406). Under cross-examination, Mr. Linn revealed that he had asked sales representatives to pick up newspaper ads to show Coors beer selling below normal prices (Tr. 2415). Under cross-examination, Mr. Linn stated that Mr. Cecil Scott's market in San Angelo, Texas is the worst market Mr. Linn had ever seen for discounting (Tr. 2421).

30. *Howard Deckard.*

Howard Deckard, general manager of Coors Distributing Company located in Denver, was next called (Tr. 2454–2460) as a witness for the respondent (Tr. 2454). Prior to that time, Mr. Deckard had been a sales representative in Colorado and Texas. He has been with the company for 18 years (Tr. 2455). Mr. Deckard stated that he had been in the Denver area since 1965 or 1966, and during that time the price ranges on 6-pack cans had been from $1.10 to $1.39 and on bottles had been $1.06 to $1.35 (Tr. 2456). He stated that the present price range in the State

of Colorado on cans is between $1.19 to $1.39 and on bottles $1.13 to $1.35 (Tr. 2466). Deckard stated that he can tell the difference in the taste of beer when comparing Coors with other brands (Tr. 2456). He stated there are many split accounts throughout the entire State of Colorado (Tr. 2457). He had 29 split accounts in the city of Denver alone (Tr. 2457). He reiterated how he had called on the Thurman organization in Glenwood Springs, Colorado in 1968 and 1970, and that it was a very poor organization (Tr. 2458).

31. *Harvey Gorman.*

Harvey Gorman was recalled to the witness stand by respondent and testified (Tr. 2476–2582) further. Mr. Gorman stated that Adolph Coors Company now serves less than 50 percent of the population of the State of Texas (Tr. 2478). When people express an interest in a Coors distributorship, they are requested to advise the company of the area in which they are interested, and the expressed interest is placed on file (Tr. 2479). Mr. Gorman directed letters of this type to both Beverage Distributors, Inc. and Thriftimart (Tr. 2480; RX 1146 and RX 1147). He emphasized quality control as one of the primary reasons for marketing through individual distributors (Tr. 2481). Mr. Gorman summed up the Coors marketing concept (Tr. 2489). He indicated (Tr. 2492) that the Coors Company controls the product as long as it is humanly possible so as to protect the quality. Mr. Gorman stated the pricing philosophy at the wholesale and retail level to be one of fair profit (Tr. 2495). He has traveled widely throughout the eleven state area and has observed in recent years, great variation in both wholesale and retail pricing (Tr. 2496). He stated that the distributor determines the prices he is to charge for the beer (Tr. 2508). Mr. Gorman stated that the brewery had no draft account policy (Tr. 2508). He reiterated that territorial restrictions are necessary for quality control, availability of product and accountability of distributors (Tr. area in Los Angeles, California, when two distributors operated 2509). He testified concerning the chaotic condition in the Spriggs in the same area momentarily (Tr. 2510). He stated that central warehousing adversely affects the quality of the beer (Tr. 2511). He stated that neither he himself nor any other agent of the Adolph Coors Company, to his knowledge, had ever used the five and thirty days termination in distributor contracts to threaten or coerce anybody in any manner (Tr. 2512). Mr. Gorman then detailed the reasons for all of the transfers set forth

on RX 753 A-C (Tr. 2513–2522). He stated that none of these turnovers were the result of any threats or coercive activities of any kind (Tr. 2522–2523). Mr. Gorman stated that for the past 12 or 15 years there were probably 30,000 sales representative reports in the active company files (Tr. 2530). Mr. Gorman stated that the Adolph Coors Company distributors served 76,848 retail accounts at the end of 1970 (Tr. 2558) and 70,612 in 1966 (Tr. 2561).

32. *Gary Vern Veber.*

Gary Vern Veber of Boulder, Colorado, testified (Tr. 2582–2593) that he serves the Adolph Coors Company as vice president in charge of quality control and has had the position for four months (Tr. 2582). He detailed at length the quality control measures and forms used to check the same at the Adolph Coors Company.

33. *William L. Friebe.*

William L. Friebe testified (Tr. 2593–2062) as the director of data processing for the company (Tr. 2593). He lives in Arvada, Colorado and has worked for the Adolph Coors Company a little over 15 years (Tr. 2593). His entire testimony detailed how the computerized operation of the Adolph Coors Company allocates beer to its distributors based upon withdrawals from the distributors' warehouses and production schedules.

34. *Robert E. Schmitz.*

Robert E. Schmitz testified (Tr. 2602–2608) that he lived in Golden, Colorado, and was employed by the Adolph Coors Company as the manager of the beer ordering department (Tr. 2603). His individual responsibilities were detailed by him in explaining how his department within the confines of Mr. Friebe's limitations actively shifted beer orders and packages to take care of extreme situations.

35. *Du Rell Hoge.*

Du Rell Hoge testified (Tr. 2610–2618) that he is a retailer in Las Vegas, Nevada, and handles many brands of draft beer in four establishments; that draft beer is a very difficult package to handle; and that no one connected with the Adolph Coors Company or its distributor has ever demanded that he handle Coors on an exclusive basis.

36. *Donald M. Curry.*

Donald M. Curry testified (Tr. 2618–2623) that he is a retailer

living in Denver, Colorado, operating Sky Chefs, Incorporated, which is the catering service that serves airports (Tr. 2619). Sky Chefs operates the concessions at Stapleton Field in Denver where he has three types of draft beer and has had for two years (Tr. 2621). He has Coors, Miller's and Michelob and no agents of Adolph Coors Company or its distributor that serves him has ever made a demand or threat to eliminate brands other than Coors (Tr. 2622). He stated that his distributor had never suggested prices to him (Tr. 2623).

37. *Andrew Stacio.*

Andrew Stacio testified (Tr. 2623–2635) that he was a retailer in Dallas, Texas, operating a string of pizza parlors serving draft beer and they all had more than one brand (Tr. 2625). He stated that draft beer was a food item and had to be handled very carefully (Tr. 2625–2626). He testified that he had attended a draft beer school sponsored by Adolph Coors Company in Golden, Colorado (Tr. 2627). He testified that no agent of the Coors Company or its distributor had ever made any demands upon him to handle Coors beer on an exclusive basis (Tr. 2627).

38. *Dr. Walter Jennings.*

Dr. Walter Jennings of the University of California at Davis was called (Tr. 2672–2701) by the respondent as an expert in the field of flavor chemistry. He defined beer as an unstable fluid which attains its maximum quality at the moment of packaging after which it begins to deteriorate, the main factors of deterioration being temperature, time and light (Tr. 2678). All of these factors have an adverse effect on flavor (Tr. 2680). Protection against these adverse effects can only be gained in preserving it from light, storing the beer in as low a temperature as possible, and consuming it as quickly as possible (Tr. 2682). Independent investigation by Dr. Jennings revealed that his own grocer advised him that respondent maintained close control over its product in the areas of strict rotation and was, in fact, the only brewer that did this in his store (Tr. 2696).

39. *Albert G. Evans.*

Albert G. Evans, executive secretary of the California Beer Wholesalers Association, San Francisco, California, a lawyer, was called (Tr. 2701–2763) by the respondent. Mr. Evans has been employed by the association since 1960 (Tr. 2702). The membership of his organization now numbers 235 and is decreasing each year (Tr. 2702). He detailed the purposes of the trade

association (Tr. 2703). He is well acquainted with Mr. Laverty, one of the witnesses for the Commission, in that he has been involved in several matters of litigation with Mr. Laverty (Tr. 2704). He likewise is also acquainted with Mr. Johnston, another of the Commission's witnesses, because of the same reason (Tr. 2706). He stated that he had read transcripts of the testimony of both Mr. Laverty and Mr. Johnston in these proceedings and categorized the testimonies as being evasive, distorted and inaccurate (Tr. 2706). He stated that Beverage Distributors, Incorporated would be classified as a wholesaler in the industry, yet they only sold to selected chain stores (Tr. 2709). He detailed at length, the services that his members provide for the brewers and stated that none of these services were performed by organizations such as Beverage Distributors, Inc. (Tr. 2709–2711). Mr. Evans is familiar with the codings that brewers place on their packages and in dealing with RX 1174 through 1195 on a few examples of said exhibits, confirmed the over-age dates as testified by Mr. De Nio (Tr. 2714–2721). Mr. Evans testified that it would be an economic impossibility in the beer business for distributors to compete with one another on an intrabrand basis (Tr. 2736). Under cross-examination by complaint counsel, he stated that it would be economic suicide for distributors to distribute outside their territory (Tr. 2760).

40. *Russell H. Hopkins.*

Russell H. Hopkins, executive vice president of the National Beer Wholesalers Association, Chicago, Illinois, was called to testify (Tr. 2764–2794) by the respondent. He has been the executive head of the organization since 1942 (Tr. 2765). The organization has approximately 2000 members with the membership being stable for the last eight to ten years (Tr. 2765). The purpose of the organization is to serve the beer wholesalers in their best interests in the means and ways that trade associations normally function (Tr. 2765). Primarily, it furnishes information to wholesalers (Tr. 2766). Mr. Hopkins confirmed the general overall responsibilities of beer wholesalers as testified to by prior witnesses (Tr. 2766–2769). He stated that intra-brand competition in the beer industry was almost non-existent (Tr. 2769). He described the competition in the beer business as "fierce" (Tr. 2771). He described Coors as a regional brewer doing business in a limited number of states as compared with the large national brewers (Tr. 2771). He knew of the reputation of the respondent with its wholesalers and described it as being very good (Tr.

2773). He testified concerning the brewer-wholesaler relationship as published by the Cambridge Institute (RX 1079; Tr. 2774). The report, dated August 1968, a study conducted under the direction of the Cambridge Center for Social Studies, for the National Beer Wholesalers Association, entitled "The Brewer-Wholesaler Relationship" had this to say (p. 24):

> Under present conditions, the wholesaler is important to the brewing industry. This was unmistakable from the almost unanimous agreement of participants in our survey that "the economic health of the wholesaler is just as important to the brewing industry as is a satisfactory profit for the brewer" (q. 16). * * *.
>
> A wholesaler is not without power to do serious financial harm to his supplier. An interesting *obiter dictum* we heard in interviews was: the wholesaler owns the beer, but the brewer owns the brand. One of the most important assets of a brewing company is the quality image of its brands. In a sense, this image is a property right, belonging to the brewer; as much, it must be taken care of by the wholesaler; i.e., by virtue of the relationship, the wholesaler has a limited obligation to respect and not to destroy the image. This brand image can be greatly weakened in a short time by a wholesaler who lets beer accumulate in his warehouse or fails to rotate retailers' stocks, with the result that some customers eventually get stale beer. * * *.

He stated that territorial restrictions have been a part of the beer wholesaling industry since 1933 (Tr. 2782). Mr. Hopkins feels that central wholesaling will be detrimental to the industry (Tr. 2788). He recognizes that a brewer must have the right to determine qualifications for a distributor (Tr. 2788). Mr. Hopkins testified that beer prices in recent years have risen less than most other consumer products(Tr. 2791). He stated that his association had received few complaints as to any conduct of the respondent (Tr. 2792; RX 1079).

41. *Paul De Nio.*

Paul De Nio of Los Angeles, California (Tr. 2804–2839), is employed by the California Beer Wholesalers Association (Tr. 2804). Mr. De Nio has been with the California Beer Wholesalers Association since 1968, and prior to that time had 14 years experience with the Alcoholic Beverage Control Board in the State of California in the areas of business practices enforcement (Tr. 2805–2806). Mr. De Nio stated that in his 14 years with the Alcoholic Beverage Control Board, the Adolph Coors Company was never accused of any trade practice violation (Tr. 2807). In those instances where Coors' distributors were accused of trade practice violations, other brands of beer other than Coors were involved (Tr. 2807). The Adolph Coors Company has a very strict

policy in which they demand adherence to all laws on the part of their distributors. Their reputation in this regard in the State of California is excellent (Tr. 2807–2808).

Mr. De Nio recently, prior to his testimony, had purchased various brands of beer from the Thriftimart stores in the Los Angeles area that practice central warehousing (Tr. 2808). These were marked as RX 1174 through 1195 and the coded dates of packaging of these samples varied from periods of approximately six months to exceeding one year (Tr. 2808–2824). Mr. De Nio stated that all brewers have restricted territory in which their distributors market primarily for quality control reasons but also for physical and economical limitations (Tr. 2824). He maintained that territory restrictions were necessary from a law enforcement standpoint (Tr. 2824). Mr. De Nio indicated that the central warehousing system of marketing tended to result in poor efforts as far as stock rotation and quality control are concerned (Tr. 2827).

FINDINGS OF FACT

General

The background history of the Adolph Coors Company, its evolution since its inception in 1873, the general overall description of the brewing industry today, and the manner in which Coors beer is brewed, distributed and marketed was explained in detail by William K. Coors, chairman of the board, president and chief executive officer of the respondent, Adolph Coors Company (Tr. 2840). Mr. Coors has worked for the respondent since 1939 after having graduated from Princeton University and obtaining a graduate degree in chemical engineering (Tr. 2841). The Adolph Coors Company was started by the grandfather of William K. Coors, Adolph Coors, in 1873 and has been ever since that time a privately held company by various members of the Coors family (Tr. 2842). The site chosen for the brewery in 1873 is the present location of the brewery and the location has remained unchanged at this single place since 1873 (Tr. 2843). During prohibition, the Adolph Coors Company manufactured near beer and malted milk (Tr. 2843). When prohibition finally shut the brewing industry down, there had been just prior to that time approximately 1,400 breweries operating in the United States. When prohibition ended, 1935 saw approximately 750 breweries in America that had survived prohibition who were able to get back into beer production

and this number has steadily declined to the point where there are now operating in America only about 70 breweries of any consequence (Tr. 2845). The decrease in the number of breweries has been due to the competition in the brewing industry (Tr. 2845). The failure to continually produce a high quality beer at a realistic price has caused 95 percent of the brewery failures since 1935 (Tr. 2873). Production of beer by the Adolph Coors Company in 1935 amounted to 140,000 barrels (Tr. 2860). In 1948, the Adolph Coors Company was the 49th largest brewer in America with production amounting to 470,000 barrels (RX 1057 A). The Adolph Coors Company now ranks as the fourth largest brewer in America following its three major competitors, Anheuser-Busch, Schlitz and Pabst (Tr. 2852; RX 1057 S). Production of the Adolph Coors Company in 1971 amounted to 8,500,000 barrels (Tr. 2860).

The Adolph Coors Company has as its major competitors, with possibly one or two exceptions, the other beers comprising the top ten breweries in America, Anheuser-Busch, Inc., Jos. Schlitz Brewing Co., Pabst Brewing Co., F & M Schaefer Brewing Co., Falstaff Brewing Corp., Miller Brewing Co., Carling Brewing Co., Theodore Hamm Brewing Co. and Associated Brewing Co (Tr. 2853). Coors competes with many other brands of beer (Tr. 447). Anheuser-Busch and Schlitz distributor organizations are well organized, well manned, well financed, and operated by very intelligent people (Tr. 1934). Coors has a substantial disadvantage to face from a competitive standpoint in that it has a single plant operation and is today the only shipping brewery left in America (Tr. 2853). All of the major breweries and some of the local breweries have plants located on each end of the Coors eleven state marketing area in the heavily populated States of Texas and California (Tr. 1848). In 1971, the average barrel of Coors beer had to travel 961 miles to its market place (Tr. 2853). In combating this, Coors must minimize its marketing costs by achieving better market penetration and minimize its advertising costs, both of which will offset the freight disadvantage (Tr. 2853). Adolph Coors Company's theory of market penetration in the same area that it marketed in in 1935 actually drops certain costs and permits Coors to better compete against the national brewers in this area (Tr. 2876). Advertising costs of the Adolph Coors Company were less than $1 a barrel during the year 1971, and these same advertising costs for Anheuser-Busch and Schlitz during that same period were $4 and up on production of 24,000,000 barrels

and 18,000,000 barrels respectively (Tr. 2853). Price competition is extremely keen with the larger breweries continually offering side deals, kick-backs and other common trade-practice violations such as price promotions numbering in some instances four times a year lasting from 30 to 60 days each time (Tr. 1856) and giving away a certain number of free cases (Tr. 1857). Competition is so keen that interbrand competition will be non-existent if distributors have to turn to concentrating on intrabrand competition (Tr. 1746). Distributors of Coors beer would not have made the investment that they have made in their businesses had they not known it was the policy of Adolph Coors Company to have only one distributor in a given territory (Tr. 1747, 1864, 1915, 1923N, 1933). The number of breweries will continue to decline and there probably will only be 20 breweries in the United States in 1980 (Tr. 2881). If the top three brewers in America, Anheuser-Busch, Schlitz and Pabst, continue their recent rate of growth, they could fulfill all of the beer requirements in America by 1985 (Tr. 2881).

The major ingredients of beer are water, hops, barley and rice (Tr. 2846; RX 172, p. 30; RX 1155 D). The Adolph Coors Company has a natural supply of water that underlies its lands and the quality of this water is remarkably pure (Tr. 2847). Eighty percent of the hops used by the Adolph Coors Company come from Germany because of their quality and the resulting ability to impart a flavor characteristic to Coors beer that is impossible with domestic hops (Tr. 2847; RX 169, p. 28; RX 1155 D). The use of German hops is extremely expensive because first of all, they cost twice as much as domestic hops and secondly, due to the lesser bittering power, you have to use twice as much (Tr. 2847). The Adolph Coors Company has its own recognized variety of brewing barley called Moravian (Tr. 2847; RX 172, p. 30). It is grown for the Adolph Coors Company by about 1,600 farmers located in Colorado, Idaho and Wyoming (Tr. 2847–2848; RX 172, p. 30). The Adolph Coors Company will not accept finished barley that is not grown from seed furnished by the Adolph Coors Company (Tr. 2848). The last ingredient, rice, is the short grain variety and comes from the Sacramento and San Joaquin Valleys of California (Tr. 2850). It is the most expensive rice in America (Tr. 2850). From a raw material, production and packaging standpoint, Coors beer is by a substantial margin the most expensive beer made in America (Tr. 2851; RX 169, p. 32).

The brewing process is an extremely technical science that takes approximately 80 days at the Adolph Coors Company as com-

pared to 20 days in plants of its competitors (Tr. 2855). The plant is classified as a food manufacturing plant with absolute standards of cleanliness controlled by what is called an aseptic process (Tr. 2855). The aseptic process is merely the art of deactivating microorganisms so that the beer can be microbiologically stabilized before it leaves the premises in the various packages (Tr. 2856). The Adolph Coors Company is unique in that it fabricates most of its own equipment (Tr. 2873). Coors beer is not pasteurized any more. The elimination of pasteurization and the conversion to the aseptic process started in 1959, and took about eight years to complete (Tr. 2856). The elimination of pasteurization is an absolute necessity for a refrigerated marketing concept (Tr. 2857). In aid to this, the entire brewery is air conditioned (Tr. 2858). No other brewer in America uses the refrigerated marketing concept (Tr. 2858). Coors beer is not stored at the brewery except for a few odds and ends with 98 percent of the beer coming right off the packaging lines and going in either insulated railroad cars or refrigerated trailers for transportation to the distributors (Tr. 2858). The foundation of the Adolph Coors Company is the quality of its beer, and the company was built around this (Tr. 2849), and the reputation of Coors beer as to ethics, image and quality in the brewing industry is the highest, the finest possible (Tr. 2491–2492). Loss of quality control would mean lost customers, and a problem to stay in business (Tr. 2492–2493).

Adolph Coors Company has many flavor and drinkability panels in order to determine particular varieties of hops, malts and other ingredients that are superior (Tr. 2869). Brewery sales representatives in monitoring distributor and retailer practices are responsible for checking on the drinkability of Coors beer through checking on product control, rotation and temperature control in the field (RX 1047 M). Drinkability and flavor are extremely important because you can tell the difference between Coors and other beers in testing these qualities (Tr. 2317, 2343, 2400 and 2456). Superior quality is a part of the image Coors beer enjoys (Tr. 2893). Absolutely uncontroverted is the fact that quality is the only thing selling Coors beer (Tr. 2896). Beer right off the packaging line is at its highest quality with deterioration starting immediately. The principal qualities affecting deterioration are temperature, time, and light, and all of these adversely affect the flavor of beer (Tr. 2678). This is extremely important because people choose one brand of beer over another because of flavor (Tr 2681). The only way that the flavor can be protected from

these damaging elements is darkened containers, storing at low temperatures, and consuming it as quickly as possible (Tr. 2682). The importance of flavor cannot be minimized because the average consumer can tell the difference in beer (Tr. 2684). Anytime you have material that is capable of being oxidized and you have oxygen present, then you have the opportunity for oxidation deterioration. You in fact have these materials in beer that are quite eager to combine with oxygen and the products of this combination are deleterious to flavor (Tr. 2695). Metallic ions also cause chemical reaction in beer containers when the beer comes in contact with the metal, which is also extremely harmful to flavor (Tr. 2695).

Coors beer is marketed in eleven states: the western portion of Texas, and all of Oklahoma, Kansas, Wyoming, Colorado, New Mexico, Arizona, Utah, Idaho, Nevada and California (RX 170, p. 24; RX 171, p. 4; RX 715 A-B; RX 1173 A-W). Population trends of the United States show a gravitation to this southwestern portion of America (RX 1081–1093). The beer is marketed through 166 independent distributors (Tr. 2860). There is one exception to that and that is the metropolitan Denver area wherein Coors Distributing Company is the distributor, this company being a wholly-owned subsidiary of the Adolph Coors Company, and the reason for this is that it serves as a model and a research laboratory, plus giving the brewery distributorship experience (Tr. 2862; RX 170, pp. 7–8). The contracts with the distributors are written (Tr. 2862; CX 2 A-C; CX 3 A-C).

The marketing department establishes the prices for Coors beer which is all sold at the same price to all distributors f.o.b. Golden, Colorado (Tr. 265, 261). The distributor selects the mode of transportation from the brewery, arranges for the same, and pays all freight bills direct to the carrier (Tr. 262–263). Seventy-five percent of the beer is shipped by rail and 25 percent of the beer is shipped by truck (Tr. 2866). All rail cars and transportation vehicles are either insulated or refrigerated and that is a part of the Coors refrigerated marketing concept (Tr. 2866). Coors beer is a very delicate and sensitive beer, and it must reach the ultimate consumer in the shortest possible time at the lowest possible temperature because of the way in which it is brewed and packaged (Tr. 2866).

The general overall responsibilities of the distributor are set forth in the policy manual as a general statement (Tr. 2862; RX 1047 E, F and G). These are summarized above. Even though

respondent's exhibit 1047 E, F & G, the general statement of the distributor's policy manual, was added in November of 1971, it merely is a written statement of what has been the policy for many, many years and this was recently written down so that the younger distributors would have no misunderstanding as to what the general overall policy of the Adolph Coors Company was in respect to what it generally expected of its distributors (Tr. 1738, 2484). The distributors and the retailers have a lot to do with the image and the product and the consumer preference for a particular brand (Tr. 2910). The image of Coors is extremely important and success without it is impossible. Strict adherence to regulations and laws, people that are outstanding in their communities and superior quality are parts of the image that Coors beer has (Tr. 2893).

Many suggestions are made but distributors certainly aren't terminated if they fail to follow the recommendations of the company (Tr. 277). There are countless examples of distributors disregarding suggestions of their representatives and this caused no particular problem even as testified to by the Commission's own witnesses. An example of this is found in Mr. Tinetti's testimony concerning draught beer cleaning (Tr. 1544). The operation of Coors' distributorship is an extremely complicated business and depends upon many things other than beer sales (Tr. 1505, 1552). Among the important things that are considered by all successful Coors distributorships are community affairs, political activities, equipment, personnel, and similar matters (Tr. 1506). A good Coors dstributor must pay particular attention to all the rules and regulations that apply to the beer business (Tr. 1796). Coors distributors are usually married men with families and belong to their state and national wholesaler's associations (Tr. 1797). The distributors also take part in the religious activities of their communities in strong religious sections of America, often serving as members of official boards of various churches (Tr. 1869). Coors beer wholesalers or distributors almost without exception are active in the state wholesaler associations by being officers or directors thereof (Tr. 1888, 2009, 1982, 1945, 1923 Q, I, 1869, 1853). Oftentimes distributors seek advice from the brewery, obtain it, and they are grateful for the help that the brewery gives them from time to time in straightening out problems in their operations (Tr. 739, 740). In some instances, they even go to the brewery to discuss problems and the brewery's philosophy is generally to decrease the expenses, cut out all dead wood, and operate

more efficiently (Tr. 744). Coors' distributors, generally speaking, have new warehouses that are fully refrigerated, identified with large Coors signs, and deliver beer in clean trucks from clean warehouses because cleanliness is so important to the image and success of the business (Tr. 1799). A successful Coors distributorship demands upon all lines of the Adolph Coors Company being available to each retailer (Tr. 559, 1365). The distributorships are very often held by families and passed on generation after generation (Tr. 1317, 1869). Adolph Coors Company has considered distributing its own beer itself and from a monetary standpoint it is extremely tempting to the company (Tr. 2906, 2907).

The sales representatives are guided by that portion of the policy manual marked "Representatives" (Tr. 242). The Adolph Coors Company has 20 to 25 sales representatives (Tr. 249). These sales representatives report direct to Mr. Corder, Mr. Linn, Mr. Golightly and Mr. Abbott, the territorial managers (Tr. 252). Included in a representative's responsibility is the writing of reports, sending factual information back to the brewery on the progress of the distributor and the way that they care for and control the product to see it is taken care of (Tr. 1053, 1077, 1078, 280). There is no particular format for these reports (Tr. 280). Reports often contain mistakes (Tr. 1173). The performance of the distributors is checked by representatives (Tr. 2863). Retail stock levels and inventories are monitored to guarantee rotation (Tr. 2874). From time to time Coors representatives are to check Coors and competitive prices in retail areas and to report changes to the brewery (RX 1047 Z–73, para. 4). The distributors have the responsibility and control of the beer until it reaches the ultimate consumer and a representative described his job as seeing to it that the distributor fulfills this responsibility (Tr. 1052). The representative is a link between the brewery and the distributor (Tr. 1078, RX 496–523 A-E, inclusive). This link is necessary because the image, property rights, trademark and products of the Adolph Coors Company, over which it never loses risk and responsibility, must be controlled and protected. These risks and responsibilities even continue until after consumption by the ultimate consumer (RX 1056 A-F, RX 1068 A-B).

There has been a chronic beer shortage at the Adolph Coors Company for many years (Tr. 2876). The shortage of Coors beer over the past few years is real and not artificial (Tr. 2880). Adolph Coors Company has a policy in its manual requiring equitable treatment of all retailers, regardless of sales volume and area,

in times of beer shortage and outlawing preferential or discriminatory treatment of retailers (RX 1047 F). The brewery produced at over capacity during the year 1971 (Tr. 2912). There is no way that the Adolph Coors Company can supply the demand for Coors beer, even in their limited marketing area (Tr. 2889). The Adolph Coors Company puts practically every resource it can generate into plant expansion to keep up with the demand, yet demand exceeds supply (Tr. 2877). Witness Danenhauer has been continually short of beer ever since he has been a Coors distributor (Tr. 443). Distributors have been told not to take on any more draft accounts (Tr. 443). A Commission witness stated that he has been short of beer on and off for many years (Tr. 514). Another Commission witness stated that he hadn't had enough beer in the last several years to take care of his own territory, let alone any other territory (Tr. 560). Another Commission witness stated that he has been short of beer ever since he has been a Coors distributor and he was out of two packages of beer the very week he was on the stand testifying (Tr. 635). There is not enough beer available for the Dallas market to supply the demand and that has been the situation almost regularly ever since the Dallas market opened up in 1966 (Tr. 688–691). A California retailer called by the Commission admitted that he didn't think there was a shortage, but went out in the market to confirm it and found in fact that there was a shortage of Coors beer (Tr. 1310). Another Commission witness testified that the demand for Coors beer greatly exceeds the supply, and there has always been a shortage of Coors beer (Tr. 1503). Coors didn't expand into the new Texas markets until 1966 because it didn't have enough production for those areas until that time. A Commission witness knew there was a beer shortage in his territory, but at the same time he admits that he asked Coors for more territory knowing at the time that he asked them that they couldn't take on any more territory because they were short of beer (Tr. 1606). When shortages occur, on several occasions distributors have had to ration beer among the retail outlets back as far as 1963 (Tr. 1789). The distributors report withdrawals and the computer system at the brewery correlates the withdrawals from the distributor's warehouses with the supply of beer which is invariably inadequate. The computer then comes up with an allocation as to how the beer is to be loaded and shipped to each individual distributor from the packaging lines (Tr. 2864, 2593). Maximum beer inventories recommended by the brewery

are 15–18 days supply during the peak summer months (RX 182 F). A large retailer in California called by the Commission admitted that the Adolph Coors Company must allocate beer, and the distributors can only give the individual retailers so much beer during a shortage (Tr. 1310). Complicating the problem is the fact that each individual state has various restrictions on containers, labels and cartons which dictates that the beer coming off of the packaging lines has to be destined at a particular time for a particular place (Tr. 2865). The Adolph Coors Company requires that both the shipper and the distributor move the beer to the consumer as fast as possible (Tr. 2874).

Fifty percent of the employees of the Adolph Coors Company are involved in construction work as far as expanding the brewery (Tr. 2880). Survival is the only factor that entered into the decision to keep the company on a constantly expanding basis (Tr. 2918). In 1980, it is expected that there will be no more than twenty breweries in America and the Adolph Coors Company intends to be one of the twenty (Tr. 2881). The availability of resources is the only thing that limits the ability of the Coors Company to grow, and all of these resources are internally generated. There was no evidence presented concerning any mergers. Although the founder of the company borrowed money, the second generation never borrowed any money and the present generation, the third, has never borrowed any money (Tr. 2918). Only 2 percent of the total cash flow is paid to the stockholders of the company (Tr. 2919).

The Adolph Coors Company started the development of the aluminum can back in 1954 through its wholly-owned subsidiary, the Coors Porcelain Company (Tr. 2871). The Adolph Coors Company is now totally converted to aluminum cans (Tr. 2871; RX 169, p. 10). The aluminum cans are superior because they are only a two-piece can rather than a three-piece can and in addition thereto, there is no weld on the main body. Joints and seams cause unsanitary conditions and interaction between the beer and the metal as beer eats through the lining at these points (Tr. 2870). The refrigerated marketing concept also dictated the development of the aluminum can (Tr. 2869). The aluminum recycling program as initiated by the Adolph Coors Company has created a favorable image from an environmental standpoint (Tr. 2894).

The Adolph Coors Company also has a bottle recycling program, the success of which depends on good retailer relations between the distributor and the retailer (RX 175 H). The public ac-

ceptance of the recycling program is obvious in the nature of the increases which have been experienced in the can return program (RX 170, p. 3).

In recent times, the last fifteen years, there have only been three distributorships terminated, namely, Spriggs in Los Angeles, Orth and Hemphill in Oakland and the Safford, Arizona distributorship (RX 752 A-D). The Spriggs termination was not much of an issue in this case. The Orth and Hemphill distributorship posed constant and recurring problems dating from 1964, such as being out of beer, poor rotation, lack of refrigeration of beer and lack of sales effort (RX 992 A-C, RX 1002) and including use of dirty signs, dirty draft equipment and unkempt premises in general (RX 993 A & B, RX 994 A-C, RX 1003) and old trucks in poor condition and appearance (RX 997). The distributorship refused to correct problems after they had been pointed out to them by Coors sales representatives and management officials, especially in 1967 (RX 997), and in 1968 (RX 999, RX 1000, RX 1002, RX 1003, RX 1004, RX 1005). The only recourse for the Adolph Coors Company was to terminate Orth and Hemphill and to seek another distributor for the market (RX 1005, RX 1006). Subsequently, the Adolph Coors Company approved an applicant who did negotiate a purchase agreement with Orth and Hemphill, but they refused to sign the agreement with him (RX 1007). They admitted that Mr. Gorman gave them permission to sell the Coors phase of their business as far as the goodwill was concerned (Tr. 1390). They were offered $48,000 for the Coors portion of their business goodwill (Tr. 1407). The offer was later withdrawn by the gentleman who made it and the Coors Company didn't have anything to do with it (Tr. 1410). Mr. Hemphill admits that they have sued the Adolph Coors Company (Tr. 1404). Exhibits RX 902 through RX 913 are samples of sales reports from October 19, 1968 through October 17, 1970, that furnished the proper background reasons that brought about the Safford distributorship termination which was initiated by the letter of termination written by Mr. Gorman to the organization dated January 8, 1971 (RX 914 A-B).

The transfer of distributorships can arise for a number of reasons (RX 753 A-C) and even though Mr. Gorman testified in detail as to the terminations or turnovers that have occurred recently, some of them deserve specific mention. For instance, in the Danenhauer distributorship, he reached that agreement with the Steinhoff people and it was an agreement of his own choosing

(Tr. 429). Mr. Barrows had only one serious disagreement with the brewery and that was when he sold out (Tr. 769). The reason for the disagreement was that the Coors Company felt that even though the teamsters struck, the consuming public had a right to have that beer and they wanted him to operate during a period of labor strife with non-union help (Tr. 769). Mr. Carskaddon sold his Coors distributorship because he was requested by the Coors Company to do so (Tr. 1493). Mr. Carskaddon had constant problems in running his distributorship, including a tendency to follow and to join with competitive distributors in his trade area rather than to provide his own decision making and leadership in his own distributorship (RX 812 A-B, RX 813 A-B). He was able to locate a buyer by the name of Ed Donaghy (Tr. 1498) whom he had known for many, many years and had often referred to him as his nephew as he in a large part actually raised Mr. Donaghy (Tr. 1508; RX 819, RX 814 A-B). When he took Mr. Donaghy to the Coors Company, Coors officials said fine, and his attorney, Mr. Jackson, negotiated the sale with Donaghy and Donaghy is the present distributor in Fresno (Tr. 1509). The sales price was never discussed with anyone from Coors (Tr. 1513). Mr. Tinetti had a history of management problems in his organization and in discrimination in favor of Olympia (RX 830, RX 831, RX 844 A-B, RX 845, RX 848 A-B). Mr. Tinetti ultimately decided to keep Olympia brand and to sell the Coors brand (RX 835) and he sold his Coors operation setting his own terms with the seller (RX 828) and producing his own buyer whom the brewery approved (RX 827) and freely handled all the negotiations on his own terms (RX 831, RX 833). Coors gave Tinetti a chance to sell (Tr. 1546). Tinetti was free to select his own buyer (Tr. 1530). The management problems in the Del Rio, Texas, organization while Mr. Dixon was in partnership with a Mr. Reynolds were serious enough to warrant a consideration by Mr. Dixon and Mr. Reynolds to sell the Coors distributorship (RX 1111 A-B). Their asking price at that time was too high and the purchaser turned it down. In this purchase price matter, the Adolph Coors Company informed the distributorship that Coors would not get involved in the amount that was to be paid for the distributorship (RX 1112). From 1969 through 1971, the distributorship showed no substantial progress whatsoever (RX 1113, RX 1115). Mr. Dixon admitted he was told he would be given 90 days to straighten up his situation and he was given the reasons as to why the Coors Company felt he wasn't doing a good job (CX 2477 A-B; Tr.

1575). He was suspended by the Texas Liquor Control Board for violations (Tr. 1598). He went out and negotiated the sale of that business and he subsequently entered into a contract for $193,000 and the Coors Company didn't take part in the transaction in any way, shape or form (Tr. 1601). Mr. Jay Thurman purchased the Glenwood Springs, Colorado distributorship in May 1968 (RX 867) and during his tenure as a distributor from the very outset had constant problems (RX 872, RX 873 A-B, RX 874 A-B, RX 875 A-B, RX 876 A-C, RX 877 A-C); including mismanagement involving short checks in payment for beer (RX 879 A-C) ; being short of beer (RX 881 A-C) ; and very poor retailer relations (RX 883 A-B, RX 886, RX 885). Ultimately, the Adolph Coors Company suggested that Mr. Thurman consider selling his business (RX 890 A-B) as Mr. Thurman had sought to find a buyer upon his own even prior to that time (RX 889). Mr. Thurman gave up the management of the distributorship to his father and another older man and terminated his relationship with Coors on a voluntary basis (RX 894 A-B, RX 895 A-B). After unsuccessful operations for a period, Mr. George Thurman, his father, and his associate, Mr. Finley, Jay Thurman's father-in-law, decided to sell the distributorship. They determined their own asking price (RX 897 A-B), and they made their own contract arrangements and basic selling terms with the purchaser they selected who was approved by the brewery, Mr. Fox (RX 898 A-B, RX 899 A-C). Mr. Thurman admitted that he had a credit problem with the brewery (Tr. 1470). Mr. Thurman admitted that he gave the brewery short checks (Tr. 1471). When he got into the beer business, he admitted that he had never been in it before (Tr. 1451). When in fact he did sell his business, an attorney represented him throughout the entire sale of the distributorship and he, Mr. Thurman, didn't take any part in the negotiations (Tr. 1435, 1437). Mrs. Bard, the San Bernardino distributor, at one time had additional warehouses in Indio and Yucca Valley and decided she wanted to reduce her territory and she asked the Coors Company to find her a buyer (Tr. 1772). The company found Mrs. Bard a buyer, and she liked the appearance of the two gentlemen sent by the Adolph Coors Company very much (Tr. 1773). She subsequently sold to these two men on her own terms because of her own desire, and the Adolph Coors Company did not dictate anything concerning the sale (Tr. 1773).

The Adolph Coors Company in its policy manual has a general policy in regard to distributor selection, deletions or terminations

(RX 1047 S). At the present time, there are 167 Coors distributors and on file at the company are 7,000 persons who are interested in becoming Coors distributors (Tr. 2477–2478). Distributors are actually chosen after a series of interviews by the marketing department (Tr. 266). The original interviews for the picking of a distributorship are held out in the field (Tr. 568). The interview team does not take any position on what the applicant tells them, they just accept their comments (Tr. 1133). No one questions the absolute right of the Adolph Coors Company to pick its own distributors. This point was emphasized by one of the witnesses for the Commission (Tr. 1309). Coors distributorships are very often family organizations for long periods of time. No one has ever paid the respondent anything to become a distributor (Tr. 1352, 1895, 1547, 1911, 1392). All Coors distributors must have sufficient refrigerated space maintained at a temperature of or below 50° F. to accommodate all packages in sufficient recommended quantities to insure and maintain the drinkability and flavor of Coors beer in order that the consumer is assured of receiving the finest product possible. In furtherance of the refrigerated marketing policy, the distributor and his organization must continually sell the retailer on the program of having sufficient, recommended refrigerated capacity for all Coors packages, thus assuring the consumer of a more drinkable product with the advantage of satisfied customers and additional sales (RX 1047 V). The Coors sales representative is to present refrigerated marketing programs to distributors and their personnel so that such distributors and their personnel are in a position to convey the same to retailers and customers in pointing out the advantages of rotated, refrigerated, Coors beer (RX 1047 V). It is the basic responsibility of the distributor to take care of and monitor temperature control of Coors beer from the time the distributor receives the beer until he places it in a retail outlet, and further, he must thereafter guard against the abuse of Coors beer, such as lack of rotation, lack of refrigerated storage, at the retail level (RX 1047 V). All of the Coors distributors are in complete accord with the refrigerated marketing concept and agree with that philosophy 100 percent (Tr. 689). Even retailers, as exemplified by one of the two retailers that testified in favor of the Commission, think that beer is better if it is stored cold (Tr. 941). New warehouses have been built to aid this concept (Tr. 1364, 1799; RX 1048). The refrigerated marketing concept dictates that the distributors refrigerate their warehouses (Tr.

2874). The distributors are now taking the next step by going to complete refrigerated trucks and this program has already started (Tr. 1802, 2875). The emphasis in recent years has been on controlling the quality of the product after it has left the brewery and the refrigerated warehousing, transportation and delivery trucks are examples of that emphasis (Tr. 2489). Refrigeration and rotation are absolute musts as far as quality control is concerned (Tr. 2493). The distributor, of course, has the initial basic responsibility of taking care of the rotation of Coors beer so that retailers and consumers handle and purchase Coors beer in the finest possible condition (RX 1047 F, para. 10). It is extremely important to keep beer fresh, and it must be rotated to see that this is done. Inasmuch as the retailer cannot be depended upon to do this, the Adolph Coors Company places this responsibility on its distributors who must see to it that each retail account has only enough beer on inventory to get him by until the next delivery date (Tr. 1088). Retailer inventory is a part of this rotation program and that is the reason the retailer inventories must be controlled (Tr. 1089). Beer is as good as it is ever going to be the moment it is packaged, and it deteriorates in flavor with each passing day (Tr. 1297). If representatives of the Coors Company find old beer in the territory, it is destroyed and the distributor has to suffer the loss (Tr. 1369).

During the interviews for his distributorship no one asked Mr. Cecil Scott whether or not he would handle a conflicting line of beer (Tr. 569). When the Orth and Hemphill organization took on Coors in 1958 they had Regal Pale, Pabst, Champale, and Mexicali (Tr. 1378). Mr. Carskaddon had Coors when he took on Olympia (Tr. 1502). Mr. Tinetti distributed many other brands of beer and at the time he sold Coors out, he was distributing Coors and Olympia (Tr. 1519). Mr. Coleman, the Coors distributor in Brownwood, Texas, had Jax beer when he was chosen as the Coors distributor in 1966 (Tr. 1845). Mr. Boersma became the Coors distributor in 1946 and prior to that time had other brands of beer and now handles Schlitz and Coors (Tr. 1861). Mr. Maloof in the entire State of New Mexico handles other brands of beer, mainly Pabst and Burgermeister (Tr. 1902). When Mr. Lee Scott became the Coors distributor in 1967 at Boise, Idaho he was actively selling Olympia beer and at the time he applied for the Coors distributorship, the Coors people knew this. Mr. Scott discussed it with the Coors people and told them how he was going to operate with both brands and Coors didn't tell him he had to

get rid of Olympia (Tr. 1923 A). Mr. Tinetti took on Olympia after he had Coors and no representatives of Coors told him not to take on Olympia (Tr. 1534). When Mr. Clymer took on Coors in 1966, he had Falstaff and Miller and the Coors Company didn't make any demands upon him that he had to get rid of them (Tr. 1939). Mr. Wagnon handles Pabst, Carling, Colt 45, Heinekens, Metz and Falstaff (Tr. 450, 451). Ford Distributing Company in Oklahoma City, the largest Coors beer distributor in its eleven state marketing area, has handled many other brands of beer, including Pabst, Miller and Schlitz (Tr. 1981). Martin Schinnerer, a distributor in Long Beach, California, has been with Coors since 1936 and over the years he has distributed a majority of the brands of beer and he now distributes Coors, Olympia, Schlitz, Hamms, Colt 45 and Budweiser (Tr. 2000). Mr. Stemach, the Coors distributor in Eureka, California testified that he now handles Olympia, Miller, Country Club, Coors, a lot of wines, and that no one in the Coors organization has ever told him to get rid of those brands (Tr. 1913 P). Consumer choice results from the brand image, which again is basically a matter of taste, product, and quality control (Tr. 2194), and any brewer must attempt to protect the quality of his beer until it is consumed by the public. This requires that the Adolph Coors Company must maintain some element of package care, if you will, to insure quality of product (Tr. 2198). If possible, Coors must protect that quality of product from the time it leaves the brewery all the way to when the purchaser at home puts it in his refrigerator (Tr. 2195). A good wholesaler or distributor of Coors beer will follow that product to the consumer to make sure the consumer purchases Coors beer which is in a condition consistent with the consumer's brand image of that beer (Tr. 2195). The use of territories assigned by the brewer to his distributors is the only effective way of getting market penetration and intensive market coverage (Tr. 2202–2203). If territorial restrictions were completely outlawed and fully open competition between distributors of the same brand were to take place in each territory, chaos would result (Tr. 2206–2207). This kind of open intrabrand competition would result in the sacrifice of the smaller retail accounts, both on and off premise, who if serviced at all by distributors, would be required to pay higher prices and their consumers would similarly be required to pay higher prices (Tr. 2207). While the initial immediate reaction to this might be price reductions as distributors of the same brand fought one another for the large retail accounts

in the given territory, once the blood bath was completed, it is very likely that prices would increase (Tr. 2208). The Alcoholic Beverage Control people fostered some of the state restrictions requiring exclusive territories (Tr. 2251). Even if beer packages could be marked to identify who sold the beer package to any particular retail account, this would be the extent of the monitoring of distributor activities that could be accomplished (Tr. 2290).

The Commission started its investigation in 1965 and filed its complaint in 1971. During this time a thorough investigation was conducted by the Commission. The Commission examined almost 30,000 sales representative reports and countless other documents (Tr. 2530). Complete cooperation of respondent is indicated by RX 700–763 and RX 1094–1107. This certainly doesn't indicate laches on the part of the government even if governmental agencies were subject to that doctrine.

Territorial Restrictions

There is no doubt whatsoever that the Adolph Coors Company unilaterally, vertically, imposes upon all of its distributors, territorial limitations within which the distributors have full responsibility for the sale, care, control, and market penetration responsibilities of Coors beer (Tr. 1081). The Adolph Coors Company restricts the territory in which its distributors are permitted to market because, among other things, each Coors distributor is required to solicit business from every retailer within the established trade area serviced by the distributor, which includes the provision of equal, normal, retailer services for all retailers desiring service in that trade area (RX 1047 F; Tr. 1536). Further, the care and control of the product demands territorial restrictions in that minimum stocks must be maintained at the retail level (Tr. 2879).

If distributors are not limited to territories, there is no way the brewery personnel can monitor a distributor's performance. Further, the only way Coors can guarantee delivery to the smaller retail accounts is by territorial restrictions, and the elimination of territorial restrictions would in time eliminate 75 percent of the retail accounts, which would be the smaller retail accounts and this is the backbone of the Coors marketing concept (Tr. 2891). The position of the Adolph Coors Company is not unique in this matter of territorial restrictions in that all major brands have territorial limitations (Tr. 1950, 2824, 2010) and in some instances, Coors merely acquiesces in territories the distributors

already have for some other brands (Tr. 1397). Even though representatives of the Adolph Coors Company have requested distributors to stop selling beer outside their territories (Tr. 710), some distributors have sold Coors beer outside their designated territories all the time they have been Coors' distributors (Tr. 1392, 1571, 1605).

The distributors themselves generally speaking have no desire to distribute beer other than in their own territories or responsibility (Tr. 445). There are many reasons for this, probably the first and foremost being that they don't have enough beer to take care of their own territories (Tr. 445). Another major reason given was that territorial limitations are necessary to properly penetrate the market and deliver quality merchandise (Tr. 562–563). The absence of territorial limitations would have a definite adverse effect on the qaulity control program of the Adolph Coors Company (Tr. 609). When beer finds its way outside of territories, there is no one in those areas to see to it that the product is subjected to quality control standards as established by the Adolph Coors Company (CX 203; Tr. 708). Quality control becomes a serious problem when beer is sold outside of the territory in which it is supposed to be marketed (Tr. 710). Representatives feel that it is a part of their job to track down beer that is not properly being taken care of (Tr. 711). Some distributors maintained that they wouldn't be a distributor unless they were the exclusive distributor because they wouldn't have control over the business in order to protect the quality of the product (Tr. 1897). Most distributors maintain that it isn't economically feasible to go outside of their territories anyway (Tr. 760).

Territories must be restricted in order to fulfill the stringent laws and regulations that apply to the liquor industry for the simple reason that if in fact law violations are reported with a particular brand it is easy to determine the guilty party (Tr. 2824). The Adolph Coors Company has a reputation for strict adherence to applicable laws which is even recognized by competition (Tr. 2808). Another reason for territorial restrictions is that of strict accountability for the distributor to the brewer concerning disribution of the product in a given area (Tr. 2826).

The Adolph Coors Company has experienced in times gone by two distributors operating in the same market and a chaotic condition resulted as far as the retail trade was concerned (Tr. 2510). It is an economic impossibility for distributors to compete with one another in the same brand (Tr. 2736, 2759). In some cases,

breweries define these territory restrictions as primary areas of responsibility, but as a practical matter this causes no change in operation since in truth and in fact the distributors do not go outside this area in order to market beer (Tr. 2010, 2241–2242). The elimination of territorial restrictions would practically destroy the beer industry (Tr. 2787).

Pricing

The philosophy of the Adolph Coors Company on pricing is that the brewery, distributor, and the retailer make a fair rate of return on their investment (Tr. 2885, 1083 and 2485). The pricing policy of the brewery is contained in their policy manual (CX 248 Z–104). Respondent has no resale price maintenance program and has not put that portion of the policy into effect because it has not chosen to do so (Tr. 1150–1151). Prices charged by the company to its distributors are uniform f.o.b. prices (Tr. 269). Price increases at the brewery have been held to a minimum in recent years, reflecting only increases in costs over which the respondent has no control (Tr. 1115).

Respondent has never made any price deal with any distributor or large franchise operator on a direct sale basis (Tr. 291). With the exception of Mr. Thurman, every witness for the Commission testified that all the Adolph Coors Company ever did was to suggest either prices or range of prices for the wholesalers and retailers of Coors beer and each individual distributor or retailer himself made the final decision as to what prices he would charge. Many distributors use as their original pricing the pricing of the former distributor (Tr. 379, 582). There is no policy of the respondent that requires distributors to have discussions with sales representatives prior to the adoption of any wholesale prices (Tr. 384, 600, 2015). Marketing representatives only suggest prices (Tr. 407, 630, 394; CX 1141). Distributors often do not adopt the prices suggested to them by Coors' representatives (Tr. 397). Distributors have no obligation to propose prices to the respondent before adopting them (Tr. 399). When distributors set prices they sometimes advise the respondent (Tr. 403, 580). Neither respondent nor any of its agents have ever threatened a distributor concerning pricing (Tr. 444, 1830). Representatives of the respondent never do anything other than suggest prices (Tr. 498). Representatives often tell distributors their prices are their own business (Tr. 506). Oftentimes distributors do not fol-

low brewery pricing recommendations (Tr. 456, 462, 465). Distributors maintain that they set their own prices and always have (Tr. 527, 560). Some distributors specifically refuse to adopt pricing suggestions made by Coors representatives (Tr. 539). Mr. Ward lowered his own prices in July of 1971, because of loss in sales (Tr. 536, 537). Mr. Cecil Scott observed that on the Friday and Saturday before he testified, a 6-pack of 12 ounce cans sold for as low as $1.09 and as high as $1.43 in San Angelo, Texas (Tr. 1842). Mr. Scott was accused of discounting by one of the Commission's witnesses, Mr. Polunsky, when in fact this was not true (Tr. 633). Many retailers threatened to quit Mr. Scott unless he started to discount (Tr. 634). Coors beer was sold in 70,612 retail accounts in 1966 and 76,848 accounts in 1970. Of all these accounts, the Commission could only locate two retailers who would testify concerning alleged price fixing on the retail level (Tr. 2561, 2557, 2558). Mr. Polunsky admitted to being upset with the Adolph Coors Company because they don't cut the price of beer (Tr. 937). He refuses to promote Coors beer for this reason (Tr. 930). Mr. Polunsky is so biased against the Adolph Coors Company that he won't push its product even if he makes more money on it than he does on Budweiser (Tr. 937). In instances where price cutting has been observed at the retail level, sales representatives have advised the distributor to merely suggest to the retailer that he make a fair rate of return on his investment (Tr. 2394–2395). Distributor organizations, not Coors personnel, make suggestions to the retailers (Tr. 667). Retailers who continually cut the price of respondent's product continue to receive it and sell it for whatever prices they choose (Tr. 671, 2395). Coors beer is widely and continually advertised at less than the suggested retail prices and these retailers are not cut off of their supply (Tr. 695, 699). Mr. Letcher, a Commission witness, was told that once he gets the beer it was his decision to do with it what he wanted (Tr. 837, 838, 840). Coors personnel do not dictate to retailers (Tr. 845). Retailers determine what their prices are going to be (Tr. 911). Retailers often ask distributors for advice on pricing (Tr. 1366).

Mr. Hemphill in testifying for the Commission stated that Mr. Eke was very diplomatic in making pricing suggestions to him and that is why he went along with Mr. Eke's suggestions (Tr. 1379, 1380). Mr. Thurman stated that the area representative gave him suggested retail prices (Tr. 1432). Mr. Tinetti, a witness for the Commission, refused to change prices when requested to

do so by agents of the respondent (Tr. 1540). Many states have price posting laws in which the manufacturer sets the retail and wholesale price of beer (Tr. 1554).

Central warehousing wouldn't do a thing to the price of beer in California because the manufacturer sets the retail price (Tr. 1633). Distributors do not have to clear price changes with the respondent in advance, they merely report changes to the company (Tr. 1085). Representatives and divisional managers of the respondent have been told that the distributor makes the final decision on his selling prices (Tr. 1096). Representatives have been told that all they should do is discuss and recommend in the area of pricing (Tr. 1098). No one at the Adolph Coors Company approves wholesale or retail prices (Tr. 1103). The respondent does not make price agreements (Tr. 1108). The respondent feels that retailers ought to make a reasonable mark-up (Tr. 1141). No retailer has ever been cut off because he didn't follow a suggested price (Tr. 1149). It is not the policy of the Adolph Coors Company to favor a uniform price at the retail level (Tr. 1151). Wholesalers set the wholesale pricing and make the final decision thereon (Tr. 1171). Discounting at either the manufacturer or wholesale level damages the quality of the beer and this practice has put more brewers out of business than any other marketing device, the reason being that over-age beer in the market place results from discounting (Tr. 2895). The final decision as to the distributor's price is what he himself determines and all the brewery people can do is discuss the matter with him and hope that he comes to a desirable conclusion (Tr. 1175). Sales representatives prepare the area marketing price data sheets and forward these to the brewery (Tr. 986). Prices contained on said sheets are merely average prices which are observed in the market place (Tr. 988, 1058). No sales representative has ever threatened a retailer with a beer shortage when discussing pricing (Tr. 1003). Distributors report to sales representatives what they are selling the beer for (Tr. 1056). Wide ranges of prices at the retail level exist (Tr. 2166, 2167). No agreements have been entered into by the respondent concerning pricing (Tr. 2104). Agents do not tell distributors to hold off on a price increase (Tr. 2115). No distributor, retailer, or any other person has ever been threatened by any representative of the Adolph Coors Company concerning pricing, territorial restrictions, exclusive draft accounts, central warehousing, and termination provisions or any other matter (Tr. 1771). Prices of Coors beer at both the wholesale and retail

level are widely scattered and publicly advertised as such throughout the entire eleven state Coors marketing area, except in price posting states and states where advertising of prices is prohibited by law. The variations shown in RX 1148 A through 1154 D and RX 524–699, except RX 649 are examples of these extreme variations (Tr. 2496). The Adolph Coors Company absorbs increased costs on the basis of greater productivity and they expect the distributors to do the same thing (Tr. 2921). Retailers are free to charge what they choose for Coors beer (Tr. 2617, 2623, 2628, 2496). No retailer that advertises Coors beer at less than the prevailing cost has been cut off from his supply (Tr. 2498). Price of beer to the general public will go up if central warehousing is permitted to flourish and sell to limited customers (Tr. 2753), Intrabrand competition will result in higher retail prices (Tr. 2761). The ability of the Adolph Coors Company to compete depends on quality and penetration (Tr. 2889).

Exclusive Draught Accounts

Draught beer, beer that is packaged and shipped in barrels and drawn as it is served to the consumer, is one of the various packages that the Adolph Coors Company produces (Tr. 559). Draught beer is a much more difficult package to handle that other packages and you have to know your business in handling draught beer (Tr. 1504). Draught beer is just as important as any other package (Tr. 432) and when you consider profits of a company you have to consider all packages together (Tr. 1824).

Cleanliness is a very serious problem as far as draught beer is concerned (Tr. 1543, 1504, 437, 746, 1850, 1866, 1975, 1976, 1977, 2615). Cleanliness is such a serious problem that even the glasses are a continual problem in the retail accounts and Coors representatives continually check glasses and report dirty glasses to the distributors (Tr. 545–46). The distributors have the responsibility of cleaning the draught accounts weekly and they assist the retail outlets in keeping the beer glasses clean (Tr. 1792).

Pressure is a constant problem with draught beer in that Coors beer draws at a higher pressure than other beer (Tr. 438). Substitution of brands is an extremely serious problem with draught beer (Tr. 1504, 561).

Draught beer has to be kept cold from the time it leaves the brewery until it is served (Tr. 1791). This is accomplished by

storing it in refrigerated warehouses and delivering it in refrigerated trucks (Tr. 433). When you permit it to get out of refrigeration, secondary fermentation takes place and that spoils the product (Tr. 1542). The Adolph Coors Company is very fanatical about the care of their refrigerated draught beer and a former distributor thinks that they are absolutely right in that respect (Tr. 1542). Rotation is also a critical problem with draught beer (Tr. 1542). The Adolph Coors Company has a draught beer school in which retailers are told how to care for draught beer, how to handle it, how to serve it, how to sell it, how to store it, and cleanliness (Tr. 2627).

Almost every witness that testified on the subject of split accounts stated that they had no policy against split accounts and in fact accounts were split in their territory (Tr. 413, 561, 609, 729, 1779, 1790, 1849, 1883, 1901, 1987, 2014, 1491). Mr. Ford, Oklahoma City, Oklahoma distributor, testified that the only accounts he didn't service, including draught beer accounts, were draught accounts serviced exclusively by competitors, such as Miller's and Budweiser, and that he serviced 95 percent of the retail accounts in his marketing area (Tr. 1978). In some instances sales representatives have actually encouraged distributors to take on split accounts (Tr. 2063; CX 287). Evidence of split accounts was so overwhelming that Commission counsel failed to introduce into evidence records subpoenaed by the Commission from various distributors which showed large numbers of Coors' accounts split with almost all various major brands. Only through insistence by respondent's counsel was this evidence forced into the record (Tr. 1358; RX 1108). Even though accounts do not have draught beer, or are split, they have other packages of Coors beer in those accounts (Tr. 636, 695, 1503). The Adolph Coors Company is not the only one that recognizes the hazard in split accounts, as all of its competitors likewise recognize the same hazard (Tr. 731).

Mr. Linn had split accounts in his territory as long as he could remember (Tr. 2401). There are split accounts throughout the State of Colorado (Tr. 2457). Mr. Hoge, a retailer in Las Vegas, Nevada, testified that he has four places in Las Vegas, the oldest place being 15 years old, the youngest being eight and all of them handle Coors, Schlitz, Michelob and Budweiser on tap and that no one from the Adolph Coors Company has ever demanded that they handle Coors on an exclusive basis (Tr. 2612, 2616). Mr.

Curry, the manager of the food and concession operation at Stapleton Field, Denver, Colorado, maintains that all of the bars out there are split with at least two beers and no member of the Coors' organization has ever demanded that those splits be eliminated (Tr. 2622). Mr. Stacio, a retailer from Dallas, Texas, operates a chain of pizza parlors and serves Coors and other brands in some of them (Tr. 2625). Mr. Stacio has attended the draught beer school in Golden, Colorado, sponsored by the respondent and never has been told to eliminate the split situation by an agent of the Adolph Coors Company (Tr. 2627).

Central Warehousing

Central warehousing for the purposes of this matter can be defined as actually a warehouse situation in which the retailer buys direct from either a brewer or distributor and takes delivery of the beer at the warehouse and then redelivers to the individual retail outlets, generally in its own trucks (Tr. 1220). Coors originally itself used the central warehouse system in distribution and discontinued it in Arizona because it was unsatisfactory (Tr. 1197). The Adolph Coors Company has determined that central warehousing has not worked for it and will not be used (RX 705 A). The Adolph Coors Company has recommended a goal to its distributors that they determine not to use central warehousing (RX 705 A). Coors has suggested that central warehousing is a very undesirable situation (Tr. 293). Coors' agents are extremely critical of central warehousing from a quality standpoint on the basis of rotation, refrigeration and those types of matters, and as to its failure when it was tried for a short time by the Adolph Coors Company (Tr. 2511). Central warehousing has an adverse effect on quality control (Tr. 2827).

Mr. Johnston's animosity toward the Adolph Coors Company is obvious in that he hopes the Adolph Coors Company loses its suit involving the Federal Trade Commission (Tr. 1209). Beverage Distributors, Inc. has been advised by the Adolph Coors Company, just as the company advises any other applicant for a distributorship that, when a situation presents itself in an area of their interest, they will be contacted by the Adolph Coors Company (RX 1146). B.D.I. cannot compete with regular beer wholesalers unless they buy at a better price than the regular beer wholesalers do (Tr. 1231, 2749). B.D.I. would only service large central warehouse accounts (Tr. 1243). In order for a central

warehouse program to be successful, it has to buy direct from the brewery (Tr. 1292). Beers that are bought for central warehousing other than private labels are a fairly insignificant portion of the California market (Tr. 1294). Cost savings shown in CX 2060 and CX 2030 A-E do not take into consideration the many services that the normal wholesaler performs that B.D.I. does not (Tr. 1252, 1284). When Miller and Anheuser-Busch were sold by B.D.I. through the central warehouse system, those two brands of beer sold for a higher price in the Safeway stores than did Coors, which was being delivered directly to the stores by the Coors distributors (Tr. 1255, 1256 and 1264).

If a retailer can't buy centrally warehoused products at a reduced price, he can't centrally warehouse them (Tr. 1627). A retailer with a central warehouse wouldn't take care of all accounts, but would sell to his own stores (Tr. 1629).

Distributors know that the responsibility for quality control is theirs, and they are unwilling to let anyone else assume that responsibility (Tr. 1794, 1795, 1984). A distributor with experience in central warehousing of a few years ago maintained that it wouldn't work because it was impractical, the distributor lost control over the product, couldn't rotate it, some stores would have twice the amount of beer they needed and others would be out and they didn't keep the beer under refrigeration (Tr. 1983). Central warehousing deals with the type of delivery, not customer restriction since Coors distributors serve all retail outlets (RX 1047 F, para. 8).

Termination Provisions

With only three terminations of distributors in the last 15 years (RX 753 A-C) it is obvious that the Adolph Coors Company enjoys great stability in its relations with distributors, and has rarely used its contractual termination powers.

The termination provision is mutual and either the brewery or the distributor can quit the other in the thirty days without cause (Tr. 1083). The company has never used a five and thirty day clause in the contract as a method of threatening distributors on the basis of prices, territorial restrictions, exclusive draft accounts or central warehousing or anything else (Tr. 2512, 2513). No distributor has ever been threatened with the termination provision as far as any allegations contained in the Federal Trade Commission's complaint are concerned (Tr. 2885). This fact was

confirmed by all witnesses with the possible exception of Mr. Thurman whose credibility is in serious doubt by the undersigned.

The above findings are very comprehensive and are the result of a careful analysis of almost 3000 pages of testimony and approximately 4000 exhibits. Matters of this magnitude seem to of necessity contain a certain number of mechanical errors but it is hoped these have been kept to a minimum.

In making these findings of fact the undersigned has considered the whole record in this matter. This of course includes both oral testimony and admitted documents. The undersigned carefully observed all witnesses as they testified, paying particular attention to their appearance and conduct on the witness stand, their intelligence, motives, state of mind, ability to observe, their relation to each side of the proceeding, the consistency of their testimony, and the circumstances under which they testified. This analysis and study have enabled the undersigned to judge credibility and give weight to the evidence in such a manner that this decision is supported by reliable, probative, and substantial evidence.

LEGAL ISSUES

A principal issue presented in this case is whether the territorial restrictions given to each Coors distributor in each distributorship agreement is a legal vertically imposed restriction under the Federal antitrust laws. It should be recognized at the outset that in one of the states in which Coors markets its beer, exclusive territories appear to be legally recognized and required. *Idaho Code,* Sec. 23–1003.

The Supreme Court held in *White Motor Company* v. *United States,* 372 U.S. 253 (1963) that the rule of reason is to be applied to antitrust cases involving vertical restraints as set forth in the cases of *Chicago Board of Trade* v. *United States,* 246 U.S. 231 (1919) and *Standard Oil Company* v. *United States,* 221 U.S. 1 (1910).

Following the *White Motor* decision came two decisions by Federal courts of appeals. In the first such decision, that of *Snap-On-Tools Corporation* v. *F.T.C.,* 321 F.2d 825 (7th Cir. 1963), the Federal Trade Commission challenged the company's distributorship system. Among other things, the Federal Trade Commission alleged that the company required that its dealers should resell "respondent's products only within the geographical

limits of the territory described in his agreement." 321 F.2d 827, N.2. The company argued to the court that its territorial exclusivity provisions were:

* * * not only reasonable, but that the effects of the practice are not significantly anticompetitive. 321 F.2d at 832.

The Court of Appeals for the Seventh Circuit upheld the territorial restrictions under the rule of reason referring to the following as key items justifying such territorial exclusivity:

* * * regular calls on customers, at the customer's places of business, by route salesmen or dealers, are essential. 321 F.2d at 828.

* * * * * * *

* * * frequent assistance and guidance to the customer in the use and application of the tools is necessary, as is regular and uninterrupted availability of service and replacement parts for the items supplied. 321 F.2d at 829.

* * * * * * *

The dealers are encouraged to call on every potential account in their territories, including industrial firms and the degree of their success is directly proportional to the thoroughness with which they cover the routes in their territories and the amount and quality of service they render their customers. 321 F.2d at 829.

The next circuit court case of importance following the *White Motor* case concerning vertical territorial restrictions was the case of *Sandura Company* v. *F.T.C.*, 339 F.2d 847 (6th Cir. 1964). In this case, the circuit court found that:

* * * Sandura assigned defined geographical areas to its various distributors and such areas became "closed territories" in the sense that each distributor was permitted to sell Sandura products only within his assigned territory and only to retail dealers located therein * * * We hold that (such does not violate Section 5 of the Federal Trade Commission Act.) 339 F.2d at 849.

The court of appeals in *Sandura* found that the company was failing economically and that in this background "some special inducement (was) necessary to attract distributors" for its products. 339 F.2d at 851. *Sandura* determined that the closed distributor territories were a significant part of the inducement needed to attract its distributors. The court of appeals in *Sandura* agreed that:

* * * Elimination of the closed territory arrangement would impair competition, rather than foster it. 339 F.2d at 859.

Then in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), a case involving horizontal restraints, the Supreme

Court *in dictum* considered the validity of vertically arranged territorial restrictions on the resale of commodities. In approaching a determination of the legal issues of the case, Justice Fortas writing for the Court stated as follows:

In *White Motor Co.* v. *United States,* 372 U.S. 253, 9 L.ed. 738, S.Ct. 696 (1963), this Court refused to affirm summary judgment against the manufacturer even though there were not only vertical restrictions as to territory and customer selection but also unlawful price fixing. The Court held that there was no showing that the price fixing was "an *integral* part of the whole distribution system," and accordingly it declined to outlaw the system because of the possibility that a trial laying bare "the economic and business stuff out of which these arrangements emerge" might demonstrate their reasonableness * * * So here we must look to the specifics of the challenged practices and their impact upon the market place in order to make a judgment as to whether the restraint is or is not "reasonable" in the special sense in which § 1 of the Sherman Act must be read for purposes of this inquiry. *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238 (1918); *Standard Oil Co.* v. *United States,* 221 U.S. 1, 51, (1911); Apex *Hosiery* v. *Leader,* 310 U.S. 469, 498 (1940).

In *Schwinn,* the Court approached the legal issues involved from the standpoint of the decision in *White Motor* and the "rule of reason." The Court went on to hold that the consignment sales system used by Schwinn was not a *per se* violation of the Sherman Act. However, Justice Fortas *in dictum,* since the issue was not before him, commented on the contrasting situation where there is an outright sale of products:

As the District Court held, where a manufacturer *sells* products to his distributor subject to territorial restrictions upon resale, a *per se* violation of the Sherman Act results. 388 U.S. at 379.

Federal Appellate Courts considering that issue subsequent to the *Schwinn* decision do not agree with complaint counsel's contention here that *Schwinn* provides a blanket *per se* rule against vertically imposed territorial restraints. In *Janel Sales Corp* v. *Lanvin Parfumes, Inc.,* 396 F.2d 398 (2d Cir. 1968), plaintiffs in a treble damage suit argued that a customer limitation clause in the agreement entered into by the defendant with others was a *per se* violation of the Sherman Act on the basis of *Schwinn.* The court of appeals held:

* * * The existence of such a contractual clause does not necessarily imply a *per se* violation. In (Schwinn) the Supreme Court premised its finding of a *per se* violation on the fact that Schwinn has been "firm and resolute" in insisting on compliance. Here the evidence is conflicting on that issue. 396 F.2d at 406.

And in *Tripoli Company, Inc.* v. *Wella Corp.*, 425 F.2d 932 (3rd Cir. 1970), the Appellate Court held that:

It is clear that not all restraints in a system of distribution fall into the per se category. *United States* v. *Arnold, Schwinn & Co., supra; White Motor Co.*, v. *United States*, 372 U.S. 253, 83 S.Ct. 696, 9 L.ed 2d 738 (1963). Those condemned in Schwinn as *per se* violations were post-sale restrictions on the territory in which or the retailers to whom a wholesaler could resell. That case does not, as plaintiff proposes, establish as a per se violation every attempt by a manufacturer to restrict the persons to whom a wholesaler may resell any product whatsoever, title to which has left the manufacturer. Rather, *Schwinn* must be read, as must all antitrust cases, in its factual context. The context is a restraint on the territories in which and retailers to whom a wholesale purchaser may resell a bicycle, a product so simple in use that most ultimate consumers are children. No considerations other than marketing and competition were advanced in Schwinn as justifications for the restraint. 425 F.2d at 936.

In *Carter-Wallace, Inc.* v. *United States*, 449 F.2d 1374 (Ct. Claims 1971), the Court cited and followed *Tripoli Co.* v. *Wella Corp., supra,* concluding that:

In *Schwinn* the Supreme Court "did not automatically outlaw any and all post-sale restrictions". Indeed, the restrictions in *Tripoli* were much stronger and more burdensome than readily avoidable limitation involved here. 449 F.2d at 1380.

More recently, in the case of *Anderson* v. *American Automobile Association,* 454 F.2d 1240 (9th Cir. 1972) the Court held, concerning towing service contracts between the AAA and a number of towing services assigning exclusive territories within which the services were permitted to operate, on a take-it-or-leave-it basis:

We view the restrictive arrangements as solely the product of vertical agreements between the association and the individual contract stations as to which the rule of reason is applicable, [citing *White Motor*, supra].

* * * * * * *

The contractual arrangement is not *per se* or *prima facie* illegal (citing *Schwinn,* 399 U.S. at 375) 454 F.2d at 1246.

In its recent decision in *United States* v. *Topco Associates, Inc.*, 5 CCH Trade Reg. Rep. 73,904 p. 91,746 (U.S. S.Ct. 1972) the Supreme Court had before it a horizontally arranged system of territorial restrictions on the resale of private brand groceries. The Department of Justice had asserted in a trial to the Federal District Court that such territorial restraints, horizontally induced were *per se* violations under the *Schwinn* doctrine, *U.S.* v.

Topco, Inc., F.Supp., 319 Supp. 1031 (N.D. Ill. 1970). The Federal Trial Court held, however, that such horizontally induced territorial restraints were pro competitive and valid under the Federal Antitrust Laws.

The Supreme Court adopted the distinction between vertical and horizontal territorial restraints, and held that such horizontally imposed territorial restraints were *per se* violations of Section 1 of the Sherman Act, 15 U.S.C. Sec. 1. The Court held:

It is only after considerable experience with certain business relationships that Courts classify them as *per se* violations of the Sherman Act * * * One of the classic examples of a *per se* violation of Section 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Such concerted action is usually termed a "horizontal", in contradistinction to combinations of persons of different levels of the market structure, e.g., manufacturers and distributors which are termed "vertical" restraints. This Court has reiterated time and time again that "horizontal territorial" limitations * * * are naked restraints of trade with no purpose except stifling of competition." 5CCH Trade Reg. Rep. at P. 91,751

The Court simply held that "it is clear" that the territorial restraint in that case is a "horizontal one" and therefore a "per se" violation of Section 1 of the Sherman Act.

The Court in *Topco* merely followed the decision in *United States* v. *Sealy,* 388 U.S. 350 (1967) to apply a well established, if narrow, "classic" exception to the rule of reason announced in *Northern Pacific R.R. Co.* v. *United States,* 356 U.S. 1, (1958). This classic violation referred to by the Court was the horizontal allocation of territories, which it pointed out in *Topco* must be distinguished from vertical territorial restraints.

Mr. Chief Justice Burger, however, would consider abandoning the "classic" rule against horizontally imposed restraints which did not involve:

restraints on interbrand competition or an allocation of markets by an association with a monopoly or near-monopoly control of the sources of supply of one or more varieties of staple goods. 5 CCH Trade Reg. Rep. p. 91,753.

Mr. Chief Justice Burger emphasized that horizontal restraints on the facts of that case would increase interbrand competition, and to prohibit that competition would result in a major clash of an antitrust policy:

In the face of the District Court's well supported findings that the effects of such a rule in this case will be adverse to the public welfare, the Court lays down that rule without regard to the impact which the condemned practices

may have on the competition. In doing so, the Court virtually invites Congress to undertake to determine that impact. 5 CCH Trade Reg. Rep. at 91,756.

The Federal Trade Commission staff has recognized in the Report of Ad Hoc Committee On Franchising issued June 2, 1969, that the *Schwinn* case is not a *per se* rule case. In that report (RX 1080), Federal Trade Commission staff representatives concluded that *Schwinn* does not stand for the flat *per se* rule contended for here by counsel supporting the complaint. In that report it was concluded that:

> * * * in *Schwinn,* the Court left enough leeway in its initial threshold test of the overall reasonableness of vertical arrangements to enable a manufacturer to justify such an arrangement by establishing that it could not have entered the market or expanded its market share because of the impossibility of obtaining dealers willing to handle its products without some territorial protection, and by showing its inability to finance an effective agency—consignment arrangement. (RX 1080, p. 30)

The record is clear that the Adolph Coors Company must have territorial restrictions to survive and stay in the beer industry, and is precluded by Federal and State Statutes from using consignment sales. See *infra.*

The Federal Trade Commission, itself, has not read the *Schwinn* decision as an absolute *per se* rule involving vertical territorial restrictions. Indeed, as recently as 1971 the Federal Trade Commission adopted the undersigned's decision, holding that it was an unfair trade practice under Section 5 of the Federal Trade Commission Act for a franchisor to misrepresent that a franchisee would be granted an exclusive territory in which to locate and sell products purchased from the franchisor, and promising a written agreement with a description of the size and limits of the exclusive territory so granted by the franchisor, unless in fact such exclusive territory was granted in writing as represented. *In Re Universal Electronics Corporation, Inc., and Wendell Coker,* Docket No. 8815, 1970, 3 UCC Trade Reg. Rep. 19,390, p. 21,515; adopted FTC, 3 UCC Trade Reg. Rep. 19,479, p. 21,556 (1971) [78 F.T.C. 265]; Reh. den., 3 UCC Trade Reg. Rep. 19,595, p. 21,632 (1971) [78 F.T.C. 1576]. This reflects a long standing policy of the Federal Trade Commission authorizing and enforcing vertically imposed exclusive sales territories in the distribution of goods and services, *e.g., In Re Coradio, Inc.,* Dkt. No. 5717, 47 F.T.C. 311 (1949); *In Re Sterling Materials Co., Inc.,* Dkt. No. 6426, 52 F.T.C. 909 (1955).

The territorial restrictions used by Coors are essential to obtain the market penetration and quality control standards required for Coors to maintain its hard-won competitive position and to stay in the highly competitive brewing and beer distribution industry. Further, such restrictions are required for Coors to obtain competent distributors for its beer. Not only are the Coors distribution practices and procedures involving territorial restrictions upon resale of Coors beer necessary, they are pro-competitive from the standpoint of interbrand competition in the sale of beer. The dominion and control which Coors exercises over its beer, to protect the value of its trademark and the quality of its product, requires the imposition of the territorial restriction contained in its distributor contracts. This dominion and control results in a reduced risk of loss to the Adolph Coors Company.

It appears to the undersigned that the very recent case of *LaFortune* v. *Ebie,* 5 CCH Trade Reg. Rep. 74,090, p. 92,484 (Calif. Ct. App. 1972) correctly analyzes *White Motor, Schwinn* and *Topco, supra,* and when in citing from *Topco* the Court stated:

The Court differentiated between horizontal territorial limitations, which it declared to be automatic antitrust violation, and vertical territorial limitations, whose validity remains subject to a rule of reason 92,486.

The Court in *LaFortune* concluded its opinion by stating:

Consequently, the restraint of trade is susceptible to justification under the rule of reason. It is possible that relevant factual distinctions between the food service industry and the bicycle industry in *Schwinn* may justify exclusivity of territory for delivery of product. For example, speed of delivery quality of product, and condition of product at time of delivery may be factors which under the rule of reason could justify restraints of trade that would be unreasonable in the marketing of a standardized manufactured appliance. . . . these issues cannot be resolved on appeal, and opportunity to present and develop them can only be provided in a new trial. 92,486.

From time to time the Adolph Coors Company through its sales representatives has suggested and discussed wholesale pricing with certain of its distributors. When retail pricing is suggested to retailers, Coors distributors almost without exception themselves recommend such pricing to their retail accounts. And, as stated in the findings, on occasions sales representatives of the Adolph Coors Company have recommended to retail accounts who are selling Coors beer below prevailing prices or cost that the Adolph Coors Company preferred to see the retailers sell Coors beer at a reasonable profit. At no time did the Adolph Coors Com-

pany threaten or coerce a retailer or Coors distributor in an effort to seek adherence to any suggested wholesale prices; nor is there any uniform adherence in fact to any wholesale or retail pricing suggestions of the Adolph Coors Company.

Coors, in the pricing area, whether at the wholesale or retail level, sought to persuade that price cutting to combat other price cutting in the industry is a foolish and unwise practice. Industry price cutting, initiated by manufacturers (brewers) is of questionable legality when brewers condition a price reduction, in whatever form, to their distributor and/or retailers in return for that distributor's or retailer's agreement to reduce price. Typically retailers do not cut prices unless receiving allowances from distributors, and distributors do not reduce prices to retailers unless the brewer has reduced its price to the distributors. These price reductions are called "price promotions" and have been held to be illegal. *Pearl Brewing Co.* v. *Anheuser-Busch, Inc.*, 5 CCH Trade Reg. Rep. 73,852, p. 91,575 (S.D. Tex. 1972). That court concluded in declaring the practice unlawful as price fixing banned by Section 1 of the Sherman Act:

It is apparent from the voluminous records and testimony that the pricing independence of * * * wholesale distributors has been tampered with and consequently restricted. It is also apparent that the respective price promotions conducted by [Brewers] are extremely well-planned sales promotion programs which are created and conducted for the purpose of securing an increasingly larger share of the Texas beer market. Thus, the economic intentions and motives of [Brewers] are properly considered in such a light and not merely as efforts aimed at meeting existing competition in the marketplace. It is even more apparent after scrutiny of the many brewery price promotion forms which were submitted at the hearing that [Brewers] view price promotions primarily in terms of the price at which the beer is to be sold to retailers. Additionally, the resulting prices to wholesale distributors and to retailers, all of which are contained in the price promotion forms, possess no consistent relationship to the supply and demand in the marketplace. At 91,584.

The lead antitrust cases over the last sixty years, *e.g., Dr. Miles Medical Company* v. *John D. Park & Sons Company,* 220 U.S. 373 (1911); *United States* v. *Colgate and Company,* 250 U.S. 300 (1919); *United States* v. *A. Schroder's Son, Inc.,* 252 U.S. 85 (1920); *Federal Trade Commission* v. *Beech-Nut Packing Company,* 257 U.S. 441 (1922); *United States* v. *Bausch and Lomb Optical Company,* 321 U.S. 707 (1944); *United States* v. *Parke, Davis & Company,* 362 U.S. 29 (1960), clearly indicate that a manufacturer may announce his policy, may discuss his policy

with customers depending finally upon their voluntary acquiescence in the suggested policy and that such conduct is lawful under the antitrust laws of the United States. It is when the manufacturer goes beyond the announcement of his policy and discussion of same on its own merits, and through coercive devices seeks or secures adherence to its policy, that a violation of the antitrust laws is made. As the Supreme Court stated in *United States* v. *Parke, Davis and Company, supra,* 362 U.S. 46–47:

> * * * if a manufacturer is unwilling to rely on individual self interest to bring about general voluntary acquiescence which has the collateral effect of eliminating price competition, and takes affirmative action to achieve uniform adherence by inducing each customer to adhere to avoid such price competition, the customers' acquiescence is not then a matter of individual free choice promoted alone by the desirability of the product. 362 U.S. 46–47.

The absence of coercive conduct, enforced adherence, and the presence of voluntary acquiescence in Coors' suggestion by distributors and retailers, with significant pricing variation by other distributors and innumerable retailers without retaliation by Coors, clearly distinguishes the Coors policies and practices from that held illegal under the antitrust laws.

Moreover, in the face of some 70,000 retail accounts serviced routinely by all Coors distributors in the 11 state market territory, the Federal Trade Commission has sought to introduce the testimony of only two to support a finding of coercive retail price fixing by the Adolph Coors Company. Both instances of such alleged price fixing occurred years prior to the filing of the action by the F.T.C. herein. See in this connection *United States* v. *Hudnut* 8. F.2d 1010 (S.D. New York 1925) and *United States* v. *Uniroyal, Inc.,* 300 F. Supp. 84 (S.D. New York 1969).

The termination by Coors of three distributors in 15 years where ample cause existed for such terminations, is similar to what the trial court in the *Schwinn case* specifically emphasized (which decision on this point was not appealed from by the Federal Government:

> This court is convinced and the record of the evidence shows that the defendant Schwinn devoutly hoped that its retail franchisees would hew close to the suggested price list, but it also shows that, whatever some officer or representative may have said or written, when retailers met competition in interbrand or even intrabrand bicycles, no action was taken by Schwinn or any of the distributors or agents of either. No one was refused bicycles and no franchises canceled. Price cutting was no doubt a factor in some cases where franchises of dealers in fair trade states were canceled, but in each case of

franchise cancellation in evidence there was shown to be a more potent reason, and generally there were several other good and sufficient grounds for the cancellation. *United States* v. *Arnold, Schwinn & Co.*, 237 F. Supp. 323, 331–32 (N.S. Ill. 1965).

Complaint counsel allege that the termination provisions in the distributorship contracts between the Adolph Coors Company and its distributors are unlawful. The generally accepted view is to the contrary. Professor Corbin states that:

A power to terminate in case performance is not satisfactory may be expressly reserved without invalidating the contract, whether the satisfactoriness is to be determined by a party to the contract, by his engineer, or by a stranger. *6 Corbin on Contracts* (1962) 1266, at pp. 65–66.

Applications of these familiar legal principals are *Ricchetti* v. *Meister Brau, Inc.*, 431 F.2d 1211 (9th Cir. 1970), *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *Quinn* v. *Mobil Oil Company*, 375 F.2d 273 (1st Cir. 1967), *Amplex of Maryland, Inc.* v. *Outboard Marine Corp.*, 380 F.2d 112 (1967), *Klein* v. *American Luggage Works*, 323 F.2d 787 (3rd Cir. 1963), and more recently *Cartrade, Inc.* v. *Ford Dealers Advertising Assoc. of So. Calif.*, 446 F.2d 289 (9th Cir. 1971) and *Bushie* v. *Stenocord*, 5 CCH Trade Reg. Rep. 73,896, p. 91,717 (9th Cir. 1972) where the court stated:

It is well settled that a manufacturer may discontinue dealings with a particular distributor "for business reasons which are sufficient to the manufacturer * * *" 5 CCH Trade Reg. Rep. at 91, 718.

and:

Nor does the fact that Bushie presented evidence that he had been a good dealer for Stenocord tend to show that Steoncord cancelled his dealership with an intent to restrain trade. 5 CCH Trade Reg. Rep. at 91,719.

Congress enacted the Federal Alcohol Administration Act, precluding *consignment* sales in the distribution of alcoholic beverages, 27 *U.S.C.A.* 205 (f), provided that states follow-up by enacting similar restrictions, 27 *U.S.C.A.* 205 (f). Only one (Nevada) of the eleven states in which Coors beer is sold has failed to ban consignment sales or related financing arrangements in the distribution of beer.

Arizona	*Ariz. Rev. Stat. Ann.* 4–243 (2) (1956)
California	*Cal. Bus. & Prof. Code* 25500, 25501, 25502, 25503, 25505 (West Supp. 1971)

Colorado	*Colo. Rev. Stat. Ann.* 1963 75–1–8; 75–2–15 (1) (a), (b) (Supp. 1969)
Idaho	*Idaho Code* 23–1031, 23–911, 23–912 (1968)
Kansas	*Kan. Stat. Ann.* 41–704 (1964)
New Mexico	*N.M. Stat. Ann.* 46–9–8(b) (1953)
Oklahoma	*Okla. Al. Bev. Cont. Bd., Rules & Regulations* Art. 3, Sec. 11, Sec. 12.
Texas	*Tex. Penal Code* Art. 666–3 (a) (2) 666–53, 667–24 (1952)
Utah	*Regulations, Utah Liq. Cont. Comm.*, regulation No. 7
Wyoming	*Wyo. Stat. Ann.* 12–22, 23 (1957)

Nothing in the Twenty-First Amendment exempts the conduct of respondent from action by the Commission. In *United States* v. *Frankfort Distilleries,* 324 U.S. 293 (1945), the Court held that the Twenty-First Amendment did not of itself, bar a prosecution under the Sherman Act of producers, wholesalers, and retailers charged with conspiring to fix and maintain retail prices of alcoholic beverages in Colorado. Accordingly, there is no foundation or justification for respondent's conclusion that the Twenty-First Amendment bars any action by the Federal Trade Commission. Of course, this does not affect the operation of Federal and State "fair trade" legislation.

The Supreme Court has said that "as a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest." *Utah Power & Light Co.* v. *United States,* 243 U.S. 389 (1917). See also, *United States* v. *Reading Co.,* 226 U.S. 325 (1912).

The complaint alleges and respondent denies that respondent and respondent's unfair methods of competition and unfair acts and practices are "in commerce" as "commerce" is defined in the Federal Trade Commission Act.

The operation of respondent's business and its acts and practices provide a firm basis for concluding that respondent's acts and practices are "in commerce." Although the beer is sold f.o.b. Golden, Colorado, respondent schedules beer shipments and ships its beer to distributors located in ten other states. Respondent has sales representatives traveling throughout its 11 state area and monitoring its distributors.

Respondent has admitted that it operates "in commerce." To the U.S. District Court for the Northern District of California, respondent has stated that it does business in California and sells beer in interstate commerce (CX 354A). In obtaining licenses to transact businesses in various states, respondent admits to doing business in those states. Clearly, therefore, respondent is "in commerce" for the purpose of this proceeding.

CONCLUSIONS

1. The territorial restrictions vertically imposed by the respondent upon its distributors, are reasonable and essential to achieve market penetration and quality control, the factors that enable the respondent to stay in and survive in the highly competitive beer industry, thereby promoting vigorous inter-brand competition. This conduct on the part of the respondent does not violate Section 5 of the Federal Trade Commission Act.

2. Respondent's conduct and activities in suggesting wholesale prices or ranges of prices to its distributors, and on isolated occasions retail prices, are not agreements, are not accompanied by refusals to deal or by threats, coercion, or intimidations of any kind, depend upon voluntary acquiescence, and are not uniformly followed. This conduct on the part of the respondent does not violate Section 5 of the Federal Trade Commission Act.

3. Respondent, in the sale of its draft beer, either by itself, through its distributors, or in combination with its distributors, does not sell its draft beer upon the condition that said beer shall be sold by the particular outlet to the exclusion of all other brands of draft beer. This conduct on the part of the respondent does not violate Section 5 of the Federal Trade Commission Act.

4. Respondent's refusal to sell to central warehouse accounts, and its recommendation to its distributors that they also refuse to sell to said accounts, using instead direct delivery just as they use with all other retail outlets, is not accompanied by threats, coercion, or intimidation of any kind, is not a customer restriction, and is reasonable so as to protect the quality and image of its product. This conduct on the part of the respondent does not violate Section 5 of the Federal Trade Commission Act.

5. The termination provisions of respondent and its distributors based upon their contractual obligations, are a matter of private contract, not subject to interference by third parties, are reason-

able, and have never been used by the respondent to force unlawful conduct. All terminations of distributors by the respondent have been for legal cause, based upon good and sufficient grounds in accordance with the distribution contract. This conduct on the part of the respondent does not violate Section 5 of the Federal Trade Commission Act.

6. The conduct of the respondent as shown by the evidence is reasonable, pro-competitive, and not in violation of Section 5 of the Federal Trade Commission Act.

7. Respondent is "in commerce" as defined by the Federal Trade Commission Act.

8. The Twenty-First Amendment to the Constitution of the United States of America does not give the individual sovereign states the exclusive authority and regulation concerning intoxicating liquors therein.

9. The Federal Trade Commission conducted its investigation, filed the complaint, and prosecuted the action with diligence.

10. The Commission's attempted interference with respondent's distribution contracts in the areas of central warehousing, territorial restrictions, and termination provisions, if successful, would violate respondent's liberty and property rights as guaranteed by the Fifth Amendment to the Constitution of the United States of America.

11. Commission counsel have not established by the preponderance of the reliable and probative evidence the allegations of the complaint set forth at the beginning of this initial decision.

ORDER

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

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

I. BACKGROUND

The complaint in this matter charges that respondent has engaged in unfair methods of competition and unfair acts and practices in commerce to control the sale and distribution of Coors beer. After extensive hearings, the administrative law judge rendered his initial decision in which he ordered the complaint

dismissed. Complaint counsel have appealed.[1]

The following facts are essentially undisputed. Respondent Adolph Coors Company (hereinafter sometimes referred to as Coors) is a Colorado corporation engaged in the brewing, distribution and sale of beer bearing the trade name Coors. Its headquarters and only brewery are located in Golden, Colorado. Its gross sales in 1969, 1970 and 1971 were $270 million, $300 million and $350 million, respectively. In 1968 Coors ranked fifth nationally in the volume of beer sold in the United States, and in 1969, 1970 and 1971 it ranked fourth.

Respondent's beer is marketed in the States of Oklahoma, Kansas, Wyoming, Colorado, New Mexico, Arizona, Utah, Idaho, Nevada, California and Texas. This eleven state area accounted for 21½ percent of the total U.S. beer consumption in 1970. (RX 1173G)[2] Respondent ranks first in the sale in ten of these states and in its entire marketing area the average Coors market share is about 40 percent. On the average, Coors has about 2½ times the market share of its nearest competitor in this area. (Tr. 2887) The top four firms accounted for 64.3 percent of all beer sales in this market in 1970. On a state-by-state basis, in 1970, the four firm concentration ratio exceeded 80 percent in seven of the eleven states. (CX 2186, 2187)

Coors beer is marketed through 167 distributors. One hundred sixty-six of these distributors are independently owned and one, the Denver distributor, is a wholly-owned subsidiary of respondent.

Respondent's marketing department establishes the price for Coors beer. All beer is sold at the same price to all distributors f.o.b. Golden, Colorado, and this brewery price is communicated directly to the distributors at the time it is established. The distributor arranges for the transportation of the beer from the brewery and pays all freight bills directly to the carrier. However, the distributor does not place orders with the brewery. The beer is sent to him by the brewery based upon the distributor's

[1] The Small Business Administration has also filed a brief on this appeal.

[2] The following abbreviations will be used throughout:

RX —Respondent's Exhibit
CX —Commission Exhibit
I.D. —Initial Decision
Tr. —Transcript of Hearings
RPF—Respondent's Proposed Findings
CPF—Complaint Counsel's Proposed Findings
CB —Complaint Counsel's Appeal Brief
RB —Respondent's Appeal Brief

withdrawals from his warehouse. Respondent exercises complete control over the distributor's inventory. As William Coors, the president, chairman of the board, and chief executive officer of respondent testified:

We exercise inventory control over our distributors. They have no say as to what their inventories are going to be. We tell them the possible maximum inventory they may have at any one given time of the year, but whether we get that much beer in there or not is our affair, not theirs, because we have to work in and out of their inventories. (Tr. 2874)

Respondent enters into written contracts with all of its distributors and each contract contains a clause specifying a certain limited area in which the distributor may sell Coors beer. The contract specifically provides that "While this agreement is in effect, the Distributor will conduct the business of the wholesale distribution of Coors beer in the above territory only." (CX 351B, 352B)

Respondent also includes in its contracts with distributors a clause providing for cancellation of the agreement (a) by respondent, for breach of the agreement by the distributor on five days' notice to the distributor, and (b) by either party, without cause, upon giving thirty days' notice. (CX 351, 352)

II. THE INITIAL DECISION

The complaint alleges (1) that respondent has fixed and controlled the prices at which its distributors and retailers sell Coors beer; (2) that it has imposed territorial restrictions on its distributors; (3) that it has joined with its distributors to have Coors beer sold as the only light draft beer in taverns; (4) that it has prohibited its distributors from selling to central warehouse accounts; and (5) that it has included thirty and five day cancellation periods in all of its distributor contracts and restrained its distributors from freely selling their distributorships to purchasers of their own choosing and at prices freely determined by the seller and the buyer.

The administrative law judge ruled that complaint counsel had failed to establish by a preponderance of the evidence that respondent had engaged in any unlawful practices and further held, *inter alia*, that the conduct of respondent was shown to be both reasonable and pro-competitive and that the Commission's attempted interference with respondent's distribution contracts in the areas of central warehousing, territorial restrictions, and

termination provisions, if successful, would violate respondent's liberty and property rights as guaranteed by the Fifth Amendment of the Constitution.

We find from a review of the initial decision that the administrative law judge relied to an extraordinary degree upon the proposed findings and conclusions of law submitted by respondent. We are, indeed, unable to ascertain from the initial decision whether the administrative law judge had any views distinguishable from those of respondent on any of the major issues in this case. He may well have based his initial decision upon a consideration of the whole record as required by Section 3.51(b) of the Commission's Rules of Practice but, if he did, it is not apparent from the initial decision itself. Our own review of the record discloses that the analyses of the testimony of certain key witnesses contained in the initial decision bear little resemblance to what these witnesses actually said. The findings of fact are based to a considerable extent on bits and pieces of unsupported and self-serving testimony, much of which is contradicted by documentary evidence. Most critically, it appears that much of the evidence relied upon by complaint counsel is simply ignored. The initial decision thus presents a distorted view of the record and is of little assistance to the Commission in resolving the issues raised in this appeal. The findings of fact and conclusions of law, as set forth in this opinion, will thus be substituted for those contained in the initial decision.

III. PRICE FIXING

A. *Background*

Respondent's pricing philosophy is spelled out in the "Coors Policy Manual" and in the testimony and statements of Coors officials. Basically, this philosophy is that the brewer, the distributor, and the retailer should sell Coors beer at prices which will provide them a fair return on their investments. (Tr. 2885) According to the Coors policy manual (in effect from 1965 to June 1970) the "Coors pricing policy" applicable to wholesale and retail prices is that:

In order to maintain a successful wholesale or retail business, pricing integrity is essential. Pricing integrity will result in an adequate and equitable profit to both distributor and retailer and is fair to the ultimate consumer.

It is the policy of the Adolph Coors Company to suggest, if it so chooses, to either the wholesaler or retailer level, suggested minimum pricing. We re-

serve the right to further that policy by simply refusing to deal with anyone who doesn't adhere to such policy.

The Adolph Coors Company and its agents must only state the policy. They cannot make agreements, threaten, coerce, or intimidate wholesalers or intimidate wholesalers or retailers in any manner. They can enforce the policy only by reserving the right to refuse to deal with those who don't adhere to the suggested prices. (CX 348Z–104, 105)[3]

It is Coors' position that the company must exercise some control over the price at which distributors sell in order to guarantee the company its share of the market. (Tr. 2890) There is also a Coors policy against giving deals to its distributors and, insofar as possible, a policy to discourage distributors from giving deals or discounts to their customers. (Tr. 2895–96) Moreover, it is the company policy that distributors should not pass on any cost savings they may realize in servicing retail accounts and, in fact, the distributors' prices to retailers do not reflect such cost savings. (Tr. 2887–88)

The Coors policy manual also makes clear that the company regards as extremely vital any information which Coors representatives can provide concerning the prices at which Coors beer is sold. The manual specifically states, in this connection, that "The Representative will keep the Golden Sales Office informed at all times, on forms provided or by any other written means applicable, of all updated price changes and price information, both wholesale and retail." (RX 1047Z–108) The Coors sales representatives are thus required to report both wholesale and retail prices. Distributors are also required to notify Coors of proposed price changes. (Tr. 1153) These reports are reviewed by company officials in Golden and when prices are found to be out of line a Coors official contacts the division manager who instructs the Coors area sales representative to discuss the matter with the distributor. (Tr. 1144–45) Distributors are also required to monitor and report retail prices (Tr. 1138–41 and, if the retail price is too high or too low, they are expected to persuade the retailer to bring it back in line with Coors suggested price. (Tr. 1142)

The Coors pricing philosophy is further reflected in the following summary of comments made by Harvey Gorman, respondent's sales manager:

We feel we must continue to keep control of our product. We feel we must

[3] The quoted portions of the Policy Manual were amended in 1970, subsequent to notification to Coors that price fixing matters were being considered by Commission investigating attorneys. (RX 1047X)

have an agreement on prices of our product with our distributors looking at the whole future picture. We do have the right to control our product *by agreeing individually with each distributor* (emphasis in original). (CX 382B)[4]

The record also contains testimony of a distributor to the effect that it was his understanding of the Coors pricing philosophy that he should be in agreement with Coors on his selling price (Tr. 461–62), and evidence of another distributor's irritation at Coors "dictating" pricing to distributors. (CX 383)[5]

B. *Wholesale Price-Fixing*

We will consider first the charge that respondent has fixed and controlled the wholesale prices at which its distributors sell Coors beer. We note at the outset that there appears to be less disagreement between counsel as to the facts relating to contacts and communications between respondent and its distributors concerning the latter's pricing of Coors beer than there is with respect to the words which should be used to describe or characterize this relationship and the law governing it. Complaint counsel speak of "price negotiation," "combinations," "agreements" and "price maintenance," while respondent prefers to use such terms as "discussions," "suggested prices," "voluntary acquiescense," "independent decisions" and "pricing integrity."

Respondent readily concedes that its sales representatives discuss with Coors distributors the prices at which Coors beer will be sold to retailers and that the representatives suggest prices or ranges of prices at which the beer should be sold. It is respondent's position that the law does not prohibit a manufacturer from securing the "voluntary acquiescence" of its customers in prices which it may suggest by announcing its pricing policy and discussing this policy with its customers. According to respondent,

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[4] Respondent attempts to explain this statement by contending that the reference to an agreement on price concerns the price the brewery charges the distributor rather than the price at which Coors beer is sold by the distributor. In other words, respondent would have us believe that it agrees with each distributor individually on the price that it will charge the distributor for Coors beer. This explanation, however, is contradicted by respondent's proposed finding that Coors' marketing department establishes the price for Coors beer; that all beer is sold at the same price to all distributors; and that these prices are communicated to the distributors when they have been established. (RPF 135) The record is devoid of any evidence which would indicate that distributors have anything whatsoever to say about Coors' brewery prices.

[5] Respondent contends that this distributor was talking about Coors' brewery price and not its attempt to control the wholesale price. Here again respondent's argument is inconsistent with the record evidence. The document in question shows clearly that this distributor was referring to Coors' refusal to permit him to increase his own price 5 cents.

"It is only when the manufacturer goes beyond the announcement of his policy and discussion of same on his [sic] own merits and through coercive devices secures adherence to its policy, then a violation of the antitrust laws including Section 5 of the Federal Trade Commission Act is made." (RPF 105) Respondent further contends that it has never threatened or coerced a distributor in any respect regarding prices.

We believe respondent is wrong with respect to both the law and the facts. Vertical price fixing agreements are unlawful whether entered into voluntarily or as a result of coercion, *Dr. Miles Co.* v. *John D. Parke & Sons Co.*, 220 U.S. 373 (1911); *Albrecht* v. *Herald Co.*, 390 U.S. 145, 151 (1968); *Pearl Brewing Co.* v. *Anheuser-Busch, Inc.*, 339 F. Supp. 945, 955 (S.D. Tex. 1972), and the record conclusively establishes the existence of price fixing agreements between respondent and its distributors, both voluntary and coerced.

There is ample evidence in the record to demonstrate respondent's superior economic power *vis-a-vis* its distributors. The fact that respondent has on file the names of 7,000 persons who are interested in becoming Coors distributors (Tr. 2477–78) and the further fact that respondent can terminate a distributor on 30 days' notice without cause, in themselves support this conclusion. We note, in this connection, that respondent's policy manual in use prior to the initiation of this proceeding states that the business practices of a distributor which do not agree with the policies of the Adolph Coors Company will be discussed in the main office in Golden, Colorado, with the distributor and that:

If a solution cannot be worked out in a reasonable length of time we will refer to the terms of the distributor's contract. All distributor terminations will be made through the Golden office * * * (CX 349 H)

The following testimony by Mr. William Coors also reveals clearly the distributor's dependence upon respondent and respondent's awareness of the distributor's subordinate position:

Q. You were talking about the importance of independent distributors to your system. You stated they had done a remarkable job today. Do you think it would be sort of a madness to change from the current system? Has Coors ever considered alternate methods of distribution?

A. Oh, yes.

Q. Has it considered distributing beer itself?

A. Oh, yes, absolutely.

Q. Is it still considering that?

A. Yes, as an alternative, an ace in the hole. Let's put it this way. The plans are all laid.

Q. Are your distributors aware of that?

A. Yes. I told them just two weeks ago. Every one of them knows except two of them that didn't show up for the meeting.

Q. What response did they make to that?

A. Well, the room was remarkably silent.

Q. Did you consider that a silence of shock?

A. Yes.

Q. Would your distributors welcome your going into direct distribution?

A. They know we wouldn't do it unless we were forced into it.

Q. And they wouldn't welcome it, would they?

A. No, they wouldn't.

Q. From your knowledge of distribution, is return on investment capital justifying your going into such a program?

A. We have set up models on this and it is our opinion that we could increase our cash flow by 50 per cent by going to selfdistribution. From a monetary standpoint, the concept is extremely tempting. (Tr. 2905–06)

The record discloses that respondent used its superior bargaining position, including threats of termination, to force distributors to sell at prices acceptable to respondent. One of these instances involved Mr. Jay Wagnon, owner of Coors distributorships in Kansas and Oklahoma. According to Mr. Wagnon's uncontradicted testimony, he refused to follow wholesale prices suggested by a Coors sales representative in August 1970. He was then asked by a Coors official to come to Golden, Colorado, where he met with the Coors sales manager, Mr. Harvey Gorman, the division manager, Mr. Ken Golightly, and the sales representative, Mr. John Kiser. He was told that his prices were unacceptable to Coors and the suggestion was made to him at that meeting that he sell at the prices previously proposed by Coors. The nature of this "suggestion" is apparent from the following testimony:

Q. Did you agree to those prices at that time?

A. No, sir.

Q. What did you say?

A. I'd like some time to think about it.

Q. Did they say anything to you at that point?

A. They asked me to give them an answer at the Kansas Wholesale Malt Beverage meeting, which was going to be in September.

Q. Did they make any suggestions to you as to what would happen if you didn't follow this suggestion?

A. I was told that they could put another distributorship in the Wichita area to compete with me.

Q. Did they tell you anything else as to what might happen? Any other suggestions that they made?

A. Mr. Golightly asked me if I ever thought about selling the Oklahoma

distributorship, since I was an absentee owner and I told him, no, I hadn't.

Q. Had you gone to Golden, at that time, to discuss your Oklahoma distributorship?

A. No, sir.

Q. What caused him to bring this up, do you know?

A. I don't know.

Q. Did you want to sell your Oklahoma distributorship?

A. No, sir.

Q. Did you understand his suggestion as to selling your Oklahoma distributorship as a threat?

A. I was afraid it was. (Tr. 459–60)[6]

In October 1970 there was further discussion of Wagnon's prices between Coors representatives and Mr. and Mrs. Wagnon. (CX 371) Immediately thereafter Mr. Wagnon wrote a letter to the division manager proposing another price schedule but received no reply. In early March 1971 a meeting was held in Mr. Wagnon's office between Mr. Wagnon, Mr. Kiser and Mr. Linn who had replaced Mr. Golightly as division manager. Again Mr. Wagnon refused to change his prices. (Tr. 464–65) About two weeks later, according to Mr. Wagnon, he again met with Mr. Kiser and Mr. Linn and, although he at first refused to change his prices, finally agreed to a schedule of prices which was to become effective July 1, 1971 (Tr. 465–66) and these prices were put into effect on that date. (Tr. 467)[7]

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[6] The record also discloses prior disagreements on pricing between Wagnon and Coors and that Wagnon realized he had "little choice" but to accept Coors' suggested pricing. (CX 84)

[7] The administrative law judge disposed of the above testimony by stating "On direct examination, there is considerable testimony relating to discussions with reference to prices charged the retailers by Mr. Wagnon and the suggested prices made by Coors representatives and officials, some of which he followed and others that he refused to put into effect. In view of the admissions made by the witness on cross-examination, it would not serve any purpose to go into the details of the direct examination." (I.D. p. 14 [p. 49 herein]) This was egregious error. Mr. Wagnon's testimony on cross-examination was perfectly consistent with his direct testimony. He reiterated that he had entered into an agreement with Coors on the prices he would charge. (Tr. 511) That Mr. Wagnon's son prepared the price list finally adopted, CX 2132, a point stressed by respondent's counsel, does not alter the fact that the list was prepared only after the process of bargaining, coercion, and agreement between Coors and Wagnon described in Mr. Wagnon's direct testimony.

By Mr. Bradley:

Q. But my point is, though, you prepared this Commission's Exhibit No. 2132, Robert Wagnon did.

A. After it had been agreed upon.

Q. I don't care about that, you prepared that, Robert Wagnon did, and these are the prices that your firm had agreed to charge for beer as of July 1, 1971?

A. Yes, sir. (Tr. 512)

Continuing this line of questioning, respondent's attorney concluded his cross-examination by asking the witness whether it was not true that he had always made the final

[Continued on next page]

Mr. John Hemphill, a former distributor of Coors beer in Oakland, California, testified that changes in his wholesale prices could be made only with Coors' approval and that a distributor "can only go so far making a request" for a price change in view of the 30 day termination clause in his contract. (Tr. 1380–81) He further testified that he had objected to a price proposed by Coors for seven-ounce cans and had failed to post this price by the date specified by Coors. Thereafter, according to Mr. Hemphill:

> * * * Mr. Weaver [Coors area representative] came into the office and said, "now, listen, I am sick and tired of coming into this office and talking about prices and territorial restriction, now, if you fellows don't wish to abide by the philosophies, the policies, the recommendations of the Adolph Coors Company, then the best thing you can do is not be a Coors distributor." So naturally the argument ceased. (Tr. 1382)

Mr. Hemphill testified that his firm then posted the price proposed by Coors. (Tr. 1383)[8]

The record also reveals that distributors regularly submitted to Coors for approval or acceptance price changes which they proposed to put into effect or counterproposals to price changes suggested by Coors. The record further shows that prices would not become effective unless and until they were satisfactory to Coors. For example, a report by area representative, James Hayden, to Robert Eke, sales department administrative assistant, for the week of December 7, 1968, concerning a meeting with distributor Joe G. Maloof and Company, Albuquerque, New Mexico, stated as follows:

> I met with George and Mike Maloof and we discussed their thinking on the 12 ounce can price structure in New Mexico. I told them that their ideas would be forwarded to Golden and that the brewery's thinking would be forthcoming. A pricing report was compiled along with recommendations and sent to Bob Eke. (CX 110)

[Continued from preceding page]
decision as to the prices at which his firm sold. Mr. Wagnon answered in the affirmative stating that he had "testified to that previously." (Tr. 512) His previous answer to a similar inquiry was that he made the final decision as to the prices he would charge if such prices were "acceptable" to the Adolph Coors Company. (Tr. 509)

[8] The judge concluded, from the fact that Mr. Hemphill had sued Coors in a private action for unlawfully terminating him, and on general grounds of demeanor and the nature of his answer, that Mr. Hemphill's replies could not be given great weight. We find it odd, though hardly inconsistent with other aspects of the initial decision, that the judge should use Mr. Hemphill's litigation with Coors as a basis for disbelieving *his* testimony regarding the termination, but not as a basis for discounting the reports of Coors representatives concerning the termination. In any event, contemporaneous documents prepared by respondent's own representatives do tend to confirm Mr. Hemphill's contentions regarding disputes with Coors concerning his pricing policies. (CX 482, 486)

A subsequent report on the same subject by the same area representative stated:

I received from Bob Eke on recommended pricing guidelines for the 12 oz. ring-pull cans. George and Mike Maloof and myself utilized this information along with market conditions, pricing philosophies, and come to a mutual understanding that was approved by Bob Eke. * * * (CX 111)

The following comments appear in a report of Jaunary 27, 1968, prepared by area representative Max Abbott concerning the prices charged to military establishments by distributor the Foster Co., West Sacramento, California:

* * * While talking to the bookkeeper [Frank Morrow] * * * I mentioned military prices, which I have been told repeatedly are regular price less state tax. Mr. Morrow, who evidently hadn't been let in on this fact, * * * informed me that they are and have been cutting military prices for sometime. Jack Sear, though I am afraid is just the fall guy on this, of course has deliberately lied to me and Coors about this and to the personnel here. They have informed me on several occasions that they are selling their military at regular less state tax. In fact they re-assured me of this on my last visit. Now I find they are cutting the price up to 25¢ a case. I am afraid this is old stuff with the Foster Co., just when you think you are making progress here, something like this comes up and you find out you can't believe a word they tell you. (CX 500)

In a subsequent report, dated April 6, 1968, Mr. Abbott states that he talked with Helen Foster and Nick Zoulas of the above company and that one of the subjects he discussed was "Lying to us about what they are charging to the military." He pointed out, however, that "They have agreed to change their military price to the regular price less state tax. This will be done on the next regular posting." (CX 501A and B) Mr. Abbott's next report, dated May 18, 1968, assured the Coors sales manager that "They have officially changed their prices at the military price. I saw the postings. Military prices now regular price less state tax." (CX 503)

The above documents and other evidence adduced by complaint counsel clearly reveal a process of discussion and subsequent agreement between Coors and its distributors as to the prices the latter would charge[9] and further establish that in many instances the distributors were induced to agree to make pricing decisions substantially different from those they would otherwise have made had respondent not interfered.

[9] See CX 247, 277, 256, 306, 330, 340, 6, 125, 104, 144, 28A, 838 among other representatives reports.

To offset the documentary evidence relied upon by complaint counsel, respondent called as witnesses some of the persons who had prepared the documents in question and elicited from them testimony to the effect that there had been no price agreements and that respondent did not require the distributors and brokers to adhere to resale prices which it recommended. It is well established, however, that little weight can be given to testimony which is in conflict with contemporaneous documents, particularly when the crucial issue involves mixed questions of law and fact. *United States* v. *United States Gypsum Co.,* 333 U.S. 364, 396 (1948). The testimony by certain distributors that they set their own prices is thus contrary to the weight of the evidence.

Moreover, the fact that certain distributors may have accepted respondent's suggested prices or otherwise set prices acceptable to respondent without the necessity for bargaining, coercion, and subsequent agreement, simply does not negate evidence of complaint counsel that such illegal price fixing occurred in the cases of other distributors. See *Basic Books, Inc.* v. *Federal Trade Commission,* 276 F. 2d 718, 720–21 (7th Cir. 1960).[10]

C. *Retail Price-Fixing*

The record also establishes that respondent has a resale price maintenance program and that it has in some cases secured adherence to its suggested retail prices by unlawful means. The existence of such a program, as well as its purpose, is best demonstrated by the following statements made in discourse with a retailer by a Coors representative:

Oh, well, yes, Mr. Letcher, we couldn't care less about competitors. As far as we are concerned, we think they are all fine, they are fine people, we don't have any arguments with them at all, but we do have certain beliefs just like yourself and certain policies on our product that we like to follow and this isn't only true here, it is true everywhere. We know for a fact that we have the prerogative to not sell to price cutters. We can't come in here and tell you what to do because this is your prerogative what you do, but it is our

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[10] It is understandable that many distributors might be unwilling to testify adversely to respondent. As pointed out in a study, entitled *"Brewer-Wholesaler Relationship,"* which was introduced into evidence by respondent "* * * The reluctance of many wholesalers to testify against brewers at government-sponsored investigations must be attributed in part to a fear of retribution by the brewers." (RX 1079, p. 23) Furthermore, it may not be irrelevant that many of the distributors who gave testimony favorable to respondent did so after attending the meeting at which William Coors announced that Coors was considering distributing its own beer as "an ace in the hole," that "the plans are laid" and that the distributors "know we wouldn't do it unless we are forced into it."

prerogative also not to sell to people who degrade the image of our product. All we want to do is sell to the people that will make a fair profit and we will get along fine. (Tr. 837–38)

* * * * * * *

Well, I understand your situation, but quite frankly, as I said before, we have the same policy throughout all of our marketing areas, no matter if it is the biggest retailer or the smallest one, we have the same belief. As a matter of fact, the biggest retailer in the United States, probably we have had an understanding with them on that and they hold our prices up all the time. Now, they felt maybe the same way that you did first, but now they look at it this way. No other brewery but Coors, that we know of, has this kind of belief, this strong belief about pricing. So they go ahead and do whatever they want to with them, but with Coors, in order to keep Coors, this is the only way we will stand. We don't want it to seem like we are being overbearing about it. It is a policy we have had before we came in to Brownwood. It is a policy we will have when we go into any other market. We have had it for years and years and this is the way we have built our reputation, our quality image. We know for a fact once we sell the beer to you we cannot tell you. (Tr. 839–40)

* * * * * * *

We are real proud of our record wherever we are and we feel it has been built not only on a quality product, which we feel we have, but also on an image that is created of being quality. The only way we are able to maintain that image is to not let our product be price cut, cut down and chopped down and degraded in image by prices. If a product is worth a certain amount, we think it should sell for that. We definitely are firm believers in our retailers making a profit. Once a retailer cuts our product, he is not making the profit he should and he is also degrading our image that we are so concerned with. We not only spend a lot of money on the product in making a quality product, but we want to let the people know and realize that it is quality. So this is the reason I certainly wanted to come by here today. (Tr. 841–42)

* * * * * * *

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

* * * * * * *

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

* * * * * * *

If you sell the product for what it should be sold for, make a profit on it. We are asking one other thing, this is between you and our distributor, I

would suggest this, if you decide that you want—we would like to have your business over there just like we have got it here, the same condition where you keep our product up, no specials, no cutting prices on it, keep it there, we could care less what you do with the rest of the beer, that is your business and their business. If you keep our beer at the same price, don't cut it, we would like to have the same relationship that we have here. (Tr. 846–47)

* * * * * * *

Well, actually as far as we are concerned, approach it the same way, they are not putting our beer on specials, they are not putting it in the paper, they are not cutting it, you are not having any unfair competition by this. We will be treated the same way by you as we will by them. That is fine with us. Where we don't have any price cutting or any advertising, that is all we ask and that is the reason I came by to have a man to man business talk with you. We want to show our appreciation, our respect, and let you know that we would respect your business and we would like to have it under these conditions, but this happens to be a basic brewery policy and we have had it for years. We had it before we came into Brownwood and we will have it forever as far as we are concerned because we find that it is the best policy we can have. (Tr. 848–49)

Another Coors representative commented as follows with respect to specific instances of retail price cutting in a report of a visit to distributor John P. Ward, Inc., Kansas City, Kansas:

Problems of discount stores, Kroeger's Tempo, etc., ordering large quantities of beer, 100 to 500 cases of Coors, to promote business by selling at low prices are being experienced in our distributorships. The approach to this problem was discussed this week with the Wards and Gordon McManamon from Junction City. Prior to this the same matter which occurred in Lawrence was resolved with Eldon Danenhauer. *Guidelines have been suggested in order to avoid this type of business practices; not enough inventory, not in keeping with distributor policies of inventory control for fresh beer, refrigerated marketing, etc. All distributors were advised to avoid discussing cost or pricing in any form.* (Emphasis added) (CX 941)

A former Coors distributor in Del Rio, Texas, Mr. Robert Dixon, testified that one of his retailer customers was selling Coors beer on "specials." A Coors sales representative, Mr. Linn, met with the retailer in the distributor's office and attempted unsuccessfully to dissuade him from advertising special sales. After the retailer had departed the distributor asked what would be done if the retailer refused to cooperate. According to the distributor Mr. Linn stated:

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

like that." And they evidently did because I didn't get any beer. (Tr. 1565–66)

As indicated by the above statements, respondent has enlisted the aid of its distributors in securing retailers' adherence to suggested minimum prices. The following excerpts from Coors area representatives' reports demonstrate the distributor cooperation as well as the methods used to obtain compliance at the retail level:

In a report of a visit to distributor Coleman Distributing Co., Brownwood, Texas, the representative stated;

Coleman reports Schlitz beer still has many retail deals going and one retailer (I have enclosed an advertisement from a newspaper) is selling Schlitz cans for 89¢ a 6 pk. This is the same store that was cut off by Stuart Coleman because they were advertising our beer at cut prices. (CX 203)

The same representative made the following comment in his report of a visit to distributor Willowbrook, Inc., Dallas, Texas;

Only one pricing problem occurred this week. The Robinwood Liquor (at Inwood and Maple St.) cut prices from our suggested $1.35 per 6 pack to $1.10 and from $4.75 to $4.40. Ray Willie [the distributor] contacted this retailer and explained our desire for him to make the suggested profit. He refused to raise his prices, however, and Mr. Willie plans to take appropriate action. (CX 208)

And the same representative referred to another price cutting problem in a subsequent report of a visit to the same distributor;

Willie reports that the Skagg discount store which was cutting our prices last week has not done so since Willie has talked to the top man in this organization and he promised that they will not do so. We will wait and see what happens on this. (CX 224)

He reported as follows with respect to a visit from a Ft. Worth distributor:

Only one problem on pricing so far. One account was cut in our 6 pack can prices and Ed Curtis called on this ratailer and there was no problem. He immediately raised our prices within normal limits. Several retailers have been advertising in the local newspaper but all are within normal price limits * * * (CX 263A)

And in a subsequent report of a visit to this distributor he stated;

Pricing of our product has been very favorable. Retailers are pricing reasonable. One problem did occur at the cutrate drug in Ft. Worth advertised our 6 pack at $1.05, which was out of line. Distributor personnel talked with this account Friday and beer was not delivered on that day * * * (CX 264)

In January 1968 the Coors representative in Reno, Nevada, reported that;

Retailers continue to disregard the recommended prestige mark-up on selling price in favor of keeping Coors priced at competitive levels. Frank [Frank Knafele, a distributor] and I are going to call on off-sale accounts on February 5 to survey this program. (CX 92)

The representative and the distributor called on various stores and explained the Coors pricing concept but the floor manager informed them that they would not stop price cutting unless all others agreed to do so. The representative expressed the view in his report that the distributor could be a "leader in attempting to direct the wholesalers in firming up price policies in this area. * * * " (CX 93) The representative and distributor continued to work to get retail prices up and in June the representative reported that the local distributors had held a meeting " * * * to attempt to find ways to curtail the price cutting at the retail level on many brands of beer in this area." (CX 97) In January 1969 the Coors representative, the division manager, and sales manager met with the Reno and neighboring Coors distributors to discuss retailer price cutting. (CX 99) By July 1969, the Coors representative "could not find any evidence of Coors being sold at reduced prices" in Reno or in five neighboring towns. (CX 102B)

Another documented incidence of resale price maintenance involved Mr. Harold Letcher, a retailer with a store in Brownwood, Texas. Mr. Letcher had advertised Coors beer at retail prices on week-end specials. He was warned by the Coors distributor, Mr. Stuart Coleman, to discontinue the practice and, when he refused to do so, Mr. Coleman stopped delivering Coors beer to his store. (CX 2095; Tr. 894, 907) Mr. Coleman later advised him that deliveries would be resumed if Mr. Letcher agreed to discontinue advertising week-end specials on Coors beer. (Tr. 777, 895–96, 908–09) Mr. Coleman also stated that he might lose his Coors distributorship if he continued to sell to a price cutter. (Tr. 794–97, 908–09) Thereafter, Mr. Letcher wrote a letter to Coors advising that he had been terminated by his distributor on the instruction of the Coors area representative. (CX 2005) In response thereto the Coors representative called on Mr. Letcher and informed him that deliveries would be resumed if he stopped discounting Coors beer. (Tr. 787–88; CX 195) Mr. Letcher refused and again appealed to officials in Golden, Colorado. The Coors representative again visited Mr. Letcher and again advised him that

he could purchase if he stopped advertising week-end specials, and stopped discounting. (CX 197; Tr. 843) Mr. Letcher again refused and consequently was unable to purchase Coors beer from Mr. Coleman or any other Coors distributor. Mr. Letcher subsequently sold his store in 1971 and soon thereafter Mr. Coleman resumed delivery of Coors beer to the new owners who purchased it with the understanding that they "couldn't run it on special or advertise in the paper." (Tr. 912)

Coors' argument that its conduct was a legitimate exercise of its rights under the *Colgate* doctrine [11] is rejected. According to the *Colgate* decision:

> In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell. (At p. 307)

In *Parke, Davis and Co.*[12] the Court further elaborated on this doctrine, holding that:

> The Sherman Act forbids combinations of traders to suppress competition. True, there results the same economic effect as is accomplished by a prohibited combination to suppress price competition if each customer, although induced to do so solely by a manufacturer's announced policy, independently decides to observe specified resale prices. So long as *Colgate* is not overruled, this result is tolerated but only when it is the consequence of a mere refusal to sell in the exercise of the manufacturer's right "freely to exercise his own independent discretion as to the parties with whom he will deal." When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, this countervailing consideration is not present and therefore he has put together a combination in violation of the Sherman Act. Thus, whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used. (At p. 44)

On the basis of the record in this case, Coors' pricing policy and its multifaceted activities in support of that policy cannot possibly be construed as simply an exercise of its right to select persons with whom it will, or will not, deal. Indeed, Coors has expressly denied that it ever put into effect that portion of its policy reserving the right to refuse to deal with persons who do not adhere to its suggested prices. (RB 24) Thus, by its own admission, any attempt by respondent to secure adherence to its suggested prices

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[11] *United States* v. *Colgate and Company*, 250 U.S. 300 (1919).

[12] *United States* v. *Parke, Davis and Co.*, 362 U.S. 29 (1960).

has been by means other than those deemed permissible by *Colgate*.

In summary, we find that respondent has pursued a policy of fixing, controlling and maintaining prices at which Coors beer is sold at both the wholesale and retail level, that in furtherance of this policy it has engaged in various acts and practices such as: suggesting resale prices to both distributors and retailers, checking prices at which distributors and retailers sell Coors beer, advising distributors and retailers that it is contrary to Coors pricing policy for them to deviate from prices approved by respondent, threatening to terminate distributorships and threatening to force distributors to sell their businesses for refusing to adhere to suggested retail prices, entering into agreements and understandings with distributors as to the wholesale prices which the distributors will charge for Coors beer, joining with distributors in attempting to coerce retailers to refrain from selling Coors beer at prices below those approved by respondent, encouraging distributors to prevent retail price cutting by refusing to deliver Coors beer to price cutters, or to reduce the amount of beer delivered, and entering into agreements and understandings with retailers as to the retail prices or range of prices at which such retailers will sell Coors beer.

The order entered in this case, in addition to prohibiting illegal price-fixing agreements and efforts to coerce and induce the same, further enjoins, for a period of three years, the use of suggested resale price lists and suggested mark-up lists. (Paragraphs 2 and 3) Respondent may petition the Commission, after a period of two years, for relief from these paragraphs upon a demonstration that competition in the resale of its products has been restored.

While dissemination of suggested resale price lists and suggested mark-up lists is not in itself illegal, the practice may lend itself to dire anticompetitive uses when accompanied by the efforts shown here to induce and coerce adherence to, and agreement with, the suggestions. Elimination of the use of such suggested resale price and mark-up lists by respondent for a short period will facilitate enforcement of the basic prohibition in Paragraph 1 against price-fixing agreements, and help to eliminate the residual coercive effect that may attach to the use of such suggestions by virtue of respondent's past practices in forcing compliance. Paragraphs 2 and 3 are necessary to restore the independence of Coors distributors and retailers in making pricing decisions that has been eliminated by respondent's conduct. Following the three-

year period (or two years, if the requisite demonstration can be made), respondent may again employ suggested resale price and mark-up lists, but will still be prohibited from illegal efforts to secure adherence to them. See *Lenox, Inc.* v. *Federal Trade Commission,* 417 F. 2d 126 (2d Cir. 1969).

IV. TERRITORIAL RESTRICTIONS

It is not disputed that respondent has contracted with each of its distributors to limit the territory within which each may resell Coors beer.[13] The Coors disributor contracts provide:

> While this Agreement is in effect, the Distributor will conduct the business of wholesale distribution of Coors beer in the above territory only. (CX 351 B, 352B)

The preponderance of the evidence indicates that the company vigorously enforces its territorial restrictions. (Tr. 1130–31, and citations below) Respondent admits that in "a few" cases it sought to determine which of its distributors had made an extra-territorial sale when one was reported. (Answer, p. 5) At trial, numerous instances were shown in which Coors sales representatives in the course of their routine duties investigated reports of sales being made outside an assigned territory (CX 203, 207, 328, 829B, 914A, 921; Tr. 411), and evidence further revealed instructions by sales representatives to cross-selling distributors to cease extra-territorial sales. (CX 196, 198, 244, 513, 552A, 625A, 715A; Tr. 710, 1423) Disregard of such warning might lead to threats of cutbacks in the amount of beer delivered by the brewery (Tr. 1164, 820–21) and threats of termination. (CX 250–51; Tr. 782, 785–86, 1571)

The effect of these territorial restrictions is that "[i]n a given territory, there is no intrabrand competition." (CX 2029A) The territorial restrictions are an obvious adjunct to Coors' efforts to control the prices at which its distributors and their retail accounts dispose of the product. The distributor knows that he will experience no intrabrand price competition without respondent's consent, and that if he cuts off a retailer for price cutting that retailer cannot buy Coors beer from anyone else. According to the testimony of William Coors:

> Q What is your philosophy on the pricing of your product?
> A We like to see our product priced a little way down the line so that the

[13] Coors sells beer to its distributors f.o.b. Golden, Colorado (Tr. 2864); title would thus appear to pass to the distributors prior to any resale of the beer on their part.

brewer, the distributor, and the retailer get a fair return on their investment capital and on their efforts.

Q What is your philosophy on territorial limitations within which your distributors may market?

A We think they are absolutely necessary to insure this. (Tr. 2885)

In addition to the utility of exclusive territories in insuring that Coors' prices will remain "a little way down the line," and that brewer, distributor, and retailer will thus receive a return presumably greater than the rigors of unrestrained competition would confer, respondent argues, and the administrative law judge concluded that:

The territorial restrictions vertically imposed by the Respondent upon its distributors, are reasonable and essential to achieve market penetration and quality control, the factors that enable the Respondent to stay in and survive in the highly competitive beer industry, thereby promoting vigorous interbrand competition. (I.D., p. 154) [p. 173 herein]

Complaint counsel argue, contrarily, that whatever the utility of the territorial restrictions, they must nonetheless be held to be *per se* illegal under the Supreme Court's decision in *United States* v. *Arnold, Schwinn & Co.,* 388 U.S. 365 (1967). There the Court noted that:

Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict the territory or persons to whom the product may be transferred—whether by explicit agreement or by silent combination or understanding with his vendee—is a *per se* violation of § 1 of the Sherman Act. (At p. 382)

While respondent and the administrative law judge contend that the quoted portion is mere *dictum,* since Schwinn did not appeal from the district court's ruling that territorial restrictions on resale of goods were illegal, it is difficult to avoid concluding, from a reading of the entire opinion, that the Court understood itself to be passing on the validity of the vertical territorial restraints.[14] Moreover, in the recent case, *Federal Trade Commission* v. *The Sperry & Hutchinson Co.,* 405 U.S. 233 (1972), the Supreme Court quoted from *Schwinn* (p. 379) with approval:

"Under the Sherman Act it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. [Citations

[14] In *holding,* for instance, that Schwinn's *customer* restrictions on resale were invalid, the Court seemed to adopt the premise that territorial restriction on resale were invalid and reason from there to the result that the customer restraints must also fall. (Pp. 377–78)

omitted] Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale." (At p. 247, n. 6)

It then noted that the Commission in *S & H* had "declined to rely on this precedent."

It would appear, as well, that the majority of lower federal courts that have considered the *Schwinn* decision have regarded it as affirming the *per se* invalidity of the vertical territorial restrictions on resale of goods challenged here.[15]

While it is thus difficult to resist the conclusion that the challenged restrictions are illegal *per se*, it is hardly necessary, given the aggregation of trade restraints present in this case, for the Commission to reach this proposition urged by complaint counsel. As the Court in *Schwinn* recognized, whatever the status of vertical restrictions unaccompanied by price-fixing, the presence of price-fixing as part and parcel of a system of territorial restrictions renders the entire package illegal *per se*. See *United States* v. *Arnold, Schwinn & Co., supra; Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 598 (1951); *Lenox, Inc.*, 73 F.T.C. 605 (1968), *aff'd*, 417 F.2d 126 (2d Cir. 1969); *Cf. United States* v. *Bausch & Lomb Co.*, 321 U.S. 707 (1944).

In evaluating the reasonableness of Schwinn's vertical restraints upon distributors to whom it had merely *consigned* rather than resold its products, the Supreme Court noted:

We do not suggest that the unilateral adoption by a single manufacturer of an agency or consignment pattern and the Schwinn type of restrictive distribution system would be justified in any and all circumstances by the

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[15] See, *e.g.*, *Cornwell Quality Tools Co.* v. *C.T.S. Co.* 446 F. 2d 825, 833 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); *Ark Dental Supply Co.* v. *Cavitron Corp.*, 323 F. Supp. 1145, 1147 (E.D. Pa. 1971), *aff'd per curiam*, 461 F. 2d 1093 (3d Cir. 1972), *Beckman*, v. *Walter Kidde & Co.*, 316 F. Supp. 1321, 1327 (E.D. N.Y. 1970), *aff'd*, 451 F. 2d 593 (1971), *cert. denied*, 408 U.S. 922; *United States* v. *Glaxo Group Ltd.*, 302 F. Supp. 1, 8–9 (D.D. C. 1969); *Interphoto Corp.* v. *Minolta Corp.*, 295 F. Supp. 711, 720, n. 4 (S.D. N.Y.), *aff'd*, 417 F. 2d 621 (1969); *Beverage Distributors, Inc.* v. *Olympia Brewing Co.*, 440 F. 2d 21, 28, (9th Cir.), *cert. denied*, 403 U.S. 906 (1971); *Fontana Aviation, Inc.* v. *Beech Aircraft Corp.*, 432 F. 2d 1080, 1085 (7th Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Tripoli Co.* v. *Wella Corp.*, 425 F. 2d 932, 936 (3d Cir.), *cert. denied*, 400 U.S. 831 (1970); *United States* v. *Arnold, Schwinn & Co.*, 5 CCH *Trade Reg. Rep.* ¶73,369 at 92,049 (N.D. Ill. May 1, 1972); *Ansul Co.* v. *Uniroyal, Inc.*, 306 F. Supp. 541, 559 (S.D. N.Y. 1969), *modified* 448 F. 2d 872 (2d Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972); *Sherman* v. *Weber Dental Mfg. Co.*, 285 F. Supp. 114, 116 (E.D. Pa. 1968); *Warriner Hermetics, Inc.* v. *Copeland Refrigeration Corp.*, 463 F.2d 1002, 1011 (5th Cir. 1972); *Lepore* v. *New York News, Inc.*, 346 F. Supp. 755, 761 (S.D. N.Y. 1972).

This list is far from exhaustive. While not all of the preceding cases have *held* that vertically imposed exclusive territories are illegal *per se*, the judges in all seem to have assumed that the Court in *Schwinn* did so hold.

presence of the competition of mass merchandisers and by the demonstrated need of the franchise system to meet that competition. But certainly, in such circumstances, the vertically imposed distribution restraints—*absent* price fixing and in the presence of adequate sources of alternative products to meet the needs of the unfranchised—may not be held to be *per se* violations of the Sherman Act. (At p. 381)

In this case, of course, there is no agency or consignment agreement, and thus *Schwinn* can hardly be used to justify a rule of reason approach to the territorial restraints, contrary to the administrative law judge's understanding. The point is simply that respondent's use of price fixing in combination with its restriction of territories renders that entire distributional scheme illegal *per se* without regard to the legality or illegality of the territories considered alone.

It has been argued by many that imposition of limited territories by a manufacturer on its distributors may, in certain circumstances, serve various useful, pro-competitive functions. A failing firm, or an aspiring entrant, it is said, may be enabled by the right to guarantee exclusive territories, to attract the distributors and distributional capital necessary to remain or become a viable competitor in a market. See *White Motor Company* v. *United States,* 372 U.S. 253 (1963); *Snap-On Tool Corp.* v. *Federal Trade Commission,* 321 F.2d 825 (7th Cir. 1963); *Sandura Co.* v. *Federal Trade Commission,* 339 F.2d 847 (6th Cir. 1964).

Where the manufacturer seeking to impose vertical restraints lacks appreciable market power, it is argued that the damage to intrabrand competition resulting from the vertical restraints may be outweighed by the impetus to interbrand competition resulting from strengthening of the failing or entering firm as a competitive factor in the market. Without reaching any final conclusion as to the economic validity of this argument, or the remaining legal vitality of such pre-*Schwinn* cases as *Snap-On Tool Corp.* and *Sandura Co., supra.,* which implicitly adopted it, we would only observe that the argument's premises are belied by the situation in which the firm imposing the territorial restrictions also engages in a widespread program of price-fixing. The failing firm or the battling newcomer, facing stiff interbrand competition and lacking market power, would no doubt find it unnecessary to limit the prices its distributors could charge retailers, and fruitless to shore-up the prices charged by distributors and retailers alike. The forces of the alleged vigorous interbrand competition would operate more effectively than any con-

spiracy to limit the prices a distributor with a guaranteed intrabrand monopoly could charge retailers, while similarly preventing the retail outlet from successfully raising prices no matter what resale price the manufacturer might seek to impose by way of conspiracy with its distributors. It is where the manufacturer of a branded item possesses substantial market power—the power to set prices irrespective of interbrand competition—that vertical territorial restrictions are especially pernicious, for they eliminate the possibility of intrabrand competition which in an imperfect market is a critical supplement to competition between and among different brands. While the presence of price-fixing by the manufacturer is clearly not indispensable to a showing that a scheme of territorial restrictions is illegal, that presence is clearly strong grounds for presuming that the most injurious effects of vertical territorial divisions may be operative, and, therefore, for holding the entire arrangement of territories with price-fixing illegal *per se*.[16] The Commission so holds.

V. EXCLUSIVE DRAUGHT POLICY

Although draught beer sales constitute only a small fraction of total beer sales, draught beer sales help to increase packaged beer sales. In the words of one Coors distributor:

> The function of the keg beer is to get customers to consume the product and I feel that draft beer is one of the most important areas where you can get an image going for yourself, get market penetration stabilized a little more and get people consuming your beer. If it's good beer they'll take home your packages. (Tr. 432)

Evidence was presented at the trial to demonstrate that in a number of cases Coors representatives engaged in the practice, in combination with distributors, of seeking to induce retail outlets to eliminate rival brands of light draught beer by threat-

[16] It is, of course, also clear from the record that we are not dealing in this case with an aspiring newcomer or a failing firm. Coors is the market leader in ten of the eleven states in which it sells, dwarfing in market share the so-called national brewers. The unique character and quality of the product was constantly stressed throughout the proceedings, and testimony indicated that the company maintained a waiting list of several thousand potential distributors of its product, ready to take the place of such of its 166 independent distributors as might be inclined to pull out. (Tr. 2863) Respondent argues that without the guarantee of an exclusive territory it could not induce distributors to market its product. This contention seems a bit strained in view of the company's retained contractual right to restrict a given territory or add additional distributors to it upon ten days' notice to the existing distributor, and its right to terminate any distributor with 30 days' notice and without cause. (CX 351, 352)

ening to terminate the supply of Coors to outlets which would not, after a period of 30 days (or in certain cases, 60 to 90), eliminate the competing draught beer.

William K. Coors himself testified that exclusive draught accounts were favored and considered "desirable" by the Adolph Coors Company. (Tr. 2885) Of 2198 Coors draught accounts in a four state area (California, Colorado, Kansas, and Texas) in 1970, 92.1 percent were exclusive Coors' accounts and 7.9 percent were split. (CX 2188)[17]

It was acknowledged by a representative of Coors that a 30-day split policy is frequently used by Coors distributors in dealing with split accounts. (Tr. 2144–45) While respondent denies that it has a "policy" of imposing exclusivity on its distributors' retail draught accounts, evidence was presented to indicate that in many instances representatives of the company urged, instructed and combined with distributors to eliminate split draught accounts. (Tr. 1524–25, 1491–92, 612–13; CX 25–26A, 162, 172–74, 270, 283, 287, 298, 321, 868–69, 872)

Glen Carskaddon, a former Coors distributor testified as follows:

Q. Did you ever discuss Blitz split accounts versus exclusive accounts with your sales representatives?

A. Yes.

Q. With whom did you discuss this?

A. All of the representatives who called on us, they wanted exclusive draft accounts.

Q. What did they tell you about exclusive accounts? Did they give you any instructions? What were you supposed to do?

A. If they came in, the beer, we could split for a short period of time and then, if they didn't let the other beer go, that we would pull out.

Q. You went to the retailer?

A. Yes.

Q. And what did you tell the retailer when you offered them Coors?

A. We said we would like for them to go exclusive, "We are outselling

[17] Respondent argues (RB 52) that CX 2188, a tabulation prepared by respondent and relied on by complaint counsel, shows that in the period 1965–1970 the number of split draught accounts in the three state area of California, Colorado and Kansas showed an absolute increase. This is true; however, a tabulation also reveals that the number of split draught accounts expressed as a *percentage* of total Coors draught accounts declined in the same period for the combined three state area. And in Texas, for which figures are first available for 1966, the number of split accounts declined from 23 out of 84 (27.4 percent) in 1966 to 22 out of *300* (7.6 percent) in 1970. Moreover, the cited statistics do not indicate how many accounts listed as "split draught" were split pursuant to a 30-day split policy. In any event, evidence of the existence of split accounts in certain areas and at particular times does not negate evidence of efforts and conspiracies to eliminate such accounts.

this other brand, and we think it would be better for you if you would just go to our brand."

Q. Did you put a time limit on the time Coors was—

A. (Interposing) Ordinarily, it was 30 days.

Q. And at the end of the 30 days, if he didn't go exclusive, what would you do?

A. We wouldn't deliver beer to them.

Q. Was this at the instruction of the sales representative?

A. Yes. (Tr. 1491–92)

The record is replete with evidence of discussions and agreements between respondent's representatives and distributors concerning elimination of rival draught accounts.

In CX 25 the Coors representative reports that in a meeting with Zeb Pearce and Sons "We discussed and agreed upon * * * A firm policy will be instituted on split accounts." In CX 26A the Coors representative reports that a 30-day split policy is being followed by Zeb Pearce and Sons.

In CX 321 the Coors representative reports that "Scotty is * * * seeing our point of view on split draught accounts and is trying to eliminate them, and says he will not take on any more."

In addition to visits to distributors, there was evidence adduced that Coors representatives would also visit retailers to explain the Coors position on split accounts and to inform the retailer that the company wanted only exclusive accounts. (CX 173A & B, 81, 126, 253) If the retailer refuses to remove the competitive brand of draught beer, delivery of Coors draught beer is discontinued. (CX 126, 271, 604; Tr. 1492)

In at least some cases, the efforts of Coors sales representatives to implement a 30-day split policy had the desired result of eliminating competing brands. In CX 172 the sales representative reports concerning the Amarillo, Texas, market that the "plan for exclusive draft accts." was discussed and that "the plans [sic, plan] for the future is to concentrate and try to get exclusive Coors accts." In CX 173 the sales representative reports on a meeting with the Amarillo distributor:

> Monday we held a meeting to decide on our approach to the split draft accounts in the market. * * * Our approach was to be to have the accounts take 30 days to decide just what brand draft they would prefer to feature.

The sales representative then personally accompanied the distributor on numerous retail calls to inform the accounts of the Coors policy requiring exclusive draught. (CX 173A & B)

In CX 174 the results of these efforts in the Amarillo market are reported:

Number of Coors draught exclusive—54—split accounts—none.

In attempting to bolster his conclusion that Coors had no policy of encouraging exclusive accounts, the administrative law judge adopted respondent's proposed finding that:

Almost every witness that testified on the subject of split accounts stated that they had no policy against split accounts and in fact accounts were split in their territory. * * * (I.D. 137) [p. 159 herein]

The former portion of this assertion is simply not borne out by an examination of the testimony relied upon. While many distributors did indeed service split accounts, at least two of the twelve distributors whose testimony is cited in support of the proposition did state they had a policy against split accounts (Tr. 1848, 1900), and only a few stated explicitly that they did not have such a policy. Moreover, the testimony of certain of these witnesses is belied by documentary evidence concerning their efforts to eliminate split accounts. (Compare Tr. 609 with CX 321; Tr. 413 with CX 77, 81)

In any event, the fact that Coors representatives may not have contrived with all distributors to eliminate split accounts simply does not negate the fact, demonstrated by the preponderance of the evidence on the record, that in many instances Coors representatives did combine with distributors in efforts to eliminate competitive brands from draught accounts. Whether or not this should be characterized as a "policy" of the company, it was obviously a widespread "practice," and a practice that must be halted.

While respondent endeavored to present some justification for its requirement of exclusive draught accounts (presumably as an alternative defense to its denial of having required such accounts), it does not fundamentally dispute complaint counsel's position that such an endeavor to foreclose competitors from marketing outlets is an unfair method of competition in violation of the Federal Trade Commission Act.

In *Federal Trade Commission* v. *Brown Shoe,* 384 U.S. 316 (1966), the Supreme Court recognized that a program by a major manufacturer which required retailers to limit trade with the manufacturer's competitors in order to receive the manufacturer's goods "obviously conflicts with the central policy of both section 1

of the Sherman Act and § 3 of the Clayton Act against contracts which take away freedom of purchasers to buy in an open market." (p. 321) Whereas *Brown Shoe* was only the second largest manufacturer in its market, Coors ranks first in sales in 10 of the 11 states in which it markets beer. It requires little imagination to envision the anticompetitive potential of efforts to make the draught-outlet choose between the number one brewer in the market and products of less-established competitors. Particularly in a market, such as that for beer, threatened by diminished competition and increased concentration, the dominant factor cannot be allowed to conspire with its distributors and retailers to foreclose competitors from outlets through which they might build themselves into a position of competitive equality. See also, *Mytinger & Casselberry, Inc.* v. *Federal Trade Commission*, 301 F.2d 534 (D.C. Cir. 1962).

For the above reasons we find that respondent has combined with its distributors in the practice of encouraging and coercing retail accounts to sell Coors draught beer to the exclusion of light draught beer competitors. We further conclude that such a practice is an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

VI. REFUSAL TO SELL TO CENTRAL WAREHOUSE ACCOUNTS

Central warehousing involves the purchase by the warehouser of beer directly from a brewer or distributor, for delivery into the purchaser's warehouse. Subsequently, redelivery of the beer is made in the warehouser's own trucks to the warehouser's retail outlets. Warehousers may themselves be retailers (such as large chain supermarkets like Lucky Stores and Safeway), who buy for redelivery to their own outlets, or independents (such as Beverage Distributors, Inc.) who buy for redelivery to non-affiliated outlets, or retailer warehouses.

Prior to 1964, Coors had permitted sales to central warehouse accounts, but, in 1964, the company "made the determination that a central warehousing program *would no longer be permitted.*" (CX 2027A) In a letter dated March 11, 1964, to distributors, the company announced that "it is the decision of the Company that this type of warehousing shall be discontinued as of April 1, 1964." (CX 2027C)

Even prior to this, there is evidence that Coors had in effect precluded its Reno, Nevada, distributor from selling to a central

warehouse account by instructing it to sell to the account at the same price offered to retailers. (Tr. 1184–89; CX 2053) Presumably the price concession previously offered voluntarily by the Reno distributor was justified by lower costs in providing large quantities to a single location.

Pursuant to the 1964 policy decision, distributors who had been selling to central warehouse customers were advised by Coors to terminate the relationship.

> Two [Coors] distributors, Zeb Pearce and Sons in Phoenix, Arizona, and O.K. Distributors, Inc., Reno, Nevada, apparently at one time did, in fact, sell to Beverage Distributors, Inc. on a central warehousing basis. Effective April 1, 1964, the Adolph Coors Company discontinued these type of sales and so advised its distributors.
>
> In conjunction with this decision on behalf of the Company, the distributors were advised that they should themselves terminate this relationship with the buyers, the main one being, I think, Beverage Distributors, Inc. (CX 2028, letter from respondent's counsel to the Commission, dated August 20, 1965.)

The reasons for Coors' imposition of restraints on sales to central warehouse accounts were disputed at the trial. Respondent contends that the prohibition on central warehousing is necessary to maintain the quality of Coors beer, that central warehouse facilities often do not provide adequate refrigeration and rotation of stocks.

At the same time, there was substantial evidence to demonstrate that Coors acted, at least in part, in an effort to satisfy distributors who viewed central warehousing as a threat to the integrity of their illegally conferred territorial monopolies. (CX 2052; Tr. 1233; CX 2446)

The threat posed by central warehousing to the illegal territorial monopoly is apparent. The central warehouser purchases a large quantity of beer at a single location, and may subsequently resell or redistribute some of that beer to retail outlets outside the territory of the distributor who has supplied it to him. The result is to bring the distributor in the outside territory into effective competition with the distributor in the central warehouse's territory, in contravention of the entire purpose of the territorial restrictions, though quite possibly in aid of competition and lower prices to consumers.

Witnesses for complaint counsel testified that substantial cost savings might be realized from the efficiencies of centralized methods of distribution, savings which would subsequently be passed on to the consumer (absent legal or illegal resale price

maintenance). (Tr. 1284–85, 1202, 1236, 1630–33; CX 2062–63) Coors contends, to the contrary, that such efficiencies are chimerical, and countervailed in any event by the substantial threats to quality control posed by central warehousing. (RB 46-48 and citations therein)

Clearly the comparative advantages and disadvantages of central warehouse distribution of beer cannot be resolved definitively from the record. Rather, resolution should be left to the free, unimpeded play of market forces, and the respective, independently exercised judgments of the relevant units of distribution. The law makes clear that the customers to whom a distributor may sell should be a matter of his own choice, and not subject to dictation by, or agreement with, the manufacturer. See *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967):

> Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict the territory or persons to whom the product may be transferred—whether by explicit agreement or by silent combination or understanding with his vendee—is a *per se* violation of §1 of the Sherman Act. (p. 382)

While it is arguable that the legality of territorial restrictions on resale was not strictly at issue in *Schwinn*, the company not having appealed from the District Court's finding of illegality, the legality of customer restrictions was appealed.

Only the narrowest exceptions to the *Schwinn* rule prohibiting customer restrictions on resale have been recognized by lower courts.[18] While Coors alleges that its customer restrictions are necessary for "quality control," it has failed to demonstrate why substantially the same protections could not be achieved by policies requiring the distributor to take responsibility for ensuring that all sub-distributors rotate supplies and maintain the necessary refrigeration, rather than by categorically obliterating the freedom of its distributors to deal with a class of sub-distributors who are presumed to be incapable of maintaining the requisite quality. Evidence at the trial was at best inconclusive as to the capacity or lack thereof of central warehouse distributors to maintain the quality standards desired by Coors. Whether even an absolute necessity to maintain quality standards would, under the law, justify imposition of restraints on resale to an entire class

[18] See *Tripoli Co.* v. *Wella Corp.*, 425 F.2d 932 (3rd Cir. 1970), *cert. denied*, 400 U.S. 831 (1970) (customer restriction imposed to limit danger of *physical injury* was reasonable).

of customers must be counted as at best uncertain. It is hardly necessary for us to determine that issue here, however, where there is no evidence that a policy less restrictive than a categorical customer restriction would not be wholly adequate.

The use of central warehouse distribution at least holds out the possibility of cost savings to consumers. While Coors characterizes its policy as not a restriction on resale to customers, but a restriction on the manner in which customers will be sold, this is clearly not the case. For one thing, at least certain central warehouse distributors are independent of the retail outlets to which they deliver. Prohibition of central warehouse sales, or, alternatively, a requirement that prices to such outlets must equal the prices to retail outlets, irrespective of cost differences, effectively eliminates these customers from the market. With respect to prohibition of sales to retailer-owned warehouses (when sales direct to the retail outlets themselves are permitted), such a categorical prohibition is still a substantial restraint on the capacity of the distributor to resell to whomever he chooses, and threatens the same anticompetitive results as other illegal restraints on alienation. We thus find both practices to be unfair methods of competition, in violation of Section 5 of the Federal Trade Commission Act.

The order prescribed to eliminate this abuse does not prevent Coors from requiring maintenance of requisite standards of care on the part of its distributors and sub-distributors, nor does it preclude each individual distributor from deciding in its own discretion whether or not to resell beer purchased from Coors to a central warehouse, or from deciding what price to the warehouse is appropriate. It merely enjoins Coors from requiring its distributors, and agreeing with them, to refrain from selling to central warehouse accounts *per se*.

VII. TERMINATION AND NON-ASSIGNMENT PROVISIONS

Paragraph 4 of the Coors distributor's agreement provides in relevant part:

4. This agreement and any supplements now or hereafter effective (whether fixing prices and terms to the Distributor or otherwise) may be cancelled in entirety at any time by the Company for any breach by the Distributor on five (5) days' written notice to the Distributor. This agreement and such supplements may be cancelled by either party without cause upon the giving of notice to that effect to the other party, in which event termination shall

become effective thirty (30) days after delivery or the mailing of the written notice of cancellation, whichever first occurs. * * * (CX 351C, 352C)

The distributor's contract enjoins the distributor to conduct his business "in a manner satisfactory to the company" (CX 352B, 353B), which is interpreted by the company to mean that the distributor must follow both written and unwritten policies and understandings. (Tr. 274) Virtually unlimited basis for termination even "with cause" would thus seem to exist.

There can be no doubt that the short-term termination provisions, whether or not in combination with a limitation on assignment of the franchise (and such a limitation is imposed by Coors [19]) constitute a potent weapon with which the manufacturer may enforce compliance by his distributors with his demands—whether reasonable and efficiency-producing, or unreasonable and anticompetitive. In a case without the record evidence available here, the Supreme Court recognized the self-evident proposition that there was "inherent coercion" in franchise agreements between a dominant franchisor and dependent franchisees containing short termination provisions. *Federal Trade Commission* v. *Texaco, Inc.*, 393 U.S. 223, 229 (1968). Respondent's own submission indicates that beer distributors in general fear termination with little or no warning, a fear that stems in part from "the use by brewers, especially by their field representatives, of threats to terminate the relationship." (RX 1079, p. 30)

Distributors of Coors beer are required to pay no franchise fee for the simple privilege of distributing it, but the record indicates that many have made substantial capital investments in facilities for distributing the product [20], and it hardly requires the wealth of record evidence available in this case to envision the coercive impact flowing from Coors' capacity to render such an investment of sharply diminished value in a short period of time and for whatever reason it chooses. While the record indicates only three actual terminations by Coors during the past fifteen years, it does contain evidence of distributorship sales consummated under the actual or implied threat of termination.

As might be expected, evidence as to the precise reasons for forced terminations or coerced sales is conflicting. A number of witnesses for the Commission testified that they were forced out

[19] Admitted in Answer, p. 5.

[20] Of those distributors who testified to the matter, the smallest investment was $120,000 (Tr. 637), the largest was $2,000,000. (Tr. 1774) (See also Tr. 445, 562, 689, 1812, 1837, 1870, 1889, 1923, 1954.)

of distributing Coors as a result of refusal to engage in a variety of anticompetitive practices—adherence to territorial boundaries, price-fixing, and distribution of Coors beer to the exclusion of other brands. Coors contended, to the contrary, that all terminations and forced sales were prompted by deficiencies in distributor performance of legitimate requirements. The administrative law judge generally accepted Coors' position.

Only one terminated dealer, Mr. John Hemphill, testified at the trial. He testified that in his view the reasons for his termination had been disputes with Coors over his pricing policies and extraterritorial sales. (Tr. 1411) The judge concluded, from the fact that Mr. Hemphill had sued Coors in a private action for unlawfully terminating him, and on general grounds of demeanor and the nature of his answers, that Mr. Hemphill's replies could not be given great weight.[21] Contemporaneous documents prepared by respondent's own representatives do tend to confirm Mr. Hemphill's contentions regarding disputes with Coors concerning his pricing policies. (Compare CX 482 and 486 with Tr. 1382–83 and 1387–89) These same documents, of course, note other alleged deficiencies in Mr. Hemphill's distributorship, which Coors claims were the ultimate basis for his termination, and which Mr. Hemphill denied.

The same evidentiary pattern is apparent in the case of distributors who sold their franchises under threat of termination.

Dixon, a Coors distributor, claimed that he was forced to sell his franchise because of disagreements over pricing and extraterritorial sales. (Tr. 1582) A Coors representative reported of a conversation with Dixon:

Discussed adherence to terrority [sic] boundaries. Mr. Dixon was shown two letters that indicated that the Del Rio distributorship had been selling beer outside of its terrority [sic]. He was advised that we had a capacity to take [care] of our present area only and could not tolerate beer going out of boundry [sic]. He was advised that if he could not control his area then we would have to find someone who could. (CX 250)

And later:

Due to Coors recently being shipped to the Laredo Air Force base and Laughlin Air Base in Del Rio I advised Mr. Dixon we should not allow Coors

[21] As noted previously, we find it odd that the judge should use Mr. Hemphill's litigation with Coors as a basis for disbelieving *his* testimony regarding the termination, but not as a basis for discounting the reports of Coors representatives concerning the termination, or the assertions of Coors representatives that no terminations had been threatened for reasons of failure to commit acts challenged by the Commission's complaint. It seems apparent to us that the judge did not give fair consideration to Mr. Hemphill's claims. Cf. *Golden Grain Macaroni Company*, Docket No. 8737 (1971) [78 F.T.C. 63], p. 17 slip opinion.

to leave our distribution area. To make this clear to Mr. Dixon, he was advised any distributorship shipping beer out of his area could expect to go to Golden to explain why he could not cooperate with us. Mr. Dixon assured me he would sell no beer outside of his area. (CX 251)

Dixon also recounted being reprimanded by a Coors representative for continuing sales to discount retail outlets in his area. (Tr. 1565–72) Dixon was eventually sent a letter threatening termination if he did not improve his operation. Dixon then arranged a sale of his franchise. His sales had been improving and he contends that his retail accounts received good service. (Tr. 1562–63, 1580–82) Coors contends that Dixon's performance was inadequate and that this was the reason for his termination.

There is also evidence that threats of termination were used in an effort to force distributors to handle Coors beer exclusively.[22] Distributors Carskaddon and Tinetti testified that Coors' desire for an exclusive distributorship (both distributed Olympia as well) led to pressure for them to sell out. (Tr. 1492–1500, 1526–32; CX 690–91, 789–90) Coors contends, and the administrative law judge concluded that these distributors had constant problems in the operation and management of their distributorships (I.D. 125) [p. 147 herein], and that these, rather than any desire for exclusive distributorships *per se*, led to the pressure for selling out. There is, however, corroborating documentary evidence to the effect that Coors in other instances discouraged its distributors from handling competing brands and pushed them to handle Coors exclusively. (CX 626, 716A & B, 718B, 719B, 720A, 721A & B, 723–25, 748–49, 796–97) We conclude, based on our review of the evidence, that threats of termination were employed by agents of respondent at least in part in order to achieve his anticompetitive result, and others, including adherence to territorial boundaries and maintenance of prices. (See also pp. 10–12, 24 *supra*.) [pp. 181–83, 192 herein]

Whether or not any actual terminations of Coors distributors, or sales forced by threat of termination can be ascribed entirely, solely and unambiguously to the failure of the terminated or coerced distributor to participate in an antitrust violation, it is abundantly clear from the record in this case that Coors representatives have used the explicit or implicit threat of speedy

[22] Respondent appears to concede the illegality of this practice, though denying that it engaged in it. Given Coors' dominant market position and the large market share held by its distributors, a practice whose effect would inevitably be to foreclose competing brands from access to such distributional outlets may have serious anticompetitive consequences. See *Federal Trade Commission* v. *Brown Shoe Co.*, 384 U.S. 316 (1966).

termination in often successful efforts to force the acquiescence of its distributors in anticompetitive behavior.[23]

In urging us to find the use of these termination provisions an unfair trade practice, complaint counsel and intervenor, the Small Business Administration, rely on two not wholly consistent rationales.

On the one hand it is urged that the short-term termination provision, in combination with limitations on assignability of the franchise, is inherently unfair to the franchisee, depriving each of the opportunity to realize the full value of his investment and labors *irrespective of any particular anticompetitive scheme of which the termination provision may be part,* or which it may be used to facilitate. The SBA cites legal precedent, developed in the context of damage suits for franchise terminations, holding that standards of fairness, reasonableness and good faith must be read into any termination attempted under a franchise agreement involving substantial investment by the franchisee. See, *e.g., Gaines W. Harrison & Sons, Inc.* v. *J. I. Case Co., Inc.,* 180 F. Supp. 243, 247 (E.D.S.C. 1960); *J. C. Millett Co.* v. *Park & Tilford Distillers Corp.,* 123 F. Supp. 484, 493 (N.D. Cal. 1954); *J. R. Watkins Co.* v. *Rich,* 254 Mich. 82, 235 N.W. 845 (Mich. Sup. Ct. 1931). At least one case has held that even in the face of express termination provisions in an agreement, the court will impose its own where the express ones are unfair, and numerous state and federal laws impose requirements of fairness and good faith in the termination of a manufacturer's franchisees or distributors. See *Shell Oil Co.* v. *Marinello,* 5 CCH Trade Reg. Rep. ¶74,178, p. 92,881 (N.J. Sup. Ct. 1972); 15 U.S.C. §§1221–1225; *Conn. Gen. Stat.* 1971, §30–17, *Burns Ind. Stat. Ann.* 1970, §12–451a; *Gen. Stat. of N.C.,* §18–69.2; *Code of Va.* 1971, §4–80.2; *W. Va. Code* 1971, §11–16–13b.

The rationale outlined above regards the distributor to some extent as a *consumer* of the products of his manufacturer, a consumer who must be protected from the oppressive effects of a particular clause of his contract that threatens to destroy its value. This argument is far from uncompelling in the circumstances of this case. A Coors distributor who has invested several hundreds of thousands of dollars to develop his business may, in

[23] Indeed, from a legal standpoint, it may be the threat of speedy termination, rather than the simple act itself that is most pernicious. While the *Colgate* doctrine would seem to permit the manufacturer to deal with whomever he pleases, *it does not permit him to use repeated threats to terminate dealings in order to forge agreements with distributors to engage in anticompetitive practices.* (Cf. CX 501A)

the space of five days for ill-defined "cause" or 30 days for no reason whatsoever, be deprived of his source of beer and thereby of much of the value of his investment. Given Coors' dominant market position, and the distinctiveness of its brand name, it is unlikely that a distributor will be able to find an adequate substitute, and whatever forced sale he may be able to make (with, of course, the required consent of Coors) can be at best but partial compensation for this loss. It is hardly a complete reply to the SBA's position to argue that the distributor, when he signs his franchise agreement, is "aware" of the short-term termination provisions.

While we must thus remark that we are hardly impressed with the reasonableness or fairness of the challenged termination provisions, on their face, it is not necessary that we consider from the facts of this case whether *absent any specific anticompetitive uses,* the inclusion of such provisions, in the distributor's agreement, would be an unfair practice. For in this case it is abundantly clear that the termination provisions have been used in efforts to achieve all manner of anticompetitive arrangements between Coors and its distributors. The short-term termination provisions here under attack have been part and parcel of the aggregation of trade restraints in which respondent has engaged, and must fall with them. We find the use of these provisions under the circumstances of this case to constitute an unfair method of competition.

To be sure, a manufacturer's ability to terminate and threaten to terminate his poorly performing distributors with dispatch may be, under normal circumstances, critical to the efficient conduct of his business, and absent abuse of that power, should be disturbed with great reluctance. The termination of a dealer who has violated reasonable requirements of a manufacturer may well serve the interests of competition rather than subverting them.[24] But when termination provisions are abused for the purpose of coercing anticompetitive behavior, remedial action is clearly required.

In seeking to fashion an appropriate remedy, the Commission's

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[24] It is, indeed, this consideration in part that leads us to eschew the rationale propounded by the Small Business Administration. Where a termination clause is not used to foment anticompetitive behavior, there remain two competing interests at stake—(1) that of the manufacturer in conducting his business as he thinks is most efficient, and (2) that of fairness to the distributor, who has made a substantial investment in his franchise, and should be protected even at some cost to "efficiency" from loss of his investment. A balancing of these interests alone should only be attempted with a more extensive record than is available here, and perhaps indeed in the context of a rule-making proceeding in which the implications for a wide range of businesses can be assessed.

design is to limit the value of the short-term termination provisions as a weapon to be used by Coors' agents for coercing compliance with anticompetitive demands by threatening distributors with substantial economic loss, or lengthy litigation, if they fail to comply with such demands. It is clearly insufficient simply to order that respondent not terminate or threaten to terminate its distributors because of their refusal to engage in the anticompetitive activities revealed and condemned in this opinion. As the record demonstrates, it is difficult in many cases to ascribe precise and exclusive reasons to a particular termination, or to a particular threat of termination. While the record reveals a helpful lack of subtlety on the part of certain of respondent's representatives in their use of termination threats—employing them hard on the heels of criticisms of distributor refusals to engage in anticompetitive behavior—there is clearly no need that such directness be used to accomplish the same result in the future. An order that merely prohibits the use of termination threats to coerce anticompetitive behavior would be extremely difficult to enforce and would therefore do little to encourage the independent choice by distributors in matters of pricing and customer selection that is necessary to remedy the abuses found in the record.

The requisite independence of Coors' distributors from coercion to act anticompetitively can only be fostered, we believe, by rendering more equitable the terms upon which they may be terminated by the brewery, and providing a more realistic remedy for unlawful termination than a lengthy and uncertain court battle.

The Commission's order thus provides in essence for the following:

(1) Termination for "cause"—defined as a material breach of one or more contract provisions relevant to the effective performance of the franchise may be made following 60 days' notice to the distributor and an opportunity for arbitration to determine whether such cause exists.

(2) Termination without cause—defined as any good faith termination (but *not* termination for reason of failure to engage in anticompetitive activity) may be made upon 180 days' notice and an opportunity for arbitration to determine that termination is being made in good faith and not for a distributor's noncompliance with anticompetitive orders. In both cases, approval of a purchaser of the terminated distributor's franchise must not be unreasonably withheld.

The intent of the remedy proposed is to provide greater assurance to a distributor who may find himself the subject of company pressure to engage in anticompetitive acts that he may resist such pressure without the threat of substantial economic hardship, while at the same time not unduly hampering Coors' capacity to terminate poorly performing distributors.

So long as respondent can cut off its distributors "without cause" there is always some possibility that it will exercise the power, and threaten to exercise the power, to anticompetitive ends. The coercive impact of such threats can, we believe, be limited by lengthening the period of notice, and requiring reasonable exercise of the power to approve franchise purchasers, thereby increasing the likelihood that a satisfactorily performing distributor who would be inclined to resist improper pressure will ultimately be able to realize the full value of his franchise if he chooses to resist the pressure, and is terminated for doing so. In addition, the requirement that termination without cause nonetheless be made in "good faith" and that the existence of such "good faith" be subject to determination by an arbitrator, should provide some assurance that a distributor will not be terminated for anticompetitive reasons.[25]

As regards termination "with cause," the Commission believes that Coors must not be deprived of its power to terminate distributors for substantial contract violations with relative expedition. Thus only 60 days' notice is required, in addition to arbitration. If Coors can demonstrate at an arbitration proceeding that substantial contract violations have occurred, the possibility that termination has been ordered or threatened for illegitimate reasons would seem thereby diminished. While this does not eliminate the possibility of Coors cloaking anticompetitive coercion in charges of contract violations, the distributor subject to such charges is nonetheless provided with assurance that Coors must, if he chooses in good faith, prove them to an arbitrator prior to the effective date of the termination. This should provide the requisite encouragement for a distributor who has performed

[25] We recognize that so long as termination without cause is not banned outright, the danger will always exist that a termination for improper reasons will be successfully disguised in a torrent of legitimate business reasons. All we can say is that a distributor who believes he has been threatened with termination for anticompetitive reasons will be more inclined to take the chance of proving his case if the forum in which he can do so is an inexpensive arbitration prior to termination rather than in court after his source of livelihood has been eliminated. Similarly, the possibility that Coors might be in violation of a Commission order for threatening termination is likely to be of limited comfort to the threatened distributor.

reasonably to resist coercion, while permitting the company to eliminate those who have violated their obligations.[26]

While the provisions of the Commission's order, as outlined hereabove, do necessarily limit Coors' freedom to contract for the terms on which it may terminate its distributors, that limitation is necessary as indicated because of Coors' anticompetitive abuse of the termination provisions which it negotiated in the past.[27] Moreover, while as noted, our relief results from the illegal use of contract provisions, we hardly think it inequitable that Coors should have to provide its distributors, who may have invested hundreds of thousands of dollars to merchandise its product, with a modicum of fairness and due process before it cuts them off.

For the foregoing reasons, the appeal of complaint counsel is granted as provided hereinabove. The initial decision of the administrative law judge will be vacated and set aside, and an appropriate order will be entered.

Commissioner Thompson did not participate.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of counsel supporting the complaint from the initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission, for the reasons stated in the accompanying opinion having granted the appeal:

It is ordered, That the initial decision be vacated and the appeal of complaint counsel be granted as provided hereinafter.

Accordingly, the following cease-and-desist order is hereby entered:

ORDER

It is ordered, That respondent Adolph Coors Company and its subsidiaries, successors, assigns, officers, directors, agents, representatives and employees, individually or in concert with others, directly or indirectly, or through any corporate or other device,

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[26] Along these lines, the order provides that the distributor shall pay for the costs of arbitration in the event it is shown he has sought it in bad faith.

[27] The administrative law judge concluded without legal support that the Commission's proposed remedies with respect to termination, exclusive territories, and dealings with central warehouse accounts if implemented would violate petitioner's Fifth Amend-Amendment rights. We reject this contention out of hand. It is fundamental that a contract provision which contravenes the Constitution or a valid statute enacted thereunder cannot be valid. *Evert* v. *Bluejacket*, 259 U.S. 129 (1922).

in connection with the brewing, distribution, offering for sale or sale of beer in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Entering into, maintaining or enforcing any contract, agreement, combination, understanding or course of conduct which has as its purpose or effect the fixing, maintaining, establishing or setting of the prices at which distributors sell Coors beer to retailers or the prices at which retailers sell Coors beer to consumers.

2. Publishing, disseminating or providing any price list or other document indicating suggested or mandatory prices for the sale of Coors beer by any distributor to any retailer or any price list or other document indicating suggested or mandatory prices for the sale of Coors beer by any retailer to any consumer.

Provided, however, That nothing contained in this paragraph of the order shall prohibit respondent from complying with the requirements of any state law, *Provided,* That when respondent purports to be complying with the state law regarding price suggestions, respondent will specifically advise the Commission of the statute and all court decisions and administrative agency decisions and rulings interpreting said statute pursuant to which it is purporting to act.

3. Publishing, disseminating or providing to any distributor or any retailer any information or suggestions concerning what Coors may believe to be an appropriate or proper markup or profit for Coors beer when the distributor sells to the retailer or when the retailer sells to the consumer or a markup or profit below which the distributor or retailer is advised not to sell Coors beer.

Provided, however, That nothing contained in Paragraphs Two (2) and Three (3) of the order shall prohibit respondent from publishing, disseminating, or providing any price list or other document indicating suggested prices for the sale of Coors beer or suggested mark-ups or profits for Coors beer after three years from the effective date of this order. Two years following the effective date of this order respondent may petition the Commission, upon a showing that competition in the resale of its products has been restored, to be permitted to publish, disseminate or provide suggested prices, mark-ups, and profits as set forth in this proviso.

4. Refusing to sell beer to any Coors distributor or termi-

nating or threatening to terminate any Coors distributor because:

A. the distributor has in the past or might in the future sell Coors beer at prices, mark-ups, or profits different from those approved or recommended by respondent;

B. one or more of the distributor's customers sold Coors beer or advertised Coors beer for sale at prices, mark-ups, or profits different from those approved or recommended by respondent;

C. the Coors distributor sold Coors beer to another distributor or to a retailer whose business is located outside of the territory granted to the distributor; or

D. the Coors distributor distributes, has distributed, or proposes to distribute in the future the product of another brewer.

5. Entering into, maintaining or enforcing any contract, agreement, combination, understanding or course of conduct to fix, establish, limit or restrict the territory in which or the persons to whom a distributor may sell Coors beer.

Provided, however, That nothing contained in this paragraph of the order shall prohibit respondent from complying with the requirements of any state law, *Provided,* That when respondent purports to be complying with a state law requiring the restriction of territories or customers, respondent will specifically advise the Commission of the statute and all court decisions and administrative agency decisions and rulings interpreting said statute pursuant to which it is purporting to act.

6. Allocating Coors beer among its distributors in times of beer shortage at the Coors brewery, by any means other than by allocating shares to distributors equal to their proportionate purchases of Coors beer from the brewery during the last three months before the allocation or when the distributor has not been in business for more than a year as a Coors distributor, on some other equitable basis.

7. Refusing to deliver all of a distributor's order because the distributor has made sales to customers outside of the territory granted the distributor or because the distributor or the distributor's customer is selling Coors beer at prices, mark-ups or profits lower than those approved by respondent.

8. Prohibiting its distributors from selling for central

warehouse delivery; *Provided, however,* That respondent can establish refrigeration standards for the central warehouse which are substantially similar to those established for distributors and can require its distributors to be responsbile, directly or indirectly, for maintainance of such refrigeration standards and for rotation of Coors beer in the central warehouse and at the retail delivery locations where the beer is redelivered from the central warehouse, if respondent changes its container dating system so that the retailer and the consumer will recognize the date without reference to a code or measuring stick.

9. Entering into, maintaining or enforcing any contract, agreement, combination, understanding or course of conduct with its distributors which has as its purpose or effect requiring that retailers serve Coors draught beer as their only light-colored draught beer.

10. Entering into, maintaining or enforcing any contract, agreement or understanding, or taking any action or course of conduct with any of its distributors which has as its purpose or effect the requirement that the distributor eliminate, or refrain from obtaining and handling rival brands of beer in order to become or remain a Coors distributor.

11. Hindering, suppressing or eliminating competition or attempting to hinder, suppress or eliminate competition between or among distributors or between or among retailers handling Coors beer.

12. Cancelling any distributor agreement unless and until the respondent has pursued the following procedure:

A. Cancellation With Cause

(a) Respondent has given the distributor sixty days' notice of respondent's intention to cancel its agreement with the distributor;

(b) Said notice, referred to in (a) above, will include in writing an assurance that the contract is being terminated in good faith and for material violation of one or more contract provisions which are relevant to the effective operation of the franchise. Said notice shall further provide a list of the specific reasons for which the franchise is being terminated;

(c) Said notice will include the assurance that the distributor may sell his interest to a third party

during the sixty days, subject to the respondent's approval of the buyer as a satisfactory distributor of respondent's products and the further assurance that approval will not be unreasonably withheld;

(d) Said notice will also include the statement that the distributor has the right to have the contract cancellation reviewed in an arbitration proceeding as hereinafter provided, to ascertain whether the termination has been made otherwise than in good faith and otherwise than for material violation of one or more contract provisions which are relevant to the effective operation of the franchise.

B. Cancellation Without Cause

(a) Respondent has given the distributor one hundred and eighty days' notice of respondent's intention to cancel its agreement with the distributor;

(b) Said notice, referred to in (a) above, will include in writing an assurance that the contract is being terminated in good faith. Said notice shall further provide a list of the specific reasons for which the franchise is being terminated.

(c) Said notice will include the assurance that the distributor may sell his interest to a third party during the one hundred and eighty days subject to the respondent's approval of the buyer as a satisfactory distributor of respondent's products, and the further assurance that approval will not be unreasonably withheld;

(d) Said notice will also include the statement that the distributor has the right to have the contract cancellation reviewed in an arbitration proceeding as hereinafter provided to ascertain whether the termination has been made otherwise than in good faith.

13. *It is further ordered,* That respondent, within three (3) months from the date this order becomes final, shall provide for arbitration, in the city in which a distributor resides, by an independent and neutral arbitrator, to determine in the case of any announced termination, and upon the request of a distributor, whether or not said termination is made in good faith (in the case of termination without cause) or

whether or not said termination is made in good faith and for material violation of one or more contract provisions which are relevant to the effective operation of the franchise (in the case of termination with cause). The arbitrator shall find that a cancellation of any distributor agreement is not made in good faith if the arbitrator finds that the termination would constitute a violation of the antitrust laws or this order.

Said arbitration shall be initiated by respondent within fifteen (15) days from the date of a request by the distributor, which request shall be made not later than fifteen (15) days after notice of proposed cancellation. If respondent fails to provide for arbitration within the time limit, or if the arbitrator finds that cancellation is not proposed in good faith (and for material violation of one or more contract provisions relevant to the effective operation of the franchise in the case of termination for cause), respondent shall reinstate the distributor at the location he held prior to cancellation and shall allow the distributor to reenter into a distributor agreement.

All costs of arbitration, except for the distributor's attorney's fees, shall be borne by respondent, *Provided, however,* That if in the course of the arbitration proceeding it is determined by the arbitrator that the distributor's claims are not brought in good faith, the distributor shall bear the costs of arbitration other than respondent's attorney's fees. The distributor's right to arbitration shall be conspicuously noted in all present and future distributor agreements.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions, to its present and future sales representatives, to its present and future distributors.

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

In the event that respondent proposes a change in the corporate respondent, as set forth above, respondent shall require said successor or transferee to file, with the Commission, at the time

of respondent's notification, a written agreement to be bound by the terms of this order; *Provided,* That if respondent wishes to present to the Commission any reasons why said order should not apply in its present form to said successor or transferee, respondent shall submit to the Commission a written statement setting forth said reasons at least sixty (60) days prior to the consumation of said succession or transfer.

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

The matter was argued before Commissioner Thompson was sworn in. Therefore, he elected not to participate.

IN THE MATTER OF

CORNING GLASS WORKS

Docket 8874. Interlocutory Order, July 24, 1973.

Order denying respondent's motion for reconsideration of final order, or in the alternative, for reopening of proceeding.

Appearances

For the Commission: *R. A. Bloch, S. B. Gold.*

For the respondent: *Sherman & Sterling,* New York, New York, *William C. Ughetta,* secretary and general counsel, Corning Glass Works, Corning, New York.

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION OF THE FINAL ORDER OR IN THE ALTERNATIVE FOR REOPENING OF PROCEEDING

On June 5, 1973 [82 F.T.C. 1675], the Commission issued its decision sustaining Counts I, II, and IV of the complaint and dismissing Counts III and V. Accompanying the Commission's Opinion was an order to cease and desist which was virtually identical to the proposed order which accompanied service of the complaint (the "notice order"), except for deletion of language which pertained to the two counts that were dismissed.

Respondent has now filed a motion pursuant to Section 3.55 of