

IN THE MATTER OF  
THE MAGNAVOX COMPANY

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

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

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

ORDER MODIFYING DECISION AND ORDER

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

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

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

products to outlets that, at least in some instances, do not have the resources to provide adequate pre-sale and post-sale service.

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

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

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

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

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

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

Commissioners Pertschuk and Bailey voted in the affirmative as to the modification to Part III of the original order and voted in the

negative as to the modification deleting Part I, subparts T and V, of the original order relating to transshipping.

STATEMENT OF COMMISSIONER PERTSCHUK DISSENTING IN PART

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

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

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

<sup>1</sup> The Magnavox Co. continues to exist, but is no longer in the consumer electronics business.

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

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

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

#### STATEMENT OF COMMISSIONER BAILEY DISSENTING IN PART

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

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

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

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

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

Complaint

102 F.T.C.

IN THE MATTER OF  
THE GRAND UNION COMPANY, ET AL.

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

*Docket 9121. Complaint, Nov. 21, 1978—Final Order, July 18, 1983*

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

*Appearances*

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

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

COMPLAINT

The Federal Trade Commission, having reason to believe that The Grand Union Company; Grand Union Holdings Inc.; Cavenham (USA), Inc.; and Cavenham Holdings, Inc., corporations subject to the jurisdiction of the Commission, have acquired the stock of Colonial Stores, Inc., a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act [15 U.S.C. 45(b)] and states its charges as follows:

I. DEFINITIONS

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

1. *Retail food stores* are retail establishments primarily engaged in selling food for home preparation and consumption.
2. *Supermarket* is a retail establishment primarily engaged in selling a wide variety of canned and frozen food, dry groceries (either

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

## II. GRAND UNION COMPANY

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

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

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

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

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

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

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

## III. COLONIAL STORES

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

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

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

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

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

#### IV. THE ACQUISITION

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

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

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

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

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

#### V. TRADE AND COMMERCE

##### A. *Product Market*

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

### B. *Geographic Market*

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

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

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

### C. *Barriers to Entry*

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

## VI. THE COUNTS

### A. *Grand Union—Actual Potential Competition*

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

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

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

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

*B. Grand Union—Perceived Potential Competition*

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

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

29. Paragraphs 24 through 26 are incorporated herein.

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

VII. EFFECTS

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

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

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

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

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

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

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

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

## VIII. VIOLATIONS

32. The acquisition of Colonial common stock by Grand Union and the merger between Grand Union and Colonial constitute violations of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

## INITIAL DECISION BY

ERNEST G. BARNES, ADMINISTRATIVE LAW JUDGE

OCTOBER 30, 1981

## PRELIMINARY STATEMENT

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

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

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

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

The Complaint alleges that Grand Union's acquisition of Colonial may have the effect of substantially lessening competition or tending to create a monopoly in violation of Section 7 of the Clayton Act; or may constitute an unfair act and practice or unfair method of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The product market was alleged to be sales by retail food stores, including the submarket of sales by supermar-

kets. The relevant geographic markets were alleged to be some of the Standard Metropolitan Statistical Areas, cities or towns in which Colonial operated supermarkets.

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

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

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

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

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

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

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

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

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

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

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

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

(Complaint ¶ 31)

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

markets, and to consider whether Count C was necessary to the Complaint or whether it should be stricken as redundant.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Murray Aboff	Managing Editor <i>Supermarket News</i>	Stipulated Testimony
Joe Blanton	President Publix Supermarkets, Inc.	Stipulated Testimony
Antoinette Machiaverna	Field Editor <i>Chain Store Age and Supermarkets</i>	Stipulated Testimony [8]

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

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

## FINDINGS OF FACT

### I. IDENTITY AND BUSINESS OF RESPONDENTS

#### A. *The Grand Union Companies*

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

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

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

<sup>3</sup> References to the record and other material are given in parenthesis, and the following abbreviations are used:

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

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

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

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

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

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

#### *B. Cavenham Respondents*

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

Cavenham Holdings Inc. was organized for the purpose of holding shares of Cavenham (U.S.A.) Inc. Cavenham (Overseas) Limited and Cavenham Limited are English companies with their principal execu-

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

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

### *C. Respondent Colonial*

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

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

The company [Colonial] is engaged primarily in the operation of a chain of self-service, cash-and-carry retail food stores (supermarkets), in seven southeastern states, offering a full line of packaged grocery products, meat, poultry, fish, fruits and vegetables,

bakery and dairy products, and other items of the type customarily sold in supermarkets, such as health and beauty aids and household items.

(CX 313J)

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

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

#### D. *Interstate Commerce*

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

#### II. THE EIGHT STORE ACQUISITION

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

Pursuant to the "FTC Enforcement Policy With Respect to Mergers in the Food Distribution Industries", 1 Trade Reg. Rep. (CCH) ¶ 4525, issued January 17, 1967 (CX 5), Grand Union notified the FTC on May 3, 1978 of its intention to acquire the eight stores from Colonial. (RX 1P; CX 654A) Thereafter, on July 6, 1978, Grand Union acquired the eight Big Star stores. One store was located in Manatee County, three were located in Hillsborough County, and four were located in Pinellas County (Tampa and St. Petersburg), all in the State of Florida. (RX 1L; CX 112B; CX 154B; CX 155B; CX 156B; CX 157B; CX 158B; CX 159B; CX 160B) Grand Union paid an aggregate consideration of

approximately \$1.45 million for the eight stores (RX 1L) Grand Union did not choose to acquire any of the Colonial stores in Central Florida. The acquired stores had been closed by Colonial prior to their acquisition by Grand Union. (CX 588 [Wood] at 189) Subsequently, seven stores were renovated by Grand Union and reopened in the fall of 1978 under the Grand Union name. (*Id.*) At the time of its notice to the Commission of its proposed acquisition of the eight supermarkets, Grand Union operated seven supermarkets on the west coast of Florida, including one in Pinellas County, Florida. (Complaint Counsel Phy. Ex C)

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

### III. THE ACQUISITION OF COLONIAL

#### A. *The Acquisition*

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

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

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

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

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

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

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

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

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

#### *B. The Hold Separate Agreement*

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

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

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

On August 18, 1978, Grand Union and the Commission staff

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

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

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

IV. THE PRODUCT MARKET

*A. In General*

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

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

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

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

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

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

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

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

(Parker 2220)

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

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

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

(Gregerson 309)

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

(Gooding 1115)

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

(Connell 1221)

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

(C. Thomas 1303)

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

(B. Thomas 1470)

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

(Byrd 1536) [18]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

