

IN THE MATTER OF  
NATIONAL FIRE HOSE CORP., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VOIATION OF  
THE FEDERAL TRADE COMMISSION ACT

*Docket C-2935. Complaint, Nov. 1, 1978—Decision, Nov. 1, 1978*

This consent order requires a Compton, Calif. manufacturer and seller of fire hose and accessories to cease, in connection with the sale and distribution of their products, from entering into agreements, or taking any other action that would impose territorial or customer restrictions on their distributors.

*Appearances*

For the Commission: *John Hankins.*

For the respondent: *Earl P. Willens, Buchalter, Nemer, Fields & Savage, Los Angeles, Calif.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that the parties listed in the caption hereof and more particularly described and referred to hereinafter as respondents, have violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the interest of the public, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent National Fire Hose Corp. is a corporation organized under the laws of the State of California, with its executive office, plant, and principal place of business located at 516 East Oaks St., Compton, California.

PAR. 2. Respondent Raymond L. Pepp is Chairman of the Board of Directors of respondent corporation. Together with the other individual respondent, respondent Raymond L. Pepp has been and continues to be responsible for establishing, supervising, directing and controlling the business activities and practices of corporate respondent, including those hereinafter set forth. Mr. Pepp's office address is the same as that of respondent corporation.

PAR. 3. Respondent Dudley H. Pepp is an officer of respondent corporation. Together with the other individual respondent, respondent Dudley H. Pepp has been and continues to be responsible for establishing, supervising, directing and controlling the business activities and practices of corporate respondent, including those

hereinafter set forth. Mr. Pepp's office address is the same as that of respondent corporation.

PAR. 4. Respondent corporation is engaged in the manufacture, distribution and sale of fire hose to distributors located throughout the United States. These distributors in turn resell to others, including users of fire hose such as fire departments and industrial customers. For the purposes of this proceeding, a "distributor" is defined as any person or firm which buys fire hose directly from respondent corporation for the purpose of resale.

PAR. 5. In the course and conduct of its business of manufacturing and distributing fire hose, respondent corporation ships or causes such products to be shipped from its plant in the State of California to customers in various other States throughout the United States. The respondent corporation is therefore engaged in "commerce" and the business of respondent corporation affects "commerce" as commerce is defined in the Federal Trade Commission Act.

PAR. 6. Except to the extent that competition has been restrained by reason of the practices hereinafter alleged, respondent corporation's distributors, in the course and conduct of their business of distributing, offering for sale, and selling fire hose purchased from respondents, are in substantial competition in or affecting commerce with one another and with other firms or persons engaged in the distribution and sale of other brands of fire hose; and respondent corporation is likewise in substantial competition in or affecting commerce with other persons or firms engaged in the manufacture, sale and distribution of fire hose.

PAR. 7. In the course and conduct of their business, respondents have engaged and continue to engage in the unfair methods of competition, and unfair acts and practices, in or affecting commerce, enumerated in this paragraph:

1. Respondents have established agreements, understandings or arrangements with their distributors whereby such distributors are granted exclusive territories in which to market respondents' fire hose;

2. Respondents have contacted distributors selling respondents' fire hose outside these defined territories and have attempted by various means to coerce such distributors to refrain from making further sales outside their assigned territories; as a result of such coercion respondents' distributors have agreed to refrain from selling respondents' fire hose outside their assigned territories;

3. Respondents have acted in concert with their distributors to foreclose the entry of new distributors into competition with respondents' distributors; and

4. Respondents have established agreements, understandings or arrangements whereby their distributors refrain from selling to particular customers.

PAR. 8. In the manner above described, respondents have entered into and maintained agreements with their distributors which have had and do have the tendency of unduly hindering and restraining competition between such distributors in the sale of respondents' products. Said agreements and respondents' acts and practices in furtherance of them have had and now have the following effects among others:

1. Distributors have been deprived of their freedom to act as independent businessmen;
2. Distributors have refrained from selling respondents' fire hose outside the distributors' assigned territories thereby eliminating or severely restricting competition between such distributors in the sale of respondents' products;
3. Willing buyers and sellers of respondents' fire hose have been prevented from consummating sales;
4. Competition among distributors of respondents' fire hose and companies dealing in other brands of fire hose has been restricted;
5. Buyers of fire hose have been deprived of the benefits of free competition.

PAR. 9. The aforesaid acts, practices and methods of competition have the tendency unduly to restrict and restrain competition and have injured, hindered, suppressed, lessened or eliminated actual and potential competition, are to the prejudice and injury of the public, and constitute unfair methods of competition and unfair acts or practices in or affecting commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Denver Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act;

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an

admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent National Fire Hose Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 516 East Oaks St., Compton, California.

Respondent Raymond L. Pepp is a director of said corporation. Respondent Dudley H. Pepp is an officer of the corporation. Together, they formulate, direct and control the acts and practices of the corporation. Their address is the same as that of the corporation.

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

#### ORDER

##### I

*It is ordered,* That respondents National Fire Hose Corp., its subsidiaries, successors, assigns, officers and directors, and Raymond L. Pepp and Dudley H. Pepp individually and as officers or directors of National Fire Hose Corp., and respondents' agents, representatives and employees, directly or indirectly, or through any corporate or other device, in connection with the manufacturing, distribution, offering for sale or sale of fire hose or fire hose accessories (hereinafter "products") in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Entering into, maintaining, preserving or enforcing any contract, agreement, combination, or understanding which fixes, establishes, limits or restricts the territory in which a distributor may sell any of respondents' products;

2. Requiring any distributor or potential distributor to enter into a written or oral agreement or understanding, concerning the

territory in which such distributor or potential distributor may sell any of respondents' products, as a condition to receiving or retaining a distributorship;

3. Refusing to sell, delaying shipment, threatening to refuse to sell or to delay shipment, or taking any other action to limit or restrict the territory in which a distributor may sell any of respondents' products;

4. Consulting or communicating with any distributor of respondents' products concerning the establishment of a new distributorship;

5. Entering into, maintaining, preserving or enforcing any contract, agreement, combination, or understanding which limits or restricts the customers to whom a distributor may sell any of respondents' products;

6. Restricting or attempting to restrict, in any manner, the customers to whom a distributor may sell any of respondents' products or the territory in which a distributor may sell such products.

## II

*It is further ordered,* That respondents, for a period of three years from the date of service upon them of this order, establish and maintain a file of all records referring or relating to respondents' refusal to sell any product to any distributor or respondents' termination of any distributor, which file shall contain a copy of any written communication to any such distributor concerning such refusal to sell or such termination. The file shall be made available for Commission inspection upon reasonable notice.

## III

*It is further ordered,* That respondents shall, within thirty days after service upon them of this order, distribute a copy of the order to each of the corporate respondent's operating divisions, to its present corporate officers, to its present sales representatives, and to its future corporate officers and sales representatives within five days of their assumption of office or employment with respondent corporation.

## IV

*It is further ordered,* That respondents shall:

1. Within thirty days after service upon them of this order, distribute a copy of the letter attached as Appendix "A" to each

existing distributor who has purchased municipal type fire hose from respondents within the past three years;

2. Distribute a copy of the letter attached as Appendix "A" to each newly established distributor who purchases municipal type fire hose from respondents within the three year period commencing from the date of service of this order upon respondents; this letter to be distributed prior to the first such sale;

3. The distribution of copies of the letter attached as Appendix "A" as provided in this part of the order shall not be construed as a limitation on the other parts of this order.

## V

*It is further ordered,* That respondents shall notify the Commission at least thirty days prior to any proposed change in the organization of 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 this order.

## VI

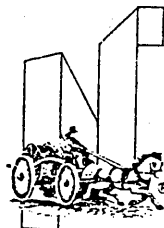
*It is further ordered,* That each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment. In addition, for a period of ten years from the effective date of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the manufacture, distribution or sale of fire hose or fire hose accessories or of his affiliation with a new business or employment in which his own duties and responsibilities involve the manufacture, distribution or sale of fire hose or fire hose accessories. Such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

*It is further ordered,* That the respondents herein shall within sixty days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Custom Manufacturers of Municipal and Industrial Fire Hose

## APPENDIX A

NATIONAL FIRE HOSE CORP.



Date:

TO: ALL DISTRIBUTORS OF MUNICIPAL HOSE

National Fire Hose and the Federal Trade Commission have been engaged in discussions concerning the Company's distribution practices as they relate to certain of our distributors. While the Company has continued to defend its practices in light of relevant factors in the marketplace, we have determined that it is in the best interests of National and you, our distributor, that the matter be put to rest in as simple a fashion as possible causing the least disruption to our distributors and to customers of our distributors. Therefore, for settlement purposes only and without admitting that any acts to this date have violated any law, we have consented to an order issued by the Commission prohibiting us from:

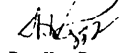
1. Imposing territorial restrictions on our distributors or coercing distributors in any manner to limit the territory in which they sell National's products;
2. Restricting the customers to whom distributors may sell National's products;
3. Communicating or consulting with our distributors concerning the establishment of new distributors.

If, in the future, you believe that National has engaged in any of the practices listed above, you should report the details in writing to:

Federal Trade Commission  
Washington, D.C. 20530

All of us at National look forward to serving you on all of your fire hose requirements in the years to come. Your continuing support of National products and policies is greatly appreciated.

Very truly yours,

  
D. H. Pepp

IN THE MATTER OF  
GOLD BULLION INTERNATIONAL, LTD., ET AL.

ORDER CLARIFYING AND MODIFYING OPINION IN REGARD TO  
ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND  
HOBBY PROTECTION ACTS

*Docket 9094. Decision, July 25, 1978 — Modifying Order, Nov. 3, 1978*

This order clarifying and modifying the opinion of the Commission, 92 F.T.C. 196, deletes any finding of liability with respect to the 10 Mark 1887 Kaiser Wilhelm I coin, and deletes the words "by respondents" at the appropriate places, to make clear that the only relationship of individual respondents to the importation of the offending coins was in their roles as owners, officers, and directors of the respondent corporation.

ORDER CLARIFYING AND MODIFYING OPINION OF THE  
COMMISSION

By motion filed November 1, 1978, respondents have requested that the Commission modify its opinion in two respects, neither of which affects the final order previously entered. Complaint counsel have not objected to the requested modifications. The first requested modification would delete any finding of liability with respect to the German 10 Mark 1887 Kaiser Wilhelm I coin, on grounds that there is record proof of only one specimen of the coin having been imported. (In its opinion the Commission concluded that no liability should be found for another coin, the German 20 Mark 1887 Kaiser Wilhelm I, for the same reason; the change would, therefore, treat the two coins consistently.) The second modification relates to the role of the individual respondents, making clear that their only relationship to the importation of the offending coins was in their roles as owners, officers, and directors of Gold Bullion. The modifications appear warranted. Therefore,

*It is ordered*, That this matter be reopened, and that the opinion of the Commission be modified in the following two respects:

1. The conclusion at p. 15 of the Commission's opinion (first paragraph) is modified to delete reference to the 10 Mark Wilhelm I (1887) coin, and that coin is dropped from consideration as a basis for the Commission's finding of liability, for the same reasons noted with respect to the 20 Mark Wilhelm I (1887) coin discussed at p. 5, n. 5 of the Commission's Opinion.
2. On p. 23 of the initial decision, the words "by respondents" are deleted from findings 3-5 of the "Summary" of the administrative law judge, and Finding 2 on p. 23 is modified to read:

## Clarifying and Modifying Order

92 F.T.C.

Gold Bullion International, Ltd. imported into the United States for sale and distribution in commerce, copies of gold coins that were manufactured after November 29, 1973, the effective date of the Hobby Protection Act. The individual respondents did not import coins into the United States in their individual capacities. Insofar as Messrs. Bogart, Costello and Thompson (along with Mr. Mayer) controlled the acts and practices of Gold Bullion or had the ability to exercise such control by virtue of their ownership of the respondent corporation and/or of their roles as officers and/or directors, they are responsible for the importation of coins by Gold Bullion for purposes of enforcement of the Hobby Protection Act by the Federal Trade Commission.

Commissioner Pitofsky did not participate.

## Complaint

## IN THE MATTER OF

## BORDEN, INC.

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

*Docket 8978. Complaint, July 2, 1974 — Decision, Nov. 7, 1978*

This order, among other things, requires a New York City firm to cease attempting to hinder, restrain or eliminate competition in the processed lemon juice market by granting improper price reductions and promotional allowances to its customers; or by selling its product, ReaLemon, below cost or at unreasonably low prices.

*Appearances*

For the Commission: *W.M. Rice, K.H. Richman, John M. Peterson, Robert C. Goldberg and William J. Tabor.*

For the respondent: *Elroy H. Wolff, David J. Lewis, H. Blair White and Charles W. Douglas, Sidley & Austin, Chicago, Ill. and Washington, D.C.*

## COMPLAINT

The Federal Trade Commission having reason to believe that Borden, Inc., hereinafter referred to as Borden or respondent, has violated Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

## I. DEFINITIONS

PARAGRAPH 1. For the purposes of this complaint the following definitions shall apply:

(a) "Reconstituted lemon juice" means a product manufactured by adding water to a lemon concentrate base, which product, either bottled or canned, can be stored without refrigeration for long periods of time.

(b) "ReaLemon" refers to the brand name of the reconstituted lemon juice product of ReaLemon Foods which is part of the Borden Foods Division of Borden, Inc.

## II. RESPONDENT

PAR. 2. Borden is a corporation organized and existing under and

by virtue of the laws of the State of New Jersey with its executive offices located at 277 Park Ave., New York, New York. [2]

PAR. 3. ReaLemon Foods is a part of the Borden Foods Division of Borden, Inc. Borden acquired ReaLemon-Puritan Co., Chicago, Illinois, in 1962. As a separately operated entity in the Borden Foods Division, ReaLemon Foods processes, packs, distributes, and sells reconstituted lemon juice.

PAR. 4. In 1972, Borden's total sales exceeded \$2 billion, net income after taxes was approximately \$66 million, and total assets were approximately \$1.3 billion. In 1973, ReaLemon Foods' total sales were approximately \$28 million. ReaLemon Foods' sales of reconstituted lemon juice were approximately \$22 million and substantially all of its net income of \$3.5 million was derived from such sales.

### III. NATURE OF TRADE AND COMMERCE

PAR. 5. The relevant market is the sale and distribution, for resale, of reconstituted lemon juice in the United States and regions thereof.

PAR. 6. Borden, through ReaLemon Foods, dominates the reconstituted lemon juice market. In 1972, industry sales of reconstituted lemon juice were approximately \$25 million; Borden accounted for approximately 90 percent of such sales. In 1973, industry sales of reconstituted lemon juice were approximately \$25 million; Borden accounted for approximately 80 percent of such sales.

PAR. 7. Approximately 20 firms are presently engaged in the reconstituted lemon juice market. Of these 20 firms, only five firms, in addition to Borden, sell a full range of bottle sizes of reconstituted lemon juice. After ReaLemon Foods, the next largest firm accounted for approximately five percent of sales of reconstituted lemon juice in 1972 and twelve percent of sales in 1973.

### IV. JURISDICTION

PAR. 8. In the course and conduct of its business, Borden has sold or caused to be sold reconstituted lemon juice to customers located throughout the United States. There is now and has been for many years a constant substantial flow of Borden's ReaLemon reconstituted lemon juice in [3] "commerce" as that term is defined in the Federal Trade Commission Act. Except to the extent that competition has been hindered, frustrated, lessened and eliminated by the acts and practices hereinafter alleged in this complaint, Borden has been and is in competition with other corporations, partnerships, individuals or firms engaged in the sale and distribution of reconstituted lemon juice.

## V. ACTS AND PRACTICES

PAR. 9. Borden, the largest processor, distributor and seller of reconstituted lemon juice in the United States, has used its dominant position, size and economic power to frustrate the growth of smaller reconstituted lemon juice processors and distributors; to reduce their opportunities for business survival; and to prevent, hinder, or lessen competition in the processing, distribution and sale of reconstituted lemon juice. Thus, Borden has been, and is now, engaging in various monopolistic or other unfair acts, practices or methods of competition in maintaining a monopoly in the processing, distribution or sale of reconstituted lemon juice.

More particularly, respondent, since at least 1965, has adopted and placed into effect and carried out various policies, acts and practices to lessen, restrain, eliminate and prevent the distribution or sale of reconstituted lemon juice by others engaged in the processing, distribution and sale of such product in the United States. Among such monopolistic policies, acts and practices, respondent engaged in the following:

(a) Granting selective price reductions which have resulted in different net prices among Borden's ReaLemon customers;

(b) Selling its reconstituted lemon juice below its cost or at unreasonably low prices under circumstances where the effect was, and is, to injure, suppress or destroy competition in the processing, distribution or sale of reconstituted lemon juice; [4]

(c) Granting selective promotional allowances or concessions under circumstances where the effect was, and is, to injure, suppress or destroy competition in the processing, distribution or sale of reconstituted lemon juice;

(d) Disparaging personnel and products of its competitor.

(e) Erecting barriers to entry into the reconstituted lemon juice market through extensive trademark promotion and advertising which has artificially differentiated Borden's reconstituted lemon juice from comparable products of its competitors;

(f) Inducing selected customers to reduce their retail prices on Borden's reconstituted lemon juice by granting special price reductions and/or special promotional allowances or concessions on Borden's reconstituted lemon juice.

## VI. EFFECTS

PAR. 10. Borden has engaged and is engaging in acts, practices and

methods of competition as hereinbefore alleged, the effects of which have included:

- (a) Monopolizing the reconstituted lemon juice market;
- (b) Preserving, maintaining, and furthering a highly concentrated market structure;
- (c) Hindering, restraining, foreclosing and frustrating competition in the reconstituted lemon juice market;
- (d) Increasing entry barriers in the reconstituted lemon juice market;
- (e) Depriving consumers of the benefits of free and open competition. [5]

#### VII. VIOLATIONS

PAR. 11. Through each act or practice, hereinbefore alleged in Paragraph 9(a)-(f), respondent has maintained monopoly power over the production, distribution or sale of reconstituted lemon juice in the relevant market in violation of Section 5 of the Federal Trade Commission Act.

PAR. 12. Respondent, through unfair methods of competition, has restrained trade and maintained a noncompetitive market structure in the distribution and sale of reconstituted lemon juice in the relevant markets in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY DANIEL H. HANSCOM, ADMINISTRATIVE  
LAW JUDGE

AUGUST 19, 1976

#### I

#### STATEMENT OF THE CASE

##### Allegations of Complaint

The complaint in this proceeding issued in July 1974 charging respondent Borden, Inc. with maintaining monopoly power over the marketing and [2] sale of reconstituted lemon juice through ReaLemon Foods, a unit of its Borden Foods Division, in violation of Section 5 of the Federal Trade Commission Act. More specifically, the complaint charged respondent Borden with using its dominant position, size and economic power to frustrate the growth of smaller reconstituted lemon juice marketers, to reduce their opportunities for survival, and to prevent, hinder and lessen competition in the

sale of reconstituted lemon juice. As a consequence of the foregoing and other enumerated acts and practices, respondent Borden was charged with (a) monopolizing the reconstituted lemon juice market, (b) preserving, maintaining, and furthering a highly concentrated market structure, (c) hindering, restraining, foreclosing, and frustrating competition in the reconstituted lemon juice market, (d) increasing entry barriers in the reconstituted lemon juice market, and (e) depriving consumers of the benefits of free and open competition.

The "relevant market," as indicated, was alleged to be the marketing and sale of reconstituted lemon juice in the United States and regions thereof. Industry sales of reconstituted lemon juice were stated to be approximately \$25,000,000 in 1973, and respondent's RealLemon brand was alleged to account for approximately 80 percent of such sales.

Borden's answer, filed August 22, 1974, denied all allegations of unlawful competitive conduct or that it had violated Section 5 of the Act. Respondent denied that reconstituted lemon juice was a relevant product market, that it had engaged in any of the specific acts and practices alleged, or that it had restrained trade or maintained a noncompetitive market structure in the sale of reconstituted lemon juice. [3]

#### Procedural History

Pretrial proceedings commenced shortly after the filing of Borden's Answer with a conference held August 28, 1974, and continued thereafter with extensive discovery and trial preparations by both sides. A number of motions were filed and ruled upon by the law judge, and several additional pretrial conferences were held to iron out various problems which developed. Hearings on the merits were originally scheduled for February 18, 1975, but that date proved to be impractical and they were reset for May 27, 1975. The case-in-chief commenced on that date in Chicago, Illinois, and thereafter hearings were held there and in Washington, D.C. and Los Angeles, California.

The trial required in all seven weeks of actual hearings, including rebuttal which was concluded on February 3, 1976. Many industry and other witnesses were called, and both sides presented extensive expert economic and marketing testimony. Complaint counsel called Dr. Michael Mann, Professor of Economics at Boston College and former Director of the Bureau of Economics of the Commission, and Drs. Warren Greenberg and Daniel P. Kaplan, economists from the Commission's Bureau of Economics. Respondent Borden called Dr.

William F. Massy, Professor of Business Administration and Vice-Provost for Research at the Graduate School of Business, Stanford University, and Dr. Morton Kamien, Professor of Managerial Economics at the Graduate School of Management, Northwestern University. In all 74 witnesses testified. When hearings were completed the transcript amounted to 6,189 pages, and twelve binders of exhibits had been accumulated numbering several thousand pages. The record was closed February 23, 1976. The initial decision was originally due May 21, 1976, but the complexity of this matter combined with another decision then being completed by the undersigned necessitated extensions of time which were granted by the Commission. [4]

The proceeding is now before the undersigned for decision based upon the allegations of the complaint, the answer, the evidence and the proposed findings of fact, conclusions and legal authority filed by both sides. All proposed findings of fact, conclusions and arguments not specifically found or accepted herein, are rejected. The law judge, having considered the entire record, and all the contentions of respondent Borden and complaint counsel, makes the following findings and conclusions, and issues the order set out at the end hereof:

## II

### FINDINGS OF FACT

#### Respondent

1. Respondent Borden is a New Jersey corporation with its executive offices at 277 Park Ave., New York, New York. Among its divisions is the Borden Foods Division which is headquartered in Columbus, Ohio (Complaint and Answer, Paragraph Two; Dillon, Tr. 4840).

2. The ReaLemon-Puritan Company, based in Chicago, Illinois, was acquired by Borden in 1962, and thereafter has been operated as ReaLemon Foods, a separate unit of the Borden Foods Division. The principal product of ReaLemon Foods is ReaLemon brand of reconstituted lemon juice (Complaint and Answer, Paragraphs Three and Four).

3. Respondent Borden, Inc. is a major U.S. corporation with total sales of over \$2 billion annually, total income after taxes of \$66 million in 1972 and assets of around \$1.3 billion. In 1973, total sales of ReaLemon Foods were approximately \$28 million of which \$22

million was reconstituted lemon juice (Complaint and Answer, Paragraph Four). [5]

4. At all times relevant herein, Borden has sold reconstituted lemon juice in various parts of the United States and was, and is now, engaged in "commerce" as "commerce" is defined in the Federal Trade Commission Act (Complaint and Answer, Paragraph Eight).

#### Market Definition

As a predicate for determining whether respondent Borden, as charged in the complaint, has "maintained monopoly power over the production, distribution or sale of reconstituted lemon juice," it is obviously necessary first to identify both the "relevant geographic market" and the "relevant product market."

#### Geographic Market

5. The geographic market within which to test the allegations of the complaint is the United States as a whole. Respondent Borden's ReaLemon bottled lemon juice is marketed nationally and competed with similar products in most of the country. Although valid geographic submarkets may exist, the record clearly establishes the existence and validity of a national geographic market (see, for example, CX 1, pp. 638-39; CX 2, pp. 660, 678, 707; CX 3, p. 740; CX 258).

#### Product Market

6. From the inception of this proceeding the composition of the relevant product market has been a paramount issue. Respondent Borden has contended throughout that any relevant market definition must include fresh lemons at a minimum. A major part of the case was devoted to documentary and testimonial evidence, some of it highly complex econometric analysis, on this issue. Complaint counsel, on the other hand, maintain that, although the "outer boundaries" of a broad product market may include [6] fresh lemons, a variety of practical factors, including product characteristics and "economic and commercial realities," establish that "processed lemon juice," described later herein, constitutes a valid submarket. After thorough consideration of the evidence and applicable legal principles on this question, the law judge, in accordance with the findings and reasoning set out hereinafter, has concluded that complaint counsel's contention is correct and that processed lemon

juice is, at the least, a proper submarket within which to test respondent Borden's competitive conduct.

#### Fresh Lemons

7. Little need be said about fresh lemons, they are known to all. Unlike other citrus fruit, however, fresh lemons are used mainly for their juice and as a garnish. Fresh lemons grow the year around, and are available at all seasons (Lee, Tr. 5079; Bohrens, Tr. 5071). California is a principal producer, although lemons are also grown elsewhere, including Arizona and Florida. Fresh lemons are perishable in a relatively short time. Estimates of the shelf-life of unrefrigerated lemons ranged from 5 to 7 days up to three or four weeks (Goldberg, Tr. 2630; Heller, Tr. 5018; Greenberg, Tr. 1202-1203; Imming, Tr. 4603), and under refrigeration at the proper temperature, six to eight weeks (Lemmerman, Tr. 981). Dollar sales of fresh lemons approximate \$200,000,000 yearly (Fey, Tr. 3970).

#### Processed Lemon Juice

8. Processed lemon juice includes the following different varieties: reconstituted lemon juice, frozen reconstituted lemon juice, processed fresh lemon juice, frozen fresh lemon juice, and imitation lemon juice (Dr. Greenberg, Tr. 2801). As indicated earlier, the complaint alleged the relevant product [7] market to be "reconstituted lemon juice," but during the proceeding, and later in proposed findings and briefing, complaint counsel shifted to "processed lemon juice" which describes a slightly broader product market. Significant market share data is in terms of processed lemon juice (CX 239), although most of the evidence offered by complaint counsel relates to reconstituted lemon juice. Bottled reconstituted lemon juice, which is the product marketed by respondent under its ReaLemon brand, is overwhelmingly the dominant type of processed lemon juice, and comprises the bulk of the processed lemon juice category (see the testimony of Dr. Greenberg, particularly Tr. 2794 through 2806, Tr. 2846-47, CX 239, and CX 1 through 4 generally). Whether the relevant market is formulated in terms of "reconstituted lemon juice" or "processed lemon juice" makes no material difference in the outcome of this proceeding. Both of the foregoing terms, as well as "bottled lemon juice," were used to describe the industry in respondent's ReaLemon Marketing Plans (CX 1-4), and have been used in writing this decision.

9. Reconstituted lemon juice is manufactured by adding water, a preservative or preservatives, and lemon oil to pure lemon juice

concentrate which is purchased in bulk, often in tank cars, by large producers such as Borden. The ingredients are mixed according to a simple, well-known formula, using uncomplicated, relatively inexpensive equipment of the sort employed by any juice bottling operation (Hansfield, Tr. 132-135; Kendall, Tr. 535, 539; Wolcott, Tr. 635-636, 661; Delaney, Tr. 679-680; Peters, Tr. 1784-85). After manufacture, the product is packaged for consumer use in glass bottles ranging from 8 to 32 ounces in size (Hansfield, Tr. 2336; Kendall, Tr. 533-34; Delaney, Tr. 681, 693; Peters, Tr. 1785; Saving, Tr. 2510). In recent years a small volume has been marketed in plastic green or yellow lemon-shaped squeeze containers (Peters, Tr. 1786). [8]

A. Distinct and Unique Characteristics Differentiate Processed Lemon Juice from Fresh Lemons

10. Processed lemon juice has a variety of distinct and unique characteristics which differentiate it from fresh lemons.

Convenience

11. Processed lemon juice is readily, in fact, instantly, available for use as an ingredient for cooking or as an additive, as in the case of iced tea, for example. Borden's ReaLemon lemon juice may be kept for long periods in the refrigerator, up to six months or even a year (Lemmerman, Tr. 980; Goldberg, Tr. 2630; Greenberg, Tr. 1202). An ounce of ReaLemon bottled lemon juice is about the equivalent of the juice of one fresh lemon (CX 3, p. 753<sup>1</sup>), meaning that a quart bottle is essentially the equivalent, ready to use, of close to 32 fresh lemons.

12. Fresh lemons, in contrast, must be squeezed for use requiring time and work, and necessitating cleanup afterward. Additionally, since fresh lemons are perishable, they must be used within a relatively short time after purchase or allowed to go bad, and, if to be available when needed, must be constantly replenished.

13. ReaLemon over the years has promoted the advantage of its bottled lemon juice from the standpoint of convenience. As early as 1953, long prior to its acquisition by respondent Borden, ReaLemon emphasized in its advertising the convenience of lemon juice in a bottle over the trouble to the user of squeezing fresh lemons to obtain lemon juice (RX 192-194). This theme has been continued during intervening years to the present time. [9]

14. A few examples will convey the emphasis which ReaLemon

<sup>1</sup> Borden document numbers stamped on documents when turned over to the Commission's staff have generally been used in this decision to refer to pages within multi-paged exhibits.

gave in its promotional efforts to the convenience of bottled lemon juice over squeezing lemons for their juice. In an ad in *Readers Digest* in August 1956, ReaLemon showed a TV personality staging a contest over his "Breakfast Club" TV show demonstrating the time taken to squeeze enough lemons to provide the 16 ounces of lemon juice contained in that size of bottled lemon juice (RX 196, 215). Ads run in *Business Week*, *U.S. News and World Report*, and *Newsweek* during 1960 recounted the original founding of the ReaLemon company and the convenience of having ready-to-use lemon juice available in the kitchen without the time, fuss and bother of squeezing lemons (RX 198). Fifteen years later, in 1975, a program for national TV broadcasting featured the "convenience and availability" of ReaLemon over "produce," *i.e.*, fresh lemons (RX 546).

15. The convenience of processed lemon juice over fresh lemons has been generally recognized in the industry (Delaney, Tr. 689; Conrady, Tr. 3481; Crane, Tr. 3460; Fey, Tr. 3968; Foorman, Tr. 5046-48; Gordon, Tr. 3398; Rose, Tr. 4628; Silver, Tr. 3431; Toms, Tr. 3115; Wardell, Tr. 3304). The following are representative of the testimony of producers, brokers and distributors, and supermarkets. The Division Manager of the Product Sales Division of Sunkist Foods stated with respect to bottled or processed lemon juice that "basically you're working with a convenience item" (Delaney, Tr. 689). A Grand Rapids, Michigan, food broker testified that bottled lemon juice was differentiated from fresh lemons by "[c]onvenience primarily, because ReaLemon would stay in the refrigerator for months where fresh lemons would have to be used immediately on purchase or before they spoil in a short time" (Conrady, Tr. 3481). The Executive Vice President of a medium-size New York City area supermarket chain testified that "undoubtedly" [10] there was a "classification of consumers who will only buy the reconstituted product because of its convenience factor, no question about it" (Rose, Tr. 4628-29).

16. Purchasers and consumers believe bottled lemon juice to differ substantially from a convenience standpoint from fresh lemons. A survey by the Center For Advanced Marketing Practice, conducted in May 1972 for the ReaLemon Foods unit of respondent Borden, explored "consumers' attitudes toward usage of lemon juice—both packaged commercial and fresh" and reported the following, ReaLemon's bottled lemon juice being referred to as "commercial" (CX 286, p. 7682):

The outstanding reason for use of the commercial lemon juice is convenience. First of all, it is always there. The housewife does not have to worry about having fresh

lemons on hand when she needs lemon juice, she does not have to make a special trip to the store when lemons are required, she does not have to keep lemons on hand that may spoil and get thrown away. The bottle stays in the refrigerator and is handy for any spontaneous use.

17. The corporate policies and marketing strategies of ReaLemon, as indicated, were based, among other factors, upon the advantage from a convenience standpoint of bottled lemon juice over fresh lemons. The ReaLemon Marketing Plan for 1973 stated (CX 3, p. 752):

Consumer Focus Group Sessions conducted in May 1972 in Chicago and New Jersey indicate that the user of bottled lemon juice is a convenience oriented consumer. [11] This is juxtapositioned against the fresh lemon user who is willing to sacrifice convenience for real/perceived flavor preference.

See also the ReaLemon Marketing Plan for 1974 (CX 4, p. 851).

#### Taste

18. There is a substantial, if not drastic, difference between the taste of reconstituted lemon juice and juice obtained from fresh lemons, differentiating these two products from each other. Respondent's 1972 Marketing Plan succinctly stated this fact (CX 2, p. 673):

Processed lemon juice is processed lemon juice and is not as good as the fresh equivalent in its taste qualities.

See also ReaLemon Marketing Plans for 1973 and 1974 (CX 3, p. 752; CX 4, p. 867). The latter noted that it was difficult to convert fresh lemon users to bottled lemon juice because they perceived "a great advantage in the taste of fresh lemons which far outweigh [sic] any convenience or economic factors."

19. The study prepared for respondent Borden by the Center For Advanced Marketing in 1972, already mentioned, evaluated a number of marketing factors bearing on bottled lemon juice. With respect to difference in taste between bottled lemon juice and juice squeezed from fresh lemons, the study informed Borden (CX 286, p. 7673):

The superior flavor of fresh lemon juice, the distasteful flavor of the commercial, is the chief reason for its use by the fresh users. The taste of the commercial is considered in no way comparable to the [12] fresh. The fresh is thought to be sweet and true tasting; the commercial is described as being different, imitation, funny tasting.

The foregoing conclusion was based on group interviews with a number of women. The group interview technique was utilized "to elicit spontaneous reactions from the respondents" (CX 286, p. 7657),

and the following specific comments of women interviewed were reported to Borden's ReaLemon management (CX 286, pp. 7673-74):

It's like night and day. You just can't compare the flavor.

I really mean the taste is so *very* different from fresh lemon. You just can't get the same taste synthetically that you do with something fresh. They are processing it. They've done something to it. It's not the same thing as the fresh.

It's nothing like a real lemon. It's like all the imitation products. It has a funny taste.

If I put the bottled lemon in tea I can't get the right flavor I want. If I use fresh lemon it's right any time.

When we make lemonade with the fresh, the lemons have a sweetness to it and we hardly have to use any sugar.

When it's fresh the flavor is stronger and truer and when it's canned or bottled the flavor is not the same.

It doesn't taste as good as fresh lemons. It really doesn't. It has a strong acidic taste. [13]

The fresh lemon is not as bitter. The bottled is stronger, more tart.

I think the concentrated is a little strong. It's a little different taste. Fresh lemon is the real lemon. I don't know what they put in the bottles but it makes it a little different.

I can take a slice of fresh lemon and eat it but I can't drink lemon juice from a bottle of reconstituted. It's much too tart and there's a bitterness to it. A fresh lemon has the tartness but not the same *strong* tartness.

It's bitter whereas a lemon is sour.

I made lemonade with the bottled stuff and the children wouldn't drink it. It was too strong.

Fresh lemons make a better lemonade but of course it's not as convenient. It's fresher tasting, not quite as tart.

It has a canny taste, a tin taste. It leaves an aftertaste in your mouth.

Most bottled things have chemicals added to it [sic] and you pick that up, the chemical taste.

The industry recognized the substantial difference in palatability of bottled lemon juice and lemon juice squeezed from fresh lemons (see Imming, Tr. 4603; Fey, Tr. 3969; Crane, Tr. 3466; Foorman, Tr. 5047; Robison, Tr. 5029; Heller, Tr. 5017). [14]

#### Shelf-life and Spoilage

20. As already stated, bottled lemon juice and fresh lemons are

very different products from the standpoint of freedom from spoilage. Fresh lemons are perishable commodities, and spoil within a relatively short time depending upon conditions (Heller, Tr. 5018; Goldberg, Tr. 2630; H. Greenberg, Tr. 1203; Lemmerman, Tr. 980; Rose, Tr. 4629; RX 314).

21. In contrast, bottled lemon juice may be kept for a year or more without spoiling (Peters, Tr. 1790).

#### Lack of Utility for Certain Uses

22. Processed lemon juice cannot be used for many of the purposes for which the public uses fresh lemons. When a restaurant or housewife wishes to garnish a dish with a slice of lemon, to present a beverage or iced tea with a lemon wedge, or to decorate a drink with a twist of lemon peel, obviously fresh lemons must be used (see Robison, Tr. 5022, 5026-27; Toms, Tr. 3112-13; Swartzberg, Tr. 2997; Edelman, Tr. 3230; Thomas, Tr. 3271; Lundell, Tr. 3360-61; Fey, Tr. 3959; Silver, Tr. 3431; Conrady, Tr. 3480; Bentley, Tr. 3288; Rose, Tr. 4628; CX 286, p. 7669).

23. In the restaurant industry, fresh lemons are commonly used in serving meals and beverages because of the visual appeal to the patron, which processed lemon juice cannot supply (Robison, Tr. 5032; Lundell, Tr. 3334-35; Bentley, Tr. 3289; Edelman, Tr. 3236; Stipulation, Tr. 6200; Massy, Tr. 5254). Similarly, householders, or some of them, use fresh lemons on occasions where appearance is important. The survey conducted for respondent by the Center For Advanced Marketing Practice found this to be true, reporting to respondent (CX 286, p. 7679): [15]

Commercial lemon juice is generally not considered appropriate for company. Even those who might use the bottled for their own tea, feel that fresh lemon should be used for entertaining because it looks nicer.

#### Presence of Additives in Bottled Lemon Juice

24. Bottled lemon juice contains additives which prevent spoilage and impart to the product the long shelf-life of a year or more mentioned earlier. The preservatives used have at times been 3/100ths of 1% sodium benzoate and 1/40th of 1% sodium bisulphite (RX 238-239). At other times, 1/30th of 1% sodium bisulphite (RX 248) and 1/50th of 1% sulphur dioxide have been used (RX 251). The presence of these additives, particularly sulphur dioxide, substantially differentiates bottled lemon juice from the juice from fresh lemons. Borden's ReaLemon president wrote in the 1972 Marketing Plan (CX 2, p. 674):

The biggest potential problem facing REALEMON, aside from competition, is the use of Sulphur Dioxide as a preservative, as mentioned earlier. While the level used in the juice could not be considered in itself harmful, there has been considerable adverse publicity given to Sulphur Dioxide in the past couple of years, as people's awareness of air pollution has grown. Should they identify our preservative as being one and the same with the gas present in the air, we could have problems. Sulphur Dioxide does have, if nothing else, a very obnoxious odor, and yet at the same time, based on our own [16] experience as well as a two-year study by the Syracuse Research Centre, is the only preservative that works effectively on lemon juice. If we were unable to continue using it, we would not have a product that could be considered satisfactory to the consumer.

**B. Substantial Retail Price Differences Prevail Between Processed Lemon Juice and Fresh Lemons**

25. Very substantial price differences prevail between processed bottled lemon juice and lemon juice obtained from fresh lemons. The ReaLemon Marketing Plan for 1973 stated that juice from fresh lemons cost between three (3) and five (5) times as much as ReaLemon bottled lemon juice (CX 3, p. 753). Since respondent's ReaLemon lemon juice commands a premium price, as discussed later in this decision, the cost to the public of juice from fresh lemons was relatively even greater in the case of other brands of bottled lemon juice. For example, the 1973 Marketing Plan of respondent reported that the most recent Nielsen survey found a 17¢ price differential between ReaLemon and another brand of processed lemon juice (32 oz. size). Based on this figure, fresh lemon juice cost four (4) to seven (7) times more per ounce than non-premium bottled lemon juice (CX 3, p. 753). Respondent's labels state that an ounce of ReaLemon lemon juice is the equivalent of one fresh lemon (RX 238-266), and ReaLemon's chief executive testified to this effect (Peters, Tr. 4570).

26. In 1975, as an adjunct to nationwide TV advertising, respondent distributed brochures to the retail food industry which stated (RX 546, p. 6):

In a recent National survey [Nielsen], Dec. 11, 1974 to Jan. 3, 1975, the [17] price of fresh lemons averaged out at 12.3¢ each. (One lemon has about one ounce of juice depending upon the size—storage time—type—season, etc.)

The average price per ounce for REALEMON came to 2.8¢ per ounce.

12.3¢ for fresh lemons  
2.8¢ for REALEMON

and the juice is extracted for her. . . it's available when she needs it. . . in volume. . . for her cooking-baking, tea, fish, salads, and many household uses. . . .

Based on the foregoing, the cost of fresh lemon juice was about four

(4) times the cost of respondent's ReaLemon, and correspondingly more than the cost of competing brands of bottled lemon juice.

27. Promotional literature used by respondent Borden stated in the late 1960's that "the lemons you'd squeeze to fill a quart bottle of ReaLemon would cost about 5 times as much" (RX 375; Lundell, Tr. 3157). Again, the lower price of other bottled lemon juices would have produced a correspondingly more expensive figure for fresh lemon juice.

28. Fresh lemons fluctuate in price on a weekly, or even, at times, a daily basis. The Executive Vice President of a supermarket chain in the New York City area testified that the price of fresh lemons fluctuated, as follows (Rose, Tr. 4623-24):

... probably, on a week-to-week basis. A lot depends on not only the supply available from the field but the supply in transit to any given area at [18] any given time, or the cold storage holdings that might be involved in any given area or any given time.

As a witness previously pointed out, the supermarket is nothing more than a transitory place. It is a place where products are stored for resale, and the hope is that it is a very immediate resale especially on the perishable products so that we would hope to turn lemons over twice a week, I would guess, so you would hope never to have lemons on hand for more than three or four days at any given time.

If there is a large glut on the market of lemons, in a market, if there is a large supply of lemons in the market at any given time, the price is going to go very, very low. If lemons, for some reason, as a produce buyer told me, if a train company can't get through to New York, the price of lemons would go sky high in one day. It is very difficult to say.

In contrast, the price of bottled lemon juice changes at infrequent intervals, there being, for example, only one or two price increases on ReaLemon between 1970 and 1974 (CX 37-54).

29. Notwithstanding the large price differential between fresh lemons and processed lemon juice, the two products continued side-by-side in the marketplace, and \$200,000,000 or more worth of fresh lemons continued to be sold annually, as stated earlier, many times the volume of processed lemon juice (Fey, Tr. 3970). Fresh lemons, in short, have not been driven from the marketplace. This circumstance alone is [19] strong evidence that fresh lemons and processed lemon juice are not in the same relevant market. As Dr. Mann testified (Tr. 6130, 6186-87):

It seems to me that any product that sells at a quarter of the price of the other, and yet, doesn't sweep it out of the marketplace and, in terms of purchasing, shifting to other purchasers, it is so difficult for me to believe that the two products are viewed as very close substitutes even when I look at it in that kind of common-sense way.

\* \* \* \* \*

Q. Does the erosion of the market which was said to exist for ReaLemon after the entry of a low priced seller demonstrate to you that no other product competes with bottled lemon juice but another bottled juice?

A. Well, it is very supportive because another bottle of lemon juice comes in and has an impact on the market which leads to response on the part of ReaLemon, and it affects the market shares and it affects price behavior, but in the case of lemons versus reconstituted lemon juice, you have a price differential, a substantial price differential, reconstituted lemon juice being in the neighborhood of one quarter of the equivalent juice content of lemons and yet, lemons aren't driven out of the marketplace.

There seems to be no concern on the part of the marketers of lemons that the [20] price differential is unsustainable, without worry, that they are going to find themselves with nobody to sell to.

Q. Could a price differential that large be explained by quality and taste perception differences by consumers?

A. I suppose it could, but it would suggest to me that taste and quality differences were so extensive that they are really separate commodities.

### C. Processed Lemon Juice Producers Priced Their Product in Competition with Competing Brands of Processed Lemon Juice—Not Fresh Lemons

#### ReaLemon

30. In pricing its processed lemon juice respondent Borden focused its attention on the prices of other brands of processed lemon juice, writing in its 1971 Marketing Plan that because of the inroads of competition "starting in 1970" price increases appeared to be "out of the question" (CX 1, p. 645). The plan went on to state that the spread between the price of respondent's ReaLemon processed lemon juice and competitive brands, 15¢ to 20¢ per unit, precluded any possibility of price increases to offset higher costs (CX 1, p. 649). The 1972 Marketing Plan observed that ReaLemon commanded a premium over "competitive offerings" as high as "25 to 30 cents per unit" (CX 2, p. 665) but noted that the most serious threat was the "low priced competition" (CX 2, p. 671). The 1973 Marketing Plan referred to the same problem stating that "new distribution" had been secured by "competitive brands" at the retail level, that "price sensitivity" had been exhibited at the consumer level, and that this "may be the [21] single most important area of the 1973 ReaLemon Plan" (CX 3, p. 781). The 1974 Marketing Plan noted that the "stability of the ReaLemon franchise" was significantly endangered by Golden Crown, "a price oriented competitive brand" (CX 4, p. 853). The plan reviewed the price spread between ReaLemon and Golden Crown processed lemon juice throughout the United States (CX 4, p. 873), and stated that price increases were planned to compensate for cost increases, but only outside "the highly competitive Golden Crown markets concentrated in Region 1 and part of Region 2" (CX 4, p. 873).

processed lemon juice brands. The 1971 Plan, after listing dollar amounts for the years 1967 through 1970 for advertising and promotions, the latter increasing relative to the former, stated (CX 1, p. 646):

The figures reflecting a considerable change in the ratio of advertising to promotion are in direct relation *to the advent of competition starting in 1967*. [Emphasis added.]

By "competition" in the foregoing quotation Borden manifestly referred to other processed lemon juices inasmuch as fresh lemons have always been marketed. The 1972 Marketing Plan stated (CX 2, p. 700):

REALEMON'S trade promotions can be considered most effective, as they generate considerable volume at the time they are being presented. In addition, this now has become an important tool in dulling the efforts of competition who are priced from 20 to 30 cents per bottle less than REALEMON, at those times when REALEMON is not being promoted.

[22] The 1973 Marketing Plan noted three major opportunities for improving performance in 1973, among them the following (CX 3, p. 817):

The use of market-by-market deal levels with higher levels in competitive markets than now.

The "basic plan" envisaged different promotional payments in "highly competitive," "moderately competitive" and "low competitive" markets (CX 3, p. 828), indicating that other processed lemon juice brands were the competitive concern of Borden's ReaLemon management, not fresh lemons. See also, in this connection, CX 4, p. 858. That promotional payments were geared to compete with other brands of processed lemon juice rather than fresh lemons was confirmed by industry members. An Iowa food broker testified (Wardell, Tr. 3313):

Q. Did ReaLemon ever offer promotions in regard to reduced prices on fresh lemons?

A. In regard to reduced prices on fresh lemons?

Q. If there was a special being offered for the sale of fresh lemons, Mr. Wardell, did the ReaLemon Company respond to that with one of their own promotions?

A. No, sir.

The Grocery Buyer for a large Texas supermarket chain testified (Thomas, Tr. 3274): [23]

Q. From your knowledge, Mr. Thomas, did the ReaLemon Company ever alter their promotions or offer new promotions due to the price changes of fresh lemons?

A. No, I can't honestly say that they ever initiated changes because of the prices of fresh lemons.

32. The lack of sensitivity between fresh lemon prices and sales of processed lemon juice is indicated by the following testimony of the ReaLemon Foods' president (Peters, Tr. 4557):

Q. If fresh lemon prices are up this year as you indicated, have you noticed what kind of trend, if any, there has been in the sale of reconstituted lemon juice?

A. They remain flat. I'm at a loss to understand why, but we could either assume that advertising is ineffective or competition is really chewing us up.

Q. How about reconstituted lemon juice sales as a whole, not just ReaLemon?

A. They also have been pretty flat.

#### Other Processed Lemon Juice Marketers

33. Other processed lemon juice marketers priced their brands in competition with other processed lemon juice brands, particularly ReaLemon, [24] not fresh lemons (Kendall, Tr. 546-47; Westcott, Tr. 615-16; Wolcott, Tr. 649; Delaney, Tr. 686-89; Hansfield, Tr. 158-59, 161, 2344). Fluctuations in the retail price of fresh lemons had little or no effect upon the price of bottled or processed lemon juice. The manager of the Product Sales Division of Sunkist Foods testified (Tr. 689):

Q. Mr. Delaney, is there considerable price interaction between fresh lemons in the supermarket and reconstituted lemon juice?

A. In my opinion, no.

The president of another regional producer of processed lemon juice testified (Kendall, Tr. 546):

Q. Is there a close correlation between retail fresh lemon prices and retail processed lemon juice prices?

A. Do you mean, do they move up and down together or apart, this sort of thing? No. [Processed] Lemon juice prices are primarily, as I said earlier, predicated on cost and promotions, et cetera.

The president of Golden Crown processed lemon juice testified (Tr. 157):

Q. Mr. Hansfield, the day to day selling of Golden Crown Reconstituted Lemon Juice, with whom are you in competition?

A. The primary competitor in the reconstituted lemon juice is Real Lemon. I mean, they are the market. [25]

Q. In day to day sales procedures, are you in competition with fresh lemons?

A. No. We give no credence to fresh lemons at all.

The Sales Manager of a regional brand of bottled lemon juice testified (Wolcott, Tr. 616):

If fresh lemons went down considerably we would not adjust the price of lemon juice to meet that competitive situation. No, we wouldn't.

**D. Retail Food Store Buyers Placed Orders for Processed Lemon Juice Without Regard for the Prevailing Price of Fresh Lemons and Vice Versa**

34. Retail grocery and supermarket buyers did not consider the price of fresh lemons in making decisions on the purchase of processed or bottled lemon juice for resale. The grocery buyer for a Wisconsin chain of 80 retail food stores testified (Ellenson, Tr. 1963):

Q. Mr. Ellenson, in making buying decisions concerning ReaLemon lemon juice, do you consult the price and quantity information concerning fresh lemons at Godfrey stores?

A. No, sir.

Q. Why not?

A. It's two different worlds you're talking about, a concentrate against the pure natural product. [26]

The head buyer for one of the nation's largest supermarket chains, Acme Markets, Inc., testified (Moreland, Tr. 1024-25):

Q. While you were in the position of head buyer, did you discuss on a regular or on any kind of a basis with the produce buying department purchases of lemons or the price of lemons in making your decisions concerning ReaLemon lemon juice purchases?

A. No.

The head of the Grocery Division of another large supermarket chain, Penn Fruit, testified (Greenberg, Tr. 1190):

Q. Do you consider the price or the instore movement of fresh lemons when you purchase reconstituted lemon juice?

A. No. We have no conversations with the Produce Department. They do their own merchandising.

The Grocery Buyer Merchandiser for still another supermarket chain, Food Fair Stores, with supermarkets throughout the East Coast, testified to the same effect (Friedland, Tr. 1494):

Q. Do you ever consider the price or instore movement of fresh lemons when you purchase reconstituted lemon juice?

A. No.

Q. Do you feel these 2 products compete with each other? [27]

A. No, I don't.

The head buyer for a Pennsylvania Grocery Cooperative testified similarly (Leahy, Tr. 850):

Q In determining the quantity of lemon juice that you purchase, do you, in any way, consult the price of fresh lemons in your member stores or the quantity of lemons in your stores?

A. No. When you come right down to it, they are two different products.

The Director of Grocery Purchasing for Giant Food, Incorporated, a large chain of supermarkets in the Baltimore-Washington-Richmond area, did not believe there was any price sensitivity from the consumer's standpoint between fresh lemons and bottled lemon juice, and did not think the price of fresh lemons affected the price of bottled lemon juice (Manos, Tr. 1521-22). This supermarket official stated (Tr. 1522):

If lemons are priced high, I don't think that a customer who is normally buying lemon juice, buying lemons, would rush over to buy lemon juice, necessarily, nor do I believe if lemons were being given away at a low price, would they stop buying [bottled] lemon juice.

See also to the same effect Gerace, head merchandiser for the leading supermarket chain, Tops Markets, in the Buffalo, New York, area, Tr. 2032; Goldberg, Director of Grocery Purchasing for a 187 member retailer-owned cooperative, Tr. 2628-29; Lemmerman, Vice-President in charge of grocery purchasing for a 104 store supermarket chain, Supermarkets General, [28] serving six states in the Northeast, Tr. 973-75; Springer, a purchasing agent for a Buffalo, New York, grocery wholesaler, Tr. 1862; Bentley, a Houston, Texas, food broker, Tr. 3294; and Silver, a Pittsburgh, Pennsylvania, food broker, Tr. 3434.

35. Conversely, the retail food store produce buyer of the largest or second-largest supermarket chain in the United States did not give consideration to the current price of processed lemon juice on the shelves of the chain's stores when placing orders for fresh lemons. The National Director of Produce Merchandising for the A&P testified (Watson, Tr. 6203):

Q In making your decision as to what demand or how many fresh lemons to buy, did you consult the grocery buyer, check his supply or his price of [bottled] lemon juice?

A. No.

E. In Their Business Operations Respondent Borden's RealLemon Management, Sales Personnel and Brokers Considered Pro-

cessed Lemon Juices and Brands Thereof To Be the Competitive Product Market

Marketing Plans

Respondent Borden's ReaLemon Foods prepared annual "Marketing Plans," referenced and quoted from earlier herein, in the fall of each year to chart business courses for the ensuing year. These are reliable business records, written by management. After revisions and redrafting, and discussion with Borden headquarters' executives, they were issued [29] by the ReaLemon Foods president for planned ReaLemon marketing the following year (Peters, Tr. 1754-55). Marketing Plans for 1971, 1972, 1973 and 1974 are in the record as exhibits (CX 1-4).

36. Although the advertising efforts of ReaLemon over the years have been geared to persuading the consuming public that the unique characteristics of bottled lemon juice, already discussed, for example, convenience, economy, relative non-perishability, etc., justified its use instead of fresh lemons, Borden management looked upon other processed lemon juice brands as constituting the competitive product market, not fresh lemons. This is revealed clearly in the Borden ReaLemon Marketing Plans for the years 1971 through 1974 (CX 1-4).

37. In 1971, viewing the competitive situation, Borden's ReaLemon management noted that its market share of processed lemon juice nationally was 92 percent at the beginning of 1970, but had slipped to 88.2 percent by August of that year. Although concluding that this loss was not great, the Marketing Plan pinpointed certain key markets as "danger spots." Milwaukee, St. Louis, Buffalo, Chicago, Cincinnati, Dayton and Columbus were identified as "now" having "Golden Crown Brand Lemon Juice for competition." Philadelphia was described as "under the siege" of competition from Seneca, another regional bottled lemon juice producer. Looking at the situation generally, the Marketing Plan observed (CX 1, p. 640):

There are presently 10-12 competitors vieing for the bottled lemon juice business. Of these, three are presently causing the most difficulty, Golden Crown, Seneca, and Tropic Fresh.

The latter was a Florida producer which had "attained modest success in the Southeast." The Marketing Plan went on to note (CX 1, p. 642): [30]

ReaLemon's other competition, while many in number, has not been of major proportions although it does include big names such as Sunkist and Vitapakt.

Both of the latter are brands of bottled lemon juice sold in California and the Southwest. In calculating its "market" share, Borden used the bottled or processed lemon juice industry, not that industry's sales *plus* fresh lemon sales.

38. The 1971 Marketing Plan states that in the past ReaLemon bottled lemon juice had been the "total market," that media and promotional expenditures had been highly successful in attracting new users and increasing uses with present buyers, and that the long range objective was to expand the size of the "total market," as follows (CX 1, p. 649):

... ReaLemon has now become a protective umbrella over all lemon juice activity. The long range objective therefore, is to expand the size of this umbrella and thus the total market.

The "total market" in the ReaLemon view was thus processed lemon juice.

39. The short range objective given in the 1971 Marketing Plan was to prevent the price spread between ReaLemon bottled lemon prices and those of competitors "from increasing," in order to preserve respondent's "market share close to its present level" (CX 1, p. 649):

Market share is the key, since industry or total market growth will be reflected more toward ReaLemon than its competitors by virtue of ReaLemon's present 90% market share. [31]

40. Turning to sales and profits, the 1971 Marketing Plan viewed other processed lemon juice marketers as ReaLemon's competition, rather than fresh lemons. Borden's 1971 Plan stated (CX 1, p. 645):

Prior to the time of serious, effective competition, ReaLemon had been able to raise prices in direct proportion to costs and its desire to increase profits.

Further:

Starting in 1970, when competition began to make serious inroads into ReaLemon's market share as a direct result of attacking in the most vulnerable area, price, further price increases appear to be out of the question. The whole issue is further complicated by the current problem of consumerism. With the cost of living going up as it has, many advertised brand names are being passed up in favor of cheaper, unknown offerings. Retailers are taking on items competitive to ReaLemon, and now the consumer, much more aware of costs/values, may be hesitant about spending 15-20¢ more per unit.

The Marketing Plan stated that in contrast to prior years the spread between the price of ReaLemon bottled lemon juice, and the prices of

competing bottled lemon juices, precluded "any possibility of price increases to offset higher costs" (CX 1, p. 649).

41. Discussing promotional pricing activity the 1971 Marketing Plan stated that ReaLemon again would be specifically attacking the problem of the retail price spread between ReaLemon and competition, and [32] noted that in "general terms, competitive activity exists in the Eastern half of the United States" (CX 1, p. 656). Promotional pricing was planned to amount to as much as \$1.20 per case, or 10¢ per bottle in the East but limited to "60 to 75 cents per case" in the West (CX 1, p. 657).

42. From the foregoing, it is evident that respondent Borden's ReaLemon management did not look upon the product market within which it operated as including fresh lemons, but only other bottled and processed lemon juice products. Because of the fact that fresh lemons are marketed nationally in a dollar volume far greater than processed lemon juice, it is obvious that, if fresh lemons were in truth a component of the product market along with processed lemon juice, respondent Borden would not have had the market power prior to 1970 "to raise prices in direct proportion to costs" and "its desire to increase profits" (CX 1, p. 645). It is additionally evident that if fresh lemons were a component of the product market within which Borden's ReaLemon brand of processed lemon juice competed, Borden management would not, and could not have written that "[i]n general terms, competitive activity exists in the Eastern half of the United States" (CX 1, p. 656). Further, Borden could not realistically have engaged in dual geographic levels of promotional pricing, using \$1.20 per case in the East and a much smaller figure "60 to 75 cents per case" in the West (CX 1, p. 657).

43. Similarly, the 1972 Marketing Plan viewed Borden's product competition to be other processed lemon producers. Although Borden's ReaLemon president continued the historic approach of ReaLemon of looking upon fresh lemon users as a source to convert to the use of bottled lemon juice by stressing "ease, convenience and economy," other brands of processed lemon juice were regarded as the day-to-day [33] product competition (CX 2, pp. 682-684). As a prelude to evaluating competition faced by ReaLemon bottled lemon juice, ReaLemon Foods' president wrote with respect to the "market" in which ReaLemon operated (CX 2, p. 669):

Historically, REALEMON has been the market in the sales of processed lemon juice. At the present time with a 90% market share, REALEMON can still be considered the market.

Identifying competition, Borden's ReaLemon president then stated along the lines of the 1971 Plan just quoted (CX 2, p. 671):

REALEMON presently has in excess of 10 competitors, three of whom have been causing real problems. These are Golden Crown, Seneca, and Tropic Fresh.

Further (CX 2, p. 674):

Our competition has restricted its efforts for the most part, to the 32 ounce or quart size, which has been our feature size in the major metropolitan areas of the Northeast and North Central. The gains they have made thus far have been largely at one another's expense, although they have captured a segment of our market as well. Should they expand their efforts into a full array of sizes, our problems could begin to multiply at a more rapid rate.

44. Promotional efforts to maintain ReaLemon as the "featured brand at the retail level" (CX 2, p. 679) were directed at competing processed lemon juice producers, not fresh lemons. When respondent Borden's 1972 ReaLemon Marketing Plan noted that since "competition" was priced "far under us," it obviously referred to other brands of bottled lemon [34] juice, as it did when it referred to ReaLemon's trade promotions as having "now become, in addition to their other features, a tool or lever against competition" (CX 2, p. 688). Likewise, when respondent's ReaLemon president stated in the 1972 Plan that a national advertising program was necessary to strengthen ReaLemon's position in those markets where "competition" had made "sizeable inroads," the reference was to competing processed lemon juice brands (CX 2, p. 688).

45. The "Basic Platform" of ReaLemon's promotional efforts announced in the 1972 Plan was to use three annual promotions "off-invoice" to cause supermarkets to feature ReaLemon, and to "narrow the gap between competitors prices and our own" (CX 2, p. 690). The 1972 Marketing Plan further stated (CX 2, p. 690):

The consumer faced with the dilemma of buying an unknown, untried brand, but nevertheless offered at prices far below that of REALEMON, must be persuaded and motivated to continue buying the No. 1 brand.

Again, the target of these references was not fresh lemons, but competing brands of processed lemon juice.

46. The 1973 ReaLemon Marketing Plan (CX 3), like the Plans for prior years, did not look upon the "market" as consisting of both processed lemon juice and fresh lemons, and respondent's management did not consider and calculate ReaLemon's market share as a percentage of such a market. Instead, the 1973 Plan, as prior Plans, viewed the product "market" to be processed lemon juice, and the competitive problem the maintenance of ReaLemon's [35] historic

