

IN THE MATTER OF

E. & J. GALLO WINERY

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

Docket C-2836. Consent Order, Aug. 26, 1976—Modifying Order, May 18, 1983

This order reopens the proceeding and vacates in its entirety the order issued on Aug. 26, 1976 (88 F.T.C. 256). The order, which was due to expire by its terms on Aug. 26, 1986, prohibited respondent from engaging in exclusionary marketing practices.

ORDER REOPENING AND SETTING ASIDE ORDER

ISSUED ON AUGUST 26, 1976

On September 23, 1982, respondent E. & J. Gallo Winery ("Gallo") filed a Petition requesting that the Commission reopen the proceeding in Docket No. C-2836 and set aside the Order. Absent Commission action, the Order would expire by its terms on August 26, 1986. The Petition was placed on the public record pursuant to Section 2.51 of the Commission's Rules of Practice, 16 C.F.R. 2.51. Four timely comments were received requesting that the Commission deny Gallo's Petition. Thereafter, in response to requests of various parties, the Commission allowed further opportunity for comment upon all matters, including information released only after the first comment period had closed. Five comments have been received in the latest comment period which expired on April 29, 1983. Although Rule 2.51 and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), require that the Commission decide petitions to reopen within 120 days of filing Gallo has voluntarily waived this deadline.

The complaint and Consent Order in this matter were issued in 1976. They were based on the belief that Gallo had a dominant position in the sale and distribution of wine in the United States and had used its market power to lessen or restrain competition in violation of Section 5 of the Federal Trade Commission Act. After the complaint and Consent Order in this matter were issued, the Commission issued decisions in *Coca-Cola Bottling Co.*, 93 F.T.C. 110 (1979), and *Heublein, Inc.*, 96 F.T.C. 385 (1980), concerning the domestic wine market. The records in these cases predated the factual information which gave rise to the complaint in Gallo.

The complaint and resulting Consent Order against Gallo reflected the Commission's concern that the domestic wine market in the mid-1970's was sufficiently concentrated to warrant close scrutiny, par-

ticularly since Gallo was then, as now, the market leader. Moreover, the Commission was concerned that Gallo may have used its dominant market position to establish and maintain exclusive dealing practices with its distributors. The Commission also believed, as evidenced by the allegations in the complaint, that: wine sales were either declining or at least stabilizing; there were no new entrants at the manufacturing level; Gallo's market share was increasing while concentration of domestic wine supply was rising; and entry barriers were substantial, in part, because of the perceived difficulty of obtaining access to distribution at the wholesale level.

In its Petition, Gallo argues that the structure of the wine market has changed, with concentration declining, demand increasing, significant new entry and low entry barriers. (Petition at 9-17). Gallo also asserts that the Commission's decision in *Coca-Cola* undercuts the rationale of the consent, especially with respect to whether distribution barriers are high at the wholesale level. (Petition at 17-19). In addition, Gallo claims that the consensual vertical practices prohibited by the Order are now analyzed under a rule of reason by the courts and the Commission and are almost always found to be procompetitive or neutral. *See, e.g., Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *In re Bellone Electronic Corp.*, 100 F.T.C. 68 (1982). Gallo contends that the Order hinders it from developing effective distribution programs that will promote interbrand competition. (Petition at 20-21).

The principal thrust of the comments filed in opposition to the Petition is that Gallo will engage in exclusive dealing to the detriment of competition if the Order is vacated in its entirety. (*See, e.g.,* November 5, 1982 Comment of Albert Kramer, Esquire, Cohn and Marks, on behalf of anonymous distributor; November 5, 1982 and January 6, 1983 Comment of Howrey & Simon on behalf of Heublein; November 5, 1982 Comment of Michael J. Keady, Esquire, on behalf of an unnamed winery. *See also, e.g.,* April 28, 1983 Comments of Wine and Spirits Wholesalers of America, Inc.; April 29, 1983 Additional Comments of the Wine Spectrum.) These commenters contend that Gallo has the market power to impose exclusive dealing on distributors and that such action would raise entry barriers by restricting supplier access to wholesale distributors.

The Commission's decisions in *Coca-Cola* and *Heublein* paint a somewhat different picture of the wine market than is implicit in the Gallo complaint and Consent Order. Rather than describing a market with stable or declining demand and increasing concentration, these decisions reveal that the market was experiencing rapid growth during the periods in question. In addition, concentration was at moderate levels and increasing only slightly, if at all. Of even greater

import, the Commission in *Heublein* noted that considerable entry had occurred and a large number of potential entrants existed who were capable of entering or expanding into the wine business. 96 F.T.C. at 590-91. While not specifically addressing the extent of entry barriers, the Commission's analysis indicates that potential entrants, particularly those in the spirits and beverage business, face no major obstacles to entering the wine market. In discussing the issue of supplier leverage vis-a-vis distributors, the Commission concluded that no significant potential for leverage existed—distributors appeared capable of resisting supplier pressure aimed at forcing dealers to carry a particular brand or line of products. 96 F.T.C. at 599. To be sure, the decision in *Heublein* did not specifically address the issue of exclusive dealing, nor did it suggest that all non-price vertical restraints in the wine market are legal, but it clearly casts doubt on the continued validity of the market assumptions that underlie the Gallo Order.

Apart from evidence presented concerning the competitive state of the wine market, the Petition also makes a strong case for eliminating many of the Order's prohibitions. The Order strictly limits the financial information Gallo can obtain from its distributors as well as any financial assistance that it may seek to provide to wholesalers. In addition, the Order places undefined limits on the extent to which Gallo may restrict the extra-territorial sales of its distributors. Finally, the Order prohibits any kind of tying or requirements arrangement and limits Gallo's ability to influence distributor inventory practices. These restrictions go far beyond concerns about exclusive dealing and the financial limitations, in particular, are highly regulatory in nature. (September 16, 1982 letter from Professor Lawrence A. Sullivan to Jack Owens, Vice President and General Counsel for Gallo). The information submitted indicates that other wine suppliers use a variety of devices, including brand dedication requirements, to induce distributors to provide more effective promotional services. Although Gallo is permitted under Section II(2)(3) of the Order to terminate dealers for cause, the broad scope of the Order's prohibitions appears to hinder unnecessarily Gallo's ability to utilize many of the marketing devices that are freely employed by its competitors. The fact that some competitors utilize a practice does not, of course, make that practice lawful for all firms, irrespective of their market power. But the conditions in the wine market make it unlikely that competitive injury would result if Gallo were allowed greater flexibility in devising effective distribution programs. Thus, the Commission finds no reason to continue these provisions of the Order.

A closer question is raised by Paragraph I(3)(2) of the Consent Order, which prohibits exclusive dealing, and is the principal focus of the

objecting commenters' concerns. After careful consideration of all comments submitted, the Commission has concluded that this portion of the Order, as well, should be set aside. We believe that the factual considerations identified by Gallo in its petition, and by the Commission in the *Coca Cola* and *Heublein* decisions, indicate that Paragraph I(3)(2) is not necessary or reasonably related to the prevention of competitive harm, and thus can only operate to chill procompetitive conduct by Gallo (e.g., brand dedication efforts) that is open to its competitors. A blanket prohibition upon exclusive dealing is not necessary under all the facts presented, because Gallo's widespread resort to exclusive dealing arrangements would likely be thwarted by the competitive structure of the wine industry, while such resort to exclusive dealing as Gallo might attempt is unlikely to foreclose competitors from needed distributional outlets.

In reaching our conclusion, we do not suggest that use of exclusive distribution arrangements would be lawful in this market under every conceivable market scenario. That would remain to be determined on a case by case basis under the rule of reason. We conclude simply that under all the particular circumstances of this case the likelihood of competitive harm is sufficiently remote that it is in the public interest to vacate the blanket prohibition on exclusive dealing contained in the Order.

Therefore,

It is ordered, That the Order of August 26, 1976 in this matter be, and it hereby is, set aside.

Commissioner Bailey dissented. Commissioner Pertschuk did not participate.

DISSENTING STATEMENT OF COMMISSIONER PATRICIA P. BAILEY

I oppose the Commission's decision to grant in full Gallo's petition to reopen and to vacate a 1976 consent order because of my concern about potential anticompetitive exclusive dealing in the wine industry. I support much of the relief requested by Gallo, except for that order provision barring efforts by Gallo to condition continued distribution of its wines on the exclusion of competing brands. I do believe that some relaxation of even this order provision is justified, in order to permit reasonable and non-discriminatory minimal performance standards on the part of wholesalers of Gallo products. These might include brand dedication efforts, such as some kind of volume sales requirements, forms of promotion and store display, inventory level standards, and assurances of dealer financial stability.

I am concerned by the public record comments received from participants in the wine industry who object to our vacating the exclusive

dealing aspect of the Gallo petition. They have argued that vacating the entire order is unjustified because even the existing proscriptions permit Gallo to impose legitimate reasonable brand dedication requirements on wholesalers. They believe that exclusive dealing is potentially a genuine problem because of Gallo's role as the wine industry's "dominant" firm. They have argued that Gallo's inherent market power stems not just from its national market share (in excess of 25%), but from its market share edge over all other competitors. Gallo's market share in some geographic areas may even exceed its position nationwide. Gallo is larger than its next several rivals combined, has maintained this share by capturing more market growth than have its competitors, and throughout has remained the firm with the most desirable "full-line" offering of wine products. The thrust of all these arguments is that Gallo may have the ability to force wholesalers in at least some major markets to decide between carrying Gallo products, which may account for a fourth of sales or more, and the products of other major competitors. Gallo apparently engages even now in exclusive dealing in eleven major markets through wholesalers controlled by Gallo or Gallo executives.

To counter these concerns, the argument is made that barriers to entry into wine wholesaling are so low that any Gallo efforts at exclusive dealing will only cause new wholesaling outlets to appear and carry the lines ousted from wholesalers electing Gallo-only distribution. While it is true that there are few technical obstacles to entry into wine wholesaling, it also appears to be the case that this business is characterized by high volume/low margin sales, with only a half-dozen or fewer incumbent wholesalers serving most urban markets. Most markets, being saturated, may be unattractive to new distributors of the size needed to ensure profitability.

Finally, Gallo has argued that the order places it at a competitive disadvantage because the order inhibits its distributional efficiency. Given Gallo's steady and longterm role as the largest and most successful of the nation's wine distributors, and its success in exploiting market growth so as to retain its overall market share, I do not see how Gallo has demonstrated that the Commission's order has hampered the success of its marketing practices.

The Commission has also taken notice of its decisions in the *Heublein* and *Coca-Cola of New York* Section 7 wine merger matters as creating a "special circumstance" justifying application of the facts of those cases to the Gallo petition. Those merger cases did not focus on exclusive dealing, or the acts, practices and market position of the Gallo wine firm, or even, in detail, the subject of wine wholesale distribution. They do not compel the granting of the Gallo petition, particularly with regard to any specific Gallo decision that might be

made to require wholesalers to exclude competing brands in Gallo's favor.

Respondent bears the burden of proof that altering any part of an FTC order is justified. With respect to exclusive dealing, I believe Gallo has failed to meet this burden, even though the Commission retains the right to sue Gallo in the future if any of its actions amount to violations of the antitrust laws under a rule of reason analysis. The course of action that I proposed as a substitute for the Commission's decision would have permitted Gallo all the relief it seeks, except with respect to a single course of action, which Gallo neither proves it needs nor states that it intends, yet which was a vital part of the original FTC settlement that respondent agreed to in 1976.

My fear is that the vacation of the Commission's order encourages exclusive dealing by Gallo in at least some large and important markets, and that such a signal in the marketplace is an ominous portent for product distribution in other industries.¹

¹See, for instance, a discussion of efforts to establish exclusive distributorship in the beer industry, *National Journal*, April 2, 1983, p. 1.

IN THE MATTER OF
BEATRICE FOODS CO., 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 9112. Complaint, June 29, 1978—Final Order, May 26, 1983

This Final Order dismisses the complaint challenging Beatrice Foods Co.'s acquisition of Tropicana Products Inc. The Commission found that the loss of actual competition in the ready-to-serve orange juice industry was too little to establish a violation of the Clayton Act.

Appearances

For the Commission: *Katherine Boland, Layn R. Phillips, Timothy B. Walthall and AnnThalia Lingos.*

For the respondents: *Edward L. Foote, John W. Stack, David S. Acker, Jerome W. Pope and Sidney Margolis, Winston & Strawn, Chicago, Ill. for respondent Beatrice Foods Co. and Robert R. Feagin, III, Holland & Knight, Tallahassee, Fla. for respondent Tropicana Products, Inc.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondents, each subject to the jurisdiction of the Commission, have entered into a merger agreement and Beatrice has also entered into a stock purchase agreement, each of which, if effected, would violate 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, that said agreements constitute violations of Section 5 of the Federal Trade Commission Act, as amended, 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), stating its charges as follows:

I. DEFINITION

1. For the purpose of this complaint, the following definition shall