In the

Supreme Court of the United States

UNITED STATES,

Appellant,

vs,

FALSTAFF BREWING CORPORATION, et al.,

Appellees.

No. 71-873

Washington, D. C.
October 17, 1972

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Washington, D. C.
Tuesday, October 17, 1972

The above-entitled matter came on for argument at 10:50 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

THOMAS E. KAUPER, ESQ., Assistant Attorney General, Department of Justice, Washington, D. C., for the Appellant.

MATTHEW W. GORING

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 71-873, United States against Falstaff Brewing Company.

You may proceed.

ORAL ARGUMENT OF THOMAS E. KAUPER, ESQ.,

ON BEHALF OF THE APPELLANT

Mr. Kauper: Mr. Chief Justice, and may it please the Court:

This is an appeal under the Expediting Act from an order of the United States District Court of the District of Rhode Island dismissing the Government's complaint of the antitrust laws against the Falstaff Brewing Company.

The complaint alleges that the 1965 acquisition by Falstaff Brewing Corporation, the nation's fourth largest brewer, of the assets of the Narragansett Brewing Company, the largest brewer in New England, violates Section 7 of the Clayton Act, as amended.

Like, really, the preceding case on the Docket, it is a potential competition case.

Central to the case is the need to halt and, if possible, to reverse the increasing trend toward concentration in the brewing industry and local markets, a trend which was both noted with concern and was the primary basis for this Court's 1966 holding in United States v. Pabst Brewing Company.

The market in this case is not in dispute. It is

stipulated it is the production and sale of beer in the New England area, comprised of the six New England States.

There is no allegation in the case that at the time of the acquisition there was any direct competition between Falstaff and Narragansett. The Government alleged rather that Falstaff was a significant potential competitor in this market, that the market was concentrated and becoming increasingly so, and that the net effect of its elimination as a potential competitor, therefore, substantially lessened competition within the meaning of Section 7.

More particularly, the Government alleged that Falstaff had the incentive to enter, it had the financial capability to enter, it had reasonable prospects for successful de novo or toehold entry.

The District Court,relying on two findings, dismissed the Government's complaint. More specifically, the Court concluded that Falstaff's management had considered acquisition by other means, found them unprofitable, and that, therefore, the decision was made by Falstaff not to enter this market by any means other than the acquisition of Narragansett.

Q The complaint did not allege, did it, Falstaff was the only brewery with equivalent opportunity and resources to enter this market?

MR. KAUPER: No, Mr. Justice, I think the Government theory is it was one of the most likely entrants. More

specifically, if I might, the allegation in the evidence submitted would tend to indicate that it is one of the nation's ten largest brewers. Seven of those brewers are already in the New England market --

Q And two of them are 'way out West somewhere?

MR. KAUPER: Well, I don't know if I would say they are 'way out West, but they are significantly further West than Falstaff. They are also significantly smaller than Falstaff.

Q At least in arguments you are going to say that Falstaff had superior opportunity and resources to any other brewery not already in the New England market, to enter?

MR. KAUPER: I believe that was the case. I don't think we would have to establish that it was absolutely the only one that could do so.

Q On the other hand, if the record showed that there were fifteen or twenty with equal access and resources the potential competition argument would be much less strong.

MR. KAUPER: Yes, I think if the evidence were to demonstrate that there were a very large number of potential entrants then clearly one would have to take the position the elimination of one had no particular impact.

Q In other words, part of the potential competition theory, I should suppose, would be proof that the potential entrant was, if not unique, at least one of a very small group, would it not be?

MR. KAUPER: I think that essentially is correct, yes. So that its elimination had some consequence, otherwise, clearly it would not.

The Court below, we believe, misconceived the standards which are to be applied in this sort of a case. More particularly in its two key holdings we believe that it improperly relied upon subjective statements made after the fact as to what the intentions of Falstaff's management would have been at a previous point in time. Second, we believe that it failed to recognize the concentrated nature of the market in the New England area, in finding that this particular market was "intensively competitive." Finally, we believe it put undue weight upon certain post-acquisition evidence which tended to indicate that following the acquisition by Falstaff Narragansett's market share declined.

Let me now briefly deal with the facts. The New England beer market, first of all, is a growing market. Total sales increased by 9.5% during the period from 1960 to 1964. In 1960, the top eight firms in the market controlled 74% of the sales. By 1964, that figure was 81%. In 1960, the top four firms controlled 50% of the market. The top four firms in 1965, 61.3% of the market. In the seven years preceding the acquisition, the number of brewers operating plants in New England declined from eleven to six.

In short, we believe that this evidence carefully

tracks the same trends which were noted by this Court in United States v. Pabst Brewing Company in 1966.

The increasing trend towards concentration and decline in number of brewers is approximately the same.

We also, as I indicated to Mr. Justice Stewart -- the facts indicate that there are ten -- of the ten largest brewers of the nation, seven are already marketing in the New England area. The remaining three -- of the remaining three, Falstaff is clearly the largest. It is also the one most geographically proximate to the New England market although I think we would all recognize it is not within, let's suppose, 100 miles.

The market is characterized, as is the marketing of most beer by heavy promotional and advertising expenditure.

The Narragansett Brewing Company acquired by Falstaff at the time of acquisition was the leading brewer in terms of sales in the New England area, approximately 20% of the market. It was at the time of the acquisition a healthy firm. Its profits and sales had increased substantially during the four years prior to the acquisition. It had engaged in significant planned expansion and indeed acquired certain assets from certain other brewers during that same period. Its distribution system was primarily through independent wholesale distributors. They were not bound by contract to Narragansett to handle Narragansett beer exclusively, and, indeed, the evidence suggests that in

most instances they did not.

The Falstaff Brewing Company, the acquiring corporation, at the time of the acquisition, was the fourth largest brewer in the United States, having 5.9% of the market. It at that time operated eight breweries. Most of those breweries had been acquired by Falstaff during a twenty-year period. In most instances they were small, failing breweries of capacities of some hundred, two hundred barrels. In each instance, Falstaff had substantially modernized those plants, had greatly expanded their capacity, and in that manner had developed the system which made them, by 1965, the fourth largest brewer in the nation.

During the period immediately preceding the acquisition, Falstaff sales and profits had also expanded greatly. It was a financially healthy company. It had no difficulty in securing capital.

Falstaff distributed its beer in two ways. Approximately 80% of its beer in various markets was distributed through independent wholesale distributors. Most of those distributors were non-exclusive distributors. I think the figure is something like 75% of the total wholesale distributors did not carry Falstaff's line exclusively.

The balance of its beer was distributed through its own owned branch operations. That was true in cities where it operated breweries. It was also true in a number of cities

in California. So that it was experienced with at least two types of distribution systems, namely, the independent wholesale distributor as well as the branch distributor which it owns.

So far as entry is concerned, Falstaff had perceived that national brewers -- and you had Mr. Metzger in the previous case refer to probably the four best known of the national brewers -- by virtue of their national status had certain competitive advantages over Falstaff. These include the ability to advertise on a national basis, and what is referred to as the so-called prestige factor. The fact that an individua who goes in to buy a bottle or a can of beer gets accustomed to a particular brand which he can find anywhere in the United States.

In 1958, Falstaff commissioned a report to be made to it on its future growth. That report is referred to throughout the record as the "Arthur D. Little Report," which was submitted to Falstaff in 1960. That report was designed to indicate method of growth for the Falstaff Brewing Company in the years to come. It made a number of recommendations, but let me refer to three.

First, it rather coldly and categorically stated that if Falstaff was to expand its sales it would need to become a national brewer with national brewer's status.

Second, it recommended that entry be made into new

markets by the building of new breweries. Specifically, in the context of our case it suggested that Falstaff should enter into the New England market --pardon me, the Northeastern market -- by the building of a new brewery which was to be located in Baltimore, Maryland.

But more generally, it concluded that building of a new brewery was more economical than entry by other means. It also indicated that distribution by Falstaff through its own company-owned outlets was more profitable to Falstaff than distribution through the use of independent distributors.

Following receipt of that report, Falstaff began, through public pronouncement and otherwise, to indicate its desire to become a national brewer.

Foremost among its desires was an entry into the Northeastern market. In pursuing that particular goal, it had negotiations with several other bewers before culmination of the acquisition of Narragansett. These brewers, I think it must be indicated, at least in several instances, came to Narragansett -- came to Falstaff -- not the other way around. But there were extended negotiations with the Leibman Brewing Company. There were extended negotiations with Rheingold Brewers. These are both brewers operating primarily -- having headquarters in New York City area but marketing in the New England area.

Employees were sent to visit the plants of the Piels

Brewer, plants both in New York and Massachusetts.

There were contacts made with other brewers in the Upstate New York area and, indeed, contacts, inquiries made of Falstaff by several smaller brewers -- at least two, pardon me -- in New England area.

Now it is in that setting that the Government contends that the acquisition of Narragansett by Falstaff eliminated a significant potential competitor from this market.

Falstaff does not, as we understand it, deny that it had the capability, financial, technical capability, to enter the New England market. Nor does it deny,at least in general, that it had a strong incentive to enter the Northeastern market. It does not assert, as far as we can tell, that there were any other brewers who were more likely to enter into the New England market.

Its essential argument, as we understand it, is that it could not enter this market other than by its acquisition of the Narragansett Brewing Company because -- and this was the basis of the finding of the District Court -- of statements made by its executives that it was necessary to secure a strong, viable distribution system to enter the Northeastern market and that kind of system could be obtained only through the acquisition of Narragansett.

Hence, I think the issue in large part comes down to the criteria by which one identifies a potential competitor in

a given market. That is,in a sense, issue one.

Second of all, I think it should be pointed out that Falstaff also contends that this market was in fact intensely competitive. Now, I take it, that the relevance of that is that if the market was intensely competitive before the acquisition, intensely competitive after the acquisition, the elimination of the significant potential competitor in and of itself would not materially alter the competition in the marketplace, and hence, under those circumstances, we should not be concerned about the question whether Falstaff is such a significant potential competitor.

Now, in general, I don't think after the discussion yesterday we need to review in detail the theory of a potential competition case. In essense, it has two parts.

One is that the particular firm -- the acquiring firm in this instance -- was, in fact, likely to enter the market, and that this because of the concentrated nature of the market would be pro-competitor; that is, it is in fact a likely entrant.

Second part of the theory says, in essence, that its presence as a potential competitor is likely to have had an impact on the behavior of firms already in the market, and it is that impact which is then eliminated through its entry of a brewer particularly of the size of this firm, Narragansett.

Indeed, in the cases decided by this Court dealing with potential competition, there appears to have been more

emphasis on the latter than on the former.

Those cases, the El Paso case and Penn-Olin case, Proctor and Gamble, Ford Motor case, decided last term, all emphasized the effect which that particular acquiring firm had on the market even without actual entry, but instead by virtue of its existence, in the phrase which has come to be used is on the wings of the market.

As it was put in Penn-Olin the existence of an aggressive, well-equipped and well-financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolous market would be a substantial incentive to competition.

Now that's the basic theory.

Q A quotation you just read spoke in terms of waiting anxiously, and you earlier used the term "likelihood." Don't those both suggest that inquiry here is a basically factual one? You wouldn't disagree with that?

MR. KAUPER: Well, obviously, there is a factual question, but it would be in any case of this sort. But I think the question is what is it that the facts have to show? Our contention in this case is what the facts have to show is that there was a substantial incentive to enter, that there was capability to enter, that there were reasonable prospects for entry and that to a reasonable and prudent management there was such an opportunity to enter.

Q Well, certainly those facts, at least as I would see them, wouldn't necessarily add up to a concept of anxiously waiting to enter. There is a subjective element noted by the phrase "anxiously waiting," as by the term "likelihood," I think.

MR. KAUPER: Well, I think the Court dealt to some extent with that same question yesterday, the question of what is subjective, what is objective. I think in the sense of: are they anxious? That may not be the best term to use. It is, I recognize, the term used by the Court, but what it suggests is the firm which is positioned at a certain point in the market and because of that position that firm when eliminated brings about an anti-competitive effect.

Now I think so far as what is subjective and what is objective, and that is indeed a major part of what we are concerned with in this case. Let me, if I might, turn to that because there was some discussion of that yesterday.

I think the question which was put yesterday is that simply a matter of retrying the facts in this case cannot be put in quite those terms. What we are talking about here is trying to decide what it is the facts have to show. It is not a question of: do the facts show that this firm would or would not in fact have entered. Instead, the Government's contention is that the Court should apply here criteria which are objective and structural in nature, and

having applied those criteria, we believe the Government has met its burden in this case.

Q What is the ultimate factual inquiry?

MR. KAUPER: In our judgment, the ultimate factual inquiry -- and let me put it in several parts because I think there are several issues although in a sense we are really only talking about one.

Obviously, number one: is it a concentrated market? And that is not the point we are talking about now.

Number two is the question of how many entrants might there be. That is, is this a peculiar entrant or one of a group of peculiarly likely entrants?

But so far as the question of entry itself, it is our belief, and indeed we believe that the Court has already so indicated, that the standard to be applied is whether or not a reasonable management on the facts established would have believed there was a basis for entry if this acquisition had been prohibited?

Q Even though the Trial Court finds the fact that this particular management, however a reasonable management might have operated, did not plan to enter?

MR. KAUPER: I think we would be prepared to make that argument. Now in this case, Mr. Justice, I think we would also contend that the particular fact on which that finding was based really was not -- and taking that particular

finding -- was not based on evidence that showed what that management had in fact done in the year 1964-1965. In other words, I think there is a second part to the problem in this case because the testimony which is relied upon by the president of Falstaff, in particular, is testimony given at a much later date as to what he would have done or would not have done, what others in the management of Falstaff would or would not have done.

But the testimony being given at a later date has some of the aspects, obviously, of a self-serving statement.

Q You say then that the District Court should have disbelieved it?

MR. KAUPER: No, I don't think I would say it should have disbelieved. I think the argument we are making is that because of the nature of that evidence it should not be the governing criterion at all. Now, what I am suggesting is that I don't think it ought to be an issue of credibility of that statement in a case by case sort of basis, that the standard should be drawn so that that statement is really not the crucial issue. I don't know whether I have made that point, but it seems to me that when you say is it a matter of should it be believed or should it not be believed I think that the ideal standard would be a situation in which you did not put a man on the stand and say to him, "What would you have done three or four years ago?"

Q You would, in effect, remove the concept of anxiously waiting or subjective -- make it kind of a reasonable man's negligence?

MR. KAUPER: Yes, although I think that's not quite the point I am dealing with here. I think there are two points. One I would not approach this as a standard which is based upon testimony given at a later fact.

Now, your question, which goes to anxiously waiting, could also go to the use of subjective evidence which is contemporaneous with the act.

But, as it seems to me, there are two parts to this particular problem. In this case, the Trial Court relied upon statements of the management that they would not have entered in any other manner other than the acquisition of Narragansett, that is testimony taken at a later point in time.

Q Mr. Attorney General, since your premise is that -- for this case, is the likely impact of Falstaff sitting on the edge of the market. That is an assumption about its effect on competitors in the market.

MR. KAUPER: That's correct.

Q So why shouldn't the standard be how competitors in the market would view a potential entrant -- the likelihood of the potential entry?

MR. KAUPER: Well, I take it -- let me see if I understand your question, Mr. Justice White. I take it what

you are suggesting is perhaps what we should do in these cases is put the actual members of the industry --

Q Your argument is that this has an impact on competition and no fool who is competing in the market would assume -- or would even think -- that some company would enter, why your case has to fall.

MR. KAUPER: Yes. I think the point is that the question of impact, whether we call it on the wings or on the edge or whatever words we use, on those already in the market is a matter -- and I think this is your point -- of the perceptions of those within an industry. That is one reason why we think a statement made after the fact as to what a firm's intention would have been is not the criteria to be applied in such a case. Obviously, that is not perceived by those who are already members of the industry.

I think our position on your question would be: if the facts in the record demonstrate that there was a basis for entry which would have been acceptable to reasonable management, that that justifies the belief that others would have perceived the same thing.

Q So, really, the basic element is not the actual likelihood of entering, but the perceived likelihood of entry by those already in the market?

MR. KAUPER: Well, I think, Mr. Justice, there may be a case where it is precisely the question of actual entry,

that is, there could conceivably be a case where a firm has no impact on the wings, so to speak, but where in fact it can be demonstrated that it would have entered.

Q Yes, and there could also be a case 180 degrees the other way, could there not?

MR. KAUPER: Yes, I believe there could be.

Q Where, in fact, there was no actual intent or possibility for some reason that was secret, some family reason or something, but if there were perceived potential, reasonably probably potential of entry that would be enough to satisfy the test, wouldn't it? Even though it were quite an inaccurate and incorrect perception.

MR. KAUPER: I believe that's right.

I am nearing the end of my time, Mr. Chief Justice, I think I will reserve the balance.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Kauper.

Mr. Goring.

ORAL ARGUMENT OF MATTHEW W. GORING, ESQ.,

ON BEHALF OF THE APPELLEES

Mr. Goring: Mr. Chief Justice, and may it please the Court:

I have been interested in several of the colloquies between counsel, not only in this case but in the preceding case, in the Court.

One of my interests lies in the dealing of the

Government with the subject of subjective evidence.

At one point in the briefing of this case, the suggestion seemed to me clearly was that on subjective evidence the Government did not elect to go so far as to say that subjective evidence should not be admitted, and indeed they made no objection to the kind of evidence we are talking about at the trial level.

Nonetheless, admissible or not, the Court should not take it into account to any degree.

Now, as Mr. Justice Stewart suggests, the Government's attitude would be quite different if the subjective evidence favored them.

Now, we had the same sort of problem in the Court below,and this is somewhat diverting but it is enlightening, I believe, with respect to post-acquisition evidence.

On page 195 of the Appendix, what trial counsel for the Government says in substance is that in some cases -- this is a quote -- in some cases post-acquisition evidence showing anti-competitive effects after an acquisition is relevant. However, post-acquisition evidence to show what would have been had this particular acquisition not taken place. In other words, if the evidence to be introduced was such as to show that after the acquisition anti-competitive effects had been felt in the marketplace, that would be admissible.

Judge Day said it would seem to the Court common justice would dictate if the evidence indicated the other way ought to permit a defendant to introduce it. And Mr. Cody in reply demurred.

Now, that is the same attitude the Government has about subjective evidence. And let me turn to the subjective evidence and speak upon it.

While I think the decisions of the Court clearly suggest -- and I know of no contrary decision -- that it does not deem its function to retry cases and will not do it, further examination into the question of whether the findings below were clearly erroneous, the discussion has got to run the gamut of significant evidence.

Now, the evidence that we are talking about --

Q Excuse me, did the trial judge consider that there would be no likelihood of entry if he was convinced the management actually had no intention of entering? Is that the standard he applied?

MR. GORING: That is not the entire standard he applied.

Q Can you tell what the standard they did apply?

MR. GORING: He referred to that as significant. What he says about it broad is the credible evidence establishes that it was not a potential entrant into said market by any means or way other than by said acquisition.

Q He just stated his conclusion?

MR. GORING: That is correct. He does not refer the question of whether Fact A or Fact B leads him to that conclusion.

Q Really, on analysis, the question is a little more subtle than that, as my brother White has suggested though, isn't it? Basically. It is not actual probability or possibility of entry but the perception of that by those already in the market. It is a little bit like the -- in Naval warfare the fleet-in-being theory. Now the British Fleet at Scapa Flow may, in fact, have all its ships unable to sail, but until or unless the enemy knows that it is still the fleet-in-being.

MR. GORING: I think it is quite clear that both facets have some significance, if they both exist. That is the likelihood of entry and the apprehension in the industry, in the market.

Q Is there any evidence that that apprehension was taken into account by the District Judge in applying the standard?

MR. GORING: There was no evidence of any kind that that apprehension existed, none whatever.

Q But how about in his -- in the legal standard that he applied? Can you tell what legal standard he applied? I guess you can't. He just stated his conclusion.

MR. GORING: You can't from the record pinpoint it. But what I am suggesting is that the things that I am talking about are in the record and some of the things which we have just talked about a moment or two ago are not. In other words, there was no evidence offered by the Government that the industry in the New England market had any apprehension that Falstaff would enter the market, and there was therefore no threat by virtue of their being 400-odd miles away, which the Government suggested, in the wings.

Q I take it, the Government's argument is, however, if you show some facts about an industry in a market area and if it happens to be a very attractive place to do business, it is profitable, that almost anyone in the industry would think that an outsider with financial resources would be interested in entering, in order to share in the prosperity. Take a set of facts like that, there must be facts about the condition of the market in this record.

MR. GORING: There are no facts about the profitability of any entry which could have been made by Falstaff.

Now, the Government started this case in 1965. It took a large quantity of depositions. It sought answers to a large quantity of interrogatories. It served upon Falstaff before the acquisition, before the consummation of the acquisition, CID's seeking extensive information.

After the commencement of the suit, it took extensive

depositions.

Now, had it chosen to try and show the state of mind of the industry in New England with respect to the threat of entry by Falstaff, there would be a large quantity of witnesses who could have been interrogated on this point, other members of the industry; and I suggest some evidence of that kind is essential. I see no way, no reasonable way, of suggesting that in industry one competitor does not know something about what another possible competitor is doing and thinking.

Now, the reason behind -- I am having to mix these things up in part -- but the reason behind the determination of Falstaff management not to enter New England market either independently or by what is referred to as a total entry -- whatever that means -- blame the fact that they had attempted to enter the Detroit market; they had attempted to penetrate the Chicago market; they, being in Northern California, attempted to penetrate the Southern California market. And in each case those attempts were dismal failures. And they were dismal failures, so Mr. Griesedieck did testify, because of the fact that there was not in fact when they went into these areas a healthy distributor organization, and in at least one of them, their attempts to create one after entering the market were failures.

And their conclusions were that they would make no attempt to enter the market thereafter. This occurred before

1964-1965. They would make no attempts to penetrate a market unless they knew they had a distributor organization which was energetic, healthy, and which promised to be able to sell the product which they were producing.

Q Mr. Goring, on your suggestion that someone called the other New England brewers, or some of them, would you regard them as an entirely objective, impartial observers of this scene?

MR. GORING: To be perfectly frank, I should think they might be very willing to say to the Government exactly what the Government wanted to hear, that they were afraid of this chap standing in the wings. They were apprehensive. It did have something to do with their price structure.

Q In other words, it is a built-in conflict of interest with respect to most of these people, is it not?

MR. GORING: I am not convinced that when the testimony to be educed that way runs in favor of the Government the Government has much concern with their observations, but I do believe that they could have obtained the soundest evidence about what the thinking in the New England beer industry was with respect to the likelihood and danger of entry and the threat of entry.

Q Well, if you are suggesting that they aren't necessarily reliable witnesses on this. They might be, but aren't necessarily.

MR. GORING: They could be honest, but let me give you a sample of what is in the record in this case.

It was offered by the Appellee. No testimony on this point was offered by the Appellant.

Mr. Haffenreffer, who was then Vice-President in charge of sales for Narragansett for a number of years before the acquisition, was called by the Appellee and he was asked, on page 376, "What have you to say about the presence of Falstaff in Ohio on the West and in Washington and/or Richmond, Virginia, on the South? What have you to say about the competive effect of their presence there and no closer to New England?"

Answer: "They were no threat. We certainly didn't consider them any threat to us. Certainly at that distance they were no threat because of transporation costs."

Now, there was a witness who at that time had no axe to grind, nothing at stake. He had been a substantial stockholder in Narragansett,and when this acquisition was consummated stockholders at Narragansett walked off with $19½ million, scott free.

The District Court refused to enjoin the acquisition before it was consummated, and dismissed Narragansett out of the case thereafter.

So at the time Mr. Haffenreffer testified, in 1970, there was no possible conflict of interest. He had no axe to

grind. He had no concern with outcome of litigation.

That is the only piece of evidence in this record concerning the thinking of people in the industry in 1965 about the danger to their position of a possible entry by Falstaff. They are eliminated as a potential competitor in that aspect of saying, by that piece of testimony.

And the trial judge who, of course, is entitled to accept it as true or reject it as false, and he accepted it as true.

With respect to subjective evidence if it is admissible, either it is initially at least up to the prior fact to determine its truth or falsity. If he finds it true, I suggest he is entitled to find upon the basis of its truth and come to a judgment of the case upon that basis.

And, unless the Court has changed its mind on the view that it had in Yellow Cab and Oregon Medical Society, it will be necessary to find that the Court below was clearly in error, and to be convinced that a serious mistake had been made by the Court below.

What the Government is seeking here for all the words they use with respect to incentive of Falstaff to enter this market -- what the Government is really seeking is what it sought in Penn-Olin, which is the equivalent of an irrebuttable presumption from two things, apparent financial ability and a desire. But desire does not reach the heights of

incentive.

Incentive must have with it in the context of things like this a reasonable anticipation of profit. And there is no showing in this record by the Government of any reasonable anticipation of profit.

But they use the word incentive almost as though it were the equal of desire.

With respect to the question asked by Mr. Justice Rehnquist, trial counsel for the Government in his opening said that he would show that for a number of years Falstaff had had a gnawing desire to enter the New England market.

Falstaff had had a desire to enter the New England market for a period of years and had never made any attempt to conceal it. But the question of whether it could profitably do it either by independent entry or by the toehold theory which nobody yet can completely define, the chances of profit in entry in either of those directions was not perceptible to Falstaff, and they had decided sometime before not to build a brewery in New England,for example, a question which I put to Mr. Griesedieck on page 296 of the record, after he had told me it was his view and the unanimous view of the Executive Committee that it would make no attempt to enter independently.

My question is:"To pinpoint this to a degree had you ever entertained the idea in the period of time from approximately 1950 on, let's say, of building a brewery in

New England?

The answer was, "No, sir."

I asked him, "Why not?" and he told me that there was no distributor system and no observable way to acquire one.

Now let me speak of the Arthur D. Little report very briefly because that has -- it has been suggested that has some significance with respect to the likelihood of entry by Falstaff independently or toehold.

The Arthur D. Little report was the result of a study by engineers with respect to certain aspects of Falstaff's future, what they should do, what markets they should enter, how they should try to enter them.

No reliable witness was called in support of that report. I objected to it on the ground that it could not stand by itself for its conclusion. It was admitted. There is nothing in the record to show whether the people who made the study and composed the report and offered their conclusions and opinions in the report itself had enough expertise to qualify as a witness, and the report is insignificant because of that.

The report did recommend that Falstaff build a brewery in the Baltimore area and Falstaff decided that that part of the report was not valid enough to entertain.

The report did recommend attempts to penetrate the Detroit and Chicago markets. Those suggestions Falstaff

analyzed on its own basis and found they had some merit, tried them out and, as I have told you, failed.

Now the critical part of this case is that there is no evidence to support the burden which the Government had. The Government certainly had to demonstrate on the one hand that there was in fact likelihood of entry which involves ability to finance, desired entry and a reasonable profitability from penetrating the market.

The Government did show desire. They showed apparent financial ability. They showed nothing about profitability. And you cannot tell from the Government's case whether an entry in either of the methods which they suggest made any sense to a prudent businessman. And I think it is some slight consequence to remember that this was a public company. The stock was widely held and there was some danger of concern, objection and litigation on the part of stockholders if they made many more blunders of the same kind that they had apparently made in both Detroit and Chicago.

There is evidence in the record which we produced showing the lack of sense in entering the market in either of the two means suggested by the Government. Dr. Horowitz we called as an expert. He testified as not feasible, not profitable enough, to build a brewery and certainly not feasible without being able to sell the beer.

Mr. Haffenreffer testified that he did not believe

that it was possible for Falstaff to acquire a viable, energeti reliable, distributor organization. He did not believe it was feasible.

There are no facts in the record which carry the Government's burden to an appropriate conclusion. There are facts in the record which clearly justify the trial judge in any judgment for the Appellee if in fact he found the evidence credible and believed it.

Q How long now has Narragansett been operated as an independent division, subsidiary of Falstaff?

MR. GORING: After the acquisition? Did you say after the acquisition?

Q Yes. How long was that going on?

MR. GORING: Until the judgment was rendered. I am not sure, as a matter of fact, that it has been changed today, but certainly at the point in time when the judgment was entered Narragansett was a wholly-owned subsidiary and had been so since the acquisition.

Q The acquisition was -- ?

MR. GORING: 1965. July 1965. And that situation was maintained at the request of the Government, of Falstaff and by agreement of Falstaff with Government to do it that way. Whether that has changed in the meantime, I do not know. I do not represent Falstaff in any other matter except the matter which is before you.

Q So at least until the judgment by the District Court, Falstaff did not gain the advantage of marketing beer in the New England market under its Falstaff name, under its national brandname label.

MR. GORING: Oh, yes, it made attempts to sell Falstaff brand in New England,using the distributor organization which existed in the Narragansett operation.

Q And was the Narragansett label discontinued?

MR. GORING: No. No need. There is a graph at the end of Appellee's brief which shows what happened to barrel sales of various brewers in the period from 1964 to 1968, and it shows that Narragansett was being sold under its own brand during that entire time. It does not show --

Q It doesn't show Falstaff, though.

MR. GORING: No. And the reason it doesn't was because the quantity of beer sold by Falstaff didn't reach the bottom line of the graph. But the fact is that Falstaff brand was being sold by Narragansett distributors and Narragansett brand continued to be sold by Narragansett distributors from the time of the acquisition to the present time.

Q I suppose one could assume that that was regarded by Falstaff as a transitional step in what they hoped ultimately would be the result. Get the name exposed to some extent before this was finalized.

MR. GORING: The only information in the record upon that, and I should have adverted to this, is the testimony of Mr. Griesedieck under examination by me.

My question was, in substance, "Have you tried to exploit and promote sale of Falstaff products in this period of time?"

And his answer was that he had.

I can conceive of the Government and anybody else suspecting that an acquisitor in a situation of this kind might deliberately drag his feet.

My question was designed to get into the record evidence that they did not do so.

Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Goring.

Mr. Kauper, you have four minutes left.

REBUTTAL ARGUMENT OF THOMAS E. KAUPER, ESQ.,

ON BEHALF OF THE APPELLANT

MR. KAUPER: Let me address myself to several matters raised in the argument of counsel.

He suggested there was no evidence of apprehension within the New England market on the part of those in the market of the likelihood of entry by Falstaff.

I think it should be indicated, number one, that the testimony of Mr. Haffenreffer which he read to you, of course says he did not fear them because of their transportatio

costs.

We are not talking about their entry through transportation. But I think more important, there is an impressive list of concerns marketing in New England who contacted this particular brewing company with respect to likelihood of acquisition. Not only the majors which are referred to primarily in the brief, but several smaller brewers contacted the Falstaff Brewing Company as a firm whom they believed would be likely to enter. The letters from distributors which are contained in the record, some twenty of them already existing beer distributors, simply allude to the rumors of the likelihood that Falstaff was preparing to enter this market.

Now, it is true there is no testimony by competitors that their conduct was influenced by this individual firm on the edge of the market. It is quite clear, however, they were perceived by those in the industry as a rather likely entrant.

Q Don't you think the Government had some duty to go forward with the evidence faster than testimony on page 376 -- this gentleman --

MR. KAUPER: You are talking about the Chief Executive Officer of Narragansett.

Well, I think, as Mr. Haffenreffer said, as I understand it, is that during the time that he was operating

Narragansett Brewery, he did not fear -- maybe I read the statement incorrectly -- shipment into the area by Falstaff. He puts it specifically in terms of transportation.

Now,it may be that at that point there was no particular likelihood of that sort of conduct, but I think given the objective fact here with respect to the likelihood of entry, and the perception of Falstaff's entry by those in the industry, and given the concentrated nature of this market, that it is reasonable to conclude that their behavior was affected by thisparticular firm.

Now, I think -- and let me turn to that issue because we really did not discuss it earlier. The second critical finding made by the judge,and there is some difficulty here because the judge made no detailed findings of fact, is that the market was intensely competitive.

Now, if that is so, presumably the elimination of the significant potential competitor is of very little consequence. Nowhere, in his opinion, does he refer to the fact that this was a concentrated market. Nowhere does he refer to the fact that that trend was increasing. He accepts, primarily the testimony by Falstaff's president, the Chief Executive Officer of Narragansett, and the economic expert put on the stand by Falstaff, that this was an intensely competitive market.

And the statement by competitors giving the

concentration and the increasing trend towards concentration, is precisely the kind of testimony given by bankers in the Philadelphia Bank case which the Court said was lay evidence not entitled to particular weight on this issue.

So far as the economist is concerned, he conceded his primary argument was that prices had not risen in this market commensurate with costs. He conceded that he had not examined price and cost data for the New England market.

Now, under those circumstances, the whole thrust of this Court's opinion in the past has been to look to concentration as the indicator of competition in the marketplace.

I think that brings me to the conclusion, Mr. Chief Justice.

Q Mr. Kauper, let me ask you one more question, if I may. In your colloquoy with Mr. Justice White about the competitors' perception of this potential competitor, I take it ultimately that, too, is a subjective determination, isn't it, albeit on the subjective state of mind of the people in the market already. They must have perceived the thing rather than it just being a question of a reasonable person in their position being capable of perceiving it.

MR. KAUPER: I think that is a subjective question. I believe we showed, however, that perception by objective fact.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Kauper.

The case is submitted.

(Whereupon, at 11:46 o'clock, a.m., the case was submitted.)