DEFENDANTS' PROPOSED JURY INSTRUCTIONS

(LITB4.101-42)

No. 24

ATTEMPT TO MONOPOLIZE DEFINED

In addition to monopolization, plaintiffs (has) *have* alleged that defendants have attempted and conspired to monopolize trade. An attempt to monopolize has (two) *three* elements: (1) a specific intent on the part of defendants or *any one* (either) of them to monopolize (and) (2) the employment of some practices which would result in monopolization if successful but, though unsuccessful, approach so close as to create a dangerous probability of success *and (3) damages suffered by the plaintiffs as the proximate result of the attempt.* Thus there are two distinctions between the offense of monopolization and the offense of attempt to monopolize that you should have in mind. To prove the offense of attempt to monopolize, (1) plaintiffs must show that defendants specifically intended to monopolize the market and (2) plaintiffs need not show that defendants succeeded in their attempt to monopolize, but must show that defendants' attempt approached so close as to create a dangerous probability of monoplization.

Antitrust Civil Jury Instructions at page 113 (Section of Antitrust Law, A.B.A. 1980 ed.)

No. 25

SPECIFIC INTENT IN ATTEMPT DEFINED

Question A deals with intent, and the law requires that, before you find an attempt to monopolize, you must find that *defendants* (Morrell) had a specific intent to control prices or destroy competition with respect to *the relevant market.* (all pork and pork products.) An intent to compete (in Montana) or to increase sales (in Montana), even at the expense of competitors, is not in itself enough to constitute a specific intent to monopolize.

You may find a specific intent from the words spoken or written by officers or employees of (Morrell) *defendants* or from the acts done by them. In other words, there may be circumstantial evidence of a state of mind. In this connection, however, the state of mind must be found in the evidence and may not be based on conjecture or speculation. It is presumed that private transactions have been lawful. That presumption may be overcome by evidence to the contrary. If, however, you find that, viewed in their entirety, the natural and probable consequence of (Morrell's) *defendants'* acts was the elimination of competition, then you may infer that (Morrell) *defendants* intended that as the natural and probable consequence of its acts and had the requisite specific intent.

The proof need not show knowledge of the defendants that a particular act or failure to act is a violation of the federal antitrust laws. Every person is charged with knowing what the law forbids and what the law requires to be done.

Antitrust Civil Jury Instructions at page S-25 (Section of Antitrust Law, A.B.A. 1985 Supp.)

No. 26

INFERENCE OF INTENT

You may not infer the specific intent to attempt to monopolize if the conduct alleged by the plaintiffs to show such an intent had a legitimate business reason or actually benefited the competition. This is true even if you find that the defendants also had the intent, in part, to limit or affect the plaintiffs' ability to compete. The actions taken by the defendants must have no purpose or effect other than the attempt to monopolize.

Oahu Gas Serv., Inc. v. Pac. Resources, Inc., 838 F.2d 360 (9th Cir. 1988); *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984).

No. 29

DANGEROUS PROBABILITY DEFINED

If you find that defendants had a specific intent to monopolize the relevant market, you must then ask whether plaintiffs *have* (has) established by a preponderance of the evidence that defendants engaged in one or more predatory or anticompetitive acts in furtherance of that intent. If you find that defendant *have* (has) engaged in such acts, you must then ask whether plaintiffs (has) *have* established by a preponderance of the evidence that there was a dangerous probability that defendant would succeed in monopolization. A dangerous probability of success may be inferred either (1) from direct evidence of specific intent to monopolize plus proof of conduct directed to accomplishing the unlawful design, or (2) from evidence of conduct alone, provided that the conduct is also of the sort from which specific intent can be inferred. If a dangerous probability of success is to be inferred from conduct alone, then, the question of market power is relevant, as it was in answering the questions of whether defendant had a specific intent to monopolize. For example, if market conditions are such that a course of conduct described by plaintiffs would be unlikely to succeed in monopolizing the market, it is likely that the defendants actually attempted to monopolize the market. Conversely, a company with substantial market power may find it more rational to engage in a monopolistic course of conduct than would a smaller firm in a less concentrated market.

Generally speaking, conduct that will support a claim of attempted monopolization must be such that its anticipated benefits were dependent upon its tendency to discipline or eliminate competition and thereby enhance the defendant's ability to reap the benefits of monopoly power.

Antitrust Civil Jury Instructions at pages S31-32 (Section of Antitrust Law, A.B.A. 1985 Supp.)

No. 30

CONSPIRACY TO MONOPOLIZE DEFINED

There are four essential elements which the plaintiffs (Association) must prove in order to establish its claim that *defendants* (Sunkist) conspired (with Reliance) to monopolize within the meaning of Section 2 of the Sherman Act:

(1) That there was a conspiracy between *defendants* (Sunkist and Reliance) to monopolize an appreciable amount of identifiable interstate or foreign commerce of the United States, which commerce plaintiffs (Association) claim(s) to be *the market as previously discussed* (export of oranges grown in California and Arizona to Hong Kong);

(2) That, if so, *defendants* (both Sunkist and Reliance) entered into such conspiracy with the specific intent to monopolize that commerce;

(3) That one or more of the acts claimed by plaintiffs (Association) in its Section 2 claims was done, and was in furtherance of such conspiracy to monopolize;

(4) That if so, separately with respect to the plaintiffs' (Association's) claim (for each of its seven members), the conspiracy so established was the proximate cause of damage to the business or property of (that member of) plaintiffs (Association), by causing *plaintiffs* (that member) to lose sales on which *plaintiffs* (that member) would have made a profit.

The burden is on plaintiffs (Association) to establish each of these elements by a preponderance of the evidence in the case.

(As to any member as to which you find the plaintiff Association has not sustained the burden of proof as to

all of the above elements, the plaintiff Associations cannot recover on the claim of such member.)

In proving *their* (its) claim of conspiracy to monopolize by (Sunkist and Reliance) *defendants* as distinguished from its claim of monopolization (by Sunkist alone), plaintiffs (Association) need not establish a relevant market sought to be monopolized. It must, however, establish a specific intent to monopolize, and that some appreciable part of the foreign commerce of the United States is subject to the conspiracy.

The term "conspiracy to monopolize" as used in Section 2 of the Sherman Act means the joint acquisition or maintenance by members of the conspiracy formed for that purpose of the power to control and dominate foreign trade and commerce of the United States in a commodity to such an extent that they are able, as a group, to exclude actual or potential competitors from the field, accompanied with the intention and purpose to exercise such power.

I shall give you some elaboration on the concept of specific intent as it applies to an alleged conspiracy to monopolize.

In order to establish that (Sunkist has) *defendants have* conspired and agreed (with Reliance) to monopolize foreign trade and commerce, it takes two people to conspire, as I have indicated. But to establish that they have conspired and agreed with one another to monopolize foreign trade and commerce, the plaintiffs (Association) again must prove by a preponderance of the evidence that each intended to conspire one with the other. In other words, you must be satisfied that *each defendant* (both Sunkist and Reliance) had specific intent to achive monopolization and that they jointly agreed to carry out a plan or scheme to attain monopolization.

Antitrust Civil Jury Instructions at pages 119-120, (Section of Antitrust Law, A.B.A. 1980 ed.)

No. 31

SPECIFIC INTENT FOR CONSPIRACY TO MONOPOLIZE DEFINED

I have instructed you that the Plaintiffs, in order to prove a conspiracy to monopolize, (is) *are* required among other elements to prove that the Defendants acted with specific intent. Thus in order for the Plaintiffs to prevail on the conspiracy or the monopolize charge you must find from a preponderance of the evidence that the Defendants (and Standard Oil Company) acted with the specific intent in mind to destroy competition or to build a monopoly in the *relevant market* (sale of motor gasoline in Tucson.) The existence of that specific intent may be proved from the evidence of actual conduct. However, rough competition is not by itself proof of specific intent to monopolize.

An intent to resist the inroads of other competitors on a market share is not by itself proof of specific intent to monopolize.

Conduct which arises from prudent business judgment is not proof of specific intent to monopolize. Rather the Plaintiffs must show that the Defendants had the specific intent of gaining an illegal degree of market control and the power to eliminate other (brands of gasoline) *competitors* from the market or to fix prices in the market.

Antitrust Civil Jury Instructions at page 115, (Section of Antitrust Law, A.B.A. 1980 ed.)

No. 32

PROXIMATE CAUSE DEFINED

In accordance with my previous instructions, in order to prove the essential elements of plaintiffs'('s) claim, the burden is on the plaintiffs to establish by a preponderance of the evidence, the following facts: First, that defendants have violated the antitrust laws in one or more of the particulars as to which I have previously instructed you; and secondly, that said violations have been a proximate cause of some injury and consequent damage sustained by *plaintiffs* (Mt. Hood) in *their* (its) business or property.

An injury or damage is proximately caused by an act or failure to act, whenever it appears from the evidence that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

This does not mean that the law recognized only one proximate cause of an injury or damage, consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; and in such a case, each may be a proximate cause. Therefore, if you find that a violation of the antitrust laws played a substantial part in causing any injury to plaintiffs, you should find that the violation was a proximate cause.

Antitrust Civil Jury Instructions at page 166, (Section of Antitrust Law, A.B.A. 1985 Supp.)