NO. 303

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

UNITED STATES OF AMERICA,

Appellant,

v.

VON'S GROCERY COMPANY and
SHOPPING BAG FOOD STORES,

Appellees.

On Appeal from the United States District Court
For the Southern District of California,
Central Division

BRIEF OF APPELLEE VON'S GROCERY COMPANY

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THE QUESTION PRESENTED

The Los Angeles retail grocery business, as appellant recognizes, is "vigorously competitive", with "vigorous price competition" being waged by approximately 4000 separate firms operating over 4800 stores in the vast Los Angeles area (App. Br. 42, 35). There are some 3700 single-store operators and most of these, as well as other concerns, obtain their groceries from huge retailer-owned cooperative buying organizations. Both parties are agreed that "opportunities of individual entrepreneurs are substantial" and the probability is that "for tbe indefinite future many relatively small firms should be able to thrive" (App. Br. 16). In the ten years prior to the 1960 merger of Von's and Shopping Bag, the market share of each of the two leading concerns (Safeway and Ralphs Grocery Co.) declined. Post-acquisition evidence indicates (and appellant concedes) that the merger has not had an adverse effect on competition; indeed competition appears to have intensified since 1960. The question presented is whether in these circumstances this merger, which brought together two local concerns with a combined market share of less than 8 per cent, should be invalidated solely on the basis of a rigid and novel test of illegality.

STATEMENT

This is a direct appeal from the final judgment of the District Court of the United States for the Southern District of California, Central Division, dated December 16, 1964, in a civil antitrust case charging that the merger of Shopping Bag Food Stores into Von's Grocery Co. would violate Section 7 of the Clayton Act, as amended (15 U.S.C. §18). The District Court held, after trial, that the merger, which occurred on March 28, 1960, did not violate said Section 7.

Three different District Judges on four different occasions have ruled adversely to Appellant on various phases of this action. The complaint was filed on March 25, 1960, and, after taking evidence, Judge William C. Mathes on March 28, 1960 denied the Motion For A

Temporary Restraining Order, whereupon the merger was consummated. The Motion For A Preliminary Injunction to require that the former Shopping Bag be operated as if it were a separate entity from Von's was denied by Judge Mathes by order dated June 13, 1960. On March 28, 1962, Judge Albert Lee Stephens, Jr. denied Appellant's Motion For Summary Judgment. After trial on the merits, Judge Charles H. Carr on September 14, 1964 wrote a Memorandum Opinion (R. 3017-3031) and ordered Judgment for Appellees.

At the time of the merger on March 28, 1960 Von's operated 28 retail grocery stores, all in the Los Angeles Metropolitan area (Los Angeles and Orange Counties) with annual sales of \$86 million in 1959. It was the successor to a family partnership which commenced doing business in the depression days of 1932 with a grocery concession in a small store. Its development thereafter was through internal growth and it was at all times largely family owned and managed. (Fdgs. 2, 3, R. 3064.)

Shopping Bag was the successor to a partnership which commenced operations in a single small grocery store in 1930. At the time of the merger it had grown through internal expansion to a 38-store chain (36 in the Los Angeles Metropolitan Area) with annual sales of \$84 million. It was likewise largely family owned and managed. The company lacked depth of qualified management, a problem which was intensified with its growth. (Fdgs. 7-13, R. 3065-3068.)

After the merger in 1960, combined Von's and Shopping Bag operated only 1.4% of some 4800 grocery stores in the Los Angeles Metropolitan Area and their combined market share in 1960 was 7.5% of total grocery store sales and 6.9% of food store sales in the area.* After the merger Von's ranked second to Safeway. (R. 1739, Fdgs. 73-74, R. 3084-3085)

By agreement of the parties any issue as to the relevant line of commerce and the relevant section of the country was eliminated. The parties agreed and the District Court found that the relevant line of commerce is "groceries and related products taken as a whole", and the relevant section of the country is the Los Angeles Metropolitan Area which is comprised of Los Angeles and Orange Counties. (Fdgs. 14, 15, R. 3068-3069.) There was no issue in the case as to the effect, if any, of the merger upon suppliers, and no evidence was offered on that subject. (Fdg. 16, R. 3069, and R. 22.)

After trial, the District Court judge filed his Memorandum Opinion in which he stated it could not be concluded "that the merger in question would probably lessen competition in the Metropolitan Area either at the time of the merger or in the forseeable future." He added that "competition in the area appears to remain vigorous, open to anyone and especially those with

* This is based on 1960 figures, the year of the merger, and was a somewhat smaller market share than the total for the two companies in 1958. (Compare Dx. AM, R. 2787-2788 and R. 1739) Appellant variously states that after the merger Von's market share was 8.9% (Br. 13), "almost 9%" (Br. 17, 19) and "almost 10%." (Br. 45) However, they repeatedly refer to area sales of $2.5 billion and Von's Shopping Bag sales of "almost $180,000,000" (Br. 15, 43) and this, if correct, would make the market share 7.2%.

experience and training, and the consumer is reaping the benefit." (R. 3031).

In accordance with Rule 7 of the Local Rules, counsel for defendants were directed to prepare revised proposed findings of fact and conclusions of law and judgment.* At a conference of the parties and the Court, District Judge Carr directed that changes be made in the proposed findings and said changes were made (R. 2250-2251). Thereafter at a hearing to settle the findings, additional changes were ordered. (R. 2246-2297). The Findings of Fact and Conclusions of Law and the Judgment were signed and filed on December 16, 1964. Appellant subsequently filed a motion under Rule 52(b) of the Federal Rules of Civil Procedure for amendment of the findings and for additional findings. (R. 3092-3097). That motion was denied by Order signed and filed on January 8, 1965. (R. 3098). This appeal followed.

* By agreement both parties had theretofore submitted proposed findings with appropriate record references. (R. 1337-1338, 2077-2079).

ARGUMENT

INTRODUCTION AND SUMMARY

I.

Appellant's entire brief rests upon the erroneous premise that the Los Angeles grocery market is a "loose oligopoly" in structure and performance. Far from being oligopolistic, the Los Angeles market is one of the most unconcentrated and fragmented markets in America. Appellant concedes that at present the grocery business in this area is highly competitive, marked by vigorous price competition, and that smaller concerns can compete effectively with the leading concerns. (Br. 31, 35, 42) The evidence in this case and the history of the grocery business in this area lead inevitably to the conclusion that the market not only is but will remain fragmented and highly competitive.

In the vast Los Angeles area, there are some 4000 separate firms operating over 4800 grocery stores. The market leaders, Safeway and Ralphs, despite their own growth and success, have lost ground to smaller concerns in terms of market share. Thus, in 1948 Safeway and Ralphs had aggregate sales of approximately $193.5 million, 21.1% of the market. In 1958, they had increased their sales to $288 million but their market share declined to 14.3%. (Fdg. 27, R. 3072.)

In 1953, there were 96 concerns operating two or more stores. By 1962, there were 150 such concerns operating a total of 1,085 stores. In 1953 there were only 10 concerns operating 10 or more stores. By 1962, there were 24 such concerns, 7 of which experienced all of their growth in the prior decade. (Fdg. 27, R. 3072).

Thus, the trend has clearly not been toward oligopoly. Rather, there has been a diffusion of economic power and a decrease in concentration, as a number of smaller concerns have grown to challenge the market leaders. With the top 20 concerns having an aggregate market share of only 56%, the Los Angeles market is "atomistic" in structure and is not a "loose oligopoly" under the test proposed by Professor Turner before he became an advocate. Kaysen and Turner, *Antitrust Policy* (1959), 72.

While Appellant professes (Br. 34-36) to foresee a danger of "interdependent" or oligopolistic pricing patterns, there is no real likelihood of this occurring now or in the future. In the unlikely event that the leading concerns should at some time in the future become so foolish or so complacent as not to engage in vigorous price competition, they would very soon cease being leading concerns. The history of grocery retailing in Los Angeles has been and still is characterized by the growth of very aggressive, very ambitious smaller competitors desirous of increasing their sales and able to compete effectively with the larger chains. Thus, if the leading chains were to conclude that the "game of price competition is not worth the candle", the aggressive smaller concerns and discount houses selling groceries would be presented with an opportunity which they would surely grasp.

II

In a market as fragmented and competitive as Los Angeles, the loss through merger of a single competitor with a market share of less than 5% is not likely to lessen competition, substantially or otherwise. After Shopping Bag's merger with Von's, there still remained in the market a very large number of substantial competitive factors, and in fact the market became even more competitive following the merger. The Shopping Bag stores remained in existence and became more effective competitive units. (R. 507, 681-682, 1249-1251.) The Government's industry witnesses testified that competition remains vigorous (R. 66, 115-116, 189, 249, 335, 340, 613-614); a number testified it was constantly increasing in vigor (R. 66, 115-116, 449, 638, 713, 729, 759-761, 765-766, 777); "this is a trend" (R. 249, 1140); "there is more competition now than ever" (R. 449 and see R. 521, 660, 661).

Competitive vitality in the grocery husiness, at least in the Los Angeles area, cannot be computed on a slide rule. Among the important forces of the market place are individual initiative, imagination, experience, vigor, ingenuity, geography and many other forces that cannot be measured arithmetically. The existence of two huge cooperative buying organizations, Certified Grocers of California, Ltd. and Orange Empire Co-op, equalizes buying power (Fdgs. 29-36, R. 3074-3076), and this, coupled with the limited draw area of any particular retail store, compel the conclusion that market power cannot be measured simply in terms of the size or market share of the concern which operates it. Aggressive and experienced operators of single stores and smaller chains have such advantages as the opportunity to provide personal service, greater flexibility in making merchandising changes, and the ability to supervise personally all aspects of their business. As Appellant recognizes, "opportunities of individual enterpreneurs are substantial" and the probability is that "for the indefinite future, many relatively small firms should be able to thrive." (Br. 16).

III.

Appellant seeks in this case to establish a black-letter rule of presumptive (actually *per se*)* illegality for any merger, regardless of the market in which it occurs. Appellant's novel rule would apply to all lines of commerce and all sections of the country — to laundries, to department stores, to furniture stores and dress shops; to New York and Los Angeles as well as Stockton, California and Logan, Utah. To adopt such a test — and thus rule out examination into economic realities with respect to a merger of two concerns having a small market share in an unconcentrated and expanding market which is characterized by ease of entry, vigorous competition, and ability of smaller concerns to compete effectively and to thrive and grow — would not be consistent with congressional intent or prior decisions of this Court. Cases such as this one can properly be decided only in the light of all relevant factors and in the context of an industry setting which is necessarily unique in every case. *Brown Shoe Co. v. United States*, 370 U.S. 294, 322 n. 38.

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* Appellant states (Br. 18) that its "proper standard" makes the merger "presumptively illegal" but it means *per se* (Br. 39-45). If ease of entry, substantial opportunities for individual entrepreneurs, and admittedly continuing vigorous price competition cannot rebut the "presumptively illegal" test, then what, one may inquire, could possibly suffice?

Appellant seeks to justify its novel *per se* test of illegality by suggesting (Br. 23) that there is no sure way of predicting whether a merger is likely to have anti-competitive effects. However, the test which appellant proposes is so sweeping that it would necessarily invalidate even inoffensive mergers, thereby requiring the forfeiture of the advantages which would flow from them. We urge that these advantages should not be forfeited in the absence of a showing of reasonable probability of a substantial lessening of competition. In an unconcentrated market characterized by ease of entry, the ability of the small entrepreneur to start a business, to grow by internal expansion, and then sell on an advantageous basis (as here) will be a spur to other new entrants. A flat prohibition of such opportunities can stifle initiative and discourage the entry of new concerns.

It is extremely important that Section 7 be interpreted so as not to bar all mergers—the inoffensive or desirable along with those which are likely to be anticompetitive in effect:

> " . . . Widespread prohibition of mergers would impose serious, if not intolerable, burdens upon owners of businesses who wished to liquidate their holdings for irreproachable personal reasons. Moreover, economic welfare is significantly served by maintaining a good market for capital assets. By enhancing the value of assets when owners wish to sell, a strong capital assets market increases the rewards of successful entrepreneurial endeavor. . . . "*

* Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Har. L. Rev. 1313, 1317 (1965).

ARGUMENT

I. THE LOS ANGELES GROCERY MARKET IS UNCONCENTRATED AND HIGHLY COMPETITIVE; IT IS NEITHER OLIGOPOLISTIC NOR TENDING IN THAT DIRECTION.

We shall show in a subsequent section (*infra*, p. 50 et seq.) that the new test proposed by Appellant is both unwarranted by the statute and unrealistic. We commence the argument, however, by discussing the basic misconception of appellant's brief, namely, that the Los Angeles grocery market is so threatened by oligopoly that the loss of a single competitor creates a reasonable probability of substantially lessening competition.

A. Far from being oligopolistic in structure, the Los Angeles grocery market is one of the most fragmented and competitive in the nation.

1. The market is atomistic; it is not loosely oligopolistic in structure.

In its brief, appellant repeatedly asserts that this market is already "loosely oligopolistic" (pp. 19, 45); that "the combined market share of the leading sellers was at a level economists would consider characteristic of at least a loose oligopoly" (Br. 33). The market facts rebut this claim and establish instead that the market is unconcentrated to a degree matched in very few other industries in America. Even appellant's figures show that at most the leading ten concerns had an aggregate market share of 43.6% (Br. 13) and the leading twenty concerns a market share of only 56.9% (Br. 9).

Assistant Attorney General Turner, before he became an advocate, regarded such a market as "atomistic" as opposed to being a "loose oligopoly." In Kaysen and Turner, *Antitrust Policy** (1959) market structures are divided into four categories: "atomistic structure" (the least concentrated), "loose oligopoly," "tight oligopoly" and "partial monopoly" (the most concentrated). A "loose oligopoly" is defined therein at page 72 as: "a small number (less than twenty) of firms supplying 75 percent of the market, with no one supplying more than 10 - 15 percent and a fringe of smaller firms supplying the rest." In the case at bar, a small number of firms does not supply anything approaching 75%. Even the entire top 20 supplies only 56%. Thus, by Mr. Turner's own definition, the grocery business in Los Angeles is not a "loose oligopoly." It is far less concentrated than that. It is atomistic.

2. Appellant concedes that the market is highly competitive and unconcentrated.

Appellant concedes, as it must, that

> "the food industry . . . remains an industry where large firms are not yet dominant and the opportunities of individual entrepreneurs are substantial.

* The preface to this work noted, p. xix, that "the study is in an important sense, the product of the discussion of a group of lawyers and economists extending over several years. Members of the group were Morris Adelman, Joe Bain, Robert Bishop, Robert Bowie, Kingman Brewster, David Covers, Kermit Gordon, Lincoln Gordon, Carl Kaysen, John Lintner, Edward Mason (Chairman), Albert Sacks, Donald Trautman, Donald Turner."

Furthermore, from all indications, its technology is such that, even today, and for the indefinite future, many relatively small firms should be able to thrive." (Br. 16.)

Appellant further recognizes that: "This general pattern is instanced by Los Angeles. At the time of the merger there were 4000 separate grocery businesses in the Los Angeles metropolitan area operating a total of 4800 separate stores. No firm had more than an 8 percent share of the area's total grocery business (Dx. AM, R. 2787), and it appears that small chains, and even some single-store enterprises, were able to operate efficiently and to hold their own in competition with the larger chains." (Br. 16, and see Br. 31.)

Appellant further concedes that concentration is not yet "undue" (Br. 19) and that "vigorous price competition" is not "seriously impaired". (Br. 35.) Appellant asserts, however, that "evidence that the market remains vigorously competitive is entitled to little weight" (Br. 42) despite the fact that it does "not contend" that substantial adverse effects on the health and vigor of competition "are already manifest in the Los Angeles market . . . " (Br. 42.)

Lacking evidence other than a dubious and theoretical test to indicate *any* anticompetitive effects, appellant is nevertheless critical of the district court for relying "heavily on evidence that in the few [more than three] years between the consummation of the merger and the trial the merger appeared to have had no adverse effects on competition (Fdgs. 52, 66, 88(e), 83, R. 3080, 3083, 3088-3089)." (Br. 42, fn. 40.) In short, despite its concessions, appellant nevertheless urges that this Court totally ignore findings of fact hased on the evidence and give controlling effect to conjecture rather than to the realities of the market place.

3. The shares of the market leaders have been declining.

The decade prior to the Von's-Shopping Bag merger was marked by the decline in the relative positions of the leading chains and the growth of smaller concerns in this area. The market share of the leading grocery chain in 1960 (Safeway with 146 stores and an 8% market share) has steadily declined since the 1930's when it had more than 1000 stores in the area. (Fdgs. 18, 27, 74, R. 3069, 3072, 3084-3085.)*

The market share of the top two chains decreased from 21.1% in 1948 to 14.3% in 1958. (Fdg. 27, R. 3072). The market share of the leading three, four and five concerns declined hetween 1952 and 1960 (Fdg. 80, R. 3087-3088).** Following 1960 one of the top 8 and two more of the top 20 concerns went into hankruptcy and a numher of their stores were sold to single-store

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* Appellant asserts (Br. 34, fn. 33) that this decline in Safeway's market share "was due to a non-recurring factor: Safeway's decision to sell off or close its many small stores and convert to modern supermarket operations." Why this should cause a *decline* in Safeway's market share appellant does not explain. The fact is that Safeway's market share declined because of the entry and growth of new concerns and there is no basis whatsoever for concluding that this is a "non-recurring factor."

**The market share of each of the third, fourth and fifth increased in this period hut not enough to make up for the decline of the two leaders. (Dx. AN, R. 2788.) Appellant criticizes the accuracy of our figures, despite the fact that they were based operators and small chains (R. 1649-1650). This, presumably at least, further reduced the aggregate market share of the leading concerns.

Seven of the top twenty chains in 1960 were either not in existence at all or had only one store in 1948. (Fdg. 27-28, 79, 3086-3087.)* In 1953 there were 96 concerns operating two or more stores; by 1962 there were 150 such concerns operating a total of 1085 stores. In 1953 there were only 56 concerns operating two or three stores, whereas in 1963 there were 104 such concerns, an increase of 86% in the number of these smaller concerns. (Fdg. 27, R. 3072.) Thus, the grocery business in Los Angeles is not dominated by large concerns. Rather the market leaders have lost ground to smaller concerns, some of them new entrants. If an industry were "dominated" by a few large concerns, one would not expect that many small concerns would continue to survive and grow.

4. The market is characterized by ease of entry.

Entrance into the business of food retailing is unusually easy to effect; perhaps more than any other industry,

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on actual sales data obtained by the F.B.I. directly from the records of the companies involved and supplied to defendants by counsel for the Government pursuant to court order. Appellant relies (Br. 34, fn. 33) on Census figures which cannot be verified because the concerns to which they relate are not identified.

* These shifts in the relative positions of firms within an industry are a good indication of the workability of competition. See e.g., Joskow, *Structural Indicia: Rank-Shift Analysis As A Supplement To Concentration Ratios*, The Antitrust Bulletin, Vol. VI, p. 9.

the grocery business is characterized by low entry barriers.* The record fully demonstrates that entry into the Los Angeles grocery market is relatively easy, thus insuring that the market will remain competitive. There is uncontradicted evidence that many successful firms have started recently with small investments (Fdgs. 28, 44-49, R. 3072-3074, 3077-3080). A new entrant:

> "starts off by renting a market that has been vacated by a chain store, usually. The fixtures are available to him, either because they have been left in the market, or he can buy used fixtures. Certified [Grocers of California, Ltd., the retailer-owned cooperative wholesaler] has a lenient plan to help the fellow put in his initial inventory, and if he is smart and works his supplier capital until he gets a foothold, he can actually get into the food business with a relatively modest investment. . . ." (R. 1314).

Indeed, the testimony indicated that the grocery department in a fairly good, small store "could be opened for not over $5000 and much of that could be suppliers' money." (R. 1315.)

Eighteen of the thirty industry witnesses called by the Government and ten of those called by the defendants opened their first store subsequent to 1948. (Fdg.

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* See, e.g., Cassady, *Competition and Price Making In Food Retailing* (1962) p. 63; Kaysen and Turner, *supra, Antitrust Policy, An Economic And Legal Analysis* (1959) p. 40; Adelman, *A & P: A Study In Price-Cost Behavior and Public Policy* (1959) pp. 14, 408.

48, R. 3079.) Government witness Eaton in 1953 at the age of 24 and with total assets of $1000 obtained the lease on a small (2500 square foot) store in La Puente. His total sales in the first year were $72,000 and they increased each year to 1961 when they leveled off at around $450,000. Prior to 1963 he had purchased real property on which he planned to construct a new and larger grocery store. (Fdg. 44(e), R. 3078-3079; R. 268-271.) Government witness Palmer in 1946 at the age of 25 and with assets of $16,000 purchased a one-half interest in a grocery store in Hollywood. He subsequently sold this interest and thereafter purchased and sold other grocery stores. In 1963 he was the president and sole stockholder of a chain of four grocery stores with annual gross sales of more than $6 million. (Fdg. 44(f), R. 3079; R. 672-679, 688-689.)

Defense witness Gelson and his brother with total assets of $5000 in 1946 purchased a small, 700 square foot market in North Hollywood. They now own two large supermarkets, one of which has annual sales of approximately $6 million and the other continues to prosper despite the fact that there are 12 supermarkets near enough to be in competition with it. (R. 1434-1438.) Defense witnesses Albert Goldstein and Joseph Goodnight each left executive employment with leading chains after Von's and Shopping Bag had merged, and each is now operating a successful business. (R. 1407-1411, 1448-1451 and see R. 1141-1142.) Other examples of the opportunities for entry, growth and success are set forth in the findings. (Fdg. 28, R. 3072-3074; Fdg. 44, R. 3077-3079.)

Appellant nevertheless asserts (Br. 40-41) that "Entry and expansion by small operators is in fact sharply limited, due to the preference of shopping-center owners for established large chains. . . . And the capital requirements for opening a new supermarket — about $700,000 exclusive of the cost of land (R. 1286-1288) — are by no means negligible. . . . The merger certainly will not increase the ease of entry, and it may have the opposite effect."

No one has ever contended that the merger will "increase the ease of entry" but there is absolutely no record or other support for appellant's speculation that "it may have the opposite effect." Appellant's assertions are otherwise completely fallacious:

(a) While it is true that shopping center owners prefer an established large chain (Fdg. 54, R. 3081), it is likewise true that prior to the merger Von's* was able to and did obtain shopping center locations. (Fdg. 54, R. 3081.) The merger changed nothing in this respect. Moreover, it is equally true that not all good grocery store locations are in shopping centers (Fdg. 54, R. 3081.) Most of the stores in this area are "free standing" stores, not in a shopping center, and this is true of the stores of the larger chains. (R. 1329-1331.)

(b) While capital requirements for opening a *new* supermarket may approximate $700,000 exclusive of the cost of land (R. 1286-1288), most supermarkets are leased by the operator, not purchased (R. 1314).

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* And Shopping Bag also (R. 152, 277, 1438).

Moreover, appellant assumes (erroneously) that the new entrant to be successful must *start out* with a new supermarket. This ignores business realities. The new entrant typically, as the record shows, starts out with an existing, older store and takes off from that point. (R. 278, 1314.) As appellant points out (Br. 12), in the period 1948-1958 the chains "disposed of a substantial number of unwanted outlets." The fact is and the record shows (R. 1472, 1476, 1489, Fdg. 49, R. 3079-3080) that the leading chains furnish the training, the experience, and frequently the stores for their future competitors. (Fdg. 81, R. 3088.) Witness Harlos Gross, for example, took over an old "unwanted" Shopping Bag store and was able to increase its gross sales from $600,000 to $1 million and maintain them at that figure despite the fact that the number of competing retail grocery stores within a two-mile radius increased from five in 1953 to 17 by 1960. (R. 1411-1413.) Witness Cecil Dobson took over an older, "unwanted" former Thriftimart store and increased its gross sales from $1 million to $2 million despite the fact that he faces competition from newer and larger stores of various chains in his shopping area. (R. 1393-1396.)

The many executives of chains who resign their positions to take over an older store and thus start their own business attest to the unlikelihood of market foreclosure by the leading chains. (R. 1396-1402, 1417-1422, 1402-1406, 1407-1411, 1448-1451, 1483-1487, 1495-1499.) If, as the appellant suggests, the existence of larger chains may discourage future entry by single-store operators, one must wonder how these experienced and knowledgeable grocery executives could be so blind as not to see what appellant professes to foresee so clearly. The record shows (Fdgs. 28, 44-49, R. 3072-3074, 3077-3080) that persons with experience can and do enter the business with relative ease and can reasonably expect to prosper in competition with the large chains and others.

B. The intense price competition which exists in the Los Angeles market is completely inconsistent with the charge that the market was approaching oligopoly conditions.

Both before and after the merger, vigorous price competition has characterized the Los Angeles market (R. 1234-1235, 1340-1341, 1344, 3031) with rival concerns featuring in their advertisements reduced prices on many and different products. Government exhibit 24, unprinted, is a collection of advertisements of some of the rivals of Von's. That exhibit shows that these concerns each offered reduced prices on a wide variety of products. Where the identical product was advertised, prices of the respective chains frequently varied.* This is not the "interdependent" pricing of oligopolists. Indeed, the actual commercial practice in the market place is a refutation of the charge that the market has oligopolistic characteristics.

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* For example (Gx. 24, unprinted) shows the following prices for March 3, 1960:

Quaker Oats		
Ralphs	— 42 oz.	39¢
Safeway	— 42 oz.	37¢
Pillsbury Flour		
Ralphs	— 5 lb. bag	67¢
Safeway	— 5 lb. bag	49¢

Toilet Tissue		
Ralphs	— 4 rolls Zee	39¢
Market Basket	— 4 rolls Zee	29¢
Jello		
Market Basket	—	1 pkge 5¢
Hughes	—	16 pkges $1.00
Coffee		
Food Giant	— 1 lb. Maxwell House	49¢
Alpha Beta	— 1 lb. MJB	79¢
Lipton Soup Mix		
(a) *Onion*		
Ralphs	— pkge of 2	35¢
Market Basket	— pkge of 2	29¢
Fox	— pkge of 2	37¢
Shoppers	— pkge of 2	35¢
(b) *Chicken Noodle*		
Ralphs	— pkge of 3	43¢
Market Basket	— pkge of 3	39¢
Shoppers	— pkge of 3	41¢
(c) *Tomato-Vegetable*		
Market Basket	— pkge of 2	25¢
Shoppers	— pkge of 2	29¢
Hunt's Tomato Sauce		
Food Giant	— 4-8 oz. cans	25¢
Shoppers	— 15-8 oz. cans	$1.00
C & H Powdered or Brown Sugar		
Ralphs	— 2-1 lb. pkges	35¢
Market Basket	— 2-1 lb. pkges	25¢
Campbell's Tomato Soup		
Alpha Beta	— 10½ oz. can	10 for $1.00
Fox	— 10½ oz. can	2 for 23¢

The advertisements for each week covered by Gx. 24, unprinted, show similar examples of price cutting by the separate grocery chains. Moreover, a reference to any of the current Thursday issues of the Los Angeles Times or Wednesday issues of neighborhood newspapers readily demonstrates that fierce price competition continues to characterize this market.

Although admitting that concentration has not "reached the stage where vigorous price competition was seriously impaired" (Br. 35, and see headnote Br. p. 42), appellant erroneously asserts that the Los Angeles market is approaching "oligopoly conditions" with the chains on the way to "consciously interdependent pricing." (Br. 34-35). As purported evidence of this erroneous conclusion, appellant cites (Br. 35) the fact that the major chains were accustomed to study carefully the prices charged by competing major chains* (and, it should be noted, of smaller chains and independents, Gx. 26, R. 2382-2383);** that they evidently believed they could not afford to be undersold; that the chains check stores of competitors, and that Von's maintained and kept copies of the weekly advertisements of major chains, including Shopping Bag advertisements. (Gx. 24, unprinted.)

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* Appellant asserts also that "each strove to maintain the same prices as the others." (Br. 35.) Apparently this misconception arises from Mr. Hayden's testimony, quoted Br. 6, fn. 6, that "we know that we can't demand any more from the customer than the other fellow on a nationally known item." Obviously, however, Mr. Hayden was referring to shelf prices, not specials. When a product is put on a shelf the price is already stamped on it. These are "shelf prices". When these shelf prices are reduced, they are known as "specials." It is not feasible to stamp a new price on items each time the price is changed. Anyone shopping at the typical supermarket can observe that the checker has and uses a list which shows the special prices at which many items are being sold.

** Several of the industry witnesses operating single stores testified that they regularly check the stores of the leading chains and that the chain store managers check the stores of their smaller competitors. (R. 279-280, 306-307, 1398, 1432).

The practice of checking stores of competitors and becoming conversant with their prices on a day-to-day basis does not at all indicate "conscious interdependent pricing (Br. 35)." Professor Cassady has correctly pointed out* that "A vendor involved in an intensive competitive situation will exert considerable effort in attempting to find out how competitors are faring" and *"If they are to compete effectively, retail vendors must keep themselves informed regarding the prices of rival sellers . . ."***

If appellant's economic theory has validity it would only be so as applied to an industry which is relatively static and has high entry barriers (see e.g. *United States v. Aluminum Co. of America*, 377 U.S. 271, 280), not in an industry characterized by easy entry and rapid shifts in market shares.***

Moreover, when a new type of merchandising institution (such as the discount house) enters the market,

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* Cassady, *Competition and Price Making In Food Retailing* (1962), pp. 111, 142.

** Emphasis is ours throughout this brief unless otherwise noted.

***Kaysen and Turner, *Antitrust Policy* (1959) point out (p. 40) that the significance of market structure is far greater in mining and manufacturing than in retail trade, service and construction industries. It has also been observed that:

> " . . . This practice of live-and-let-live is feasible, in the absence of formal agreement or understanding, only in a market of few sellers. Of course, in the case of consumer goods advertised and sold to unidentified members of the general public, the practice is, absent market division, not possible even in an oligopolistic market." Comment, 68 Yale L.J. 1627, 1641 (1959).

competition increases. This situation occurred in the Los Angeles market in 1961 as a result presumably of successful competitive efforts of several aggressive discount house food operations:

> "In mid 1961 one of the most important supermarket institutions in the Los Angeles area dropped shelf prices drastically on 3 fast selling items—sugar, coffee (all brands), and bread (its own brand). This move was met almost immediately by at least two important competing supermarket concerns. Shortly thereafter, a small but aggressive supermarket chain operator announced that he was dropping prices of 'over 3,640' items in one of his stores (on a test basis) and patronizing this establishment would require 'no membership cards or fees.' This was promptly followed by specially announced moves on the part of leading supermarket concerns in the area, one of which stated in its advertising that it was dropping shelf prices of over 1,000 items. The items publicized were mainly the fast-moving type: margarine, soups, detergents, soaps, shortening, paper products, flour, mayonnaise, gelatins, canned and powdered milk, baby foods, coffee, sugar, and bread. Comparative prices given in this one advertisement indicated that reductions ran approximately 10 per cent."*

Articles in trade papers in the years following the trial demonstrate that, contrary to appellant's economic theory, price competition in this area continues to be

* Cassady, *Competition and Price Making In Food Retailing* (1962) P. 184, fn. 84.

intense.* Such competition is utterly inconsistent with the charge that this market is approaching oligopoly either in structure or performance.

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* See, e.g., Grocery Bulletin, May 7, 1965: "Chains Meet Discount Threat In Area With Price Slashes"; Supermarket News, May 17, 1965: "Von's Stress On Price Cuts Cues Others"; Grocery Bulletin, October 15, 1965: "Discount Price Battle Breaks Out Among Chains In Metropolitan Los Angeles Area"; Supermarket News, January 3, 1966: "Los Angeles — Fierce competition from discount supermarkets during 1965 forced most conventional chains here to lower prices and in turn watch profit margins sink." Chain Store Age (Western Supermarket Executives Edition) March 1966, pp. W1 and W2: "Two factors have prompted Western chains to seek new roads to tomorrow's earnings: 1. Stiffening internal competition: Not only is there razor-sharp competition among conventional supermarkets, but discounters, drive-in dairies and deli-liquor stores are also trying to cut a bigger piece of the Western market pie. 2. External competition from Eastern chains entering Western territory: These expansion-oriented firms not only want a beachhead on the West Coast, but they come equipped with timetables for new store openings."

C. Neither the decline in number of stores nor acquisitions made by others indicate a tendency toward oligopoly in the Los Angeles market.

1. The individual grocer, and the smaller concerns, aided by cooperative wholesalers, remain major competitive forces.

The number of grocery stores in this area has declined largely because of the development of the supermarket and more widespread use of the automobile which deprived the former small corner grocery store of its local neighborhood monopoly (Fdg. 24, R. 3070-3071). Presumably these were "the marginal grocery operators whom 'the supermarket' revolution has made technologically and competitively obsolete." (App. Br. 31.)* Nevertheless, there is scarcely a single household in the entire Los Angeles Metropolitan Area which does not have a choice of from three to ten competitive grocery stores within convenient shopping distance. (Fdgs. 26, R. 3071.)

But the gradual disappearance of the small, old style grocery store does not mean the small businessman will disappear from the grocery industry, as appellant apparently concedes (Br. 31). Nor can the leading chains price their products without regard for the many single-

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* According to the January 1960 staff report to the Federal Trade Commission entitled *Economic Inquiry Into Food Marketing, Part I — Concentration and Integration in Retailing*, p. 10, the number of grocery stores nationwide decreased by more than 110,000 between 1939 and 1954 and the "whole decrease from 1939 to 1954 occurred in the class of stores selling less than $50,000 a year."

store operators with whom they compete: the toughest competitors for the leading chains are often the single-store operators. (See, e.g., R. 1328, R. 1388, R. 1392, R. 1396, R. 1397, R. 1404, R. 1408, R. 1412, R. 1421, R. 1430, R. 1432, 2061.)*

The prospect for the foreseeable future is that the hundreds of single-store operators will continue to thrive and at the same time provide vigorous competition for the larger chains. This is due primarily to the existence in this area of the two largest cooperative buying organizations in the world, Certified Grocers of California, Ltd. and Orange Empire Co-op. The growth of these cooperatives has been phenomenal: In 1948 Certified's wholesale sales to its member-owners amounted to $86,829,000 and its members' retail sales were $382,000,000 — by 1958 Certified's wholesale sales to its members had more than tripled, to $338,957,000 and so had its members' retail sales — to $1,390,000,000. (R. 1641-1645, Fdg. 34, R. 3076). Orange Empire had a similarly spectacular growth: Its wholesale sales to its members were $12,500,000 in 1945 and were $321,000,000 in 1962. (Fdg. 35, R. 3076) These cooperative buying organizations provide their members with group buying advantages as well as many other advantages and are, without doubt, a decisive factor in the continued vitality and growth of smaller concerns (Fdgs. 29-37, R. 3074-3076).

* Illustrative of the vitality of the smaller competitors and their ability to compete with stores of the larger chains is the comment of W. H. Crawford, a single-store operator. He testified he had no problem competing with the chains; that "the question is not whether I can compete against them, but whether they can compete against me." (R. 1388 and see R. 2061.)

The January 1960 Staff Report To The Federal Trade Commission* noted that more than a fourth of all cooperative wholesale sales are in California and that "Although the unaffiliated retailer is rapidly losing position, voluntary and cooperative distributors have shown a capacity for effective competition with the corporate chains." This is certainly true in the Los Angeles Metropolitan Area. (Fdgs. 29-37, R. 3074-3076.) Membership in Certified Grocers or Orange Empire is open to anyone (R. 1208, 3026) and the single-store operator can thus obtain his merchandise and related services** at a cost comparable to that of the direct-buying large chain.

Since smaller grocers have always been and still are the primary support of Certified Grocers, that cooperative would naturally be opposed to any merger which might adversely affect the competitive opportunities of individual retailers in the area. However, both the former President and the Chairman of the Board of Certified Grocers testified that the merger of Von's and Shopping Bag would not have such an effect. (R. 1483-1487, 1641-1645.) The District Court felt that "considerable weight" (R. 3027-3028) should be accorded the testimony (R. 1641-1645) of Campbell Stewart, former President of Certified Grocers. This testimony as well as that of the single-store operators and officers of small and large chains fully supports the conclusion that there is no tendency toward oligopoly in the Los Angeles grocery market.

* *Economic Inquiry Into Food Marketing, Part I — Concentration and Integration in Retailing,* pp. 6 - 7.

**See Dx. AV, R. 2869-2880.

2. **The fact that some other concerns had previously made acquisitions should not invalidate this merger.**

Government exhibits 44 and 45 (R. 2418-2420) indicate that between 1949 and 1958 ten of what were the leading 20 grocery concerns as of 1958 had acquired some 126 grocery stores in the Los Angeles Metropolitan Area. Forty per cent of the acquisitions (48 stores with gross sales of $71,537,000) were made by Fox Markets, Yor-Way and McDaniels. All three of these firms had become bankrupt prior to the time the exhibits were prepared.* It is apparent that growth by acquisition is by no means an assurance of a successful operation and does not necessarily or in fact lead to undue concentration. (See R. 1233-1234).**

Indeed, the evidence was clear that the growth in market share of the top 20 concerns of which appellant complains was due primarily to internal growth of

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* Yor-Way commenced doing business in 1953 and thereafter expanded rapidly by acquisition. Following the death of its founder, Mr. Kennedy, in 1961 it suffered reverses and eventual bankruptcy. Fox Markets was first organized in 1954 and it likewise expanded very rapidly primarily by an aggressive acquisition program. Because of too rapid expansion, under-capitalization and lack of qualified management in depth, Fox Markets became bankrupt. McDaniels, for largely the same reasons likewise became bankrupt in 1961. (Fdg. 49, R. 3080, and R. 1649-1650, 1222-1225, 1537-1538.) The bulk of the Yor-Way, Fox and McDaniels stores were sold off to single-store operators and small chains in 1961 and 1962. (R. 1649-1650, 1236.)

**It should also be noted here that the exhibit is in error in showing an acquisition by Food Giant *from itself* of six stores doing an annual volume of $31,700,000. Actually this was simply a change of name by Food Giant (R. 1535).

smaller concerns, many of them new entrants. (Fdgs. 27-28, 80-81, R. 3072-3074, 3087-3088.) The following table taken from Dx. AN, R. 2788, indicates the growth between 1948 and 1958 of concerns not shown to have made any acquisitions in that period:

Company	Market Share 1948	Market Share 1958
Von's	2.4	4.7
Shopping Bag	1.2	4.2
Market Basket	2.2	4.4
Boys'	.9	1.3
Shoppers*	.0	.8
Alexander's	.5	1.1
	7.2	16.5

Also, as noted above, in this same period the leading concerns, some of which are listed by Dr. Mueller as having made acquisitions, disposed of a "substantial number of unwanted outlets" (App. Br. 12) and thus provided an opportunity for new entrants. (Fdgs. 49, 81, R. 3079-3080, 3088, and see R. 1476, 1489-1490, 1651-1652).

D. New forms of competition are resulting in even more intense rivalry than existed in the past.

In 1963 there were 35 discount houses with grocery departments doing business in the Los Angeles area. (Fdg. 61, R. 3082-3083.) They are becoming a factor of increasing importance in the grocery business in Los

* Shoppers did have one market in 1948. (R. 1478.)

Angeles. (R. 54, 233-234, 236,237, 360, 510-512, 614, 759,761, 2324-2327, 1439-1445, 1646-1648, 3027, Fdg. 61, R. 3028.) Their food prices are often lower than the chain grocers in part because of lower operating costs and in part because they often use low food prices to attract customers who may buy appliances and other items on which markups are higher. In addition, surveys have indicated that average sales per customer and average sales per square foot of selling space are higher in discount houses than in supermarkets. (R. 1590, 1739-1740.) At least one industry observer* has predicted that within a few years the discount houses will relegate today's supermarkets to the role of the "Mom and Pop" store. (R. 1586-1589.) Regardless of the accuracy of this prediction the discount house is a new and dynamic competitive force in the area. Appellant's effort to deprecate the importance of the discount house as a competitive factor (Br. 41, fn. 39) is rebutted by Professor Cassady,** by appellant's witnesses (R. 54, 233-237, 360, 510-512, 614, 690, 759-761), by studies made by the Department of Agriculture (R. 1590), and by the Opinion of the District Court (R. 3027) and Finding 61, R. 3082.

In addition to discount houses there has been an influx of bantam or convenience stores. (Fdg. 62, R. 3082.) Milk depots, which by California law are permitted to sell milk, an important draw item for a grocery store (R. 240-241), at a lesser price are increasing in number.

* Government witness (on other matters) Dr. Jenssen.

**See p. 24, post.

They have captured 16% of the milk market and they also sell other grocery items. (Fdg. 63, R. 3083 and see R. 240-241, 467-468.) Liquor stores are selling more and more other grocery products — some sell more bread than some supermarkets. (Fdg. 64, R. 3083.) Indeed, the record demonstrates that grocery retailing in the Los Angeles area has been and promises to be a constantly changing, highly competitive business — one in which the aggressive individual competitor can and does survive and the consumer is well served.

II. THE LOSS OF ONE COMPETITOR WITH A MARKET SHARE OF LESS THAN 5% DOES NOT HAVE A REASONABLE PROBABILITY OF LESSENING COMPETITION IN A MARKET WHICH IS AS FRAGMENTED AND COMPETITIVE AS LOS ANGELES.

A. Withdrawal of Shopping Bag as a separate competitive factor had no significant actual or potential adverse effect on competition.

What was lost to the market by this merger was a single chain with a 4% market share. What remained were five of the largest national chains, two sectional chains, seventeen "local" chains with ten or more stores, 126 other chains and several thousand single-store operators backed up by huge cooperative buying organizations. (Fdgs. 75-77, R. 3085-3086, and Fdgs. 29-38, R. 3074-3076). Moreover, after the merger, the Shopping Bag stores were upgraded and became more effective competitive units. (R. 1249-1251.)

Appellant nevertheless attaches great importance to the fact that Shopping Bag was one of seven firms listed in the Key Survey book, a weekly publication sold "primarily to retailers who operate one, two or three stores—the so-called independents." (R. 1648.)* The Key Survey book lists the *shelf* prices charged for some 3000 grocery items (Gx. 21, 22, R. 2369, 2374) but "it does not purport to reflect actual prices being charged by the chains surveyed on all items at any given point of time." (R. 1646-1647.) Regardless of its being listed in the Key Survey book Shopping Bag was not considered a price leader. A survey of the market with particular reference to Von's, Shopping Bag and Alexander's Markets made by an employee of the Kroger Company in 1957 concluded that "general observations indicate that their [Shopping Bag and Alexander's] retails are slightly higher than either Ralphs or Von's." (Dx. AF, R. 2749, 2755.)

Government witness Palmer, the sole stockholder of a four-store chain with annual sales of $6 million, testified as follows:

> "Q. Do you recall . . . you told me that you had felt that Shopping Bag before the merger were real good competitors?
>
> "A. Yes. I don't recall that in the conversation, but that is a fact. That is what I recall.
>
> "Q. Do you recall saying this is because their prices were a little higher than the others?
>
> "A. I could have said that.

* Shopping Bag was not listed in a rival survey book (R. 1647).

"Q. Do you recall saying that Von's sells at lower prices than the other chains and therefore you felt this merger was bad?

"A. Yes, I could have said that because that is the way I feel.

* * *

"Q. I direct your attention to several prices (advertised in the Los Angeles Times July 13, 1961) and I ask you to read the headline first, please, Mr. Palmer.

"A. 'Von's and Shopping Bag Slashes Food Prices Permanently. Over 1,000 Regular Prices Slashed. Now a New Low Price.'

"Q. Were these actually slashed prices?

"A. Yes.

* * *

"Mr. Hughes (government counsel): Q. Did Shopping Bag do any price slashing such as this prior to the merger?

"A. No."

(R. 681-682 and R. 720-721.)*

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* Nevertheless, the witness testified that he was able to and did meet these prices by cutting overhead without suffering a loss of profits. He further testified this price reduction enabled the chains and single-store operators to become more competitive with the discount houses (R. 726-727).

1. The testimony of industry witnesses demonstrates that the merger will not lessen competition.

The crucial importance of industry witnesses was underscored by the Government in its brief filed with this Court in the *Brown Shoe* case* and was also emphasized in the opinion of this Court in that case. (370 U.S. at p. 344.) In the lower court Appellant consistently deprecated the importance of such testimony; here, it simply ignores it. We suggest the explanation is obvious: In *Brown Shoe* such testimony established the Government's case; here it destroys the Government's case.

The defense industry witnesses gave solid reasons** to support their respective conclusions that this merger is not likely substantially to lessen competition or tend to create a monopoly. While recognizing that the larger chains have certain advantages, they pointed to the counterbalancing advantages of aggressive and experienced operators of single stores and smaller chains. (R. 1387-1499.) These include:

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* In its brief filed with the United States Supreme Court in the *Brown Shoe* case, the Government stated in part:

> "This Court has said that '[t]he existence of competition . . . is a fact disclosed by observation rather than the process of logic' (International Shoe Co. v. Federal Trade Commission, 280 U.S. 291, 299). Recognizing the validity of this proposition, the government called as its major witnesses 24 retailers who represented a cross-section of the retail shoe industry. . . ." (Government Brief at pp. 63-64).

**Unlike the industry testimony in *United States v. Philadelphia National Bank* 374 U.S., 321, 367.

(a) Membership in a cooperative buying organization which, in addition to other valuable services provided, enables them to purchase their groceries as cheaply as the larger chains;

(b) Their ability to purchase their meat and produce at prices comparable to those of the larger chains;

(c) Their greater flexibility in making price and other changes;

(d) Their greater opportunity to provide personal service, participate in community affairs and thus develop a loyal patronage; and

(e) Personal supervision and on-the-scene management.

The defense presented a representative cross-section of industry witnesses: Twelve single-store operators (whose gross annual volume ranged from $1 million to $4 million), nine representatives of concerns operating from two to nine grocery stores, nine representatives of chains having ten or more stores, five officials of Von's and five representatives of suppliers. These witnesses testified to the continued vigor of competition, the opportunity for new entrants, the ability of smaller concerns to compete and grow, the inability of the larger concerns to dominate the market, and the absence of any likelihood that this merger might substantially lessen competition or tend to create a monopoly. Each gave concrete reasons to support his conclusion. (R. 1387 to R. 1645.) Except for three of the five Von's officials, the Government failed to cross-examine any of these defense witnesses. Their testimony stands unchallenged and it is impressive proof that this merger has not had and is not likely to have an anti-competitive effect. We submit that this "formidable array of testimony by experienced retailers cannot be minimized . . . ."*

2. **Sufficient "major competitive factors" remain to assure vigorous competition.**

Many large national and sectional concerns do business in the Los Angeles area. The following table lists 1962 total assets,** total sales, and numbers of stores for all areas of these grocery concerns which compete in the Los Angeles area (Dx. L, R. 2568-2573):

Name of Firm	Total Stores	Total Sales	Assets (millions)
A & P	4,475	$5 billion	$767
Safeway	2,069	2.5 billion	473
Kroger	1,354	2 billion	400
Acme	845	1 billion	209
Food Fair	465	1 billion	193
Mayfair	178	288 million	62
Lucky	141	232 million	47

In addition there are approximately 17 "local" chains operating ten or more stores in the area (seven of which were not operating as many as two stores as late as 1952) and 126 other concerns operating two or more stores in this area. (Fdg. 77, R. 3086.) It is apparent also, we believe, that even the single store operators, such as

* Government Brief on the appeal in *Brown Shoe* at pp. 63-64.

**After the merger Von's had 66 stores, sales of approximately $180 million and assets of $42 million. (R. 15, Fdgs. 3, 6, R. 3064-3065).

Messrs. Crawford, Dahl, Dobson, Elkin, Goldberg, Goldstein, Gross, Hines, Irwin, Richard, Roberts, and Sherry (R. 1387-1433) and the operators of smaller chains such as Messrs. Gelson, Gilbert, Godfrey, Goodnight, Inadomi, Jones, Miller, and Wilson (R. 1434-1467) are "substantial competitive factors" in this market. It seems apparent that appellant has grossly exaggerated the significance of the disappearance of Shopping Bag as a separate competitive factor.

3. Appellant is in error in its attempt to inflate the amount of overlap in the draw areas of particular Von's and Shopping Bag stores.

The operations of the two companies complemented each other with little overlap in the geographical areas each served (Fdgs. 4, 10, 12, 53, R. 3065-3066, 3080-3081). The District Court found that Von's and Shopping Bag were able to compete for the same customers in "only four or five areas." (Fdg. 53, R. 3080-3081.) Most of Von's stores were located in the southern and western portions of the Los Angeles Metropolitan Area and Shopping Bag's in the northern and eastern portions of that area. (Fdgs. 4, 10, 12, R. 3065-3066, and see Fdg. 53, R. 3080-3081.)

Nevertheless, relying on a survey by its witness, Dr. Jenssen (Dx. BK, R. 3011-3016; and see Gx. 85, App. C to App. Br.) and his testimony (R. 2024-20) that the "average customer was willing to drive at least 10 minutes, or about 4 miles, and to pass by other stores, in order to reach a particular store (Fdg. 39, R. 3076)" (Br. 7),* appellant asserts that "almost half the stores of the two concerns, with aggregate sales of approximately $76 million were in a position to compete directly . . . ." (Br. 7-8.) This is a gross overstatement of the amount of competitive overlap:

(a) It assumes that each of the two stores could compete for *all* of the customers served by the other, with the result that appellant's $76 million figure represents *total* sales rather than the pertinent figure, namely, possible sales to customers in the more limited areas from which stores of the two concerns could possibly draw the same customers;

(b) It ignores physical barriers such as hills, freeways and the like (Fdg. 39, R. 3076, and see R. 2065-2071); and

(c) Dr. Jenssen's study (Dx. BK, R. 3011-3016) actually found that only 54% of those interviewed shopped "regularly" (more than 6 times a month) or "frequently" (4 to 6 times a month) at retail food

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* An earlier study Dr. Jenssen had made for Shoppers Markets for their store in Norwalk indicated that 67% of the customers came from a one-mile radius and 94% from within a two-mile radius. (Dx. BJ, R. 3002-3010 and see R. 2048-2050). And see an earlier (1955) study which indicates the much more limited draw area of Von's stores (Dx. S, R. 2623-2630).

stores located at such a distance from their homes (R. 3027 and Dx. Bk., R. 3011).*

Assuming, however, for argument's sake that even as much as 50% of the sales of the Von's-Shopping Bag stores in question could represent possible overlap competition, this would represent at most $38 million in possible overlap sales between Von's and Shopping Bag — or 1.5% of the $2½ billion grocery sales in the Los Angeles area. In *Tampa Electric Co. v. Nashville Coal Co.,* this Court declared that a total foreclosure of competition for a period of twenty years is not illegal if it does not involve a substantial share of the relevant market; that a mere showing that a substantial number of dollars is involved ordinarily is of little consequence; that a preemption of less than 1% of competition "is, conservatively speaking, quite insubstantial", and that "While $128,000,000 [here $38 million by the most generous of tests] is a considerable sum of money, even in these days, the dollar volume, by itself is not the test, . . ." (365 U.S. 320, 327-334).

Moreover, appellant's discussion of overlap necessarily focuses on competition between the acquired and acquiring concerns and thus ignores the fact that in the purported overlap areas there were at least six stores of other chains and a number of stores of other concerns readily available to the population in those areas. (Fdg.

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* Another 16%, according to Dr. Jenssen's study, shopped at such a distance "occasionally" but since this question was defined as "less than 4 times a month" (R. 3011) we suggest the answer is meaningless — it could mean once or twice a year. Thirty percent never shopped at such a distance. (Dx. BK, R. 3011).

53, R. 3080-3081). This Court has stated that the test is broader, i.e., the effect on competition *generally*:

> " . . . Section 7 of the Clayton Act, prior to its amendment, focused upon . . . lessening of competition between the acquiring and the acquired companies. The 1950 amendments made plain Congress' intent that the validity of such combinations was to be gauged on a broader scale: their effect on competition generally in an economically significant market." *Brown Shoe Co. v. United States*, 370 U.S. at 335.

B. Post acquisition evidence confirms that this acquisition will not have an anti-competitive effect.

Industry witnesses called by the Government and the defense confirmed the fact that competition remains vigorous; many testified competition has increased in vigor; "that is the trend" (R. 249); "there is more competion now than ever" (R. 449); "competition generally, increases every year" (R. 1425); it seems to be steadily increasing" (R. 1482); it has been "enhanced since the merger" (R. 1498); "competition is and always has been vigorous. It is becoming more so as the passage of time brings change, not only in the geographic area of competition faced by any store, but in the form, content and character of competition as well." (R. 1640.)

Appellant concedes that the "market remains vigorously competitive" but nevertheless urges that this fact "is entitled to little weight." (Br. 42.) In the court below, appellant strongly contended that post-acquisition evidence could not even be considered (R. 2111-2116). In this Court, appellant merely deprecates the importance of such evidence. We suggest the reason for deprecating the importance of the evidence is apparent: despite the more than three years which had elapsed since the merger occurred, appellant was totally unable to point to any diminution of competition generally in the market area.

This Court has recently emphasized that post-acquisition evidence is relevant in a merger case but that the "force of § 7 is still in probabilities, not in what later transpired" (*Federal Trade Commission v. Consolidated Foods Corp.*, 380 U.S. 592, 598). However, in a case (as here) where appellant concedes that:

(a) "[O]pportunities of individual entrepreneurs are substantial" and the probability is that "for the indefinite future, many relatively small firms should be able to thrive" (Br. 16); and

(b) The market remains "vigorously competitive" (Br. 42); and

(c) Concentration has not reached the stage where "vigorous price competition" is "seriously impaired" (Br. 35),

then the post-acquisition data would seem considerably more reliable than appellant's proposed "economic prophecy". (Br. 23.)

C. None of the merger cases decided by this Court supports reversal of the trial court.

The foundation case under amended Section 7, *Brown Shoe Co. v. United States,* 370 U.S. 294, involved a large national chain which, through a series of acquisitions, had integrated its manufacturing operations with its retail operations to the proven disadvantage of small, nonintegrated, retail competitors. Moreover, the Court said that the tendency toward concentration in the shoe industry was being "accelerated through giant steps striding across a hundred cities at a time." 370 U.S. at 346.

The combined market shares for Brown and Kinney in women's shoes in 114 cities ranged from a low of 5.1% in Cedar Rapids, Iowa, to a high of 57.7% in Dodge City, Kansas; in children's shoes it ranged from a low of 5% to a high of 51.8%; in men's shoes tbe combined market shares ranged from a low of 5.1% to a bigh of 24.8%, and for all shoes the combined market shares for 35 cities ranged from a low of 10% to a high of 35.8%, and by Standard Metropolitan Area* the combined market share ranged from a low of 2.5% to a high of 22.6% for all shoe sales. (370 U.S. at 347-354, App. A-D.)

By contrast, in the case at bar, the government is not urging that the merger had anticompetitive implications of a vertical character. Moreover, even on the basis of appellant's 1958 market share statistics, the top concern following the merger had only an 8.9% market share; the top two 16.9%; the top four 24.4%; the top eight 40.9%; the top twelve 48.8%; the top six-

* Not the relevant market in that case; see 370 U.S. at 339.

teen 53.4%; and the top twenty only an aggregate market share of 56%. (Br. 13 and Gx. 7, R. 2331.)

Brown Shoe was amplified in *United States v. Philadelphia Nat. Bank,* 374 U.S. 321, but neither the facts nor the language of that case stand as a barrier to affirmance of the judgment of the court below. In *Philadelphia Nat. Bank,* the merger produced a bank controlling 30% of a highly concentrated market marked by high entrance barriers in which four concerns controlled 78% of the business. Moreover, after the merger, the two leading banks in Philadelphia would have controlled 58% of the total bank assets, deposits, and loans in the relevant market area.

In *Philadelphia Nat. Bank* this Court laid down the much-quoted test that "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen the competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anti-competitive effects." 374 U.S. at 363. In contrast to *Philadelphia Bank,* this merger produced a combined percentage share of 1.4% of the grocery stores and 7.5% of sales in the relevant market. Cf. *Philadelphia Nat. Bank,* 374 U.S. at 364 n. 41. The increase in concentration is far from "significant": in the decade prior to the merger, the market shares of the leading chains had been decreasing. (Fdgs. 74, 78, R. 3084-3086). As a result of the merger, the market share of the leading two concerns increased from 14.1 to 15.1% (Dx. AM-AN, R. 2787-2788; Fdgs. 74, 78, R. 3084-3086).

In *United States v. First National Bank*, 376 U.S. 665, the merged bank was larger than all of the remaining banks combined, having more than 50% of the bank assets, deposits, and loans in the market area there held to be relevant. It is plainly inapposite because, unlike the Von's-Shopping Bag merger, the merger of the banks involved in that case produced a bank controlling an "undue" percentage of an already concentrated market.

In *United States v. Aluminum Co. of America*, 377 U.S. 271, this Court found that the "line of commerce showed highly concentrated markets," with the domination by a few companies producing an "oligopolistic" structure (completely unlike that present in the grocery industry in Los Angeles). 377 U.S. 278-80. In this setting, the Court found that the acquisition of Rome Cable by Alcoa, the market leader with 27.8%, was a violation of Section 7 despite the relatively small share of the acquired company in the aluminum conductor market.

In *United States v. Continental Can Co.*, 378 U.S. 441, the relevant product market was dominated by six firms having a total of 70.1% of the business. The merger produced a company with 25% of the market which the court found to be violative of Section 7 in an industry where, in sharp contrast to the grocery business in the Los Angeles area, there had been a "history of tendency toward concentration." 378 U.S. at 461.

The distinctions between the recent decisions of this Court and the instant case are both numerous and substantive. Here, the combined market share is much smaller; the market as a whole is atomistic; the market is dynamic and expanding; the trend is away from concentration; entry is classically easy; the competitive effectiveness of a particular retail store is not dependent upon the size of the concern which owns it, and new forms of competition have arisen to heighten already vigorous price competition.

III. THE MERGER WILL HAVE A BENEFICIAL EFFECT ON COMPETITION AND ON THE COMMUNITY.

A. The ability of a concern to grow and sell out advantageously serves economic welfare and acts as a spur to new entrants and thus increases competition.

In an unconcentrated market with low entry barriers (as here), the opportunity for the individual to start a business, grow by internal expansion, and eventually, if he so desires, sell on an advantageous basis tends to spur additional entrants. A continuous flow of new competitors can thus be expected—and this stimulates, adds to, and revitalizes competition. A rule-of-thumb prohibition of such opportunities will, we believe, stifle incentive to entry, aggressive competitive effort, and growth.

Since the record demonstrates that this merger is not likely to lessen competition (and appellant concedes that in the more than three years following the merger the market remained vigorously competitive) (Br. 42) we urge that there can be no compelling reason to deprive all concerned of the many beneficial effects of the merger, including:

(a) Cost savings;*

(b) Opportunity for the principal owners of two closely held corporation to create a more ready market for their securities by getting listed on the New York Stock Exchange;

(c) Substitution of a broad and able management group;

(d) Assurance to stockholders that they would receive an adequate return on their investment and that it would continue to be secure;

(e) Avoidance of the adverse effects that a possible decline or failure of Shopping Bag might have on the employees, the stockholders and the community; and

(f) Ability to obtain equity or debt financing, if necessary, on more advantageous terms. (Dx. AW at R. 2967 and Fdgs. 12-13, R. 3066-3069, and R. 1511, 1539-1541, Gx. 66, R. 2487-2491).

B. The sale by Shopping Bag was dictated by valid personal and business reasons.

Compelling reasons support the merger from the standpoint of Shopping Bag. The president and principal stockholder was advanced in years. He wished to dispose of the company on a favorable basis. The stock was not

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* The importance of not using cost savings as a basis for invalidating mergers has heretofore been emphasized. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Har. L. Rev. 1313, 1326 (1965).

listed and there was not an active market in it. Shopping Bag profits had been declining; management was thin; the president was concerned about the future of his company and the impact of further decline or possible failure upon his family, stockholders, employees, and the public. (R. 1506-1514; Fdg. 12, R. 3067-3068.)*

Shopping Bag was not a "failing company" but the concern of its president was not entirely without reason. The following table (Fdg. 12, R. 3067) shows Shopping Bag's total sales, net income, percentage of net income to total sales and percentage of net profit after taxes to total assets for the years 1957-1959. For purposes of comparison, comparable information for Von's is also set forth:

SHOPPING BAG

Year	Total Sales	Net Income	% of Net Income to Total Sales	% of Net Income to Total Assets
1957	$87,007,857	$1,360,986	1.6%	6.6%
1958	90,531,209	912,851	1.0%	3.9%
1959	84,403,866	770,122	.9%	3.2%

VON'S

Year	Total Sales	Net Income	% of Net Income to Total Sales	% of Net Income to Total Assets
1957	$89,990,056	$1,872,943	2.1%	12.7%
1958	94,483,993	1,947,367	2.1%	12.4%
1959	86,605,829	1,981,358	2.3%	10.8%

(A four week strike in January 1959 resulted in lower sales for each company in that year.)

* See also Gx. 66, R. 2487-2491. Three of the top 20 concerns did fail in 1961. (Fdg. 81, R. 3088.)

Estate tax considerations necessarily played an important part in the decision to merge. Prior to the merger the Von der Ahe family owned 80% of the Von's stock and Mr. Hayden and his family owned 60% of Shopping Bag's stock. The death of a member of either family who held a large number of shares would have resulted in severe estate tax problems requiring the forced sale of many shares of the closely held stock. Von's had only 3,280 public stockholders and Shopping Bag had only 2,064. The over-the-counter market in the stock of these companies was not active. The merger gave Von's a total of 5,344 public stockholders and a much broader and more active market for its stock—in fact, as a result of the merger the stock of the merged company became eligible for listing on the New York Stock Exchange and it was so listed in 1961. Therefore, the merger, as anticipated, has resulted in a much more favorable market for the sale of family-held stock should this become necessary to meet estate taxes or other needs. (R. 1506-1514, Fdg. 12, R. 3066-3068.)

C. The merger maintains local control of the business.

Shopping Bag no doubt could have been sold to one of the large national chains not then doing business in the area.* But the president of Shopping Bag preferred to deal with Von's. He had been acquainted with the Von der Ahe family for some 34 years and had confidence in their fairness, integrity and business ability. He knew that Von's had an able and deep management staff and that its business record in terms of profits in relation to

* But cf. Appellant's Brief p. 44, fn. 42.

sales and in relation to assets was one of the best in the entire food industry. (R. 1506-1514.) The acquisition of Shopping Bag by Von's was consistent with the "desirability of retaining 'local control' over industry." (See *Brown Shoe Co. v. United States*, 370 U.S. at 315-316.)

IV. THE NEW TEST PROPOSED BY THE GOVERNMENT IS UNWARRANTED BY THE STATUTE AND TOTALLY UNREALISTIC.

Appellant requests this Court to establish a rigid, rule of "presumptive illegality"* to strike down any merger of "substantial" concerns in *any* market, in *any* industry, in which *any* grouping of leading concerns appellant may choose has increased its aggregate market share. Appellant concedes that its test "calls more for an economic prophecy than for a conventional legal judgment." (Br. 23.) We suggest that economic prophecy has not reached a stage of reliability that it should supplant the record facts and the findings which demonstrate the prophecy is totally unreliable. Assistant Attorney General Turner has asserted:

> ". . . If you attack a merger, you have to make a judgment of what would happen in the future. Economics does not yet provide an adequate theoretical framework for this." 29 A.B.A. Antitrust Section, August 1965, p. 194.

Other authorities would also agree that economic analysis has not yet been formally developed to the point where it can usefully be incorporated into the law:

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* Actually they mean *per se*. See p. 9, n., *supra*.

> ". . . Economic analysis, like the adjudicatory process, must center upon the individual case. Both its advocates and critics would agree that the concept of workable competition, or its necessary equivalent, has not yet been formally developed to the point where it can usefully be incorporated into the law itself. That is to say, indicia of monopoly that can be unswervingly and uniformly applied to all industries, irrespective of their market environment and stage of development, have not yet been clearly identified." Markham, *The Per Se Doctrine And The New Rule of Reason,* 22 Southern Economics Journal (1955) p. 29.

Appellant, in effect, suggests abandonment of the accepted test of reasonable probability of a substantial lessening of competition or tendency to monopoly in favor of economic prophecy applicable, as stated, to all mergers, all markets and all industries. This test would necessarily invalidate inoffensive and even beneficial mergers along with those which, with reasonable probability, may likely be anticompetitive. Assistant Attorney General Turner has stated:

> ". . . I have formed a fairly definite view that Section 7 cannot be effectively enforced except on the basis of more or less arbitrary rules — arbitrary in the sense that they may well apply in particular situations to mergers which an exhaustive investigation of the facts might disclose would not have, or do not have a likelihood of having, an adverse effect on competition."*

* 29 A.B.A., Antitrust Section, August 1965, p. 194.

More recently, Mr. Turner amplified his views as follows:

"Q What's the solution to the problem, as you see it?

"A To draw up broad rules or guidelines that will be right in the great majority of cases, and accept the fact that they will sometimes be wrong.

"For instance, I have made it clear that we will attack any merger between substantial and healthy competitors in almost any industry.

"But I wouldn't try to argue that there is going to be substantial harm to competition in every case in which two substantial competitors merge. And the antimerger act is concerned with probabilities, not certainties.

"Q Does that mean that you would rule out some 'good' mergers along with the 'bad' mergers?

"A Yes. But remember what I said: You simply can't predict what the economic effects are going to be in every individual case.

"We'll never really know which mergers would have worked out all right. And, if our rule is right most of the time, then the few instances in which it turns out to be wrong are probably not going to do much damage."

. . . . .

"Q Does it worry you that Federal Trade Commission figures show an increase in the number of mergers?

"A I'm not worried about the numbers as such.

"Q Why not?

"A What if most of the mergers, as is undoubtedly true, have no adverse effects on competition? The concern of the antitrust laws is whether mergers are likely to have anticompetitive consequences of some sort. The fact that the merger rate is going up doesn't necessarily establish that."*

We urge that appellant's proposal is not warranted by the statute or its legislative history. In *Brown Shoe Co. v. United States*, 370 U.S. at 321-322, this court stated:

> ". . . Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry. . . ."

Elaborating upon the foregoing, this Court pointed out:

> "Subsequent to the adoption of the 1950 amendments, both the Federal Trade Commission and the courts have, in the light of Congress' expressed intent, recognized the relevance and importance of economic data that places any given merger under consideration within an industry framework almost inevitably unique in every case. Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course,

* U. S. News & World Report, Feb. 21, 1966, *Guidelines For Fair Competition; Interview With Head of Antitrust Division*, pp. 76-77, 84.

the primary index of market power; but only a further examination of the particular market — its structure, history and probable future — can provide the appropriate setting for judging the probable anti-competitive effect of the merger." 370 U.S. at 322, fn. 38.)*

In *United States v. Philadelphia National Bank,* 374 U.S. 321 at 363, this Court said that the test of presumptive illegality there applied:

> ". . . lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect in light of Congress' design in § 7 to prevent undue concetration. . . ."

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* Moreover, appellant is in error in its statements (Br. 17 and fn. 23) that the legislative history of the Antimerger Act discloses that "Congress specifically referred to the retail grocery industry" as one of the industries of particular concern. Congress did specifically refer to mergers which had taken place in the field of "food and kindred products". H. Rep. No. 1191, 81st Cong., 1st Sess., p. 3. But appellant must concede that "food and kindred products" is a census category of *manufacturers,* not retailers. Only one retailer, Safeway is mentioned in the 1948 *Report of the Federal Trade Commission on the Merger Movement — a Summary Report* and the discussion of Safeway related primarily to its backward vertical acquisitions of food manufacturers. Nor does the said Report of the Federal Trade Commission on which "Congress drew heavily in its consideration of the merger problem", (App. Br. 17, fn. 23) support appellant's new proposed *per se* test, because it very carefully states: "As in the case of other acquisitions cited in this report, the Commission takes no position as to whether any individual acquisition or group of acquisitions constitutes 'a substantial lessening of competition or tendency to create a monopoly.' *Such a determination can be made only after an examination of the facts on a case-by-case basis.*" (Report, pp. 53-54, fn. 41.)

There is no warrant, however, for lightening the burden of proving illegality in the case of a merger of two concerns with small market shares in an unconcentrated market where the market shares of the leading two concerns have been declining, where the market shares of the top four aggregate only 24.4% (Gx. 7, R. 2331), where market share is not the equivalent of market power, where the small concern admittedly can compete effectively with the larger chains, and where entry is classically easy.*

Appellant clearly is requesting judicial legislation to correct what it considers inadequacies in the present law. With respect to comparable contentions prior to 1950 that "there was no need to amend § 7 because the loophole could be closed by judicial interpretation", the House Judiciary Committee responded

> ". . . the Commission has taken the position, and the committee believes rightly so, that any defect in the law, as interpreted by the Supreme Court, should be remedied through legislative rather than judicial action."**

The Los Angeles retail grocery business is about as unconcentrated and vigorously competitive as any market

* Entry, of course, is not easy in the banking business. In *Philadelphia Bank* only one new bank had entered the market in the decade prior to 1961 and after ten years it had only one-third of 1% of the area's deposits. 374 U.S. at 367. The top *two* banks after merger in that case had a greater market share than the top *twenty* concerns in the present case. 374 U.S. at 331.

** H. Rep. No. 1191, 81st Cong., 1st Sess. p. 11.

in the United States. It is a dynamic and growing market characterized by ease of entry, innovation and technological changes. Small competitors flourish and consumers are well served. (Fdgs. 27-28, 43-44, R. 3072-3074, 3077-3079, and see R. 3031.) The market leaders have been unable to maintain, much less increase, their market shares. We urge it would not be appropriate to ignore the realities of the market place as demonstrated in the record and reflected in the findings of fact and substitute therefor appellant's proposed rigid test. Indeed, the basic vice of appellant's novel proposed test is that it substitutes theory and conjecture in place of reasonable probability, and, as applied to this merger at least, it is completely unrealistic.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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